HUNGARY AND THE RULE OF LAW

The law of the European Union and Hungary's Act XII of 2020 on the containment of coronavirus and Decrees issued thereunder

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OPINION

INTRODUCTION AND SUMMARY

1. We are asked by the Open Society Justice Initiative to advise on the compatibility with EU law of (i) certain provisions of Act XII of 2020 on the containment of coronavirus (**"the Coronavirus Act"**), which was adopted by the National Assembly of Hungary on 30 March 2020; and (ii) certain Decrees which the Hungarian Government has issued in the exercise of powers conferred by the Coronavirus Act.[1]

2. The key factual context is as follows:

   2.1. International institutions and civil society organisations have in recent years expressed concern about threats to democracy, equality, human rights and the rule of law in Hungary. On 12 September 2018, the European Parliament voted to call upon the Council to determine, pursuant to Article 7(1) of the Treaty on European Union (**"TEU"**), the existence of a clear risk of a serious breach by Hungary of the fundamental values of the EU, as set out in Article 2 TEU. The Article 7 procedure in relation to Hungary remains ongoing. The Commission has also taken action against Hungary under Article 258 of the Treaty on the Functioning of the European Union (**"TFEU"**) in relation to various specific measures, e.g. the adoption of a law imposing restrictions on civil society organisations which receive donations from abroad.[2]

   2.2. Covid-19, a novel strain of coronavirus disease, was identified in China in December 2019, and soon spread to numerous countries in Europe and other parts of the world.

[1] We do not advise on any matter of domestic Hungarian law. Our understanding of the meaning and effect (as a matter of Hungarian law) of the Coronavirus Act and the Decrees issued under it is based on the instructions we have received. We gratefully acknowledge the assistance that we have received from the Hungarian Civil Liberties Union, the Hungarian Helsinki Committee, Mérték, the Open Society Justice Initiative and the Open Society European Policy Institute.

[2] See the Opinion of Advocate-General Sánchez-Bordona in C-78/18 *European Commission v Hungary* (14 January 2020), which concludes that the law in question violates Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights. The judgment of the Court of Justice of the European Union is awaited.

The World Health Organization declared the Covid-19 outbreak a Public Health Emergency of International Concern on 30 January 2020, and a pandemic on 11 March 2020. The Hungarian Government issued a Decree declaring a "*state of danger*" the same day (Government Decree 40/2020).

2.3. Many countries, including several EU Member States, passed emergency legislation intended to limit the spread of Covid-19 and assist in tackling its effects. The legislation promulgated in Hungary following the declaration of the "*state of danger*" is, however, unusual by comparison with most other Member States, in view of: (i) the breadth of the powers that the Coronavirus Act conferred upon the Government; (ii) the absence, when enacted, of any definite temporal limit on those powers; and (iii) the Government's use of the powers to issue Decrees which purport to suspend the application of aspects of EU law.

2.4. On 17 April 2020, the European Parliament passed a resolution which described the measures adopted in Hungary as "*totally incompatible with European values*". The Parliament called on the Commission "*to urgently assess whether the emergency measures are in conformity with the Treaties and to make full use of all available EU tools and sanctions to address this serious and persistent breach*".

2.5. On 26 May 2020 the Hungarian Government submitted to the Hungarian Parliament a Bill on Terminating the State of Danger and a Bill on Transitional Provisions related to the Termination of the State of Danger. These Bills are at present only available in Hungarian, but we are instructed that the first provides for Parliament to call upon the Government to terminate the "*state of danger*". We are also instructed that, if and when the Bill is passed, Parliament's call does not in any way oblige the Government to terminate the "*state of danger*". It therefore remains unclear for how long the "*state of danger*" will last, although press reporting has suggested it may be ended on 20 June 2020.[3] Whether or not the "*state of danger*" is ended on that date, the legislation that has been adopted raises fundamental concerns of wider and enduring significance for the rule of law in the European Union, for the reasons set out below. If those concerns are left unaddressed they set a dangerous precedent as a matter of basic constitutional principle.

