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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT AND THE COUNCIL**

**on the application 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**

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1. INTRODUCTION

Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget (the ‘Regulation’ or the ‘Conditionality Regulation’)¹ applies since 1 January 2021. In accordance with Article 4(1) of the Conditionality Regulation, the Commission can propose to the Council to adopt measures in case 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. Complementary to other tools and procedures established to protect and foster the rule of law, the objective of the Conditionality Regulation is the protection of the Union budget and the Union’s financial interests.

According to Article 9 of the Conditionality Regulation, the Commission shall report by 12 January 2024 to the European Parliament and the Council on its application, in particular on the effectiveness of the measures adopted. Moreover, recital 28 of the Conditionality Regulation states that the Commission should consider, in addition to reporting on the effectiveness of the measures adopted, to report also on the overall effectiveness of the procedures set out in the Conditionality Regulation, as well as the complementarity of this instrument with other instruments.

The report is structured in the following five sections:

- Section 2 describes the actions taken by the Commission in the application of the Conditionality Regulation, including the first procedure opened as regards Hungary;
- Section 3 reflects on the complementarity of the Conditionality Regulation with other relevant instruments;
- Section 4 describes the Commission’s evaluation of the effectiveness of the measures adopted and refers to the protection of final recipients and beneficiaries;
- Section 5 addresses the overall effectiveness of the procedure set out in the Conditionality Regulation;
- Finally, section 6 presents an evaluation of the application of the Conditionality Regulation.

2. APPLICATION OF THE CONDITIONALITY REGULATION

The Conditionality Regulation is a budgetary instrument designed to react with effective protective measures in the event of breaches of the principles of the rule of law that affect or seriously risk affecting the Union budget or the financial interests of the Union. As such, the Conditionality Regulation is not designed primarily to remedy specific situations that may be indicative of breaches of the principles of the rule of law as referred to in Article 3 of the Regulation; instead, those situations could be relevant for the Conditionality Regulation and could be addressed as a result of its application when they affect or seriously risk affecting the sound financial management of the Union budget or the protection of the Union’s financial

¹ OJ L 433I, 22.12.2020, p. 1.

interests in a sufficiently direct way. Only in that case, in fact, and if other instruments would not allow the Commission to protect the Union budget more effectively, the Commission can initiate a procedure under the Conditionality Regulation. Appropriate measures under that Regulation must be taken where the conditions set out in its Article 4 are fulfilled, following the procedure established in Article 6.

On 16 February 2022, the Court of Justice of the European Union confirmed in its rulings² the validity of the Conditionality Regulation, dismissing Hungary's and Poland's actions for annulment.

To provide clarity and predictability on the application of the Conditionality Regulation, and considering the case law of the Court of Justice of the European Union, the Commission adopted the Guidelines on the application of the Conditionality Regulation ('Guidelines')³.

In the first three years of the application of the Conditionality Regulation, the Commission has been proactively and permanently monitoring the situation in all Member States, to identify at the earliest possible stage breaches of the principles of the rule of law falling within the scope of the Regulation. Since the entry into force of the Conditionality Regulation in January 2021, the Commission has intensified the cooperation between its services to combine both country- and sector-specific knowledge and identify possible situations or developments in the Member States that would be relevant for the application of the Conditionality Regulation.

Information and evidence gathered under different instruments applied by the Commission can be relevant to identify whether situations that are indicative of breaches of the principles of the rule of law exist in a Member State. Similarly, the Commission, in defending the financial interests of the Union under different instruments, may become aware of risks for the Union budget that are linked to breaches of the principles of the rule of law.

In particular, services responsible for the preparation of the European Semester⁴, of the Rule of Law Report⁵ and for the implementation of the Recovery and Resilience Facility⁶ and of the Common Provisions Regulation⁷, as well as the European Anti-Fraud Office 'OLAF' and the audit services of the Commission, have exchanged information acquired under the respective activities on a regular basis.

² Judgment of the Court (Full Court) of 16 February 2022, *Hungary v European Parliament and Council of the European Union*, C-156/21, ECLI:EU:C:2022:97; Judgment of the Court (Full Court) of 16 February 2022, *Republic of Poland v European Parliament and Council of the European Union*, C-157/21, ECLI:EU:C:2022:98.

³ Communication from the Commission Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, OJ C 123, 18.3.2022, p. 12.

⁴ https://commission.europa.eu/business-economy-euro/economic-and-fiscal-policy-coordination/european-semester_en.

⁵ The Rule of Law Report is the centrepiece of the European Rule of Law Mechanism. See more information at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

⁶ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (RRF Regulation), OJ L 57, 18.2.2021, p. 17.

⁷ 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.

The Commission has also actively raised awareness about the Conditionality Regulation with a view, inter alia, to incentivise the filing of complaints and the sharing of relevant information by third parties, which may be relevant for the application of the regulation.

So far, the procedure was opened and the Council adopted measures upon the Commission's proposal under the Conditionality Regulation once, with respect to relevant breaches of the principles of the rule of law identified in Hungary.

2.1. Screening of relevant sources

In the application of the Conditionality Regulation, the Commission ensures a permanent monitoring of the situation in all Member States to identify relevant breaches of the principles of the rule of law that affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union, in line with Article 6(3) of the Conditionality Regulation. In the course of this monitoring, the Commission takes into account all possible relevant sources of information, in particular those listed in recital 16 of the Conditionality Regulation, such as the Commission's Rule of Law Reports, reports of the European Court of Auditors and of International Organisations⁸, as well as other relevant sources, including resolutions, studies of the European Parliament, reports from NGOs and investigative journalists. The Commission screens these sources on a regular basis, as appropriate.

