Message 113

Communication from the Commission - TRIS/(2024) 2670

Directive (EU) 2015/1535

Notification: 2024/0384/HU

Forwarding of a detailed opinion received by a Member State (Germany) regarding a voluntary agreement (article 6, paragraph 2, first indent of Directive (EU) 2015/1535)

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 01-10-2024. - La Commission a reçu cet avis circonstancié le 01-10-2024. - Die Kommission hat diese ausführliche Stellungnahme am 01-10-2024 empfangen. - Комисията получи настоящото подробно становище относно 01-10-2024. - Komise obdržela toto podrobné stanovisko dne 01-10-2024. - Kommissionen modtog denne udførlige udtalelse den 01-10-2024. - Η Επιτροπή έλαβε αυτή την εμπεριστατωμένη γνώμη στις 01-10-2024. - La Comisión recibió el dictamen circunstanciado el 01-10-2024. - Komisjon sai üksikasjaliku arvamuse 01-10-2024. - Komissio sai tämän yksityiskohtaisen lausunnon 01-10-2024. - Komisija je zaprimila ovo detaljno mišljenje dana 01-10-2024. - A Bizottság 01-10-2024-án/-én kapta meg ezt a részletes véleményt. - La Commissione ha ricevuto il parere circostanziato il 01-10-2024. - Komisija gavo šią išsamiai išdėstytą nuomonę 01-10-2024. - Komisija saņēma šo sīki izstrādāto atzinumu 01-10-2024. - Il-Kummissjoni rċeviet din l-opinjoni dettaljata dwar il-01-10-2024. - De Commissie heeft deze uitvoerig gemotiveerde mening op 01-10-2024 ontvangen. - Komisja otrzymała tę opinię szczegółową w dniu 01-10-2024. - A Comissão recebeu o presente parecer circunstanciado em 01-10-2024. - Comisia a primit avizul detaliat privind 01-10-2024. - Komisia dostala toto podrobné stanovisko dňa 01-10-2024. - Komisija je to podrobno mnenje prejela dne 01-10-2024. - Kommissionen mottog detta detaljerade yttrande om 01-10-2024. - Fuair an Coimisiún an tuairim mhionsonraithe sin maidir le 01-10-2024.

MSG: 20242670.EN

1. MSG 113 IND 2024 0384 HU EN 06-01-2025 01-10-2024 DE DO 6.2(1) 06-01-2025

2. Germany

3A. Bundesministerium für Wirtschaft und Klimaschutz, Referat EB3

3B. Bundesministerium für Wirtschaft und Klimaschutz, Referat VIID1

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

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

6. Notification: 2024/0384/HU

Retransmission of a detailed opinion received from a Member State (Germany) (second indent of Article 6(2) of Directive (EU) 2015/1535).
Subject: 'Food chain and its official supervision' in accordance with Notification No 2024/0384/HU – Detailed opinion
On 1 February 2022, an Act to Prevent and Reduce Food Waste entered into force in Hungary, under which many foods with a durability exceeding 48 hours were no longer allowed to be sold by food retailers to consumers once the date of minimum durability was within 48 hours. This Act was not notified at the time. However, the Hungarian government has now made amendments to this Act and notified the amending Act. Under this, a large number of products (the list of products laid down by decree is worded broadly and in the current version also includes, for example, fresh bread and meat) must be taken off the shelves from 48 hours before the date of minimum durability and registered in a state-organised database. The products must be kept for collection so that they can be donated to the food rescue centre/ÉMK, which reports to the state and is to distribute the products to people in need. No compensation for food retailers is provided for. The Act only covers retail chains with a net annual turnover of more than 100 billion Hungarian forints (HUF). The reasons given to justify the scheme are the need to reduce food waste and to support food provision to people in need.
The notified Hungarian Act fundamentally changes the voluntary donation scheme currently in place, which also includes the product groups covered by the Act. Instead of voluntary donation, a state-controlled, forced scheme is to be introduced. Affected products include fresh and processed vegetables, fruits and mushrooms as well as other plant-based foods. Donations to the ÉMK are mandatory. A large amount of data must be provided to the food rescue database, including on the offering entity, the implementation of logistical tasks, the 'book value' and the food offered.
In 2022, the Government increased the already existing 'retail tax', stating that the increase was necessary to finance the new food rescue programme. The original retail tax rate was raised from 2.5 % to 2.7 % of companies' annual turnover, which also applies only to companies with a net annual turnover of more than HUF 100 billion.
In principle, Germany welcomes initiatives to reduce food waste. However, the present draft raises doubts as to its compatibility with EU law.

