



Brussels, 20.7.2022  
C(2022) 5313 final

**COMMUNICATION TO THE COMMISSION**

**COMMUNICATION FROM COMMISSIONER HAHN TO THE COMMISSION  
on the information to Hungary, pursuant to Article 6(7) of Regulation (EU, Euratom)  
2020/2092, about the intention to make a proposal for an implementing decision on the  
appropriate measures to the Council**

1. Article 4(1) of 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<sup>1</sup> ('Conditionality Regulation') provides 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. 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.'
4. Article 6(7) of the Conditionality Regulation provides that '[w]here the Commission intends to make a proposal pursuant to paragraph 9, it shall, before doing so, give the Member State the opportunity to submit its observations, in particular on the proportionality of the envisaged measures, within one month.'
5. 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. On 27 January 2022, the Hungarian authorities replied to it.
6. On 27 April 2022, the Commission sent a written notification to Hungary ('Notification') pursuant to Article 6(1) of the Conditionality Regulation. On 27 June 2022, the Hungarian Minister of Justice sent the reply to the Notification ('Reply'). By letters of 30 June and 5 July, the Hungarian Minister of Justice submitted further information to complement the Reply.
7. The Notification presented the findings of the Commission regarding a number of issues about the public procurement system in Hungary: systemic irregularities, deficiencies and weaknesses in public procurement procedures; high rate of single bidding procedures and low intensity of competition in procurement procedures; issues related to the use of framework agreements; detection, prevention and correction of conflicts of interest; concerns related to the use of public interest trusts. In addition, the Notification also presented findings regarding investigation and prosecution, and the anti-corruption framework. The main findings were the following.
8. First, there are serious systemic irregularities, deficiencies and weaknesses in public procurement procedures. Such irregularities have been found following consecutive Commission services audits conducted for both 2007-2013 and 2014-2020 programming

---

<sup>1</sup> OJ L 433I, 22.12.2020, p. 1.

periods, as well as several OLAF investigations that led to financial recommendations for significant amounts. In addition, the available data indicate that there have been unusually high percentages of contracts awarded where there was 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 indications of possible irregular auctioning of state-owned agricultural land as well as issues related to the prevention, detection and correction of conflicts of interest. Finally, 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 of a lack of transparency with regard to the management of funds by those trusts. 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 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 to the separation of powers.

9. 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 practice. In particular, there is a lack of effective judicial remedies by an independent court against decisions of the prosecution service not to prosecute alleged corruption and fraud affecting the Union’s financial interests, the lack of a requirement to give grounds when fraud and corruption cases are attributed or reassigned, and the absence of rules to prevent arbitrary decisions. In addition, there is a lack of a comprehensive anti-corruption strategy covering also the most relevant corruption prevention areas, under-utilisation of the full range of preventive tools to assist corruption investigation, including in particular high-level corruption cases, as well as an overall lack of effective prevention and repression of criminal fraud and corruption offences. 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.
10. 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. Questions were also asked as regards potential related issues concerning the independence of the judiciary.
11. In the Reply, Hungary argues that the Commission (i) did not ensure non-discrimination and equal treatment among Member States, (ii) did not sufficiently explain why certain sources referred to in the Notification would be reliable, (iii) relied on past assessments without taking into account all the information submitted by Hungary in different contexts, (iv) did not sufficiently qualify or justify why certain issues would be situations concerned by cases that are indicative of breaches of the principles of the rule of law, and (v) could not request information within the Notification. Hungary also submitted that pursuant to the temporal scope of application of the Conditionality Regulation, past issues cannot justify the existence of risks for the 2021-2027 Multiannual Financial Framework; it also submitted that the Commission may protect

the Union budget from risks for the future by recurring to other procedures set out in Union legislation.