3. We have reviewed the Coronavirus Act, and a number of the Decrees issued thereunder. We understand that there have been over 145 such Decrees, and we focus in this Opinion,

[3] See, e.g., https://www.reuters.com/article/health-coronavirus-hungary-emergency/hungary-to-end-state-of-emergency-on-june-20-justice-minister-idUSL8N2D81LG

by way of example, on Government Decree 74/2020 on certain procedural measures applicable during the period of state of danger (**"the Procedural Decree"**); Government Decree 85/2020 on the specific domestic and administrative rules applicable during a state of danger (**"the Expulsion Decree"**); and Government Decree 179/2020 on the derogation from the specific data protection and data request provisions during the state of danger (**"the Data Protection Decree"**).

4. **In summary, we conclude:**

   4.1. **The overly broad and temporally indefinite enabling powers granted by the Coronavirus Act, as enacted, represent a serious threat to the rule of law, and are thus inconsistent with the values of the EU identified in Article 2 TEU.**

   4.2. **There are several respects in which Decrees issued under the Coronavirus Act plainly violate EU law, and go against the principles of the Charter of Fundamental Rights ("the Charter").**

   4.3. **The new offence created by Section 10 of the Coronavirus Act (Article 337 of the Criminal Code, which criminalises the dissemination of any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection, with minimum imprisonment of one year) also violates certain EU Directives and the Charter.**

5. We emphasise that the Decrees we have analysed are illustrative in nature and the fact that we focus on only these should not be taken as any indication that the problems we refer to are confined to them.

THE ENABLING POWERS IN THE CORONAVIRUS ACT

6. The key provisions of the Coronavirus Act are as follows:

   6.1. The preamble identifies the purpose of the Coronavirus Act as *"granting authorisation to the Government to extend the applicability of its decrees adopted during the period of state of danger, and determining the framework for this authorisation"*.

   6.2. Section 2 provides:

> *"(1) During the period of the state of danger…the Government may, in order to guarantee that life, health, person, property and rights of the citizens are protected, and to guarantee the stability of the national economy, by means of a decree, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.*

> *(2) The Government may exercise its power under paragraph (1) for the purpose of preventing, controlling and eliminating the human epidemic referred to in the Decree* [i.e. Decree 40/2020, in which the Government had declared the "*state of danger*"]*, and preventing and averting its harmful effects, to the extent necessary and proportionate to the objective pursued*".

6.3. Section 3 authorises the Government to extend the applicability of Decrees adopted during the "*state of danger*" until the end of the period of the "*state of danger*".[4] The full text of Section 3 is as follows:

> *"(1) On the basis of Article 53(3) of the Fundamental Law, the National Assembly authorises the Government to extend the applicability of the government decrees under Article 53(1) and 53(2) of the Fundamental Law adopted in the state of danger until the end of the period of the state of danger.*
>
> *(2) The National Assembly may withdraw the authorisation under paragraph (1) before the end of the period of state of danger.*
>
> *(3) The National Assembly confirms the government decrees referred to in paragraph (1) that have been adopted after the entry into force of the Decree, but before the entry into force of this Act."*

6.4. Section 4 requires the Government to provide information on measures taken to eliminate the "*state of danger*" to the National Assembly or, if the National Assembly is not sitting, to its Speaker and the leaders of parliamentary groups.

6.5. Section 5 provides for the continuous operation of the Constitutional Court during the "*state of danger*".

6.6. Section 6 postpones until after the end of the "*state of danger*" the entry into effect of any declaration of the dissolution of a representative body of local government or a national minority self-government; provides that no by-elections or referendums shall be held until after the end of the "*state of danger*"; and suspends certain time limits pertaining to referendums and the European Citizens' Initiative.

6.7. Section 10 creates certain new criminal offences, which we discuss further below.

7. We note the following points about the enabling powers in Sections 2 and 3 of the Coronavirus Act:

7.1. We are instructed that the effect of Section 2(1), as a matter of Hungarian law, is that the Government is empowered to suspend <u>any</u> legislation passed by the National Assembly, and to take <u>any</u> measures that it sees fit. The only material constraints on

[4] We are instructed that, absent this authorisation, the validity period of the Decrees would have been limited to 15 days.

these powers are that they must be exercised (i) consistently with the Hungarian Constitution; (ii) for the purposes specified in the Coronavirus Act; and (iii) only to such extent as is "*necessary and proportionate to the objective pursued*".