In doing such a screening for all Member States, the Commission carries out a qualitative assessment on a case-by-case basis to identify whether there are reasonable grounds to initiate a procedure under the Conditionality Regulation. As the Court of Justice of the European Union has stressed⁹, the Commission is required to ensure that the information it uses is relevant and that the sources of that information are reliable. This requires a comprehensive assessment of alleged issues; the Commission should base its assessment on a wide range of evidence and strives to use several sources for its conclusions¹⁰.

Additionally, the Commission takes advantage of the monitoring performed and meetings with stakeholders taking place as part of other work streams. Information coming from the Rule of

⁸ Recital 16 of the Conditionality Regulation reads '[t]he identification of breaches of the principles of the rule of law requires a thorough qualitative assessment by the Commission. That assessment should be objective, impartial and fair, and should take into account relevant information from available sources and recognised institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO) as relevant, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission, in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission if necessary for the purpose of preparing a thorough qualitative assessment.'

⁹ Judgment of the Court (Full Court) of 16 February 2022, *Hungary v European Parliament and Council of the European Union*, C-156/21, ECLI:EU:C:2022:97, paragraph 285, and Judgment of the Court (Full Court) of 16 February 2022, *Republic of Poland v European Parliament and Council of the European Union*, C-157/21, ECLI:EU:C:2022:98, paragraph 285.

¹⁰ See paragraph 63 of the Guidelines. The Commission could not, for example, initiate a procedure based on a single piece of information, such as a press article, even if that source is considered reliable. The Commission assesses the information provided by the sources available and corroborates that with other sources or information.

Law annual cycle¹¹ or from the application of other relevant instruments, such as the Recovery and Resilience Facility and the Common Provisions Regulation, is also considered for the purposes of its screening under the Conditionality Regulation. Commission services responsible for auditing Union funding or for infringements also contribute. Moreover, the Commission consults OLAF as well as the European Public Prosecutor's Office ('EPPO'), to collect more data, where relevant.

Furthermore, the Commission collects information from citizens and civil society, in particular on the basis of complaints about potential breaches of the principles of the rule of law. The Commission has been receiving complaints by various means (emails and letters to Members of the Commission or to different Commission's services, etc.). To make the information provided to the Commission more streamlined already at the input stage and to provide a clear contact point for complaints under the Conditionality Regulation, the Commission made available a complaint form¹² that complainants could use, with particular features for those wishing to remain anonymous, and set up a dedicated functional mailbox¹³. This dedicated complaint form was adopted as an Annex to the Guidelines with the aim of facilitating the submission of information that would be relevant to the application of the Conditionality Regulation. The filling of the complaint form and sending it to the dedicated functional mailbox is the recommended contact method with the Commission.

The Commission has been consistently raising awareness on the possibility of filing complaints and on the existence of the complaint form for this purpose, for instance in its replies to grievances from citizens, in meetings with relevant stakeholders, and in the context of its interventions before a number of European Parliament's committees.

The Commission carries out a qualitative assessment of the information and documents provided by every complainant to identify whether it contains relevant information that would substantiate possible grounds for the application of the Conditionality Regulation. Over the three-year period, a considerable number of letters, emails or complaints were received. To date, the information received has typically not shown that the conditions for the application of the Regulation were fulfilled. For example, there have been numerous complaints about challenges to the functioning of the internal market, which however did not involve Union funding¹⁴. None of the nearly three hundred were substantiated enough for the Commission to corroborate evidence, nor to initiate a procedure under the Conditionality Regulation. While the Commission considers every complaint, so far only a very small number of complainants used the standard complaint form. To improve the basis for assessing the merits of a complaint and facilitate better handling and response, complainants are encouraged to use the standard complaint form, as it may help them better frame their submission for the purposes of an

¹¹ Within the Rule of Law mechanism, the preparatory work for the Rule of Law Report spans throughout a year every year. It includes consultations on rule of law issues between the Commission and Member States, international and non-governmental organisations. See more information at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

¹² The complaint form is available in the public webpage on Conditionality Regulation (https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en), as published on 23 November 2021; it is also annexed, as Annex II, to the Guidelines adopted in March 2022, see *supra* fn. 4.

¹³ BUDG-CONDITIONALITY-REGIME-COMPLAINTS@ec.europa.eu.

¹⁴ These can typically be followed up through other tools, but are not relevant for the Conditionality Regulation.

assessment under the Conditionality Regulation. This will also facilitate a meaningful assessment by the Commission services under the Regulation.

2.2. Requests for information

Pursuant to Article 6(4) of the Conditionality Regulation, and as part of the process of collecting information for its assessment, the Commission can send a request for information to the Member State concerned. Pursuant to the Conditionality Regulation and in line with paragraph 56 of the Guidelines, the Commission may request additional information aimed at confirming the fulfilment of the conditions for the application of the Conditionality Regulation, assessing the extent of the impact on the Union's budget or on the protection of the financial interests of the Union (or risk thereof), or assessing more in detail any remedial measures that the Member State put in place or is planning to put in place. The Commission can request additional information not only before initiating the procedure, but also after sending a written notification.

During the reporting period, the Commission sent two administrative letters to request information from Poland and Hungary, on 24 November 2021.

Poland replied to the request for information in January 2022 and the information contained in the reply was taken into account to assess whether breaches of the principles of the rule of law affected or seriously risked affecting the Union budget in a sufficiently direct way. A procedure under the Conditionality Regulation was not initiated in the case of Poland, since the Commission did not find that it had reasonable grounds to consider that all the conditions for the application of the Conditionality Regulation were fulfilled. This is without prejudice to the Commission continuing to address rule of law issues in Poland through other instruments. The Commission has continued to closely monitor the situation in Poland, the same way it continuously monitors the situation in all the other Member States to assess whether the conditions for the application of the Conditionality Regulation are met.

