Part III
– Developments in European law

The 'Price' of the Rule of Law

Financial Issues Arising from the Change in Higher Education Models in Hungary in the Proceedings of the CJEU

*Laura Gyeney – Maja Szabó**

Abstract

On 15 December 2022, the Council of the European Union adopted Implementing Decision 2022/2506, setting out measures to protect the EU budget against breaches of the rule of law in Hungary. Perhaps the most notable aspect of this Implementing Decision is the prohibition on the Commission entering into legal commitments with Hungarian public interest asset management foundations (known as "KEKVAs") and legal entities maintained by them. As a direct consequence of this sanction, Hungarian higher education institutions that have changed their model and are maintained by KEKVAs have been excluded from EU mobility (Erasmus+) and research (Horizon Europe) programmes. Six Hungarian higher education institutions have filed annulment actions against the Implementing Decision with the General Court. This study examines the well-foundedness of the legal arguments presented in these actions and their likely chances of success, based on the case law of the CJEU.

Keywords: Conditionality Regulation, KEKVA, model changing, higher education, rule of law

* Laura Gyeney: associate professor of law, Pázmány Péter Catholic University, Budapest, gyeney.laura@jak.ppke.hu.
Maja Szabó: law student, Pázmány Péter Catholic University, Budapest, majera12@gmail.com.

1. Introduction

On 15 December 2022, the Council of the EU adopted Implementing Decision 2022/2506, setting out measures to protect the EU budget against breaches of the rule of law in Hungary[1] (hereinafter: Implementing Decision). This decision has significant political and economic consequences for several Hungarian higher education institutions. Due to concerns raised by certain EU institutions regarding Hungary's compliance with the fundamental principles of the rule of law, the Implementing Decision has suspended a number of EU funds allocated to Hungary.[2] According to Article 2(2) of the Implementing Decision, the Commission shall not enter into legal commitments with any public interest asset management foundation (hereinafter: KEKVA) established under Hungarian Act IX of 2021[3] (hereinafter: KEKVA Act) or any legal entity maintained by such a KEKVA. As a direct consequence of this sanction, Hungarian higher education institutions that have changed their model and are maintained by KEKVAs have been excluded from EU mobility (Erasmus+) and research (Horizon Europe) cooperation. The Implementing Decision affects a significant number of Hungarian higher education institutions, including their lecturers, researchers and students, and its indirect consequences negatively impact the Hungarian higher education sector as a whole. Six Hungarian higher education institutions subsequently initiated proceedings before the General Court to annul the Implementing Decision; these proceedings are ongoing at the time of finalizing this manuscript.

This paper examines the potential legal consequences of these actions and other possible legal solutions.[4]

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1 Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.

2 Implementing Decision, Article 2(1).

3 Act IX of 2021 on public interest asset management foundations performing public duty (hereinafter: KEKVA Act).

4 This study is a shortened, edited and revised version of Maja Szabó's OTDK (National Scientific Competition for Law Students) thesis, which was presented in March 2025, and awarded first place. The OTDK thesis was supervised by Laura Gyeney.

2. Background to the Adoption of the Implementing Decision

2.1. A Brief Overview of the Model Change

To date, 21 higher education institutions (the majority of the Hungarian universities and colleges) in Hungary have changed their operational models.[5] The Hungarian Government's stated aim is to increase the competitiveness of higher education by making the management framework more flexible. The government's vision is to provide high-quality education and help young people in higher education to find employment more easily upon graduating.[6]

In contrast to the approach of the previous constitution (was in force until 2012), the Fundamental Law distinguishes between management autonomy and the autonomy granted to higher education institutions.[7] According to Article X(3) of the Fundamental Law, "The Government shall, within the framework of the Acts, lay down the rules governing the management of public institutes of higher education and shall supervise their management." However, the (constitutional) legal basis for the model change is not Article X(3), but rather Article 38(6) of the Fundamental Law, which came into force with the Ninth Amendment to the Fundamental Law (2020) and established constitutional protection for the KEKVA. Higher education institutions that have undergone a model change under the provisions of the KEKVA Act are no longer considered "state institutions" and are therefore excluded from the scope of Article X(3) of the Fundamental Law.

According to the relevant provisions of the KEKVA Act,[8] "a board of trustees comprising not more than five natural persons shall be responsible for the management of the foundation."[9] According to the text of the Act in force at the time of its adoption, "board of trustees and supervisory board mem-

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5 Although the Budapest University of Technology (*Budapesti Műszaki és Gazdaságtudományi Egyetem,* BME) is formally a model-changing university, it continues to operate as a company (under the aegis of BME Fenntartó Zrt.) rather than a foundation.

6 Norbert Kis, 'Esszé a magyar felsőoktatási modellváltás kockázatairól és mellékhatásairól', *in* Attila Barna & Péter Krisztián Zachar (eds.), '*Titkos cikkek az örök békéhez: Ünnepi tanulmányok a 70 éves Fülöp Mihály tiszteletére*', Ludovika Egyetemi Kiadó, Budapest, 2023, p. 207.

