EuroCommerce Position on the Hungarian TRIS Notification 2024/0384/HU

Amendment of ACT XLVI of 2008 on the food chain and its official supervision

On 4 July 2024, Hungary notified the European Commission and Member States, through the Technical Regulations Information System (TRIS), of its intention to amend Act XLVI of 2008 on the food chain and its official supervision in an attempt to make food rescue more effective.

The draft text proposes a shift from the current voluntary donation system to a mandatory one and extends significantly the scope of food products to be donated. Under this amendment, food retailers and traders engaged in wholesale activities with an annual net turnover exceeding HUF 100 billion will be prohibited from selling food products within 48 hours before their minimum durability date (‘*best before’ expiration date*) and will be required to donate them instead. Donations will need to be made exclusively through ÉMK’s (Food Rescue Centre – state-controlled organisation) IT system following a prescribed procedure to an intermediate organisation registered in the food rescue database.

EuroCommerce welcomes the opportunity to provide comments to the Hungarian TRIS notification. It is important to emphasise that retailers and wholesalers have been committed to reducing food waste for several years and have achieved remarkable success in this area. This is evident by the results of both the first and second EU-wide monitoring of food waste[1] , which show that compared to other stakeholders in the supply chain, retailers and wholesalers generate the least amount of food waste.

While Hungary claims that the amendment aims to enhance food donation efforts for those in need, this TRIS notification presents numerous flaws that raise concerns regarding the freedom of establishment, right to property, freedom to conduct business, legal certainty, and whether the new rules will actually reduce food waste.

1. Freedom of Establishment – Article 49 of the Treaty on the Functioning of the European Union

We believe that the proposed rules on food donations may infringe the freedom of establishment, because the new rules will make it less attractive for new players to establish and for established foreign-owned retailers to operate in Hungary.

[1] Eurostat, Food waste and food waste prevention estimates, (September 2023) Note that earlier estimations (October 2022) were 57 Mt, i.e., 127 kg/capita

According to Section 3 of the proposed decree, the obligation to donate food products 48 hours before their best before date applies exclusively to food retailers and wholesalers with a net turnover exceeding HUF 100 billion in the previous calendar year. In practice, this mainly affects foreign-owned retailers in the Hungarian market due to the way the Hungarian government calculates turnover. For retail chains that are centrally organised and manage all their stores centrally, turnover is calculated based on the **combined revenue** of all the stores. Consequently, all major foreign-owned retail chains exceed the HUF 100 billion threshold. In contrast, for retail chains operating on a franchise model, **turnover is calculated separately for each franchisee**. This means that the three major local Hungarian retail chains fall below the HUF 100 billion threshold.

Additionally, those foreign-owned retail chains are also subjected to the recently increased retail tax, which increased from 2.5% to 2.7%. The aim of this tax is primarily to finance the food rescue programme of the state. While taxation policies fall within the competence of individual Member States, such policies must still comply with Union law[2]. As a result, this decree breaches the freedom of establishment and violates EU Law by indirectly discriminating against non-Hungarian companies and imposing disproportionate restrictions on them. As a result, both the food rescue obligation and the retail tax target foreign-owned retailers, making the decree discriminatory under Article 49 of the Treaty on the Functioning of the European Union (TFEU).

Article 49 TFEU guarantees the right of companies from other Member States to establish and operate businesses under the same conditions as domestic entities. In this case, the decree would result in foreign-owned retail and wholesale companies being subjected to burdensome obligations that do not apply to their Hungarian counterparts.

2. General Food Law Regulation (EC) No 178/2002

Moreover, the requirement for these retailers and wholesalers to manage food donations via the IT system operated by the Food Rescue Centre Nonprofit (ÉMK), as specified in Section 3(1) and 3(5), could lead to significant operational challenges. As outlined in Article 18 of the General Food Law Regulation[3], *traceability is the responsibility of food and business operators*, and any systems should be efficient and proportional to the objective of ensuring food safety and traceability. Despite being announced in 2022, the IT system is not operating and has neither been piloted nor proven effective. Making food donations mandatory and simultaneously, imposing an untested system disrupts the established practices that many retailers and wholesalers already have in place. Such disruption can lead not only to duplication, but importantly to increased logistical pressures, and unnecessary complexity and undermine the precision of the supply chain management. This further complicates the situation and, in extension, makes it more difficult for non-Hungarian or partly Hungarian-owned companies to establish, or operate in Hungary, thus rendering the draft regulation indirectly discriminatory.

