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## **INFORMATION**

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From:	General Secretariat of the Council
To:	Budget Committee
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Subject:	Rule of Law/Conditionality Regulation: COM replies to MS questions

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Delegations will find attached the Commission's replies to MS questions on the RoL/Conditionality Regulation following the Budget Committee meeting on 25 October 2022.

## Questions from the delegation of Luxembourg and answers from the European Commission, DG Budget (Budget Committee of 25 October 2022)

Integrity Authority:

1. The establishment of the flagship measure - the Integrity Authority - is meant to reinforce prevention, detection and correction of illegalities and irregularities concerning the implementation of EU funds. However, it seems unclear how it will exercise its full powers, limited to soft powers, as it is fully reliant on the cooperation of state agencies that have in the past failed to carry out their duties in the protection of EU funds?
2. How will it be ensured that the Authority is independent both in law and in practice?

Answer:

1. In accordance with the remedial measure proposed, the Integrity Authority will be endowed with extensive powers which include: (i) having full access to information of on-going and upcoming or planned public procurement procedures, conflict of interest declarations and asset declarations; (ii) instructing other authorities to carry out administrative investigative acts on its behalf; (iii) instructing the relevant authorities to initiate procedures to verify conflict of interest declarations upon complaints and suspicion in relation to the management of Union funds; (iv) verifying asset declarations of high-risk officials; (v) recommending contracting authorities to use a certain public procurement procedure in a specific procedure or for a category of procedures; (vi) instructing the relevant contracting authority to suspend a tender in case of suspected fraud, corruption, conflict of interests or other serious illegalities or irregularities detected in the procedure; (vii) recommending contracting authorities on grounds for exclusion of economic operators from public procurement; (viii) initiating proceedings before the relevant national authorities or bodies with the aim of establishing suspected illegalities or irregularities; (ix) requesting judicial review of all decisions of authorities concerning public procurement procedures that involve any Union support and may be subject to judicial review; (x) issuing an annual analytical Integrity Report including recommendations and findings, whose content the Government shall explain how will be addressed. For more details on the powers granted to the Integrity Authority, please refer to the text of the relevant remedial measure.

In the Commission's view, the powers granted to the Integrity Authority are not soft powers.

2. The remedial measure contains specific commitments on the constitution of an independent 'eligibility committee', to be selected following an open call for expression of interest (consulted with the Commission), in charge of establishing a call for applications for members of the board of the Integrity Authority, checking the eligibility of candidates for the board and reviewing its operations in cooperation and consultation with international organisations, two years after the appointment of the board. The candidates eligible for the board of the Integrity Authority must fulfil criteria of independence and expertise, similarly to the members of the eligibility committee. The selection of candidates, among those found eligible, is done by the State Audit Authority based on a set of criteria set in the remedial measure and in the evaluation methodology established by the State Audit Authority. All the commitments regarding the selection and appointment of the board of the Integrity Authority were transposed into law.

On 23 September 2022, the Director General of the Directorate General for Audit of European Funds ('EUTAF') issued an international open call for expression of interest regarding the selection of the three members of the Eligibility Committee, based on the criteria established by the remedial measure. On 11 October 2022, the Director General of the EUTAF appointed the three members of the Eligibility Committee. On 14 October 2022, the Eligibility Committee published a call for

applications for the board of the Integrity Authority based on the criteria established by the remedial measure, with deadline 25 October 2022. On 22 October 2022, the Eligibility Committee adopted its rules of procedures; on 28 October, it issued the list of eligible candidates for the position of President and Vice-Presidents of the board of the Integrity Authority. On the same date, the President of the State Audit Office published the evaluation grid for the selection of the members of the board; on 3 November 2022, he nominated the selected members, who were then appointed by the President of the Republic on 4 November. The EUTAF and the State Audit Office published information on the selection processes in their respective websites: <https://eutaf.kormany.hu/kondicionalitasi-eljaras>, <https://www.aszhirportal.hu/hirek/az-allami-szamvevoszek-elnokenek-kozlemenye> and <https://www.aszhirportal.hu/hirek/az-allami-szamvevoszek-elnokenek-kozlemenye-2022-11-03-20-49-00>.

3. And looking further into the process, will the Authority be able to carry out its decision tasks independently from the Prosecutor's Service or the Kúria? The answer to this question is important as the Commission's work in the context of the rule of law mechanism excluded the judicial deficiencies, which are nonetheless identified elsewhere, for example in the 2022 Rule of Law Report. Its establishment process also raises some issues – how will the Commission guarantee the independence of the Members of the Selection Board as well as Members of the actual Board in order to avoid any political influence in the process?