7 *"Egyetemi demokrácia" – Jogi háttértanulmány,* Eötvös Károly Intézet, Budapest, n.d., p. 6,

8 For more details, *see* Gergely Cseh-Zelina & Zsófia Kincső Varga, '*A felsőoktatási modellváltás, valamint az újonnan létrejövő közérdekű vagyonkezelő alapítványok főbb aspektusai*.' Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, 2022/2, pp. 77–95.

9 Section 6(1) of the KEKVA Act.

bership shall not be incompatible with any further employment relationship, or employment-related relationship and any other position or office under an other Act."[10] The KEKVA Act also enabled the boards of trustees (and supervisory boards) to decide on the recall of members and the filling of vacancies for whatever reason; this power was not granted to the Government, but to the boards of trustees themselves.[11]

2.2. The Path to the Adoption of the Implementing Decision

Article 2 TEU enshrines the rule of law as a value of the EU. This article forms the basis for Regulation 2092/2020, also known as the Rule of Law Conditionality Regulation (hereinafter: Conditionality Regulation).[12] The Conditionality Regulation explicitly permits the application of financial penalties, including the suspension of payments or financial corrections▪, for breaches of the rule of law in a Member State. These penalties are applied when it is established that the breach affects, or poses a sufficiently direct risk of affecting, the sound financial management of the EU budget or the protection of the Union's financial interests.[13]

On 24 November 2021, the Commission sent Hungary a request for information based on Article 6(4) of the Conditionality Regulation. One of the issues concerned public interest asset management foundations.[14] The Commission was concerned that the rules on public procurement and conflict of interest rules were not being applied and that there was a "lack of transparency regarding the management of funds by these foundations."[15] Following the Commission's observations, Hungary amended Section 5(1) of Act CXLIII of 2015 on Public Procurement by Act XXIX of 2022, clarifying that KEKVAs are also subject to public procurement procedures.[16] The dispute between the Commission and Hungary has since mainly concerned and still concerns the conflict of interest rules for the boards of trus-

10 Id. Section 15(1).
11 Id. Section 7(4).
12 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.
13 Conditionality Regulation, Article 4(1).
14 Implementing Decision, Recitals (1) and (2).
15 Id. Recital (11).
16 Act CXLIII of 2015, Section 5(1)(f).

tees of public interest trusts.[17] For this reason (and, according to the wording of the Implementing Decision, *solely* for this reason), a general prohibition of legal commitments with public interest trusts was declared in accordance with Article 2(2) of the Implementing Decision.[18]

Prior to the adoption of the Implementing Decision, the Hungarian Government replaced the previously cited Section 15(1) of the KEKVA Act, which contains the conflict of interest rules, with a new Section 15(3). The new Section clearly states that

> "a person who cannot, or can only to a limited extent, perform their tasks in an impartial, objective and unbiased manner due to an economic or other personal interest or circumstance (including family, emotional, political or national reasons), shall refrain from any activity that could be contrary to the interests of the foundation, its members or donors."[19]

Anyone with a conflict of interest shall not participate in the decision-making process. Act XXIX of 2022 does not introduce additional conflict of interest rules under the KEKVA Act. Instead, members of the board of trustees of public interest trusts that are subject to the KEKVA Act are excluded from participating in decision-making processes that give rise to a conflict of interest under the laws governing the legal status of certain Hungarian state institutions.[20] This means that, while the Commission deemed it necessary to declare a conflict of interest based on legal status, the Government opted for a case-by-case approach. This also means that the Government and the Parliament did not formally comply with the Commission's requirements. In terms of substance, however, it is questionable whether the adopted amendments appropriately address the Commission's concerns regarding conflict of interest and, if not, whether the complete prohibition of legal commitments to public interest trusts and legal entities maintained by them under the KEKVA Act can be considered a necessary and proportionate measure.

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17 Implementing Decision, Recital (43).

18 Id. Recital (62).

19 Established by Section 20 of Act XXIX of 2022, in force from 13 October 2022.

20 *See* Section 225(2a) of Act CXXV of 2018 on Government Administration and Section 51(10a) of Act CVII of 2019 on Bodies of Special Legal Status and on the Legal Status of their Employees.

2.3. EU Powers in the Field of Education

As the EU can only act within the limits of the powers conferred on it by the Member States,[21] the existence of these powers must be considered when examining all EU acts. The EU has only limited competence in the area of education policy. In the field of education, "the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States."[22] Article 165(1) TFEU states that the EU shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their actions. This shall be done while fully respecting "the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity."

Accordingly, specific education policy issues fall under the competence of Member States. However, the exercise of these competences necessarily impacts other areas of EU competence,[23] as illustrated by the *lex CEU* case.[24] According to the facts of the case, Hungary amended Act CCIV of 2011 on National Higher Education (hereinafter: Higher Education Act) by Act XXV of 2017 (the so-called *lex CEU*), by introducing a licensing system for the foreign higher education institutions operating in Hungary.[25] Although the amendment formally covered all foreign higher education institutions operating in Hungary, the Government did not conceal the fact that it aimed to review the operation of the Central European University (CEU).[26] Although the law ostensibly regulated matters relating to the 'organization' of individual higher education institutions, the CJEU ruled that national rules gover-

21 We interpret "conferred powers" in a broad sense, including all powers derived directly or indirectly from the Treaties, such as the external powers included therein. For more information, *see* László Knapp, 'A beleértett külső hatáskörök doktrínájának kodifikálása és az EU-Szingapúr szabadkereskedelmi megállapodás.' *Jog-Állam-Politika,* 2019/1, pp. 79–100.

