EUROPEAN COMMISSION
Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

Message 115

Communication from the Commission - TRIS/(2024) 2690

Directive (EU) 2015/1535

Notification: 2024/0384/HU

Forwarding of a detailed opinion received by a Member State (Austria) (article 6, paragraph 2, second indent of Directive (EU) 2015/1535). This detailed opinion extends the standstill period until 06-01-2025.

Detailed opinion - Avis circonstancié - Ausführliche Stellungnahme - Подробно становище - Podrobné stanovisko - Udførlig udtalelse - Εμπεριστατωμένη γνώμη - Dictamen circunstanciado - Üksikasjalik arvamus - Yksityiskohtainen lausunto - Detaljno mišljenje - Részletes vélemény - Parere circostanziato - Išsamiai išdėstyta nuomonė - Sīki izstrādāts atzinums - Opinjoni dettaljata - Uitvoerig gemotiveerde mening - Opinia szczegółowa - Parecer circunstanciado - Aviz detaliat - Podrobné stanovisko - Podrobno mnenje - Detaljerat yttrande

Extends the time limit of the status quo until 06-01-2025. - Prolonge le délai de statu quo jusqu'au 06-01-2025.- Die Laufzeit des Status quo wird verlängert bis 06-01-2025.- Удължаване на крайния срок на статуквото до 06-01-2025. - Prodlužuje lhůtu současného stavu do 06-01-2025. - Fristen for status quo forlænges til 06-01-2025. - Παρατείνει την προθεσμία του status quo 06-01-2025. - Amplía el plazo de statu quo hasta 06-01-2025. - Praeguse olukorra tähtaega pikendatakse kuni 06-01-2025. - Jatkaa status quon määräaikaa 06-01-2025 asti. - Produžuje se vremensko ograničenje statusa quo do 06-01-2025. - Meghosszabbítja a korábbi állapot határidejét 06-01-2025-ig. - Proroga il termine dello status quo fino al 06-01-2025. - Status quo terminas pratęsiamas iki 06-01-2025. - Pagarina “status quo” laika periodu līdz 06-01-2025. - Jestendi t-terminu tal-istatus quo sa 06-01-2025. - De status-quoperiode wordt verlengd tot 06-01-2025. - Przedłużenie status quo do 06-01-2025. - Prolonga o prazo do statu quo até 06-01-2025. - Prelungește termenul status quo-ului până la 06-01-2025. - Predlžuje sa lehota súčasného stavu do 06-01-2025. - Podaljša rok nespremenjenega stanja do 06-01-2025. - Förlänger tiden för status quo fram till 06-01-2025.

The Commission received this detailed opinion on the 02-10-2024. - La Commission a reçu cet avis circonstancié le 02-10-2024. - Die Kommission hat diese ausführliche Stellungnahme am 02-10-2024 empfangen. - Комисията получи настоящото подробно становище относно 02-10-2024. - Komise obdržela toto podrobné stanovisko dne 02-10-2024. - Kommissionen modtog denne udførlige udtalelse den 02-10-2024. - Η Επιτροπή έλαβε αυτή την εμπεριστατωμένη γνώμη στις 02-10-2024. - La Comisión recibió el dictamen circunstanciado el 02-10-2024. - Komisjon sai üksikasjaliku arvamuse 02-10-2024. - Komissio sai tämän yksityiskohtaisen lausunnon 02-10-2024. - Komisija je zaprimila ovo detaljno mišljenje dana 02-10-2024. - A Bizottság 02-10-2024-án/-én kapta meg ezt a részletes véleményt. - La Commissione ha ricevuto il parere circostanziato il 02-10-2024. - Komisija gavo šią išsamiai išdėstytą nuomonę 02-10-2024. - Komisija saņēma šo sīki izstrādāto atzinumu 02-10-2024. - Il-Kummissjoni rċeviet din l-opinjoni dettaljata dwar il-02-10-2024. - De Commissie heeft deze uitvoerig gemotiveerde mening op 02-10-2024 ontvangen. - Komisja otrzymała tę opinię szczegółową w dniu 02-10-2024. - A Comissão recebeu o presente parecer circunstanciado em 02-10-2024. - Comisia a primit avizul detaliat privind 02-10-2024. - Komisia dostala toto podrobné stanovisko dňa 02-10-2024. - Komisija je to podrobno mnenje prejela dne 02-10-2024. - Kommissionen mottog detta detaljerade yttrande om 02-10-2024. - Fuair an Coimisiún an tuairim mhionsonraithe sin maidir le 02-10-2024.