Answer: The Integrity Authority shall be an autonomous state administration organ. It shall be fully independent in the performance of its tasks, shall be subordinated only to law, shall not be instructed by another person or organ in the exercise of its functions, and shall perform its task separately from other organs and without any interference from any other institution, body, political party, company, association or legal or physical person.

An important guarantee of independence is the fact that the budget of the Integrity Authority shall be a separate chapter in the State budget. The budget shall be proposed by the Authority itself to the Government and proposed by the latter to the National Assembly. The budgetary allocation of the Authority may not be reduced during the fiscal year without the consent of the Authority.

As replied to the first question, the Integrity Authority is vested with extensive powers. It will act as a safety net and will on one hand be able to intervene in procurement procedures and on the other hand will issue reports that may flag issues that can trigger a new procedure under the Conditionality Regulation.

The criteria for independence of the Eligibility Committee and of the board of the Integrity Authority, as well as criteria for avoidance of conflict of interests, are listed in the remedial measure and were transposed into law – see also the answer to the first question.

Anti-Corruption Framework:

Furthermore, the Integrity Authority has a foreseen role in the new rules for asset declarations.

4. How does the Commission interpret this role as there are however no proposals to establish regular controls and efficient sanctions?
5. And to what extent will these new rules differ from the previous situation as they do not actually fully cover all officeholders deciding about EU funds?

Answer: To answer this question, reference should be made both to the remedial measure on the Integrity Authority and to the remedial measure on strengthening the anti-corruption framework as complemented by the September letter. Under those measures, the personal and material scope of asset declarations would be wider than before, to include, in addition to persons entrusted with senior political functions, also relatives living in the same household with the person concerned. The full scope of the asset declarations is still being assessed by the Commission, based on the acts being

submitted by Hungary. The asset declarations will be filled in a digital format, to ease checks. The Integrity Authority will be competent to verify certain asset declarations (i.e. those of members of the government), including by accessing trade registers. It is also to be noted that members of national authorities at any level, involved in EU budget implementation, including acts preparatory thereto, audit or control, shall file comprehensive conflict of interest declarations, pursuant to the remedial measure on strengthening audit and control mechanisms to guarantee the sound use of EU support. These declarations will be verified by the newly created Directorate of Internal Audit and Integrity (DIAI) and the Integrity Authority will have access to such declarations and to the DIAI's files on request and without delay.

6. Does the COM believe that it is more than just a return to the initial situation that was worsened during the July 2022 reform?

Answer: As the Commission noted in the 2021 and 2022 Rule of Law Report Country Chapters for Hungary, Hungary has had an extensive asset disclosure system in place. The remedial measures aim at ensuring that such system is maintained, following the July 2022 reform. For sake of completeness, specific commitments give the Integrity Authority the power to verify asset declarations from several categories of subjects and to take enforcement measures (see previous answers).

[Redacted]

[Redacted]

8. [Redacted]

[Redacted]

9. [Redacted]

[REDACTED]

10. [REDACTED]

[REDACTED]

11. [REDACTED]

[REDACTED]

Extraordinary legal remedy to bring corruption cases to justice by private prosecution:

12. The new procedure for special crimes related to the exercise of public authority or the management of public property should be welcomed. However, what is the Commission’s assessment of such short deadlines given the often-complex nature of the cases? Also, does the Commission believe that the legal costs of such action might deter the actual use of this supposed opportunity?

Answer: Both the deadlines and the legal costs are based on standard provisions applicable in Hungary to other procedures too. With specific regards to legal costs or fees, as in any criminal procedure there is a need to keep a balance between the right to access the procedure and the protection from abuses, to preserve efficiency, economy of justice, the presumption of innocence and the reputation of the persons concerned by the procedure.

Once again, the question of the procedure’s relation to the Kúria and the resolution of the latter’s deficiencies is important in this context.

13. Will the new procedure cover all cases of fraud, conflicts of interest and corruption as well as other illegalities and irregularities concerning the implementation of any Union financial support? Will the

Integrity Authority or EU agencies be able to use the specific procedure? What are the special guarantees of independence applicable to the Buda Central District Court (competent to review the cases in the new procedure)? More generally, could the relevant court decisions be revised by the Kúria?

Answer: As set in the commitments under the remedial measure on the procedure in the case of special crimes related to the exercise of public authority or the management of public property, the new procedure shall cover corruption-related criminal offences, all cases of bribery involving public officials as well as other cases of bribery with the exception of petty crimes, abuse of office with the exception of petty crimes, the aggravated cases of budget fraud, failure to comply with the supervisory or control obligation related to budget fraud, agreement restricting competition in a public procurement and concession procedure. This is further specified in the relevant legal act. Natural and legal persons shall have right to file motions under this procedure. In addition to the remedial measure, the Hungarian Government formally confirmed its commitment that all courts in Hungary hearing civil, administrative and criminal cases, including those relevant for the protection of the financial interests of the EU, shall comply with the requirements of independence, impartiality and being established by law in accordance with Article 19(1) TEU and the relevant EU acquis. In particular, this commitment applies to investigating judges adjudicating a motion for revision of the decision of the prosecution service or the investigating authority to dismiss a crime report or terminate the criminal proceedings or any court seized subsequently in a specific procedure in the case of special crimes related to the exercise of public authority or the management of public property. The Buda Central District Court falls within this commitment and is a court highly specialised and reputed for the matters covered by the new procedure.