22 Article 6 TFEU.

23 In the context of the right to free movement, *see* Ildikó Bartha, *Felsőoktatás az Európai Unióban: tagállami szabályozás és integrációs kötelezettségek,* Debreceni Egyetemi Kiadó, Debrecen, 2019, pp. 75–98.

24 Judgment of 6 October 2020, *Case C-66/18, Commission v Hungary,* ECLI:EU:C:2020:792.

25 Dóra Lovas, 'Lex CEU, avagy a szabad oktatáshoz való jog kérdése.' *Közjavak,* 2017/1, pp. 5–9.

26 László Valki, 'A lex CEU és a nemzetközi jog normái', *in* Attila Menyhárd & István Varga (eds.), *350 éves az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara: a jubileumi év konferenciasorozatának tanulmányai.* ELTE Eötvös, Budapest, 2018, pp. 1215–1224.

ning the operation of such institutions fall within the scope of the freedom of establishment under Article 49 TFEU, in so far as "that requirement applies to a higher education institution that has its seat in a Member State other than Hungary and offers education or training for remuneration in Hungary."[27] According to the settled case law of the CJEU, "any measure which prohibits, impedes or renders less attractive the exercise of the freedom of establishment must be regarded as a restriction on that freedom."[28] This also means that, where a matter falling within a Member State's competence in education policy also falls within the EU's exclusive or shared competence, the compatibility of legislation with EU law will not be assessed within the framework of the education policy competence. The CJEU also found that the Charter of Fundamental Rights could be invoked, since the legislation concerned freedom of establishment.

However, the *lex CEU* infringement proceedings were specific due to its *cross-border* element; therefore, we could not speak of a purely internal situation. In the case of the KEKVA Act, however, no such cross-border element can be identified.

3. Framework for Proceedings before the General Court

3.1. General Characteristics of Actions for Annulment Challenging the Implementing Decision

Following the adoption of the Implementing Decision, *Debreceni Egyetem* (University of Debrecen) initiated annulment proceedings before the General Court under Article 263 TFEU on 2 March 2023. A few days later, on 13 March 2023, five other universities – the *Állatorvostudományi Egyetem* (University of Veterinary Medicine), the *Dunaújvárosi Egyetem* (University of Dunaújváros), the *Miskolci Egyetem* (University of Miskolc), the *Óbudai Egyetem* (University of Óbuda), and the *Semmelweis Egyetem* (Semmelweis University) – did the same. These six cases can be divided into three groups based on their main features.

27 *Case C-66/18, Commission v Hungary,* para. 163.
28 Id. para. 167.

No.	Case number	Applicant	Defendant(s)	The contested (legal) act	Interim measure
1	T-115/23	*Debreceni Egyetem*	Council	Article 2(2)	yes
2	T-132/23	*Óbudai Egyetem*	Council and Commission	Article 2(2) in part + additional acts	not
	T-133/23	*Állatorvostudományi Egyetem*			
	T-139/23	*Miskolci Egyetem*			
	T-140/23	*Dunaújvárosi Egyetem*			
3	T-138/23	*Semmelweis Egyetem*	Council	Article 2(2)	not

Edited by the authors based on the information on the CJEU's website.

For the analysis of each procedure, we have used documents published on the Court's and Semmelweis University's website (in English), which were made public by the applicant.[29] The actions seek the annulment of Article 2(2) of the Implementing Decision, its entirety or in part (*i.e.,* the phrase "any legal entity maintained by such public interest trust"). Nevertheless, these applications have an equivalent impact on the applicants' legal position.[30]

3.2. Request for Interim Measures

Only the *Debreceni Egyetem,* one of the six higher education institutions, submitted a request for interim measures, asking for the Implementing Decision to be suspended. The university justified its claim of serious and irreparable damage by stating that it would lose funding for EU projects and be prohibited from participating in them. This would affect its reputation, academic prestige, and financial situation.[31] However, the President of the General Court dismissed the application for interim measures, considering

29 The relevant documents are available at https://semmelweis.hu/english/2023/03/application-for-partial-annulment-in-respect-of-council-implementing-decision-eu-2022–2506/.

30 Debreceni Egyetem has requested total annulment; Állatorvostudományi Egyetem, Dunaújvárosi Egyetem, Miskolci Egyetem and Óbudai Egyetem have requested partial annulment; and Semmelweis Egyetem has requested partial and total annulment in part or in whole.