12. The arguments submitted by Hungary are not correct, as the Commission carried out a thorough qualitative assessment that is objective, impartial and fair and duly took into account relevant information from available sources, as required by the Conditionality Regulation, as interpreted by the Court of Justice of the European Union<sup>2</sup>, including the information submitted by Hungary in its reply to the Request for information. The Notification also duly explained why other procedures set out in Union legislation would not allow the Commission to protect the Union budget more effectively.
13. As regards the findings in the Notification, Hungary argued that (i) it complies with all applicable rules, (ii) the veracity and reliability of the data used by the Commission is doubtful, (iii) the level of competition for contracts within framework agreements is high, (iv) it uses already Arachne, (v) public interest trusts are already subject to procurement rules and certain conflict of interest rules are contained in the articles of associations of these entities, (vi) investigation and prosecution work properly, and (vii) certain deadlines for the implementation of measures within the Corruption Prevention Strategy 2020-2022 had to be extended due to the COVID-19 pandemic.
14. The observations submitted in the Reply do not adequately address all the findings set out in the Notification. In particular, the Reply 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 of the odds of winning of politically connected companies. 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<sup>3</sup>. The observations 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 in the tourism, communication and sports sector. 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 were provided in relation to public interest trusts. The Reply did not provide relevant information on the current and future Corruption Prevention Strategy, nor on the effectiveness of repressive measures under the anti-corruption framework.
15. As regards the information requested, Hungary replied only partially, either reiterating information that was already available for the Commission and assessed by it, or by providing information that would not be adequate to dispel the findings of the Commission. For instance, Hungary did not provide the requested granular information on tenders and on certain aspects of the regulatory framework for public interest trusts. Therefore, the reasonable grounds based on which the Commission sent the Notification

---

<sup>2</sup> 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.

<sup>3</sup> *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.

to Hungary remain. As regards the questions on potential related issues concerning the independence of the judiciary, Hungary submitted again part of the information it had submitted to the Commission in the context of the preparation of the 2020, 2021 and 2022 Rule of Law Reports, without replying to the detailed and specific questions asked in the Notification.

16. The Commission also notes that Hungary has not submitted substantiated information regarding the concerns identified with respect to the judicial independence in Hungary. As also set out in the Rule of Law Report 2022, such concerns therefore persist, in particular on effective checks and balances regarding the powers of the President of the National Office for the Judiciary (NOJ); the possible review by the Hungarian Supreme Court (*Kúria*) of preliminary references to the Court of Justice and related disciplinary proceedings against judges; and the possibility for administrative authorities to challenge before the Constitutional Court a judicial decision that has already become final. In consequence, the Commission should reserve its right to open a procedure under the Regulation regarding the independence of the judiciary at a later stage.
17. While Hungary contests all the findings in the Notification, for many of them it also cross-refers to a number of measures that it is discussing with the Commission's services in the context of the draft national recovery and resilience plan ('NRRP') under the Recovery and Resilience Facility (RRF)<sup>4</sup> to fulfil RRF requirements or address country-specific challenges and priorities identified in the context of the European Semester. Many of the issues that would be addressed by the draft measures under discussion in the NRRP context are related to the same issues raised in the Notification, which shows that Hungary itself has implicitly acknowledged those issues need to be addressed. However, as the Commission will make clear to the Hungarian authorities, the references in their Reply to the draft NRRP milestones cannot be considered as remedial measures committed in the context of the Conditionality Regulation. 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 Regulation, and be precise and not limited in time.
18. By letters of 30 June and 5 July Hungary sent two additional letters to the Commission, both submitting the same additional information. The additional information refers to a measure (under discussion in the NRRP context) on the judicial review of decisions of the prosecution service<sup>5</sup>. This measure would consist of the entry into force of provisions allowing effective judicial review of decisions to interrupt investigations or not prosecute cases including as regards financial crimes against the Union budget. Hungary requested that such measure is considered as a remedial measure under the Conditionality Regulation.

---

<sup>4</sup> 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.

<sup>5</sup> See also 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, and the 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](https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf).