We must not overlook the potential risk to the continued efficiency of logistics. Currently, food is delivered directly from stores using a short supply chain mode, where charitable organisations collect and distribute donations locally. However, under the draft regulations, delivery would be routed through regional warehouses via transport companies, which would lead to an increase in delivery costs and negative environmental impact. Charitable organisations would have to collect food products from these logistic centres and then redistribute them to local communities.

[2] Case C-250/95 Futura &Singer [1997] ECR I-2471 §19, 22

[3] Regulation (EC) No 178/2002 laying down the general principles and requirements of food law

3. Legislation on food waste

The justification for this amended decree is based on events such as the drought of 2022 and the Russian-Ukrainian war, which have intensified the need to focus on food waste reduction and ensure that surplus food reaches those in need. Indeed, these events highlight the importance of addressing growing food waste/security concerns, however, food waste is not solely a consequence of such crises. It is often the result of inefficiencies in the food supply chain and consumer behaviour which are not always directly influenced by external events.

The EU and its Member States have already committed to achieving Sustainable Development Goal (SDG) Target 12.3, which aims at halving per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chain, including post-harvest losses, by 2030. Retailers and wholesalers have taken significant steps toward reducing food waste and improving resource efficiency. This is evident in the reports assessing the progress towards achieving SDG 12.3 in 2022 and 2023[4], which are praising the sector's leadership in food waste reduction. Moreover, through the EU Code of Conduct for Responsible Food Business and Marketing Practices, many food retailers and wholesalers, with some being present in Hungary, have made concrete commitments, including the goal of reducing food waste within their operations by 50% by 2025[5].

However, since not all actors were on track to meet SDG Target 12.3, the European Commission in July 2023, proposed binding food waste reduction targets for Member States to achieve by 2030, through a revision of the Waste Framework Directive. This revision encourages each Member State to take measures tailored to its specific national situation which aim to support consumer behavioural change as well as strengthen coordination of actions between actors across the whole food value chain without placing any disproportionate burden on any of the actors. Unfortunately, the proposed amendment to the decree imposes *a* disproportionate burden on retailers and wholesalers, and specifically on the foreign-owned ones. This decree *forbids* retailers from selling safe and fit-for-consumption products and requires them to donate instead, which leads to severe financial losses for many of them.

In Hungary, donations and food rescue operations are already being successfully carried out under current laws, thanks to the cooperation between retailers and charitable organisations under a voluntary donation scheme. ÉMK is already involved in the process, as the retailers provide it with their food rescue plan, which the organisation may control. The existing legislation has proven effective, with minimal food waste and significant donations already taking place. In contrast, the proposed decree imposes mandatory food donations and disregards the effective internal waste management systems of retailers and wholesalers. The draft decree also overlooks existing collaborations between retailers, charitable organisations, and the national Food Bank, which has been excluded from this decree. To fight food waste, there is the need to involve proportionately all stakeholders in the food supply chain, raise consumer awareness and ensure a simplified donation process without imposing undue or unjustified costs on businesses.

Furthermore, obliging retailers – who account for only 7% of food waste in comparison to consumers' 53% both at EU level[6] – to donate saleable and fit-for-consumption food before its best before date will not effectively address the broader issue of food waste. Crucially, there is no evidence suggesting that by increasing donations there will be automatically a reduction in food waste. Without legislative

[4] Champions 12.3, SDG Target 12.3 on Food Loss and Waste: 2022 Progress report, https://champions123.org/publication/sdg-target-123-food-loss-and-waste-2022-progress-report

[5] European Commission, Food Safety, *EU Code of Conduct on Responsible Food Business and Marketing Practices* (2021)

[6] Eurostat, Food waste and food waste prevention estimates, (September 2023) Note that earlier estimations (October 2022) were 57 Mt, i.e., 127 kg/capita

support for behavioural change interventions and raising awareness campaigns, which retailers and wholesalers are already doing[7], it is unlikely that the objective of reducing waste will be achieved.

