



Council of the
European Union

Brussels, 8 November 2018
(OR. en)

14022/18

LIMITE

FREMP 190
JAI 1109
POLGEN 206
AG 30

**Interinstitutional File:
2018/0902(COD)**

COVER NOTE

From: The General Secretariat of the Council
To: Delegations
Subject: Values of the Union - Hungary - Article 7 (1)

Delegations will find in the Annex a Commission non-paper providing factual information on the values-related infringement proceedings in relation to Hungary.

The situation in Hungary

Information on values-related infringement proceedings

A. Introduction

As explained by the European Commission in the European Parliament's plenary debate on 11 September 2018 on the situation in Hungary, the Commission is using all the instruments at its disposal to address concerns in the manner the Commission considers most effective.

Unlike the European Parliament, the European Commission has a right under the Treaty on European Union to launch infringement procedures and, in the case of Hungary, has launched many value-related infringement proceedings.

It is also using other instruments, including audits and investigations relating to the use of EU funds and actions through the European Semester, the EU annual cycle of economic policy coordination.

B. On-going values-related infringement proceedings

1. NGO law¹: On 7 December 2017, the European Commission decided to refer Hungary to the Court of Justice for failing to fulfil its obligations under the Treaty provisions on the free movement of capital, due to provisions in the NGO Law which indirectly discriminate and disproportionately restrict donations from abroad to civil society organisations. In addition to these concerns, the Commission is also of the opinion that Hungary violates the right to freedom of association and the rights to protection of private life and personal data enshrined in the Charter of Fundamental Rights of the European Union, read in conjunction with the TFEU provisions on the free movement of capital. The case is pending before the Court of Justice (case C-78/18).

2. Higher Education Law²: On 7 December 2017, the European Commission decided to refer Hungary to the Court of Justice on the grounds that the law as amended is not compatible with the freedom for higher education institutions to provide services and establish themselves anywhere in the EU. In addition, the Commission also remains of the opinion that the new legislation runs counter to the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union and the Union's legal obligations under international trade law (the General Agreement on Trade in Services, GATS, in the framework of the World Trade Organisation, WTO). The case is pending before the Court of Justice (case C-66/18). Upon request of the Commission, the Court of Justice granted priority to the case.

¹ European Commission press release IP/17/5003

² European Commission press release IP/17/5004

3. Asylum³: On 19 July 2018, the European Commission decided to refer Hungary to the Court of Justice concerning the compliance of national legislation with the requirements of the Asylum Procedures Directive. The Commission is of the opinion that the border procedure implemented by Hungary does not respect the maximum duration of 4 weeks in which someone can be held in a transit centre and fails to provide special guarantees for vulnerable applicants; moreover, according to the Commission, Hungary fails to provide effective access to asylum procedures as irregular migrants are escorted back across the border, even if they wish to apply for asylum. In addition, the indefinite detention of asylum seekers in transit zones without respecting the applicable procedural guarantees is in breach of the Reception Conditions Directive. Finally, the Commission considers that the Hungarian law does not comply with the EU's Return Directive as it fails to ensure that return decisions are issued individually and include information on legal remedies.

4. Relocation⁴: On 7 December 2017, the European Commission decided to refer Hungary to the Court of Justice for non-compliance with its legal obligations on relocation established by Council Decision 2015/1601. The case is pending before the Court of Justice (case C-718/17).

5. New legislation criminalising activities in support of asylum and residence applications⁵: On 19 July 2018, the European Commission addressed a letter of formal notice to the Hungarian authorities because it found that the criminalisation of support for asylum and residence applications and the related restraining measures are in violation of the Asylum Procedures Directive and the Reception Conditions Directive, Articles 20 and 21(1) TFEU and the Free Movement Directive, as well as the Charter of Fundamental Rights of the European Union. Moreover, the European Commission considers that the introduction of a new non-admissibility ground for asylum applications is a violation of the EU Asylum Procedures Directive. In addition, the new law and the constitutional amendment on asylum curtail the right to asylum in a way which is incompatible with the Asylum Qualifications Directive and the Charter of Fundamental Rights of the European Union. The Commission is now analysing the response of the Hungarian authorities.