31 Order of the President of the General Court of 1 June 2023, Case T-115/23 R, Debreceni Egyetem v Council of the European Union.

that the damage claimed by the University was essentially financial and could be remedied subsequently in the absence of exceptional circumstances.[32] Furthermore, the University did not claim that the Implementing Decision would engender its existence.[33] The President of the General Court dismissed the University's further arguments regarding non-material damage rather cynically. He argued that the Implementing Decision does not prohibit or restrict the University's academic activities,[34] and that an institution's involvement in a research proposal is not solely dependent on EU funding; consortium partners also consider other aspects.[35]

The findings of the order are undoubtedly correct in form and are in line with the case law of the CJEU. Following a successful action for annulment, there is also no doubt that the applicant institutions can claim compensation for the material damage they suffered due to the Implementing Decision. However, by calling into question the direct causal link between academic performance and the research proposals, as well as the prohibition imposed by the Implementing Decision, the order also highlights the applicants' potential difficulties in proving their case in a possible future action for damages. It is important to note that it is no longer sufficient to prove elements of damage and a causal link, as was the case with the interim measure.

In this context, it is interesting to note that after submitting the actions, the Hungarian Academy of Sciences conducted a thorough questionnaire survey to assess the impact of the Implementing Decision on the Hungarian scientific and research community, as well as the situation arising from the suspension.[36] The survey reveals that the leaders of foreign consortia in EU research tenders view Hungarian universities and research institutions with uncertainty. Perhaps the most interesting finding of the survey is that the Implementing Decision has also made things more difficult for non-model-changing higher education institutions, as there is a public perception within the EU that contracting with 'Hungarian' universities is banned.[37]

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32 Id. para. 23.
33 Id. para. 25.
34 Id. para. 30.
35 Id. para. 32.
36 Júlia Koltay *et al.*, '*A fiatal kutatóknak káros az európai uniós forrásokból történő kizárás.*' Fiatal Kutatók Akadémiája, 2024, at https://fka.mta.hu/wp-content/uploads/EU_suspension_report_HUN_final_0610.pdf.
37 Id. p. 3.

4. Assessment of the Arguments Raised in the Proceedings before the General Court

The applicant model-changing higher education institutions set forth several legal arguments explaining how the Implementing Decision is flawed in form and substance. While only *Semmelweis Egyetem* made its detailed legal reasoning publicly available, summaries of the other applicant's actions are also available on the Court's website.

4.1. Formal (Procedural) Arguments

In our point of view, formal arguments are those that do not require an examination of the substance of the Implementing Decision; they relate solely to its adoption or the existence of its mandatory elements.

4.1.1. Lack of Adequate Reasoning

According to Article 6(9) of the Conditionality Regulation, when proposing an implementing decision, the proposal "shall set out the specific grounds and evidence on which the Commission based its findings". According to Article 4(1), an implementing decision may be adopted if "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". Consequently, the Implementing Decision should have included a statement of reasons explaining why the sound financial management of the Union budget or the financial interests of the Union are affected in the case of legal persons covered by the KEKVA Act. This is particularly pertinent given that the Government had already responded to the Commission's comments on public procurement procedures and amended Hungarian legislation in line with the Commission's legal expectations. In the context of higher education institutions changing their operational model, the only legal issue debated was conflicts of interest among the members of the boards of trustees. Notably, at the time the Implementing Decision was adopted, the KEKVA Act already stipulated the exclusion of individuals with conflicts of interest from decision-making processes (rather than a general exclusion, as the Commission had suggested).

According to the case law of the CJEU, the obligation to provide reasons goes beyond merely checking whether the EU act in question is reasoned. Rather, the statement of reasons must be detailed enough to withstand judicial review. In other words, it must be able "to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended."[38]

In the present case, the Implementing Decision concludes that Hungary has not met the Commission's expectations regarding conflicts of interest and therefore "a serious risk for the Union budget remains and can best be addressed by a prohibition on entering into new legal commitments with any public interest trust and any entity maintained by them under any programme under direct or indirect management."[39] The Implementing Decision does not explain why the serious risk to the EU budget remains unchanged despite Hungary's compliance with the Commission's recommendations on public procurement and the tightening of conflict of interest rules on trusteeship. Nor does it explain why this risk justifies a total ban on contracting with organizations covered by the KEKVA Act. However, as the Implementing Decision contains a statement of reasons for sanctioning the entities covered by the KEKVA Act which is open to judicial review, it is more likely that the General Court will ultimately reject the applicants' argument.

4.1.2. Misuse of Powers

Semmelweis Egyetem's action highlights power abuse as a separate issue.[40] According to the action, the sanctioning of universities subject to the KEKVA Act is merely a way for Hungary to relinquish its position in the dispute with EU institutions over the rule of law.[41]

From a purely formal point of view, we do not consider that there was a misuse of powers in this case. The Commission had already made the Government aware of the issues relating to public interest trusts in its writ-

38 Judgment of 8 December 2020, *Case C-620/18, Hungary v Parliament,* ECLI:EU:C:2020:1001, para. 116.

39 Implementing Decision, Recital (62).

40 Article 263 TFEU.

41 Action brought on 13 March 2023, *Case T-138/23, Semmelweis Egyetem v Council,* pp. 47–49, para. 172.

ten notification of 27 April 2022.[42] Therefore, the debate on the legal status of universities covered by the KEKVA Act formed an integral part of the process from the outset. The combination of personal (conflict of interest) and financial (procurement) issues undoubtedly increases the risk of damage to the Union's financial interests. While the partial resolution of the legal issues identified by the Commission in Hungary may render the direct threat to the Union's financial interests debatable, it does not negate the potential threat to higher education institutions covered by the KEKVA Act.