7.2. The purposes for which the Government is empowered to issue Decrees are very broad and ill-defined. The power is not confined to measures aimed at preventing or controlling the spread of Covid-19, but extends to measures aimed at "*preventing and averting its harmful effects*" (see Section 2(2)). We assume that the Covid-19 pandemic has affected most aspects of life in Hungary (as in other countries), and that many of those effects could reasonably be characterised as *"harmful"*. The Coronavirus Act therefore confers on the Government a power to issue Decrees on an extremely wide range of matters (for instance, economic and social issues as well as narrow health issues).

7.3. The purposes for which the Government is authorised to act discriminate on grounds of nationality. Section 2(1) empowers the Government to act *"in order to guarantee that life, health, person, property and rights of the citizens are protected"*. The Government is not empowered to act to protect the life, health, person, property or rights of non-citizens who are lawfully present in Hungary, including nationals of other EU member states.

7.4. The powers are conferred for the duration of the "*state of danger*", and the Government is authorised to extend the validity of its Decrees until the end of the period of the "*state of danger*". As explained above, it is not presently known how long the "*state of danger*" will last, but regardless of when it is brought to an end the effect of the Coronavirus Act on enactment was to confer extraordinary powers on the Government for an indeterminate period. This contrasts markedly with the emergency legislation adopted in other EU member states, which typically included a "*sunset clause*" providing that the legislation will expire after a specified number of days or months, unless renewed by Parliament.

8. Any provision which permits the Executive to suspend legislation passed by Parliament and/or rule by decree undermines the rule of law. The threat to the rule of law is especially serious if, as in the present case, the power is broad in scope and/or without strict and express temporal limit or strict rational connection to those areas where urgent response to the Covid-19 pandemic or its consequences is required.[5] Such safeguards as the

[5] For authoritative guidance on the applicability of fundamental rule of law principles in emergency situations, see the Council of Europe information document *"Respecting democracy, rule of law and human*

Coronavirus Act incorporates do little to address our concerns regarding the threat that it poses to the rule of law:

8.1. Notwithstanding the stipulation that the powers conferred by the Coronavirus Act may only be exercised "*to the extent necessary and proportionate to the objective pursued*", the Government has adopted Decrees which impose blanket provisions that are neither necessary nor proportionate to any of the objectives identified in the Coronavirus Act. Thus, for example, the Data Protection Decree purports to prohibit data controllers from complying with their obligations under the General Data Protection Regulation (Regulation (EU) 2016/679, **"GDPR"**) in relation to certain types of data processing, even in circumstances where they could comply with those obligations without any adverse effect on the objectives identified by the Coronavirus Act: see further below.

8.2. Section 3(2) provides that the National Assembly may withdraw the authorisation to extend the applicability of Decrees, and Section 4 imposes on the Government a (relatively vague) obligation to provide information to the National Assembly. We do not consider these to provide strong safeguards since (i) the preamble to the Coronavirus Act and Section 4 contemplate that the National Assembly may cease to sit; and (ii) Section 3(2) means that the authorisation remains in place unless and until the National Assembly withdraws it (or the Government declares an end to the "*state of danger*"). This is a much weaker safeguard than a sunset clause, under which the default position is for powers to terminate after a specified period.

8.3. We are not in a position to assess whether the Coronavirus Act and/or any of the Decrees adopted thereunder breach the Hungarian Constitution. Nor are we in a position to assess the effectiveness of the Hungarian courts. Even if the Hungarian courts are robustly independent of the Executive, however, this would not significantly allay our concerns about the rule of law, given that (i) the powers conferred by the Coronavirus Act are very wide, which is likely to reduce the extent to which the courts can control their exercise; (ii) the courts can only constrain unlawful Executive actions insofar as litigants with standing choose to challenge such actions; (iii) we understand that the rules which govern standing to bring constitutional challenges in Hungary are relatively restrictive; and (iv) there is likely

rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states" (SG/Inf(2020)11, 7 April 2020) and the European Commission for Democracy through Law's *"Compilation of Venice Commission Opinions and Reports on States of Emergency"* (16 April 2020).

to be a substantial period of time between the implementation of legislation and the conclusion of any legal challenge to it. So far as we are aware, the Hungarian courts have not declared any of the Decrees issued under the Coronavirus Act to be unlawful, despite (as we explain below) the obvious breaches of EU law to which certain of them give rise.

