



JOHANNES HAHN
MEMBER OF THE EUROPEAN COMMISSION

Brussels, 9 December 2022

Dear Minister,

Thank you for your letter of 6 December, following the discussion in the ECOFIN of that day, by which, referring to Article 241 TFEU, you requested the Commission to present an updated assessment of the remedial measures taken by Hungary in the context of the procedure under Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget (the “Regulation”)¹. In your letter, you also requested that the report from the Commission includes the necessary justificatory elements for the Council to assess the proportionality principle.

In its Communication to the Council of 30 November, the Commission considered all the information that it had received from the Hungarian authorities by 19 November, including legislation adopted on 22 November and announcements related to legal acts for which adoption was foreseen on 6 December. On 6 December, Hungary submitted further information to the Commission in relation to legislation that was to be voted upon by the Hungarian National Assembly the day after, and then on 7 and 8 December, Hungary communicated the adopted legislation. The information provided by Hungary refers to the actions undertaken and acts adopted by Hungary until 7 December. It also reinstates the additional commitments proposed in the form of milestones under the Hungarian national recovery and resilience plan, as endorsed by the Commission. However, it does not

¹ OJ L 433I, 22.12.2020, p. 1.

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demonstrate the adoption of legal acts to fulfil such milestones in a way that would fully implement the remedial measures.

In addition, the information and the legal acts transmitted on 6, 7, and 8 December largely correspond to those already available to the Commission at the time of the adoption of the Communication from the Commission to the Council on the remedial measures notified by Hungary of 30 November (the “Communication”) and were already covered by that Communication.

The legal texts of 7 December only introduced limited changes in comparison to the previously submitted versions of the documents received by the Commission on 19 November 2022. These relate to the data fields to be covered for the Central Register and on the administrative procedure for transparency, showing that Hungary is taking positive steps to enhance transparency in public spending. However, the weaknesses and risks as set out in paragraphs 153 and 154 of the Communication, including those of a structural and horizontal nature, are confirmed. The attached table illustrates the implications of the information submitted by Hungary on 6, 7 and 8 December in relation to all the weaknesses and risks.

In its letter of 6 December, the presidency of the Council also requests the necessary justificatory elements for the Council to assess the proportionality principle. Article 5(3) of Regulation 2020/2092 provides that ‘[t]he measures taken shall be proportionate. They shall be determined in light of the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. The nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account. The measures shall, insofar as possible, target the Union actions affected by the breaches’.

In its judgments on Regulation 2020/2092, the Court recalled that the principle of proportionality, ‘requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued’². The Court also emphasised that Regulation 2020/2092 requires ‘an objective and diligent analysis of each situation which is the subject of a procedure under the contested regulation, as well as the appropriate measures necessitated, as the case may be, by that situation, in strict compliance with the principle of proportionality, in order to protect the Union budget and the financial interests of the Union effectively against the effects of breaches of the principles of the rule of law, while respecting the principle of equality of the Member States before the Treaties’³.

² Judgment of the Court of 16 February 2022, *Hungary v Parliament and Council*, Case C-156/21, EU:C:2022:97, paragraph 340.

³ *ibid.*, paragraph 317; see also paragraphs 271, 278 and 329.

It is also recalled that Regulation 2020/2092 requires the measures to be not only proportionate but also effective. Therefore, while the measures should not go beyond what is required, they should not stop short and compromise their effectiveness.

The Commission duly explained the proportionality of the measures in its proposal of 18 September 2022 (COM(2022) 485 final, the “CID Proposal”)⁴). The Commission understands the request of the Council as being one for additional explanations as to why, in the Communication of 30 November 2022, the Commission maintained the proposal for measures in spite of the fact that Hungary delivered on several remedial measures.

The Commission can provide the following clarifications.

Firstly, it was clear in the CID Proposal that, although ‘[t]he proposed remedial measures, taken together, would in principle be capable of addressing the issues’ raised in the procedure, this would only be the case if ‘all the measures are correctly and effectively implemented’ (recital 38 of the CID proposal). Recital 39 of the CID proposal added that ‘the detailed implementing rules for the proposed remedial measures [were] 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’. The same recital stated that, ‘[g]iven 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’.