Hungary replied to the Commission's request for information on 27 January 2022, and after assessing Hungary's reply, the Commission sent a written notification to Hungary on 27 April 2022, thereby initiating a case under the Conditionality Regulation (see Section 2.3 below).

2.3. Procedure

Article 6 of the Conditionality Regulation sets out the procedure to be followed for the adoption of protective measures. By design, the procedure is mainly (i.e. until its final steps, where the Council takes the final decision) a bilateral process between the Commission and the Member State concerned, with the obligation to inform the European Parliament and the Council of specific acts taken throughout the procedure (see Section 2.4 below).

Following the sending of a written notification under Article 6(1)¹⁵, stating the factual elements and specific grounds on which the findings are based, the Commission carries out a

¹⁵ Article 6(1) reads '[w]here 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. The Commission shall inform the European Parliament and the Council without delay of such notification and its contents.'

contradictory procedure with the Member State concerned. If the Member State, in the course of the procedure, demonstrates that it remedied the situation in full, the conditions to propose measures to the Council would not be fulfilled. Otherwise, the Commission must continue the procedure and eventually propose the adoption by the Council of an Implementing Decision¹⁶ on appropriate measures to protect the Union budget or the Union's financial interests. Any protective measures adopted by the Council remain in place until the situation that led to their adoption is remedied. The Council can lift or modify the protective measures following a Commission proposal when the situation is deemed to be partially or totally remedied, pursuant to the procedure established in Article 7.

The only case opened so far under the Conditionality Regulation that has led to adoption of protective measures by the Council is the case concerning Hungary. This first case also constituted the first practical application of the definitive deadlines set out in the Conditionality regulation which sets clear and ambitious time limits for every actor at every stage.

On 27 April 2022, the Commission sent a written notification to Hungary, given that, after an objective analysis, it found that it had reasonable grounds to consider that all the conditions for the application of the Conditionality Regulation were met. The written notification informed Hungary about concerns on a number of issues that affected or seriously risked affecting the sound financial management of the Union budget in a sufficiently direct way.

Hungary submitted its observations with complementary letters on 27 June 2022, 30 June 2022, and 5 July 2022. In substance, Hungary did not submit any remedial measures during this time period. Instead, Hungary rejected all findings and in particular their link to EU financial interest. In practical terms and as a result of the deadlines embedded in the Regulation, this created significant time pressure during all subsequent stages of the procedure.

It was only on 19 July 2022, at a very advanced stage of the procedure, that Hungary proposed 17 remedial measures to address the identified findings¹⁷. The Commission evaluated them and considered that the remedial measures did not appropriately address the concerns.

On 20 July 2022, the Commission informed Hungary of its intention to propose budgetary protection measures to be adopted under the Conditionality Regulation. Hungary replied on 22 August 2022. This reply was complemented by a second letter on 13 September 2022.

On 18 September 2022, the Commission proposed to the Council to adopt budgetary protective measures for the protection of the Union budget and the financial interests of the Union against breaches of the principles of the rule of law in Hungary¹⁸. In this proposal, the Commission raised concerns with regard to: (i) the systemic irregularities, deficiencies and shortcomings in public procurement, (ii) detection, prevention and correction of conflicts of interest, and (iii) investigation, prosecution and anti-corruption framework. The Commission concluded, after a thorough assessment, that the risk for the budget remained. On that basis, the Commission proposed the suspension of 65% of the commitments for three operational programmes under cohesion policy (or the suspension of one or more of those programmes, in proportion to the

¹⁶ Pursuant to Article 6(11) of the Conditionality Regulation, the Council adopts its implementing decision by qualified majority.

¹⁷ See Section 4 for more details on the remedial measures submitted by Hungary.

¹⁸ 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, COM(2022) 485 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0485>.

ensuing risk for the budget, in case they are not adopted by the time of the Council decision) and a prohibition to enter into legal commitments with specific entities (the so-called public interest trusts (PITs)¹⁹ and entities maintained by them) for programmes implemented in direct and indirect management.

On 30 November 2022, the Commission informed the Council of its assessment on the implementation of the remedial measures, considering the progress made until 19 November 2022. In this assessment, and in the complementary assessment of 9 December 2022, the Commission identified remaining weaknesses and risks and decided to maintain its initial proposal from September, inviting the Council to proceed on this basis.

On 15 December 2022, the Council, in line with Article 6(10) of the Conditionality Regulation, adopted an Implementing Decision within three months of receiving the Commission's proposal, exceptionally extending the one-month period for adoption.

The Council Implementing Decision established measures to protect the Union budget from breaches of the principles of the rule of law in Hungary, based on the Commission's proposal²⁰. Pursuant to Article 6(11) of the Conditionality Regulation, and for reasons linked to the proportionality of the measures, the Council amended the Commission proposal and reduced the percentage of commitments to be suspended from 65% to 55% for the three operational Cohesion programmes concerned²¹, once adopted, amounting to approximately EUR 6.3 billion in total for the period 2021-2027. The Council also prohibited entering into new legal commitments with Hungarian public interest trusts and entities maintained by them when implementing the Union budget in direct and indirect management.

Following the adoption of the Council Implementing Decision, Hungary informed the Commission of the further steps it took to implement all the commitments it had submitted in the course of the procedure. The Commission has exchanged with the Hungarian authorities to help Hungary devise the appropriate new remedial measures that would be effective in addressing the outstanding issues outlined in the Council Implementing Decision.

According to Article 7(2) of the Conditionality Regulation, '[a]t the request of the Member State concerned, or on its own initiative and at the latest one year after the adoption of measures by the Council, the Commission shall reassess the situation in the Member State concerned, taking into account any evidence submitted by the Member State concerned, as well as the adequacy of any new remedial measures adopted by the Member State concerned.'