1. Infringement of the right to property and the freedom to conduct a business – Articles 17 and 16 of the Charter of Fundamental Rights of the European Union (the Charter)
Germany's Federal Government is of the view that the provisions in the Hungarian Act to Prevent and Reduce Food Waste infringe the fundamental right to property.
Under Article 17(1) of the Charter, both natural and legal persons governed by private law have the right to own, use and dispose of their lawfully acquired possessions. The products they offer for sale are usually the property of food retail companies. The statutory provision limits the companies' power of disposal over the products in time, as sales are no longer possible from 48 hours before the date of minimum durability.
This constitutes de facto deprivation of possessions in accordance with the second sentence of Article 17(1) of the Charter.
In the case of a pure restriction of use, no (legal or actual) transfer of the legal position may take place.
With regard to deprivation of possessions, a distinction is made between formal deprivation and de facto deprivation. Formal deprivation is the forced transfer of ownership to the state or a third party.
De facto deprivation exists if the owner is prevented from using or disposing of the possessions in any 'reasonable way', for example, is prevented from marketing them in any reasonable way (Jarass, in: Jarass, Charta der Grundrechte der EU, 4th ed., 2021, Article 17, paragraph 17 et seq.).
The Hungarian Act is therefore likely to constitute de facto deprivation.
The Hungarian Act lays down rules on disposal over property. These could therefore go beyond the above-mentioned 'imposed restrictions'. The Act thus requires a transfer of the legal position and thus more than a provision on use.

It can also be assumed that the disposals are not carried out voluntarily, i.e. by renunciation. Although the Hungarian Act uses the construct of a 'donation', such a donation is to be mandatory and is therefore not voluntary.
While there is no de facto deprivation if the owner can still dispose of his property (even at a significantly lower price), this is not likely to be the case here, however: In contrast to the above-mentioned case, the 'disposal' must be made free of charge. In any case, the food retailers are to have only one option for disposal – with no room for manoeuvre.
There is no justification in the public interest. No one may be deprived of his possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss (second sentence of Article 17(1) of the Charter). It is true that the fight against food waste and the provision of food to people in need could, in principle, constitute a public interest. For objectives pursued by limitations to be considered legitimate, both with regard to deprivations and restrictions of use, limitations may be made only if they 'meet objectives of general interest recognised by the Union' or 'the need to protect the rights and freedoms of others' in accordance with the first sentence of Article 52(1) of the Charter. The requirement of the 'general interest' in the third sentence of Article 17(1) of the Charter therefore does not impose any further requirements or restrictions (Jarass, in: Jarass, Charta der Grundrechte der EU, 4th ed. 2021, Article 17, paragraph 25 et seq.).
However, the second sentence of Article 17(1) of the Charter requires the pursuit of public interests, which is why, in the case of deprivations, the favouring of private entities must not be the sole purpose. Deprivation of property for the benefit of private entities (ÉMK) is only possible if public interests are thus also being pursued. In the case of deprivations, the possible legitimate objectives are narrower.
In particular, the statutory provision is not proportionate.
From the outset it is not suitable for preventing food waste. There is no apparent reason why food would have to be donated before the date of minimum durability has been reached. The products are still marketable and saleable until this date, so there is no risk of the food being thrown away and the draft Act thus does not reduce food waste. This is also supported by the fact that, under the directives of the Hungarian Food Safety Office as well as the national and EU provisions (Chapter Va of Regulation 852/2004 on food hygiene), even products past the date of minimum durability can still be consumed for a certain period of time and products can be provided free of charge past their date of minimum durability without health concerns. This means that there is no risk of food being thrown away and associated waste within the 48 hours before the date of minimum durability. In addition, the period of 48 hours before the date of minimum durability is not the last possible period in which the food can be utilised. Mandatory donation before the date of minimum durability therefore does not contribute to the reduction of food waste.
Although the draft Act is suitable and necessary for achieving the objective of food provision to people in need, it is not proportionate given the degree of intervention in the present case. Due to the high degree of intervention, high requirements must be placed on proportionality.
There are numerous collaborations in place between food retailers and private food banks as well as non-profit organisations. The ban on donating products to organisations other than the ÉMK prohibits these established processes, even though they already contribute to the reduction of food waste. While it is true that already established processes for voluntary food rescue at scale are not as suitable as compulsory supplies, it must also be borne in mind when weighing up interests that the imposition of mandatory donations to the ÉMK specifically jeopardises the already existing and established processes of retailers with other non-profit organisations. At the same time, the centralised state scheme is unsuitable for products such as fruit and vegetables, baked goods and products that need refrigeration due to the long logistics chain. The complex distribution system and the long transport times and routes increase risks for food safety and allow errors – in contrast to the current voluntary 'just in time' donations.
In particular, fresh products such as meat, fish, milk, fruit and vegetables should, under the Act, only be offered for sale for a few minutes/hours before they would have to be kept in the warehouse for 48 hours for collection by the state organisation.
Furthermore, contrary to the second sentence of Article 16(1), no financial compensation is provided to food retailers. The lack of compensation constitutes a disproportionate and unreasonable intervention in relation to the objective pursued, since the products have their current market value before the date of minimum durability has passed and the forced donations cause significant damage to the food retailers at a time when the products would not yet be discarded under normal circumstances, i.e. there is no risk of food waste.
This means that food retailers will have to pay twice for the state food rescue: Once through the tax in the amount of 2.7 % and additionally as a result of the uncompensated forced donation.
Finally, it should be noted that the Act is too vague. It is not clear from the provisions which products are subject to