4.1.3. Failure to Involve Higher Education Institutions Undergoing Model Change in the Process

At first glance, one of the strongest formal arguments put forward by higher education institutions is that the Commission (and the Council) failed to consult them when adopting the Implementing Decision. This argument features in all of the universities' applications. *Semmelweis Egyetem* cites it as a breach of the right to be heard and the right to defense,[43] the *Debreceni Egyetem* cites it as a failure to consult,[44] the *Állatorvostudományi Egyetem,* the *Dunaújvárosi Egyetem,* the *Miskolci Egyetem* and the *Óbudai Egyetem* cite it as a (presumably) violation of essential procedural requirements.

In *Front Polisario,*[45] the General Court ruled that the right to be heard before the adoption of individual measures that adversely affect an individual, as outlined in Article 41(1)(a) of the Charter of Fundamental Rights, applies only to such measures. Therefore, the General Court must determine whether the Implementing Decision can be considered a general or individual measure. When rejecting the Council's objections regarding admissibility, the General Court held that the Implementing Decision "has general effect since it applies to all the economic operators concerned."[46] This statement suggests that, when deciding the cases' merits, the General Court will probably treat the Implementing Decision as a source of law with gene-

42 Implementing Decision, Recital (2).

43 Action brought on 13 March 2023, *Case T-138/23, Semmelweis Egyetem v Council,* paras. 118, 140, and 147.

44 Action brought on 2 March 2023, *Case T-115/23, Debreceni Egyetem v Council,* sixth plea in law.

45 Judgment of 10 December 2015, *Case T-512/12, Front Polisario,* ECLI:EU:T:2015:953, para. 132.

46 Order of the General Court of 4 April 2024, *Case T-115/23, Debreceni Egyetem,* ECLI:EU:T:2024:208, para. 36.

ral effect. Consequently, the General Court will probably conclude that the procedure for adopting the Implementing Decision did not legally require the involvement of public interest foundations (trusts) under the KEKVA Act. This is true even though the Implementing Decision in this case defines the relevant persons in a taxative manner. However, this definition is not in the Implementing Decision itself, but in the Hungarian law – specifically, Annex 1 to the KEKVA Act. The Implementing Decision is a source of law with general effect because, under the Conditionality Regulation, implementing decisions are always addressed to a Member State. Designating a Member State as the addressee necessarily gives the act general scope.

However, for the sake of completeness, it should be noted that, while the applicant universities' legal argument is morally understandable; it is common knowledge that the change in the higher education model affected the legal status of higher education institutions. Nevertheless, the KEKVA Act names the maintainers of the applicants (*i.e.,* the public interest foundations themselves), not the applicant universities. In our view, this distinction is so vital that, for procedural reasons, the General Court will probably not need to address the infringement of the applicants' "right to be heard."[47]

4.1.4. Arguments on Lack of Competence

In its application, *Debreceni Egyetem* set out several arguments to demonstrate that the Implementing Decision's provision relating to the KEKVA Act falls outside the EU's area of competence.

(i) Firstly, "the tasks of guaranteeing the functioning of higher-education establishments and designing the framework in which they operate – fall within the exclusive competence of the Member States."[48] This means that the EU does not have the power to define it.[49] *Debreceni Egyetem* essentially repeats this argument when it claims that "the TFEU did not confer on the

47 If the General Court were to conclude that the Implementing Decision is not of general application, the failure to include the individually concerned public interest trusts in the proceedings would lead to the annulment of the Implementing Decision. This would be the case if the KEKVAs had initiated the proceedings. Judgment of 3 July 2014, *Joined Cases C-129/12 and C-130/13, Kamino International,* ECLI:EU:C:2014:2041, paras. 28–31.

48 Action brought on 2 March 2023, *Case T-115/23, Debreceni Egyetem v Council,* second plea of law.

49 Tamás Kende *et al.,* '*Európai közjog és politika*', Wolters Kluwer, Budapest, 2018, p. 222.

European Union, in the area of policy relating to education and scientific research"[50] and asserts that the article on freedom of scientific research in the Charter of Fundamental Rights is infringed.[51] *(ii)* On the other hand, *Debreceni Egyetem* claims that the contested element of the Implementing Decision does not contribute the high level of education and training; rather, it explicitly contradicts this goal,[52] and fails to contribute to the development of quality education.[53] *(iii)* Finally, *Debreceni Egyetem* also claims that the Implementing Decision (indirectly) attacks Hungary's (different) autonomous legal system and legal traditions.[54]