In the absence of a written notification from Hungary, the Commission reassessed on its own motion the situation in Hungary based on the information available. On 13 December 2023, the Commission decided (in its 'Reassessment Decision') that the situation that led the Council to adopt measures had not been remedied and that the Union's budget remained at the same level

¹⁹ PITs are also called "public interest asset management foundations".

²⁰ Council Implementing Decision (EU) 2022/2506 of 15 December 2022 (the 'Council Implementing Decision'), OJ L 325, 20.12.2022, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022D2506>.

²¹ a) Environmental and Energy Efficiency Operational Programme Plus; b) Integrated Transport Operational Programme Plus; c) Territorial and Settlement Development Operational Programme Plus.

of risk as established by the Council Implementing Decision. For that reason, the Commission concluded that the measures adopted had to remain in place²².

2.4. Communication with the European Parliament and the Council

Pursuant to Article 6(1) of the Conditionality Regulation, the Commission must inform the European Parliament and the Council in the event of a written notification initiating a procedure; under Article 7(2), the Commission must inform the Council if it addresses to a Member State a decision that the situation that had led to the adoption of measures has not been remedied. Article 8 states that the European Parliament must be informed of any measures proposed, adopted and lifted under the Conditionality Regulation procedure.

In the only case so far, the Commission fulfilled its information obligations under the Conditionality Regulation by notifying the European Parliament and the Council of the steps taken or acts adopted throughout the procedure, in line with the Regulation. Beyond its obligations, it firstly published its proposal for an implementing decision on the appropriate measures to the Council²³, as well as its communication to the Council on the remedial measures notified by Hungary²⁴ and its Reassessment Decision. The Commission, secondly, regularly informed the European Parliament and the Council at technical and political level about the implementation of the Conditionality Regulation. In addition, representatives of the Commission participated in hearings and Committee meetings of the two institutions, and the Commission replied to Resolutions, letters and other queries from Members of the European Parliament.

3. COMPLEMENTARITY WITH OTHER INSTRUMENTS

The Union has developed a variety of instruments and processes that promote the rule of law and its application and provide an effective response from Union institutions to breaches of the rule of law through infringement proceedings and the procedure provided for in Article 7 TEU. Further tools include financial support for civil society organisations, the Rule of Law annual cycle and the EU Justice Scoreboard²⁵. Other tools and procedures established by Union legislation specifically aim to protect the Union budget, including OLAF investigations, checks and audits or financial corrections. The Conditionality Regulation complements these instruments²⁶ by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the

²² The text of the Commission decision of 13 December 2023 is available, under the section News, at https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en.

²³ 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, COM/2022/485 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0485>.

²⁴ Communication from the Commission to the Council on the remedial measures notified by Hungary under Regulation (EU, Euratom) 2020/2092 for the protection of the Union budget, COM(2022) 687 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022DC0687>.

²⁵ Other tools included the Cooperation and Verification Mechanism, which had been introduced to facilitate progress in certain fields, e.g. judicial reforms and anti-corruption for two Member States. In September 2023, the Commission closed the Cooperation and Verification Mechanism, as the two Member States had satisfactorily met their obligations set out under this instrument.

²⁶ These instruments are independent of each other, each serving its own purpose.

Union²⁷. Recital 28 of the Conditionality Regulation notes that complementarity is one of the main topics that this report should address.

Article 6(1) of the Conditionality Regulation requires assessing whether procedures set out in Union legislation other than the one established by the Conditionality Regulation would allow to protect the Union budget more effectively. Recital 17 of the Conditionality Regulation notes in that context that ‘[...] Union financial legislation and the applicable sector-specific and financial rules provide for various possibilities to protect the Union budget, including interruptions, suspensions or financial corrections linked to irregularities or serious deficiencies in management and control systems. [...]’.

In considering whether the procedure established by the Conditionality Regulation protects the Union budget more effectively than other procedures, the Commission takes into account a set of criteria, to be applied on a case-by-case basis. The Guidelines refer specifically to two criteria to determine the effectiveness of the protection by the Conditionality Regulation over other instruments²⁸. This ‘complementarity test’ will be refined based on the practical experience gained in applying the Conditionality Regulation.

Under Union legislation, several instruments can be activated to protect the Union budget. As mentioned, OLAF²⁹ and EPPO³⁰ investigations can address risks to the Union budget, irrespective of their underlying issues, and the application of Financial Regulation rules can also lead to audits, checks and suspensions of payments³¹.

The Common Provisions Regulation governs four cohesion policy funds, one maritime, fisheries and aquaculture fund, and three home affairs funds under shared management. The implementation of programmes under the Common Provisions Regulation is subject to the fulfilment (throughout the entire programming period) of prerequisite conditions for the effective and efficient implementation of the specific objectives (known as “thematic” or “horizontal” enabling conditions). The horizontal enabling condition on the Charter of Fundamental Rights³² set out in Article 15 and in Annex III of the Common Provisions Regulation requires that all Member States put in place effective mechanisms to ensure compliance of the programmes supported by the Funds and their implementation with the Charter. When there is a failure to fulfil an enabling condition, the Commission cannot reimburse expenditure related to programmes or parts of the programmes for those specific objectives linked to the enabling condition³³. Risks for the protection of certain fundamental rights, for instance the right to an effective remedy and to a fair trial, might also put at risk the principles of the rule of law. If, at any point in time, the Commission considers that an enabling condition previously found as fulfilled is no longer fulfilled, it shall inform the Member State setting out its assessment. Where the Commission concludes that the non-fulfilment of the

²⁷ Recital 14 of the Conditionality Regulation.

²⁸ Paragraphs 41-43 of the Guidelines.

²⁹ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/199, OJ L 248, 18.9.2013, p. 1.

³⁰ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (the ‘EPPO’), OJ L 283, 31.10.2017, p. 1.

³¹ Article 63 and 131, 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, OJ L 193, 30.7.2018, p. 1.

³² Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012, p. 391.

³³ Article 15(5), Common Provisions Regulation.

enabling condition persists, expenditure related to the specific objective concerned shall not be reimbursed. In addition, the Common Provisions Regulation requires the Member State to set up an effective and efficient internal control system to protect the financial interests of the Union. It includes specific safeguards and measures, including the interruption of payment deadlines or the suspension of payments in relation to deficiencies in the effective functioning of the management and control system, and financial corrections, to protect the Union budget from irregularities in the implementation of the programmes.

Additionally, the conditions to access the Recovery and Resilience Facility funding require the Member State to set up an effective and efficient internal control system to protect the financial interests of the Union in implementing the Facility. Member States must also address all or a significant subset of challenges identified in the relevant country-specific recommendations. Challenges that may be indicative of breaches of the principles of the rule of law may be covered by such country-specific recommendations. The applicable rules also require Member States to take all the appropriate measures to protect the financial interests of the Union and to ensure that the use of funds in relation to measures supported by the Recovery and Resilience Facility complies with applicable Union and national law. A suspension of payments, the termination of agreements related to financial support as well as the reduction and recovery of financial contribution already paid are possible when a recovery and resilience plan is not implemented in a satisfactory manner by the Member State concerned, or in the case of serious irregularities (such as fraud, corruption and conflicts of interest) in relation to the measures supported by the Facility, or a serious breach of an obligation under the agreements related to financial support³⁴.

As regards the common agricultural policy, the Regulation on the financing, management and monitoring of the common agricultural policy³⁵ sets specific obligations for the Member States to protect the financial interests of the Union and the Commission can suspend payments in relation to serious deficiencies in the proper functioning of governance systems to protect the financial interests of the Union and exclude expenditure from Union financing, in case it has not been incurred in conformity with Union law³⁶. In certain instances, such serious deficiencies may stem from a breach of the principles of the rule of law³⁷ and may therefore be relevant for the application of the Conditionality Regulation.

In this regard, according to the Guidelines³⁸, one of the criteria to address the effectiveness of the Conditionality Regulation over other procedures relates to the types of remedies available and their suitability for different situations. Article 5 of the Conditionality Regulation sets out the list of budgetary measures that the Commission can propose to the Council if all the conditions of the Conditionality Regulation are fulfilled³⁹. Moreover, the various protective

³⁴ Article 24, RRF Regulation.

³⁵ Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013, 6.12.2021, OJ L 435, p. 187.

³⁶ Articles 42, 55 and 59, Regulation on the financing, management and monitoring of the common agricultural policy.

³⁷ For example, in relation to the proper functioning of the authorities in charge of land registries and of related controls on leasing and/or ownership of agricultural land (including law enforcement actions, where appropriate), insofar as such leasing and/or ownership is relevant to the receipt of subsidies under the CAP. See paragraph 24 of the Guidelines.

³⁸ Paragraphs 41-43 Guidelines.

³⁹ Pursuant to Article 5 of the Conditionality Regulation, the protective measures can entail, in direct or indirect management, the suspension of payments or of the implementation of legal commitments, termination of the

measures to address the specificities of the relevant breach(es) of the principles of the rule of law may be applied cumulatively.

In the case of Hungary, a combination of serious issues supported the conclusion that there was no other procedure under Union law that would allow the Commission to protect the Union budget effectively⁴⁰. This case also showed that the measures that can be proposed under the Conditionality Regulation are not limited to specific projects or programmes: they can cover all Union funds and therefore better deal with systemic or cross-cutting deficiencies that put the Union budget at risk.

In the case of Hungary, the procedure under the Conditionality Regulation has been running in parallel to various processes under several Union instruments. This was the case mainly due to the timing of entry into force of those instruments and of the procedural steps established by each of them, which also depended on the timing of the information submitted by Hungary in the course of each of the procedures. It is to be noted that the Conditionality Regulation is the only instrument that requires an assessment of whether there are more effective ways under other instruments to protect the Union's financial interests from the breaches of the principles of the rule of law.

In its 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 Hungary⁴¹, the Commission considered that no other procedure under Union law would allow it to protect the Union budget against the breaches identified in the Proposal more effectively than the procedure set out by the Conditionality Regulation. The identified deficiencies, weaknesses, limits and risks were considered widespread and intertwined, which prevented other procedures from being more effective than that provided for by the Conditionality Regulation. The Commission stressed that, for more than ten years, Hungary had been the addressee of recommendations and corrections due to weaknesses and serious irregularities, in particular in the public procurement domain. Over an extended period of time, public procurement in Hungary continued to present significant deficiencies and weaknesses that affected the sound financial management of the Union budget and the protection of the financial interests of the Union, which Hungary failed to address in a systematic manner.

Under the Recovery and Resilience Facility, on 15 December 2022, the Hungarian Recovery and Resilience Plan was approved⁴². In this plan, Hungary committed to 27 “super-milestones”, milestones linked to the protection of the financial interests of the Union to ensure compliance with Article 22 of the RRF Regulation, through the establishment of an adequate control system, which must be satisfactorily fulfilled by Hungary before any payment following a payment request under the Recovery and Resilience Facility is possible: as such, the ‘super-milestones’ are necessary conditions for Hungary to be able to submit requests for payments under its recovery plan. These cover three areas: firstly, reforms in the areas of anti-corruption and public

legal commitments, prohibition of new legal commitments, suspension of disbursements, suspension or reduction of the economic advantage and prohibition on entering into new agreements on loans or other Union instruments. Under shared management, the protective measures can entail suspension or programs, suspension or reduction of legal commitments, reduction of pre-financing, and interruption or suspension of payments.

⁴⁰ Council Implementing Decision, recitals 14–18.

⁴¹ COM/2022/485 final.