6. Roma⁶: In May 2016, the European Commission launched infringement proceedings against Hungary for discrimination of Roma children in the field of education, on grounds of their ethnic origin. Hungary entered into a constructive dialogue with the Commission and has subsequently adopted legislative amendments to prevent segregation and has taken measures to desegregate. The Commission is currently monitoring the implementation of the new measures.

³ European Commission press release IP/18/4522

⁴ European Commission press release IP/17/5002

⁵ European Commission press release IP/18/4522

⁶ European Commission MEMO/16/1823

C. Previous values-related issues

1. Equal treatment⁷: On 27 April 2017, the European Commission decided to send a reasoned opinion to Hungary for its failure to correctly and completely implement EU law on equal treatment of men and women in employment and occupation (Equal Treatment Directive as well as the Maternity Leave Directive). On 7 June 2018, the Commission decided to close the infringement procedure after Hungary had modified its legislation to meet the concerns expressed by the Commission.

2. Retirement age for judges: In a case brought by the European Commission, the Court of Justice ruled on 6 November 2012 that the abrupt and radical lowering of the retirement age for judges, prosecutors and notaries in Hungary violated EU equal treatment rules (Directive 2000/78/EC). According to the Court's judgment (case C-286/12), the forced early retirement of judges and prosecutors in the course of 2012 as well of the notaries in 2014 under a new Hungarian law constituted unjustified age discrimination⁸. Following calls by the European Commission for Hungary to comply with the judgment as soon as possible, Hungary adopted changes to its law. On 20 November 2013, the Commission decided to close the infringement procedure⁹.

3. Data Protection Commissioner: In a case brought by the European Commission, the Court of Justice ruled on 8 April 2014 (case C-288/12) that the abrupt termination the Hungarian Data Protection Commissioner's term in office constituted an infringement of the independence of the Hungarian Data Protection Authority and is hence in breach of EU law. In the context of a reorganisation of the data protection authority by the Hungarian government, the six-year term of the Data Protection Commissioner, appointed in 2008, was prematurely brought to an end in 2011 (instead of 2014)¹⁰. Following the judgment, the former Data Protection Commissioner obtained material and moral compensation and he did not wish to be reinstated in his function, as required in principle. The Commission decided to close the infringement procedure.

4. Fourth Amendment: In 2013, the President of the European Commission sent a letter to Hungary raising concerns related to the compatibility with EU law of certain provisions of the Fourth Amendment to the Hungarian Fundamental Law¹¹: 1) the ad-hoc tax for Court of Justice judgments entailing payment obligations, 2) the regime for transfers of cases between courts and 3) the restrictions on the publication of political advertisements, namely during European Parliament election campaigns. The Fifth Amendment to the Hungarian Fundamental Law amended the provisions concerned and addressed the concerns raised in the letter of 2013.

⁷ European Commission MEMO/17/1045

⁸ European Commission MEMO/12/832

⁹ European Commission press release IP/13/1112

¹⁰ European Commission MEMO/14/267

¹¹ European Commission press release IP/13/329

D. Other issues currently examined as to their compatibility with EU law

1. 25% NGO-tax: The European Commission is aware of the Hungarian law which entered into force on 25 August 2018 and which introduces a special immigration tax applicable to financial support for "activities facilitating immigration", defined as communication and networking activities presenting immigration in a favourable light, and in particular carrying out and participating in media campaigns, carrying out educational activities and trainings, carrying out propaganda activities and setting up and operating networks. The Venice Commission will deliver an opinion on the law in December 2018. The European Commission is currently analysing the situation.

2. Food for asylum seekers and migrants: The European Commission has received reports that the Hungarian authorities have not been providing food since early August 2018 to certain persons held in the transit zones in Röszke and Tompa at the Hungarian-Serbian border. On 17 September 2018, the Commission addressed an administrative letter to the Hungarian authorities requesting additional information. Following the answer of the Hungarian authorities, the Commission is currently monitoring the situation.

3. Justice reform: The European Commission is monitoring through the European Semester¹² the functioning of the Hungarian justice system, including the regime for appointment and promotion of judges, the organisation of the prosecution service and the envisaged setting up of a new administrative court system and assesses its compliance with EU law and European standards.

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¹² See Country Report Hungary 2018, SWD(2018) 215 final, page 32