With regard to competences in education policy, the aforementioned *lex CEU* case clearly shows that if a matter falls within the competence of the EU and concerns other matters within the scope of supporting (complementary) competence, the "stronger" competence framework rule will prevail. Regarding the substantive arguments of *Debreceni Egyetem,* the General Court is likely to conclude that the Implementing Decision does not address the substance of education and training in any way, nor its financial aspects: it only regulates issues relating to the eligibility of specific EU funds. The argument concerning Hungary's different legal tradition does not seem convincing. This is not only because the existence of the KEKVA system can hardly be considered part of Hungary's national identity or historical constitution (as it is a legal institution of only a few years' standing without precedent), but also because the CJEU only accepts similar references by Member States in exceptional cases.[55]

4.1.5. Specific Case of Misuse of Powers: Only the CJEU Has the Power to Declare an Infringement

Finally, the question of why the Implementing Decision was adopted can be considered a formal argument, as it is also an argument found in the univer-

50 Action brought on 2 March 2023, *Case T-115/23, Debreceni Egyetem v Council,* seventh plea of law.
51 Id. fifteenth plea of law.
52 Id. eighth plea of law.
53 Id. thirteenth plea of law.
54 Id. tenth plea of law.
55 Marcel Szabó, 'Összenő, ami összetartozik? A tagállami állampolgárság és az uniós polgárság viszonyának jövője', *in* Laura Gyeney & Marcel Szabó (eds.) '*Az uniós polgárság jelene és jövője: úton az egységes európai állampolgárság felé?*', ORAC, Budapest, 2023, p. 186.

sities' application.[56] "The purpose of the Conditionality Regulation is to protect the Union budget from the effects of breaches of the rule of law in a Member State in a sufficiently direct way",[57] and not to penalize such breaches.[58] Breaches of the rule of law are governed by separate procedures, particularly those under Article 7 TEU.[59] By contrast, the Implementing Decision establishes a breach of the rule of law and therefore imposes legal consequences. This is due to the fact that it is based on a finding of a breach, rather than a presumption of one, in order to protect financial interests.[60] In this context, one could argue that the Implementing Decision exceeds the scope of the Conditionality Regulation as enabling legislation.

In our view, the wording of the Implementing Decision suggests that the Council found a breach of the rule of law by Hungary based on the Commission's proposal. However, the Conditionality Regulation does not empower the Council to make such a finding. While it is undoubtedly true that the 'finding' of a breach is indeed contained only in the preamble to the Implementing Decision, the purpose of the preamble in EU law is not merely symbolic; rather, it demonstrates that the act in question was adopted through the proper application of powers.

However, the General Court's decision in favor of the applicants could easily be interpreted as meaning that Hungary did not violate the rule of law. Therefore, it seems unlikely that the General Court will base a favorable decision on this argument.

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56 Action brought on 2 March 2023, *Case T-115/23, Debreceni Egyetem v Council,* Nineteenth plea of law; Állatorvostudományi Egyetem, Dunaújvárosi Egyetem, Miskolci Egyetem and Óbudai Egyetem, first plea of law. This plea is not raised in the action brought by Semmelweis Egyetem.

57 *Case C-156/21, Hungary v Parliament and Council,* para. 119.

58 Conditionality Regulation, Article 3.

59 Erzsébet Szalayné Sándor, 'Az Európai Unióról szóló Szerződés 7. cikke Nizza előtt és után – az Ausztriával szembeni szankciók háttere és következményei.' *Európai Jog,* 2001/3, pp. 3–8.

60 Implementing Decision, in particular Recital (22) as regards KEKVAs. Recital (60) is even clearer.

4.2. Substantive Arguments

4.2.1. Lack of Factual Basis

In their applications, both *Semmelweis Egyetem*[61] and *Debreceni Egyetem*[62] referred to the fact that no serious risk to the financial interests of the Union could be identified with regard to the KEKVA Act. Under Article 5(1)(a) of the Conditionality Regulation, the adoption of implementing decisions may explicitly refer to "governmental entities". However, under Article 2(b), a governmental entity is defined as including not only national authorities, but also Member States organizations within the meaning of Article 2(42) of Regulation (EC) No 1605/2002 of the European Parliament and of the Council (Financial Regulation) 2018/1046,[63] which includes the KEKVAs. This means that the Implementing Decision was correct in designating Hungary as the addressee of the legal prohibition of legal commitments for KEKVAs under the KEKVA Act, while remaining within the legal borders of the Conditionality Regulation. Conversely, if the public interest foundations under the KEKVA Act are considered to be 'governmental bodies' (as the Implementing Decision does following the Conditionality Regulation), it is at least difficult to see why government-linked political actors' involvement in these KEKVAs operations poses a legal problem. However, as the Implementing Decision remains within the framework of the enabling legislation, it is unlikely to be invalid for this reason. The question of the invalidity of the Conditionality Regulation could still be raised, though.[64]

Both *Semmelweis Egyetem*[65] and *Debreceni Egyetem*[66] also argued that none of their public interest foundations have any individuals on their

61 Action brought on 13 March 2023, *Case T-138/23, Semmelweis Egyetem v Council,* para. 112.

62 The sixteenth and nineteenth pleas in law relied on by Debreceni Egyetem in its action.

63 "Member State organisation means an entity established in a Member State as a public law body, or as a body governed by private law entrusted with a public service mission and provided with adequate financial guarantees from the Member State." Recital (42).