⁴² Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, OJ L 57, 18.2.2021, p. 17.

procurement, which effectively implement all key implementation steps of the 17 remedial measures introduced under the Conditionality Regulation procedure; secondly, reforms to strengthen judicial independence which reflect the conditions included in the Commission's implementing decisions approving Hungary's programmes under the Common Provisions Regulation to ensure compliance with the judicial independence aspect of the horizontal enabling condition on the Charter of Fundamental Rights⁴³; and thirdly, specific audit and control measures. However, the 'super-milestones' are not able to protect the financial interests of the Union in relation to breaches of the principles of the rule of law that already affect or risk affecting the implementation in Hungary of spending programmes financed by the Union budget other than the Recovery and Resilience Facility.

As regards the Common Provisions Regulation, on 22 December 2022, the Commission adopted the Partnership Agreement and all programmes under the Common Provisions Regulation for Hungary for the multiannual financial framework 2021-2027⁴⁴. Nevertheless, at the time, the Commission had found that Hungary did not fulfil the horizontal enabling condition on the effective application and implementation of the Charter of Fundamental Rights. This meant that Hungary could still implement the programmes, and receive pre-financing, but could receive reimbursements only for technical assistance, which represents around 3% of the total funds allocation under the Common Provisions Regulation, or for operations that contribute to the fulfilment of the enabling condition. On 13 December 2023, after a thorough assessment and several exchanges with the Hungarian government, the Commission established that Hungary has taken the measures necessary for the Commission to consider that the horizontal enabling condition on the EU Charter of Fundamental Rights is fulfilled as regards judicial independence. As a consequence, for part of the above-mentioned funding Hungary may start receiving reimbursements, as long as the condition remains fulfilled⁴⁵.

The Commission has also launched a number of infringement proceedings against Hungary, in relation to the rights of civil society organisations, academic freedom, media freedom, the rights of migrants and asylum seekers, and the rights of LGBTIQ people as well as to the functioning of the single market⁴⁶. These infringement procedures do not concern the conditions for the application of the Conditionality Regulation under its Article 6(1). Infringement proceedings are not aimed directly to protect the Union's financial interests and do not by default lead to budgetary protective measures. However, they can also be a tool to lead the Member State concerned to reform areas deemed problematic from a rule of law perspective.

⁴³ See the press release Judicial independence and EU funding for Hungary, and the questions and answers therein, at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465.

⁴⁴ See the Partnership Agreement with Hungary – 2021-2027 (europa.eu), at https://commission.europa.eu/publications/partnership-agreement-hungary-2021-2027_en.

⁴⁵ See the press release Judicial independence and EU funding for Hungary, and the questions and answers therein, at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465.

⁴⁶ See the 2022 Annual Report on monitoring the application of EU law, section on Hungary, at https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure/2022-annual-report-monitoring-application-eu-law/hungary-2022_en and the Single Market Scoreboard data on Hungary at <https://single-market-scoreboard.ec.europa.eu/countries/Hungary>.

4. EFFECTIVENESS OF THE MEASURES ADOPTED

According to Article 9 of the Conditionality Regulation, the Commission shall report to the European Parliament and the Council on the effectiveness of the measures adopted.

From the point of view of the protection of the Union's budget, the budgetary measures as proposed by the Commission and adopted by the Council in the case of Hungary are considered to be effective, in the sense that they currently achieve their objective to protect the Union's financial interests. The adopted measures are also proportionate, in line with the requirements set by the Conditionality Regulation, as interpreted by the Court of Justice of the European Union⁴⁷.

As regards the question of the effectiveness of the suspension of 55% commitments in three cohesion programmes (Article 2(1) of the Council Implementing Decision), the Council considered such percentage to be proportionate in light of the circumstances of the case and taking into account the positive steps taken by Hungary already at the time of the Council Implementing Decision (see section 5 below). In addition, effectiveness also depends on the targeted nature of measures and the Commission therefore identified the programmes most at risk from breaches of the principles of the rule of law in relation to public procurement.

As regards the question of effectiveness of the measure related to the public interest trusts (Article 2(2) of the Council Implementing Decision), since the adoption of the Council Implementing Decision there has been no new legal commitment signed with the public interest trusts and the entities maintained by them, thereby ensuring full protection of the Union's financial interests from the conflict of interests risks identified.

The measures as adopted by the Council took into account the remaining risks for the Union budget and are effective, insofar as they have been protecting the Union budget concerned from the risks identified throughout the procedure. In line with Article 7 of the Conditionality Regulation, the risks outlined in the Council Implementing Decision must be addressed with new adopted (remedial) measures that Hungary should notify to the Commission before the budgetary measures can be lifted by the Council (upon a Commission's proposal).

In the absence of a written notification from Hungary, on 13 December 2023, the Commission reassessed on its own motion the situation based on the information available, within the deadline imposed by Article 7(2) of the Conditionality Regulation. The Commission's reassessment takes note of the implementation of the commitments Hungary made in 2022 and the willingness to address outstanding issues. At the same time, the reassessment concludes that cross-cutting issues have not yet been addressed, and no further remedies were adopted by Hungary. This leaves the risk for the Union budget at the same level as identified by the Council Implementing Decision. In light of this, the Commission decided that it could not propose the Council to adapt or lift the budgetary protective measures.

However, for a full and overall appreciation of the effectiveness of the measures, all elements of the Conditionality Regulation aimed at addressing the identified breaches of the principles of the rule of law (see section 5.1 below) should be considered, taking into account the entire

⁴⁷ Judgment of the Court (Full Court) of 16 February 2022, Hungary v European Parliament and Council of the European Union, C-156/21, ECLI:EU:C:2022:97, in particular paragraphs 328-333 and 344.

procedure, including remedial measures submitted by the Member State concerned before the adoption of budgetary measures by the Council.