MSG: 20242690.EN

1. MSG 115 IND 2024 0384 HU EN 06-01-2025 02-10-2024 AT DO 6.2(2) 06-01-2025

2. Austria

3A. Bundesministerium für Arbeit und Wirtschaft
Abteilung V/8

A-1010 Wien, Stubenring 1
Telefon +43-1/71100-805433
E-Mail: not9834@bmaw.gv.at

3B. Bundesministerium für Arbeit und Wirtschaft
Abteilung V/5
A-1010 Wien, Stubenring 1

4. 2024/0384/HU - C00A - AGRICULTURE, FISHING AND FOODSTUFFS

5. article 6, paragraph 2, second indent of Directive (EU) 2015/1535

6. I. Introduction:

Austria opposes the amendment to Act XLVI of 2008 on the food chain and its official supervision, Notification 2024/0384/HU.

The draft Act in question amends Act XLVI of 2008 on the food chain and its official supervision. Certain foodstuffs with a period of minimum durability exceeding 48 hours shall not be placed on the market as a foodstuff from 48 hours before the date of minimum durability, except in cases of interest for food safety, food supply security, consumer protection, and cases in which the product is made available free of charge.

According to the Hungarian government, the planned amendment to the Act is intended to reduce food waste. The amendment to Act XLVI of 2008 envisages an amendment to Section 38/H(1) and (2): With a view to preventing food waste and enhancing food distribution to those in need, wholesalers and food retailers selling fast-moving consumer goods with a net turnover of more than HUF 100 billion (EUR 2 535 170.62) in the previous calendar year must donate certain foodstuffs at least 48 hours before the date of minimum durability via the IT system of Food Rescue Centre Nonprofit Ltd. (‘Élelmiszermentő Központ Nonprofit Korlátolt Felelősségű Társaság). Extensive data must be entered into the food rescue database, such as the place of business, company registration number, tax number and the address of each site/premise; barcode, unit packet, unit weight, etc. of the foodstuff concerned. Furthermore, traders must draw up a food waste reduction plan and appoint a food rescue officer to coordinate food rescue activities (paragraph (1) of Section 38/I). These stricter rules do not apply to traders falling below these thresholds.

Due to the infringements of fundamental freedoms and rights listed below, Austria opposes the amendment to Act XLVI of 2008 on the food chain and its official supervision, notification 2024/0384/HU:

II. Infringement of Article 34 TFEU and Article 56 TFEU:

The Hungarian legislation infringes the principle of the free movement of goods laid down in Article 34 TFEU: According to the settled case-law of the Court of Justice, any measures of a Member State which are liable to hinder, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 34 TFEU (see CJEU, 23 December 2015, Case C-333/14, Scotch Whisky Association, paragraph 31 with further references).

The territorial scope of Article 34 TFEU applies (Article 349 TFEU). The scope ratione materiae applies, i.e. these are goods within the meaning of Article 28 TFEU which are in free circulation in a Member State pursuant to Article 29 TFEU. The following foodstuffs are likely to be prohibited from being placed on the market as foodstuffs from 48 hours before the date of minimum durability (the exact list of products will be further determined by means of ordinance) and must be offered via the food rescue database: poultry meat, pork, beef and other meat, fish, preserved fish, meat products, milk, sour cream and their substitutes, yoghurt and other acidified preparations, other dairy products, cheese and cheese substitutes, butter, margarine and preparations thereof, other vegetable and animal fats, ice cream, eggs and egg products, bread, pastries, pasta, rice, other cereals, flour, sugar, honey, cocoa, chocolate and confectionery, preserved

bakery products, fresh and processed vegetables, fruit and mushrooms and vegetable foods, fruit and vegetable juices, preserved food, pickled food, frozen products, spices, condiments, coffee and cocoa powder, tea, mineral waters and soft drinks, food supplements. It can therefore be assumed that a wide range of foods is affected.

The legislative amendment in question is a state measure in the form of a restriction on trade, especially since it imposes particular obstacles on goods imported into Hungary and on trading companies operating in Hungary from other EU Member States.

The proposed amendments to Act XLVI of 2008 on the food chain and its official supervision have the effect of obstructing the sale of fresh goods, such as fish, meat, fruit, etc. These are often sold within the 48-hour period before their date of minimum durability, but such sales would no longer be allowed under the planned legislation. Indirectly, therefore, foreign goods are discriminated against, as the time it takes to import them means that they will reach the point at which they are no longer allowed to be sold even faster. Specifically, fresh foreign products such as poultry meat, pork, beef, milk, dairy products, bread, etc., are more affected than domestic products. Thus, in practice, foreign goods will be much more significantly affected by the planned legislative amendment than domestic goods.