It was therefore clear that, with the exception of the remedial measure relating to public interest asset management foundations (analysed below), the remedial measures had to be assessed in their entirety as a global package, in the light of their overall adequacy to put an end to the breaches of the rule of law and/or to the impact on the Union’s budget. In other words, the assessment would be qualitative and not quantitative. It was also clear that all the remedial measures had to be implemented correctly and effectively for the package to be considered adequate. Finally, since the remedial measures were only a general outline, their effectiveness had to be assessed in the light of their detailed implementation in the relevant legal texts.

⁴ See paragraphs 125 to 152 of the explanatory memorandum to the CID Proposal.

Secondly, as was explained in the Communication, some of the remedial measures are more punctual in nature (such as measures vi to xvii), while other measures are more structural and horizontal in nature (in particular, measures i, iii, and v)⁵. In addition, some measures (viii and xii to xiv) did not involve any implementation by the cut-off date of 19 November 2022, and required a longer period of implementation.

One of the most important and structural measures to tackle the problems raised in the procedure is the creation of the Integrity Authority, a new body that aims precisely at remedying systemic breaches in the field of public procurement. For the Integrity Authority to be able to perform this crucial function, it must be fully independent and have effective powers to perform its duties. However, as the Commission explains in paragraph 36 of the Communication, its independence risks to be undermined since the way the dismissal procedure is organised does not sufficiently protect the members of the Integrity Authority from undue influence. In addition, the effectiveness of its powers is undermined by significant defects as summarised in paragraph 37 of the Communication. These concerns have not been addressed by the legal acts of 7 December and therefore the effectiveness of the main element of the package of remedial measures is undermined by deficiencies in its detailed implementation.

The same reasoning applies to the remedial measure relating to the judicial review of prosecutorial decisions, which is another structural measure and a necessary complement to the establishment of the Integrity Authority. While the Integrity Authority is meant to redress breaches of the rule of law regarding public procurement, the judicial review of prosecutorial decisions aims to ensure that effective and deterrent measures are taken through the application of criminal law, in line with Article 325 TFEU. However, the effectiveness of this measure is seriously undermined by the defects that have been set out in the Communication (paragraphs 71 to 87), which have not been addressed by the legal acts of 7 December.

This is compounded by serious shortcomings in the system of asset declarations, another important measure of a horizontal nature (paragraphs 57 to 59 of the Communication), which have not been addressed by the latest legal acts.

Thirdly, the case of public interest management foundations was the object of one particular proposal for measures: the prohibition from entering into legal commitments with those foundations (Article 2(2) of the CID Proposal), while the other proposed measure (Article 2(1) of the CID Proposal) protected the Union's budget against the potential impact of the problems in public procurement. As explained in the Communication, while the specific remedial measures relating to public interest management foundations were implemented correctly, the facilitation, at the beginning of November, of the presence of top-level officials on boards of public interest management foundations whose purpose it is to disburse large

⁵ See Communication, paragraphs 19, 49, 73 and 156.

amounts of public funds went against the objective of the remedial measure and rendered it inadequate (paragraph 70 of the Communication). This justifies the proportionality of keeping the specific remedial measure proposed in this regard.

As explained in paragraphs 151 to 156 of the Communication, the overall assessment by the Commission was that, notwithstanding the steps taken by Hungary, the overall risk for the Union's budget remains unchanged with regard to the CID Proposal. However, as explained above, and in the table attached to this letter, this has not changed in the light of the latest legislative changes adopted in Hungary.

The provisional nature of the measures proposed is also relevant when assessing their proportionality. Among the measures provided for by Article 5 of Regulation 2020/2092, the Commission has proposed a suspension of commitments (or of the approval of programmes). By contrast with other possible measures, these measures do not have definitive effects in accordance with Article 7(3) of the Regulation. The Member State concerned has the possibility, at any time, to submit to the Commission a written notification including evidence to show that the conditions of Article 4 are no longer fulfilled. If this is the case, the measures may be lifted under the procedure foreseen by Article 7 of the Regulation and, as long as solved within two years, no Union funding will be lost.

I would like to thank you for the continuous cooperation of the Council on this procedure. At the same time, I note the efforts made so far by Hungary to address several of the remedial measures. I trust that this reply will allow the Council to take an informed decision on the adoption of measures under the Regulation and remain available for further cooperation.

Yours faithfully,

(e-signed)
Johannes Hahn