mandatory donation and which are subject to optional donation, especially for products with a short expiration date. Retailers have no legal certainty as to how long – or if at all – they have the right to sell the products. It remains unclear how products without a date of minimum durability are to be dealt with or whom the information on the user should refer to exactly. Furthermore, it is not clear whether the definition of the book value refers to the purchase price or the value of inventories. This may differ given the accounting method for inventories.
In addition to an infringement of Article 17 of the Charter, an infringement of Article 16 of the Charter is also likely here, since Article 16 of the Charter protects disposal over economic, technical and financial resources, earning potential and the setting of prices (Jarass, in: Jarass, Charta der Grundrechte der EU, 4th ed., 2021, Article 16, paragraphs 7, 10). The Hungarian legislation restricts power of disposal in the last 48 hours before the date of minimum durability and sets the price '0' euro. In particular, the above comments on the lack of proportionality of the legislation also apply in this respect.

2. Infringement of the freedom of establishment and the free movement of goods
Furthermore, the regulation laid down in the Hungarian amending Act is not compatible with the freedom of establishment under Article 49 TFEU in conjunction with Article 54 TFEU.
Freedom of establishment covers the taking up and pursuit of activities as self-employed persons of a certain duration, including the operation of a food retail business by a company (or natural person) established in another Member State. This protected activity is compromised by the draft Act. Article 49 TFEU lays down not only a prohibition of restriction but also a prohibition of discrimination. Indirect discrimination arises from the fact that the Act applies only to companies with an annual net turnover of more than HUF 100 billion. Hungarian retailers usually do not have turnover exceeding HUF 100 billion, whereas the turnover of international food retailers is usually above this limit. As a result, only foreign food retailers are de facto affected by the Act. Article 49 TFEU also applies to de facto disadvantages of companies based in other EU countries.
A disadvantage occurs insofar as the regulations impair or make less attractive the taking up or operation of food retail businesses. The ban on the sale of food from 48 hours before the date of minimum durability leads to significant financial losses and makes it less financially attractive to take up or pursue a food retail business. This is particularly true given the significant share of total company turnover that is accounted for by the products affected by the Act.
No justification is given.
It is true that there is a lawful justification. Lawful justifications for indirect discrimination are, in addition to the written justifications arising from Article 52 TFEU, also unwritten justifications (overriding reasons in the public interest). The draft Act was adopted, on the one hand, to provide food to people in need – this could fall within the protection of public health under Article 52(1) TFEU – and, on the other hand, to prevent food waste and thus to protect the environment. The latter is recognised as an unwritten justification.
However, the Act is not proportionate. The reader is referred to above remarks in this respect.
In addition, retailers with a turnover of more than HUF 100 billion do not cause proportionately more food waste than smaller companies. To impose a duty to surrender products – especially 48 hours before the date of minimum durability – would constitute unequal treatment of the same facts.
In addition to the disproportionate financial burden due to the lack of compensation plus tax increases, the draft also proposes excessive administrative provisions that lead to disproportionate red tape. Reporting obligations to the food rescue database are disproportionate. The individual points of sale (supermarkets), which must provide the data digitally for each sorted product batch, do not have the data required by the Act, nor do they have the human resources to generate such data to the extent necessary on a daily basis. The data in question are currently processed efficiently and in consolidated form by company headquarters.
In addition to an infringement of the freedom of establishment, there is also an infringement of the free movement of goods. The remarks relating in particular to proportionality can be applied in this respect.

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