According to the settled case-law of the Court of Justice cited above, national rules restricting or prohibiting certain selling arrangements are not liable to hinder trade between Member States, directly or indirectly, actually or potentially, only if they actually apply to all the traders concerned who carry out their activities within the national territory and if they affect the marketing of domestic and foreign products in the same way, in law and in fact. Such national rules, which would restrict or prohibit certain selling arrangements, fall outside the scope of Article 34 TFEU under the above mentioned conditions. This is not the case with the present legislation.

Nor can the rules in question be justified by the grounds set out in Article 36 TFEU (Articles 34 and 35 TFEU do not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security, the protection of the health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property). Under Article 36 TFEU, such prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States. Even on the basis of the objective of preventing food waste for the purposes of public security, the measure infringes Article 34 as it is not suitable for ensuring the attainment of the objective pursued and goes beyond what is necessary to attain it.

The CJEU held that, in the event of a derogation from the principle of the free movement of goods, Member States are required to demonstrate ‘that their rules are necessary to achieve the declared objective and that this objective could not be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade’ (see CJEU Case C-198/14 Valev Visnapuu, paragraph 117 with further references).

Although it is known that food often lasts longer than the date of minimum durability, a complex logistical process is to be initiated 48 hours in advance, thereby losing valuable time, e.g. to sell the products at a discounted price and thus to prevent food waste. The legislative amendment in question is therefore not a suitable means and also not the least restrictive means to achieve the intended objective. In addition, cold chains may be interrupted if the affected foodstuffs have to be made available to the food rescue centre, which can even increase the risk of food waste.

Food waste could be prevented by less restrictive means. Foodstuffs whose date of minimum durability is approaching could be sold at a reduced price, thus avoiding food waste. In Austria, there are voluntary initiatives to combat food waste (e.g. https://united-against-waste.at/).

Similarly, the legislation in question has the effect of hindering the provision of services and therefore infringes Article 56. Cross-border economic activity is particularly hindered by the fixing of time limits, and foreign traders are particularly restricted in their sales activities by the fact that they have to donate certain foodstuffs (see list of foodstuffs concerned above) to one designated food rescue centre, associated with considerable red tape, at least 48 hours before the date of minimum durability. The turnover threshold of HUF 100 billion (EUR 2 535 170.62) effectively discriminates against

companies from other Member States operating in Hungary.
(https://www.handelsdaten.de/lebensmittelhandel/ranking-unternehmen-lebensmittelhandel-ungarn-umsatz-2023)

The planned extensive data to be entered in the food rescue database and complicated logistical processes create a disproportionate administrative burden for the food traders concerned. These heavy administrative burdens de facto only affect companies from other EU Member States, not small (usually Hungarian) traders, who do not have to donate the foodstuffs concerned via the IT system of Food Rescue Centre Nonprofit Ltd.
As regards the lack of justification, the comments made in relation to Article 36 TFEU similarly apply. The planned legislation is therefore contrary to Articles 34 and 56 TFEU.

III. Infringement of Article 49 TFEU:

The legislation in question also infringes Article 49 TFEU, which prohibits restrictions on the freedom of establishment of nationals of one Member State in the territory of another Member State. Such prohibition also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

The CJEU has consistently held that Article 43 TEC (now Article 49 TFEU) precludes any national legislation 'which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU citizens of the freedom of establishment that is guaranteed by the Treaty' (see CJEU, 24 March 2011, Case C-400/08, paragraph 63). By specifying a net turnover threshold of more than HUF 100 billion, the planned legislation would restrict and prevent particularly foreign companies from entering the market (see above).

The draft also envisages the imposition of fines if information to be provided to the food rescue database is late, incorrect or not provided at all. This is another aspect that affects the freedom of establishment for food traders.

IV. Infringements of the Charter of Fundamental Rights of the European Union:

The planned legislation also infringes several fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (hereinafter: 'the Charter'): Article 16 of the Charter provides for the freedom to conduct a business: According to the case-law of the Court of Justice, this safeguards 'the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it' (CJEU, 30 June 2016, Case C-134/15, Lidl, paragraph 27). However, food traders cannot freely use their resources or are restricted in terms of their product range if they are compelled to donate food. There is therefore a restriction on their freedom to conduct a business.

The right to property enshrined in Article 17 of the Charter is infringed by the legislation in question. Under Article 17(1) of the Charter, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. The obligatory donation of foodstuffs even before the date of minimum durability has been reached impedes the ability of traders to dispose of their property in respect of the foodstuffs concerned. The traders can no longer sell the food concerned, but lose their ownership of it. They have to make the food available to a government agency free of charge and at great effort 48 hours before the date of minimum durability is reached. - The provision of food free of charge to the state-run food rescue centre thus constitutes deprivation of property, as these goods could still be sold normally or at discounted prices in the sales premises. The proposed legislation would cause significant financial damage to food traders as a result of the mandatory donations.