Moreover, a company's net turnover should not be a determinant factor, as there is no evidence to suggest that retailers with a turnover exceeding HUF 100 billion are solely responsible for food waste; such a requirement is unreasonable. What matters are the food waste reduction programmes they have in place, their actions, and the actual amount of food waste they generate.

Therefore, considering the success of the current voluntary donation scheme, this amendment is unsuitable for achieving the decree's objective. Adding on that, it is disproportionate and raises uncertainty about whether it will effectively combat food waste.

4. Potential distortion of local agri-food market

Retailers and wholesalers should have the right to sell the products they possess until the end of their best before expiration date. In fact, restricting this ability could lead to several issues related to competition as well. It could create an uneven playing field, as retailers may face unfair limitations on selling certain core products (such as poultry, bakery and dairy items) that are essential for their business operations. The rule suggested in Section 2, not only impacts the retailer's ability to sell in business-to-consumer (B2C) settings but, also affects business-to-business (B2B) transactions. For example, if this amendment is approved, wholesalers may become more reluctant to stock products with a best before date due to the fact that they will be unable to sell them 48 hours before expiration, which would lead to unjustified financial losses and have a domino-effect down the supply chain. These restrictions could undermine competition by artificially reducing the range of available products and limiting consumer choice. As a result, these products may be excluded from the market, and retailers targeted by the decree would lose the ability to make business decisions based on consumer demand.

Ultimately, the proposed rule would harm both marketability and competition, as it limits the sale of essential food items and creates unnecessary risks for those retailers and wholesalers who are targeted by this decree.

5. Right to Property - Article 17 of the EU Charter of Fundamental Rights of the European Union

According to Section 2 of the draft amendment *"foodstuffs with a period of minimum durability of more than 48 hours shall not be placed on the market as foodstuff within 48 hours before the date of minimum durability, excluding cases of interests of food safety, food supply security and consumer protection, as well as cases where the product is made available free of charge and the requirements of point (a) in Chapter V of Annex II of Regulation (EC) No. 852/2004 of the European Parliament and of the Council."*

Obliging retailers and wholesalers to donate food products that are safe, saleable, and fit-for-consumption infringes upon the Right to Property. According to Article 17(1) of the Charter of Fundamental Rights, *everyone has the right to own, use, dispose of, and bequeath their lawfully acquired possessions. Deprivation of property is only permissible for public interest reasons, under legal conditions, and with fair compensation.* The proposed requirement to donate food products 48 hours before the best before date does not meet these conditions and unjustly infringes upon property rights. While the Charter allows regulation of property use for the general interest, this amendment

[7] For more best examples of how retailers and wholesalers fight food waste, please visit our website: https://www.eurocommerce.eu/sustainable-commerce/food-waste/

exceeds what is necessary. The retail sector has long been committed to reducing food waste and has regularly and voluntarily donated consumable unsold items to various charitable organisations. This voluntary approach has been effective in managing food distribution and preventing waste without compromising retailers' property rights or freedom to conduct business.

The date of minimum durability, is defined under Article 2(2) of the Food Information to Consumers Regulation as "*the date until which the food retains its specific properties when properly stored*"[8]. It is indicated as the *best before* date and applies to a wide range of refrigerated, frozen, dried (such as pasta, rice), tinned and other products and relates to food quality rather than safety. Except for specific regulations (ex. for eggs), EU rules allow the marketing and sale of food after the best before date has passed, provided that the food remains safe and its appearance is not misleading. Similar guidelines are set by the Hungarian National Food Chain Safety Office, which permits the consumption of products after their best before expiration date[9]. Therefore, retailers should have the right to sell products they possess until the end of their best before date. It is unreasonable that, while some Member States are considering allowing the donation of products even after this date, Hungary does not even permit their sale before the best before expiration date.

Over the years, retailers and wholesalers have made numerous voluntary commitments, demonstrating their strong sense of social responsibility. Their successful collaboration with charitable organisations in voluntary food donation schemes further underscores this commitment. In fact, Hungarian retailers donate for human consumption more than 7,000 tonnes of food per year, a clear indication of their proactive role in supporting food redistribution efforts.