64 Although Állatorvostudományi Egyetem, Dunaújvárosi Egyetem, Miskolci Egyetem and Óbudai Egyetem have raised plea of illegality against the Conditionality Regulation, they have done so because the Conditionality Regulation does not allow for individual exemptions to be granted.

65 Action brought on 13 March 2023, *Case T-138/23, Semmelweis Egyetem v Council,* paras. 108–109.

66 Action brought on 2 March 2023, *Case T-115/23, Debreceni Egyetem v Council,* Sixteenth plea of law.

boards of trustees who would be affected by a dispute over a conflict of interest.[67]

Under Article 3 of the Conditionality Regulation, a breach of the rule of law is defined as "failure to ensure the absence of conflicts of interests". However, it must also be demonstrated that this breach "affects or seriously risks affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way"[68] It is also noteworthy that the Implementing Decision does not identify a single case in which a conflict of interest on the part of the KEKVAs' board of trustees directly affected the protection of the Union budget or financial interests. Nevertheless, the Council considers the conflict of interest to be systemic.[69]

The 'systemic' nature of a problem means an individual assessment is not necessary. However, in this case, the Implementing Decision does not clearly explain why the conflict of interest reported by the Commission constitutes a 'systemic' problem, particularly given the resignation of all senior political leaders in 2023 under the KEKVA Act. In these circumstances, the factual soundness of the Implementing Decision seems questionable at best.

4.2.2. Violation of the Principle of Proportionality

The principle of proportionality, which underlies all actions, may be the strongest argument of the applicants.[70] According to Article 5(3) of the Regulation, which sets out the criteria for proportionality, "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 the proceedings for the annulment of the Conditionality Regulation, the CJEU specifically mentioned the importance of the principle of proportionality. Accordingly,

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67 However, the boards of trustees of the public interest foundations of the other four applicant universities were or are made up of individuals who may be affected by the conflict of interest.

68 Conditionality Regulation, Article 4(1).

69 Statement of Defence lodged by the Council of the European Union on 21 May 2023, *Case T-138/23, Semmelweis Egyetem v Council,* para.17.

70 Debreceni Egyetem's action also mentions a breach of the proportionality principle in relation to the subsidiarity principle. However, it is difficult to establish a breach of the subsidiarity principle in the context of the Implementing Decision. Action brought on 2 March 2023, *Case T-115/23, Debreceni Egyetem v Council,* third plea in law.

> "Those various requirements thus entail 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, 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."[71]

The requirement of proportionality is met if *(i)* the acts of the EU institutions are "appropriate for attaining the legitimate objectives pursued by the legislation at issue" and *(ii)* "do not exceed the limits of what is necessary 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".[72] However, the Implementing Decision merely states that a total ban on contracting with foundations covered by the KEKVA Act is necessary and proportionate.[73] It does not explain the criteria on which the Council (and the Commission) based their conclusion in accordance with Article 5(3) of the Conditionality Regulation. In the context of proportionality, it is also noteworthy that, in its defence, the Council pointed out that the measure in question is suitable for protecting the financial interests of the Union because it does not authorize any payments,[74] which, in our view, is likely to constitute a severe breach of the principle of proportionality in itself.[75]

In the context of the proportionality test, it should be noted that the Horizon Europe programme is a long-term research project spanning several years. Therefore, the legal consequences of the Implementing Decision will persist for many years, clearly exceeding the proportionality requirement in terms of time. Another aspect of the proportionality principle is that the boards of trustees of the foundations have no real influence over the allocation and expenditure of funds under the Horizon Europe programmes. The groups awarded the grants manage and control these funds, so even if con-

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71 *Case C-156/21, Hungary v Parliament and Council,* para. 317.

72 Judgment of 4 May 2016, *Case C-358/14, Poland v Parliament and Council,* ECLI:EU:C:2016:323, para. 78.

73 Implementing Decision, Recital (62).

74 Statement of defence lodged by the Council of the European Union on 21 May 2023, *Case T-138/23, Semmelweis Egyetem v Council,* para. 50.

75 This legal reasoning is akin to arguing in a criminal trial that the death penalty is an appropriate punishment because it precludes the possibility of reoffending.

flicts of interest were present, there would be no real risk of harm to specific EU financial interests.[76] In this context, the Council should also consider which rules apply to the use of specific EU funds. Are they directly part of the higher education institutions' budget, or are they only formally part of the KEKVA as a kind of 'separate fund' with specific financial rules? The latter applies to ERASMUS+ and Horizon Europe.