Public Procurement:

Regarding public procurement, which was a major area in the Commission proposal, we take note of the general commitments made.

14. How will the Council be able to assess this by 19 November given that the commitment is to 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?

Answer: We recall that the Council decided it will take a decision by 19 December 2022. The single bids rate has to be calculated for each year. All results from all public procurement procedures that took place in year 2022 will have to be taken into account. Please refer to the text of the relevant remedial measure, in which Hungary took the commitment to adopt additional measures in this respect. The Commission will be monitoring the situation and the fulfilment of all commitments by Hungary very closely. The services are in regular contact with the Hungarian authorities and insist on the proper implementation of all remedial measures. The Hungarian Directorate General for Audit of European Funds (EUTAF) has audited the compliance of the methodology to measures single bids with the Single Market Scoreboard methodology.

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 EUTAF.

15. Can we expect the Commission to provide an assessment on the state of compliance with the SMS methodology as well as where the global figure stands with the correct methodology and an opinion on whether open calls would potentially allow for the target to be met?

Answer: The audit is responsibility of the Hungarian Directorate General for Audit of European Funds (EUTAF). The Commission's role is to assess the audit methodology and result and report on that.

16. How will the Commission assess the objective of reducing single bids below 15% by the end of the year when there are no actual interventions or measures planned for the coming months to enhance competition? Can we expect the Commission to provide an assessment on the state of compliance with this target?

Answer: measures to enhance competition were already taken pursuant to Government Decree 63/2022, which is cited, together with its key provisions, in the remedial measure on reducing the share of tender procedures with single bids financed from EU funds. There are no key immediate implementing steps on this target so the Commission will provide an assessment on the state of play only provided Hungary provides the relevant information.

17. We also acknowledge the establishment of the Electronic Public Procurement System (EPS) in order to enhance transparency in public procurement. How do you measure transparency given that there seems to be an enduring lack of substantial information to be provided, for instance the names of unsuccessful bidders or justifications for exceptional procedures? It would also be interesting to get an update on the transparency portal, financed by cohesion funds, that should have been set up by 2020?

Answer: 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. In particular, as set in the remedial measures, the functions of the EPS shall allow the structured search (including by using Boolean search operators) and bulk export of all contract award notice data with company identification numbers (including the names of each individual member of consortia and sub-contractors) in a format that can be processed by machine means regarding future public procurements, and in a free text format for historical data. A separate remedial measure on ensuring enhanced transparency of public spending requires the publication of an extensive set of data in a central register; the central register shall include unique identifiers of contracts used in EPS to allow data requesters to find related procurement documents in EPS.

As regards the 'transparency portal', we suggest to take it separately, as it does not relate to the procedure under the Conditionality. Certain clarifications on the question are also needed.

18. We noticed the weakening of conflict of interest rules in public procurement legislation – how does the Commission justify this in the context of protecting the EU's financial interests?

Answer: We do not see what this question relates too. The remedial measures on the Integrity Authority and on strengthening the anti-corruption framework provide for comprehensive commitments to protect the EU's financial interests, including with regard to funds implemented through public procurement. Please refer to previous answers.

19. Lastly in this context, a new resolution was adopted on the development of a procurement performance measurement framework by 30 September. Could the Commission offer some insights on the involvement of external experts, as announced for this task, given that they were supposed to be selected through an open call for application by 10 October which had not been launched on 7 October?

Answer: the key implementation step regarding this remedial measure set 30 September 2022 as the implementation date for the development of a performance measurement framework, including the adoption of a Government Decision. The remedial measure requires that the performance measurement framework be operation by 30 November 2022. We would defer to Hungary for further information on the selection of the experts.

Framework Agreements:

20. we also noticed that the Commission's assessment mentions the issues related to the common use of framework agreements. As these are not covered by the proposed remedial measures can the Commission still guarantee the complete protection of the EU budget after the introduction of all the proposed measures?

Answer: This is covered by one of the tasks of the Integrity Authority included in the relevant remedial measure. The Commission considers that the remedial measures could in principle address its concerns, if the measures are correctly detailed in relevant laws and implemented accordingly to consider that the budget would no longer be at risk.