Apart from effectiveness, the Conditionality Regulation also considers the protection of the rights of final recipients of beneficiaries⁴⁸. Under Article 5(2) of the Conditionality Regulation, unless the relevant Council Implementing Decision provides otherwise, the imposition of measures does not affect the obligations of government entities or Member States to implement the programme or fund affected by the measure.

In practice, following measures imposed because of the conduct of its authorities, a Member State is not relieved of its obligations to implement the Union budget, including paying those who should ultimately receive the Union funding. The Member State remains required to fulfil its obligations, provided any such obligations existed before the adoption of the relevant Council Implementing Decision or are established following it. At the same time, the suspension of EU funding under the Regulation may lead to a situation where the policy areas concerned by breaches will not benefit from the entire pre-assigned amount of Union funding when they otherwise should, as long as the suspension is maintained. As for any budgetary measure, the Member State concerned must act to take swift and substantial action to allow for the lifting of possible budgetary protection measures imposed due to the conduct of public authorities.

5. EFFECTIVENESS OF THE PROCEDURE

5.1. Effectiveness of the procedure to address the identified breaches of the principles of the rule of law

The assessment of the effectiveness of the procedure under the Conditionality Regulation to address the identified breaches of the principles of the rule of law is based on a single case of application of the Conditionality Regulation, which has to be seen also in a wider context of several actions that were taken to enhance the protection of the Union financial interest. In practice, these actions result from the entire procedure initiated in the case of Hungary in April 2022, even before the adoption of measures by the Council. They are without prejudice of further developments that could only be observed after the publication of this report, be they positive or negative.

In the case of Hungary, the Commission identified widespread and intertwined deficiencies, weaknesses, and risks, which put at particular risk the Union budget implemented through public procurement and funding implemented for the benefit of public interest trusts and entities maintained by them.

Hungary committed to the adoption of 17 remedial measures before the adoption of the proposal for a Council Implementing Decision: such measures were meant to address the findings in the Commission's written notification. Following the opening of the procedure against Hungary and the intention to propose budgetary measures to the Council (which the Commission communicated to Hungary with a letter pursuant to Article 6(7), the "Intention Letter"), in 2022,

⁴⁸ Recital 19 of the Conditionality Regulation reads '[i]t is essential that the legitimate interests of final recipients and beneficiaries are properly safeguarded when measures are adopted in the event of breaches of the principles of the rule of law. When considering the adoption of measures, the Commission should take into account their potential impact on final recipients and beneficiaries.'

Hungary has proposed a number of relevant reforms, taking legislative and non-legislative steps to implement the proposed remedial measures.

For each remedial measure, Hungary proposed detailed and realistic commitments and steps that could address the issues identified in the course of the procedure. On that basis, the Commission assessed the remedial measures proposed by Hungary as pertinent and adequate in principle, if correctly and fully implemented⁴⁹.

By way of example of these commitments, which Hungary has been implementing:

- a) To reinforce the prevention, detection and correction of illegalities and irregularities concerning the implementation of Union funds through public procurement in Hungary, a new Integrity Authority was set up. While the regulatory framework as set out in the Act establishing the Integrity Authority (the ‘Integrity Authority Act’⁵⁰) does not fulfil certain commitments taken under the remedial measure⁵¹, the introduction of an independent authority with powers to detect, prevent and correct illegalities and irregularities is already a major step forward for the protection of the Union’s financial interests. Its long-term systemic impact can only be assessed later on in view of its operation but the setting up of such a body is an improvement that has a clear link to this procedure.
- b) A new Anti-Corruption Task Force was established, with the participation of non-governmental actors selected in an open and transparent manner. Among its competences, the Anti-Corruption Task Force can present proposals for measures aimed at improving corruption prevention and detection; it has also been consulted on important aspects of the Hungarian anti-corruption framework and contributes to the scrutiny of trends of corruption with its annual report. The existence of such a task force, with the involvement and parity of representation of relevant and independent non-governmental organisations is already a step in the right direction which has been undertaken under this procedure.
- c) The anti-corruption framework was strengthened with the broadening of the personal scope of asset declarations to include persons entrusted with senior political functions and members of the National Assembly, as well as relatives living in the same household, in addition to extending the material scope to include all relevant assets. However, important weaknesses, risks and shortcomings remained as regards certain elements of the asset declaration system which create possible loopholes undermining the effectiveness of the measure⁵². Despite the weaknesses that remain to be solved, the already introduced measures have clear links to this procedure.
- d) Hungary adopted a legislative act amending certain Acts concerning public interest asset management foundations performing public duty (also called “public interest trusts”)⁵³, which entered into force on 13 October 2022. It enlarged the scope of rules on public procurement and on conflict of interests to cover also public interest asset management foundations performing public duty. However, important

⁴⁹ See recitals 28-39 of the Proposal for a Council Implementing Decision; the Explanatory Memorandum of the Proposal contains further details on the Commission’s assessment.

⁵⁰ Act XXVII of 2022 on the control of the use of European Union budget funds, entered into force on 11 October 2022.

⁵¹ Council Implementing Decision, recital 36.

⁵² Council Implementing Decision, recital 41.

⁵³ Act XXIX of 2022.

shortcomings that maintained or even aggravated possible conflicts of interest, remain⁵⁴.