It is not a secret that unsold products represent a financial loss for retailers and wholesalers. Therefore, they do everything within their power and control to prevent food waste from occurring in the first place and thus they do not solely rely on donations to reduce their food waste levels. They employ a wide range of strategies, such as discounting products nearing their best before date, using technology and investing in innovation to extend shelf life, and working closely with suppliers to better align supply with demand. They explore alternative uses for unsold food products, such as repurposing fruits and vegetables into soups and jams. The sector is actively engaging with consumers via different channels to raise awareness on how to avoid food waste. This includes sharing recipes for leftovers, offering tips on proper food storage and removing date marking from specific products, such as fruits and vegetables, to address consumer confusion regarding date labels[10]. The effectiveness of those measures in reducing food waste is reflected both in the European as well as in the national data, which shows that food retailers and wholesalers are responsible for only 4.6% of Hungary's food waste [11].

In addition, according to the latest JRC survey on date marking and Eurobarometer results, up to 10% of food waste generated annually in the EU is linked to confusion over date marking[12]. By removing products from the shelves before their best before date could further deteriorate the understanding of the best before label, and result in discarding food that is still safe and fit for consumption. This could potentially increase food waste rather than reduce it.

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[8] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

[9] Article 15(2) of Act No. XLVI of 2008 on food chain and its control

[10] For more best examples of how retailers and wholesalers fight food waste, please visit our website: https://www.eurocommerce.eu/sustainable-commerce/food-waste/

[11] Hungarian Central Statistical Office: Sustainable development goals (October 2022): Élelmiszer-hulladék – Fenntartható fejlődési célok (ksh.hu)

[12] European Commission: Directorate-General for Health and Food Safety, Market study on date marking and other information provided on food labels and food waste prevention – Final report, Publications Office, 2018, https://data.europa.eu/doi/10.2875/808514

The proposed amendment fails to strike a fair balance between public interest and individual property rights. Forcing retailers and wholesalers to relinquish their right to possess and sell their products exceeds what is necessary and infringes upon both their property rights and their freedom to conduct business. The current voluntary donation scheme has already proven to be an effective and less restrictive method of achieving the goals of reducing food waste and aiding those in need. By maintaining this approach, retailers and wholesalers can continue their successful food waste reduction efforts without the burden of a mandatory obligation to donate.

6. Legal Uncertainty

The draft decree introduces several sources of legal uncertainty that significantly affect the businesses targeted by its provisions. Firstly, the decree includes vague definitions, such as “book value”, as well as an unclear scope of products that would have to be donated. Without clear definitions and a well-defined scope, businesses will not be able to navigate this with legal certainty.

Secondly, this uncertainty introduced by the decree has the potential to harm investor confidence in the market. Legal uncertainty leads to unpredictability and thus, leading to diminished investor confidence. In particular, if retailers are unable to freely sell products until the last day of the said best before date due to this law, it could have a chilling effect on investment in the retail sector.

Another critical factor is the introduction of the ÉMK system, which is untested and not yet proven or adapted to the current operations of retailers. This system, developed without sufficient input from the retail sector, imposes operational burdens on businesses and the data requested appears redundant and offers no added value. This creates further legal uncertainty, as businesses are being asked to implement processes that are not feasible in the current circumstances. The cumulative effect of these issues is a substantial increase in legal uncertainty, which undermines the predictability of the legal framework and could have long-term negative impacts on the retail sector and its innovation, and the broader market.

In light of the above, EuroCommerce kindly requests the European Commission to ensure that Hungarian measures on combatting food waste are in line with EU law.

EuroCommerce is the principal European organisation representing the retail and wholesale sector. It embraces national associations in 28 countries and 5 million companies, both leading global players such as REWE, Lidl, IKEA and Tesco, and many small businesses. Over a billion times a day, retailers and wholesalers distribute goods and provide an essential service to millions of business and individual customers. The sector generates 1 in 7 jobs, offering a varied career to 26 million Europeans, many of them young people. It also supports millions of further jobs throughout the supply chain, from small local suppliers to international businesses. EuroCommerce is the recognised European social partner for the retail and wholesale sector. For more information, please visit our website.