19. Although the remedial measure submitted by Hungary as regards the judicial review of decisions of its prosecution service is a positive development, it does not adequately address the findings set out in the Notification. In particular, the measure fails to address the findings in the Notification on the organisation and functioning of the investigative authorities and the prosecution service, with specific regard to the award of Union funds through public procurement procedures, the concentration of such awards, appropriate checks on conflict of interests and objective and independent review and reporting of risks for all the Union funds. In addition, certain aspects of this proposal weaken its ability to solve the problems with the ineffectiveness of prosecution, and require further discussion.
20. The Commission should inform Hungary that it has not submitted adequate remedial measures in its Reply nor in the letters of 30 June and 5 July 2022. However, it should also make clear that Hungary could still submit adequate remedial measures, in a timely manner, that the Commission could assess. The Commission should also signal that it stands ready to pursue discussions on the adequacy of any remedial measure Hungary might want to consider. In the absence of adequate remedial measures, and given that Hungary has not adequately addressed the findings set out in the Notification, pursuant to Article 6(7) of the Conditionality Regulation, the Commission should inform Hungary of its intention to submit a proposal for an implementing decision on the appropriate measures to the Council and give Hungary the opportunity to submit its observations, in particular on the proportionality of the envisaged measures, within one month as set out in Article 6(7) of the Conditionality Regulation.
21. The Conditionality Regulation requires that measures be proportionate and, insofar as possible, target the Union actions affected by the breaches. Considering the nature of the findings in the Notification in relation to public procurement, the measures should concern Union funding that is mainly implemented through public procurement and less through grants. The Commission audits which identified the public procurement processes 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, 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. In this light, the programmes to be protected by the measures should in priority be the Cohesion policy programmes 2021-2027 that are expected to be implemented mainly through public procurement taking as a benchmark the way Hungary has implemented the equivalent under the MFF 2014-2020: Environment and Energy Efficiency Operational Programme Plus; Integrated Transport Operational Programme Plus; Territorial and Settlement Development Operational Programme Plus (“operational programmes concerned”). 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.
22. In line with the proportionality requirements set by the Conditionality Regulation, the appropriate level of the measures to be applied should be determined by a percentage that reflects the ensuing risk for the Union budget.

23. 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, justifying a very high level of financial impact for the measures. As regards the operational programmes concerned, the level of implementation through public procurement is estimated at 85%-90%. Taking this into account, as well as the fact that some public procurement procedures may not be affected by the systemic breaches, a reasonable estimation of the potential level of risk for the EU budget may correspond to [70%] of the funds of these programmes. Thus [70%] suspension of commitments of these operational programmes can be considered proportionate. Should the operational programmes not have been approved by the time the Commission would propose measures to the Council, the corresponding suspension of approval of certain operational programmes concerned could be proposed instead.
24. Concerning the identified breaches in relation to public interest trust, the general exception from conflict of interest rules and the lack of transparency may have an impact on any budget these entities may implement or manage. In light of this impact, it can be considered proportionate to propose 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. As this prohibition only targets these entities, funds under the said programmes may be used for legal commitments with other entities. Thus the appropriateness and proportionality of the measure is ensured.
25. The Commission is therefore invited to empower the Commissioner in charge of the Budget to adopt, with the agreement of the President, the definitive text of a letter pursuant to Article 6(7) of the Conditionality Regulation, to inform Hungary of the Commission's intention to make a proposal for a Council implementing decision and give it the opportunity to submit its observations, in particular on the proportionality of the envisaged measures within one month from the receipt of the Article 6(7) letter in the Hungarian language. The letter will be in line with points 7 to 24 of this Communication, including to inform Hungary of the lack of remedial measures in its Reply, to invite Hungary to submit adequate remedial measures and to signal that the Commission stands ready to pursue discussions on the adequacy of any such remedial measure. The Commission is also invited to empower the Commissioner in charge of the Budget to continue his exchanges with the European Parliament and the Council.