According to the case-law of the Court of Justice, derogations from the prohibition on discrimination and the prohibition on restrictions of fundamental freedoms must be interpreted in light of the general principles of EU law and, in particular, of the fundamental rights guaranteed by the Charter. The envisaged derogations from the prohibition on discrimination and prohibition on restrictions of fundamental freedoms can therefore only apply to national legislation if they are compatible with fundamental rights (see CJEU 14 October 2021, Case C-231/20, Landespolizeidirektion Steiermark (gaming machines), paragraph 42). The planned legislation does not meet these requirements.

Under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter are permissible only if they are provided for by law, respect the essence of those rights and freedoms, and comply with the principle of proportionality. Under the third sentence of Article 17(1) of the Charter, the use of property may be regulated by law in so far as is necessary for the general interest (CJEU, 5 May 2022, Case C-83/20, BPC Lux 2 and Others, paragraph 36). The fight against food waste and the provision of food to people in need could, in principle, constitute a general interest, but the planned legislation is not proportionate. However, whether there is, in fact, any general interest could also be questioned, as the planned legislative amendment could even jeopardise food provision to the population. Why should food traders still carry fresh food in their product range when they ultimately have to give it away at enormous administrative effort? As stated above, food waste could be prevented by less restrictive means. If foodstuffs whose date of minimum durability is approaching are sold at a reduced price, this will also prevent food waste without interfering with the fundamental rights of food traders. Food traders could thereby reduce their losses, and a discounted sale would also benefit lower-income consumers.

With regard to the issue of proportionality, the reader is also referred to Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions. Recital 3 of this Directive states: ‘The principle of proportionality is one of the general principles of Union law. It follows from case-law that national measures liable to hinder, or to make less attractive, the exercise of fundamental freedoms guaranteed by the TFEU should fulfil four conditions, namely, they should: be applied in a non-discriminatory manner; be justified by public interest objectives; be suitable for securing the attainment of the objective which they pursue; and not go beyond what is necessary in order to attain that objective.’ (See also CJEU, 30 November 1995, C-55/94, Gebhard, paragraph 37). Article 7(2)(e) of Directive (EU) 2018/958 also provides that Member States must take into account, when making their choice, the possibility of using less restrictive means to achieve the public interest objective. This is not taken into account by the amendment to Act XLVI of 2008 on the food chain and its official supervision, and less restrictive means are not used.

V. Infringement of Directive (EU) 2018/958:

The legislative amendment in question could also infringe Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions. Article 5 of that Directive provides that, when introducing new, or amending existing, legislative, regulatory or administrative provisions restricting access to, or the pursuit of, regulated professions, Member States shall ensure that those provisions are neither directly nor indirectly discriminatory on the basis of nationality or residence. For the purposes of the efficient application of the Directive, information is exchanged between the Member States (Article 10). Article 4 requires Member States to undertake an assessment of proportionality before introducing new, or amending existing, legislative, regulatory or administrative provisions restricting access to, or the pursuit of, regulated professions (see above). Hungary’s amendment to its legislation could therefore also infringe Directive (EU) 2018/958.

VI. Concluding remarks:

The reader is also referred to the judgment of the Court of Justice in Case C-557/23 – SPAR Magyarország. The CJEU ruled on 12 September 2024 that the ordinance issued by the Hungarian government on fixing prices in emergency situations, which imposes the obligation on traders to offer certain agricultural products for sale at a fixed price and in a predetermined quantity, is contrary to EU law. Free competition, an essential element of the Regulation on common organisation of the markets in agricultural products, is undermined. The Hungarian provision that a fine must be imposed if the obligations under the ordinance are not met is also unlawful.

The CJEU also found that the Hungarian legislation adopted in the context of the Covid-19 pandemic and the war in Ukraine infringes EU law and is not proportionate. According to the CJEU, free market access for traders is compromised and the entire supply chain is disrupted by the fixed prices and the quantities imposed on traders. The planned legislation would have a similarly serious impact.

The planned extensive data that is to be entered in the food rescue database creates a disproportionate administrative

burden for the food traders concerned. Reducing administrative burdens on businesses has been a priority for the European Commission for years. However, the planned Hungarian legislation requires extensive information from the businesses concerned and therefore imposes a heavy administrative burden on them. In fact, only foreign businesses are affected by the planned legislative amendment and therefore only they are subject to the heavy administrative burden.

In summary, the only conclusion is therefore that the Hungarian draft Act constitutes a serious impediment to the free movement of goods, the freedom to provide services, and the right to freedom of establishment and infringes several fundamental rights. The planned measure is likely to restrict the internal market and is therefore rejected.

****

European Commission
Contact point Directive (EU) 2015/1535
email: grow-dir2015-1535-central@ec.europa.eu