- e) Hungary introduced a specific procedure in the case of special crimes related to the exercise of public authority or the management of public property, which allows for the review of the decision by the prosecution service not to prosecute a case or the decision of the investigative authority not to investigate. The Integrity Authority was also given powers to file a motion for revision or repeated revision with this new procedure. However, certain weaknesses, such as those introducing a margin of discretion in the procedure, remain⁵⁵. The existence of this procedure gives additional oversight to the work of the prosecution which can trigger increasing prosecutorial efforts.
- f) To strengthen audit and control mechanisms to guarantee the sound use of Union support, Hungary established by law the Directorate of Internal Audit and Integrity to improve compliance with conflict of interest rules, and amended the regulatory framework to guarantee the independence of the Directorate-General for Audit of European Funds ('EUTAF') responsible for conducting independent audits over the implementation of Union support in Hungary. Moreover, Hungary strengthened the rules applicable to the implementation and control of Union support to more effectively prevent, detect and correct conflicts of interest⁵⁶.
- g) After Hungary undertook to significantly reduce the share of single bids financed from Union funds, the share dropped to the envisaged level⁵⁷. However, it should be monitored whether this level will be maintained in the long-term.
- h) Hungary developed a new monitoring and reporting tool, which has been audited as operational, functional and capable of monitoring the ratio of single bid procurement procedures. This was further developed in December 2022⁵⁸. This contributes to keep under public scrutiny public procurement procedures closed with single bids.
- i) Similarly, with a view to increasing public scrutiny on public procurement, Hungary completed the development of the Electronic Public Procurement System database by 30 September 2022, including information on contract award notices of public procurement procedures, company identification numbers and the names of each individual member of the consortia and the subcontractors⁵⁹.
- j) On 5 September 2022, the Government Decision 1425/2022 established a performance measurement framework to assess the efficiency and cost effectiveness of public procurements, which was published on the Electronic Public Procurement on 30 November 2022⁶⁰.
- k) On 4 October 2022 Act XXIX of 2022 was adopted to strengthen cooperation with OLAF, by designating the National Tax and Customs Administration as the competent national authority to assist OLAF and to introduce a dissuasive financial sanction to be imposed in case an economic operator refuses to cooperate with

⁵⁴ Council Implementing Decision, recitals 42-43.

⁵⁵ Council Implementing Decision, recital 46.

⁵⁶ Council Implementing Decision, recital 47.

⁵⁷ Council Implementing Decision, recital 48.

⁵⁸ Council Implementing Decision, recital 49.

⁵⁹ Council Implementing Decision, recital 50.

⁶⁰ Council Implementing Decision, recital 51.

OLAF⁶¹. This amendment facilitates the work of OLAF when carrying out on the spot checks in the course of its investigations.

All the above demonstrates that the procedure effectively spurs changes that increase the protection of the financial interests of the Union from breaches of the principles of the rule of law. In the Commission's assessment, other instruments under Union legislation would not have led to the same results.

These remedial measures were taken into account by the Commission when, given the remaining deficiencies, it proposed to the Council to adopt budgetary measures in relation to Hungary under the Conditionality Regulation. Any further remedy to be adopted by Hungary to request the lifting of the budgetary measures could be considered as adequate only if it remedies in full the situation that led to their adoption.

While the measures adopted by the Council are effective to protect the Union budget concerned (see Section 4 above), the Commission will continue to monitor closely developments on the ground that may hamper or undo the remedies already adopted by Hungary, as well as those, if any, that will address the outstanding issues and possibly lead to the lifting of measures.

5.2. Effectiveness of the procedure – the steps provided for in the Conditionality Regulation

The Conditionality Regulation has been in force for three years, and so far, the procedure under the Conditionality Regulation has led to the adoption of protective measures once, in the case of Hungary. The adoption of the Guidelines, in line with the case law of the Court of Justice of the European Union, provided more clarity and predictability as regards the procedure. Further development of the case practice in the enforcement of the Conditionality Regulation will provide more specifications and examples on the application of the Regulation and the procedure provided therein.

The procedure, from the moment a written notification is sent, is relatively quick, as it can be concluded in a time-limited period ranging from five to nine months. The time limits for the Commission allow for little flexibility and are in certain phases particularly challenging. For instance, to decide whether measures should be proposed to the Council, the Commission has one month to assess the observations of the Member State, including remedial measures if any, consult internally to gather the expertise needed, draft and adopt a reasoned decision. Taking the example of Hungary, the Member State did not submit remedial measures in reply to the written notification from the Commission. Instead, remedial measures were only submitted at a later stage, *i.e.* in reply to the Intention letter. This shows that, where the remedial measures submitted by a Member State at that stage are numerous and/or complex to assess, the overall effectiveness of the procedure could benefit from more flexibility in the application of the mentioned one-month deadline.

Another element that may improve the effectiveness of the procedure is ensuring that, when submitting its observations to the Commission, the Member State also puts forward the views,

⁶¹ Council Implementing Decision, recital 53.

if any, of the government entities⁶² that may be concerned by the measures. That would allow an even more granular assessment of the issues at stake and of the measures that would be most effective.

Finally, given the lack of experience of the procedure under Article 7 of the Conditionality Regulation, regarding the lifting of measures, it is too early to report any observation on its effectiveness.

6. CONCLUSION

The analysis provided in this report shows how the Conditionality Regulation has been applied in the past three years.

While it is too early to draw definitive conclusions on the procedure and the effectiveness of the protective measures adopted under the one case that led to the adoption of measures by the Council, at this stage the analysis outlined in this report confirms their effectiveness and their potential looking forward.

A more extensive case practice would allow to better identify possible improvements, if any. The Commission will continue to gather and rigorously assess information indicative of breaches of the principles of the rule of law in Member States that 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.

Based on a more established case practice, the Commission may review the Guidelines to take into account developments in its practice, relevant changes to Union legislation, or relevant case law of the Court of Justice of the European Union. Such review would be done after consultation of the Member States and the European Parliament.

⁶² A government entity is defined in Article 2(b) of the Conditionality Regulation as a public authority at any level of government, including national, regional and local authorities, as well as Member State organisation within the meaning of point (42) of Article 2 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (16) (the ‘Financial Regulation’). Government entities, as recipients of funding under direct or indirect management, can be affected by measures under Article 5(1)(a) of the Conditionality Regulation.