For all these reasons, it can rightly be argued that the Implementing Decision fails to meet the proportionality requirement, for several reasons. *(i)* Firstly, the Council did not consider the possible alternative measures, partly because the prohibition imposed on undertakings applies automatically to all KEKVAs without any examination of their individual situations, and partly because the effects of the measure are felt over time. *(ii)* The Council did not consider the substantive weight of the contracting prohibition (*i.e.,* that it applies equally to all funds, regardless of the differences in the rules governing their use) or the temporal nature of the measure (research proposals cover several years). *(iii)* Finally, in the context of the proportionality principle, the Council failed to consider the impact of the measure on academics and researchers. This is interesting because, when there was a realistic possibility that the UK would leave the EU without an agreement, the Commission drafted a regulation specifically to ensure the smooth continuation of the Erasmus programme for states leaving the EU, taking into account the proportionality principle.[77] Therefore, while the Commission would have considered the termination of the Erasmus programme to be disproportionate for one state, the possibility that the adoption of the decision would adversely affect Hungarian lecturers, researchers and students was not raised in the proportionality test for another state, as set out in the Implementing Decision. Nevertheless, the Conditionality Regulation explicitly states that, "When considering the adoption of measures, the Commission should consider their potential impact on final recipients and beneficiaries."[78]

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76 Action brought on 13 March 2023, *Case T-138/23, Semmelweis Egyetem v Council,* paras. 122–124.

77 *See* at https://data.consilium.europa.eu/doc/document/PE-55–2019-INIT/hu/pdf.

78 Conditionality Regulation, Recital (19).

4.2.3. Arguments on the Impact on the Education Market

The universities also argue that the Implementing Decision distorts the education market, placing them at a competitive disadvantage against other universities within the same market.

The competition provisions of the TFEU (in particular Articles 101–108) essentially concern the effects of state aid and measures in Member States. Therefore, an EU measure cannot, in principle, result in a breach of EU competition law. Commitments entered into with the KEKVA, which may provide EU funds, cannot be considered a "subject matter right", such as area-based subsidies under the Common Agricultural Policy. Therefore, applicants cannot argue that the Implementing Decision has diverted funds intended for them to other higher education institutions. Paradoxically, it is precisely the "non-model-changing" higher education institutions that can continue to apply for student mobility and research funds without considering the KEKVAs as competitors when submitting their applications, putting the applicants at a legal disadvantage. In other words, the KEKVAs in Hungary are disadvantaged by the fact that Hungary did not lose all mobility and research funds (even temporarily) by adopting the Implementing Decision. Therefore, it can be assumed that the General Court will not accept this argument.

5. Concluding Thoughts

In our view, the legal arguments put forward by the higher education institutions may provide a sufficient basis for annulling the Implementing Decision. Therefore, the General Court would be acting in accordance with the letter and spirit of EU law by annulling the Implementing Decision. However, given the highly politicized nature of this issue, it cannot be assumed that the General Court will not consider 'non-legal' arguments when reaching its decision.

Therefore, it is interesting to review the other legal options available (or that were available) against the Implementing Decision. *(i)* On the one hand, Hungary could have brought an action for annulment against the Council itself, but did not do so. This was presumably because Hungary had previously challenged the Conditionality Regulation unsuccessfully before the ECJ. The action brought by the applicant universities is not before the ECJ but before the General Court. This possibility is no longer available due

to the deadline for taking legal action having passed. However, according to press reports, in February 2025, Hungary filed an action for annulment against the Commission's decision of 16 December 2024 not to initiate an amendment of the Implementing Decision. At the time of finalizing this study in April 2025, this action was not listed on the CJEU's website. Even if the annulment procedure were successful, however, the consequence would only be that the Commission would have to reassess the justification for maintaining or amending the Implementing Decision under the Conditionality Regulation (and not lift the standstill obligation). *(ii)* In principle, some academics or students could have brought an action for annulment before the General Court. However, in this case, it would have been almost impossible for them to satisfy the requirement of "direct and personal" involvement, since they would have needed a tender to be awarded to them. Nevertheless, it cannot be excluded that an interest group, such as the National Conference of Student Self-Governments (hereinafter: HÖOK), could successfully challenge the Implementing Decision before the General Court. The reason for this is that the HÖOK is the collective representative of students' interests under Article 60(1) of the Higher Education Act, and the General Court has already recognized in *Growth Energy* that if an organization entrusted with defending the collective interests of its members is expressly conferred a right of action by national law, this may give it standing to bring a legal action.[79] *(iii)* In principle, there is also no legal barrier to bringing a damages claim against the Hungarian State in Hungary. In such a case, it may even be possible to initiate a preliminary ruling procedure under Article 267 TFEU. *(iv)* Finally, depending on the General Court's decision, the model-changing universities can claim damages against either the Council or the Hungarian State.

On the other hand, in the case of the Erasmus and Horizon Europe programmes, much of the real damage is in terms of lost mobility and research cooperation, which cannot easily be compensated for financially. This is due not only to the various (often procedural) difficulties related to the aforementioned procedures, but also to the specific nature of mobility and research cooperation. In this sense, even if the General Court ultimately rules in their favor, universities, students and lecturers who have opted for the model will lose out.

79 Judgment of 9 June 2016, *Case T-276/13, Growth Energy,* ECLI:EU:T:2016:340, para. 45.