



Mr. Gabor MAGYAR
Policy Officer
European Commission
Directorate-General for Justice and Consumers

JUST C.1 – Justice policy and rule of law
Rue Montoyer 59, B-1000 Brussels, BE
gabor.magyar@ec.europa.eu

September 20th, 2020

Subject: Ongoing disregard for CJEU judgment on ‘foreign agents act’ in Hungary and its impact on the distribution of EU funds for civil society organizations

Dear Mr. Gábor Magyar,

It is with profound concern that we write to you about a new repressive measure deployed in Hungary against civil society organizations, in blatant disregard for the recent judgment of the Court of Justice of the EU (CJEU) in Case C-78/18, which concludes the relevant infringement procedure the Commission launched against Hungary. A Hungarian civil society organization, Az emberség erejével -- Cum Virtute Humanitatis Alapítvány, seated in Pécs, Hungary, has been denied EU funding precisely due to its resistance to obey legal provision the CJEU has already declared to be in violation of EU law. In the matter described below in more detail, said organization has contacted Commissioner Didier Reynders. In the present letter, we wish to facilitate the Commission’s work in overseeing the execution of said judgment by providing further details about the case.

As you will recall, in 2017, the Hungarian Parliament enacted Law No LXXVI of 2017 on the Transparency of Organisations which Receive Support from Abroad, a sweeping regulation that imposes obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and which provide for the possibility of applying penalties to organisations that do not comply with those obligations. This law did not spare those organizations either which received funds from EU sources, requiring such organizations to register upon receipt of a certain threshold of EU funding as “foreign agents”. On June 18th, 2020, however, in Case C-78/18, the Court of Justice of the European Union (CJEU) found that by enacting the aforementioned regulations, Hungary has introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union.

However, while the CJEU has already ruled on the unlawfulness of said regulation, we see a growing disregard for the Court’s authority in Hungary. While Parliament has not taken any steps to repeal the legislation that violates EU law, a manager and distributor of EU funds in Hungary has recently -- well after the Court’s judgment mentioned above -- decided to apply

the law in question, as explained below. This not only shows disrespect for the European value of the rule of law (TEU 2), but also openly defies one of the foundational principles of the public law of the Union: the primacy of EU law over national law. As early as 1978, the Court made it clear that in cases of conflict between national law and EU law, the latter shall prevail and be applied, irrespective of whether provisions of the national law generating the conflict are still in effect (*Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (1978), Case 106/77).

On 3rd of May 2020, Emberség Erejével Alapítvány submitted an application for grants under the “Erasmus+” application scheme. Grants within this application scheme are financed by EU funds, with Tempus Közalapítvány, a foundation registered in Hungary, being responsible for the management and distribution of these grants. They were dismayed to receive an e-mail from Tempus Közalapítvány on 24th August 2020, which not only happily informed them that their application, upon evaluation, reached the grant eligibility threshold, but also requested them to declare that they fully comply with the provisions of Law No LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad, warning them that such declaration was a necessary condition for receiving the grant they applied for.

In response to this request, Emberség Erejével Alapítvány informed Tempus Közalapítvány on 25th August 2020 that the legal provisions concerned had already been found to be in violation of EU law, and as such, are inapplicable in the Member States; and hence, that they refused to submit the declaration requested unlawfully. Tempus Közalapítvány responded, on 27th August 2020, that their Board of Trustees had decided on August 24th, 2020, “that only organizations operating lawfully, observing domestic law could receive funding”, and as Law No LXXVI of 2017 is “still in effect”, a declaration regarding compliance with it may be lawfully required. On 31st August 2020, the results of the application were announced, and Emberség Erejével Alapítvány was denied funding.

It is our understanding that organizations which had applied for the same funds but whose application had received less favorable evaluation were not asked to provide evidence of or commitment to register as foreign agents in compliance with Law No LXXVI of 2017. This further testifies to the fact that Emberség Erejével Alapítvány was asked for such evidence or commitment at a stage in the application process where their application already received favorable evaluation, and the grant would have been awarded, had it not been for their consistent refusal to commit to a stigmatizing national regulation which has already been found unlawful by the CJEU.

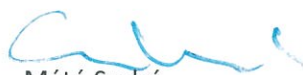
Tempus Közalapítvány is a “public foundation”, established by the Government of Hungary. In administering EU funded grants, it does not exercise public authority; its decisions on the distribution of grants are final, without any appeal procedure guaranteed. Grant agreements, once concluded, are governed by Hungarian civil law. However, national law does not create any obligations for Tempus Közalapítvány to establish a grant agreement, in our case; nor does it prohibit refraining from contracting in our particular case, nor does it create an obligation to compensate for the damages, either as a tort or as *culpa in contrahendo*. In summary, administrative law does not apply to the decisions of the fund distributor, whereas civil law creates no relevant grounds for legally challenging them. Therefore, it is not possible to challenge the decision detailed above in court.

Further complexity is added to the case as Tempus Közalapítvány insists on applying national law that is in violation of EU law, yet it only 'applies' the law in the sense that as a private party, it requires a private contracting party to obey it. In effect, the unlawful legal provision is transformed into and reanimated as a contractual term. It would be helpful, accordingly, if the Directorate-General provided some guidelines as to what follows from the a judgment of the CJEU to the effect that a national legal provision violates EU law, with respect to the legality of private parties requesting obedience to such legal provision in contracts concerning grants from EU sources. It is our view that, on the one hand, it is against the spirit of the primacy of EU law if private parties in their affairs concerning the management and distribution of EU funds are allowed to contract themselves into terms and conditions which, if they were legal provisions, would violate EU law. On the other hand, we also find it troubling that the legal construction in which Tempus Közalapítvány operates -- as a foundation primarily subject to civil law -- expressly facilitates such abuse.

We respectfully ask you to give due consideration to the issues outlined above as the Commission oversees the execution of the Court's judgment in Case C-78/18, which concludes the infringement procedure the Commission launched against Hungary. At the same time, we would like to offer our assistance, should it be necessary, in providing further details of the national legal and political context which contributes to the neglect of EU law in the management and distribution of these funds, and in liaising with the victims as their input is sought.

Thank you for your kind consideration.

Sincerely yours,



Máté Szabó
Director of Programs
Hungarian Civil Liberties Union