9. Even if the "*state of danger*" were now swiftly brought to an end, this would not dispose of our concerns about the threat to the rule of law which the Coronavirus Act represents. First, we are instructed that, in practice, a call by the National Assembly for the Government to end the "*state of danger*" (through passage of the Bill on Terminating the State of Danger) would essentially be a call from the Government to itself, since the Bill was submitted by the Government.[6] The ending of the "*state of danger*" would therefore in effect be an exercise of executive discretion, rather than evidence of any effective rule of law constraint on executive power. The inroads into the rule of law and the requirements of EU law arose from the outset. Moreover, the threat to the rule of law arises not from the mere promulgation of a particular piece of extraordinary legislation, but also from any failure by those in a position of oversight (e.g. the Courts, and the EU Commission) to challenge it – if encroachments on the rule of law are allowed to go unchallenged, there is a grave risk that they will become normalised. In this sense the fact that the Government may choose to bring the extraordinary powers it has claimed to an end is irrelevant, and it remains imperative that oversight bodies take action to uphold basic democratic principles and to safeguard the rule of law for the future. In this regard, we are reminded of the salutary words of Jackson J in his famous dissent in Korematsu v United States 323 US 214, 245-6:

> *"Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new*

[6] We are instructed that the Government could end the *"state of danger"* without such a call, simply by issuing a Decree at any time it sees fit.

purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic.""[7]

10. <u>For the reasons above, we consider the enabling powers in the Coronavirus Act to be seriously prejudicial to the rule of law, and thus inconsistent with the foundational values of the EU identified in Article 2 TEU. Even if the "*state of danger*" were ended in the near future, this would not dispel our concerns about the rule of law.</u>

<u>DECREES ISSUED UNDER THE CORONAVIRUS ACT</u>

<u>The Procedural Decree</u>

11. Section 36 of the Procedural Decree provides:

> *"…in proceedings falling within the scope of* [Act I of 2017 on the Code of Administrative Court Procedure]*, interim relief shall not be granted if an administrative act is connected to the elimination of the consequences of the human epidemic endangering life and property and causing massive disease outbreaks or to the protection of the health and lives of Hungarian citizens."*

12. The "*consequences*" of Covid-19 pervade most aspects of society, and an administrative act need only be "*connected to*" the elimination of those consequences to fall within this provision. The effect of Section 36 is therefore to preclude the possibility of interim relief in challenges to a very wide range of administrative acts.

13. We are instructed that certain proceedings within the scope of Act I of 2017 will involve issues of EU law. To the extent that this is so, Section 36 of the Procedural Decree will fall within the scope of EU law, and the CJEU has held that a Member State cannot bar the availability of interim relief in cases involving issues of EU law:

    13.1. In <u>*R v Secretary of State for Transport ex parte Factortame Ltd*</u> [1990] 3 CMLR 867, the CJEU said: "*Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule*" (§23).

    13.2. In C-393/96P(R) <u>*J. Antonissen v EU Council and EC Commission*</u> [1997] 1 CMLR 783, §36, the CJEU said that an absolute prohibition on the availability of interim relief

[7] Jackson J's words were cited with approval by Lord Hope in the United Kingdom in <u>*A v Secretary of State for the Home Department (No 2)*</u> [2005] UKHL 71, [2006] 2 AC 221, §113. The decision of the majority in <u>*Korematsu*</u> has since been recognised (including by the Supreme Court itself) as incorrect, even at the time it was decided.

"would not be compatible with the right of individuals to complete and effective judicial protection under Community law".

14. As the quotation from *Antonissen* emphasises, interim relief is in some cases necessary if a litigant is to have an effective remedy, since without interim relief he/she would suffer serious and irreparable prejudice. For this reason, the denial of interim relief is likely to give rise in some cases to violations of the right to an effective remedy in Article 47 of the Charter.

15. We therefore consider that, insofar as Section 36 of the Procedural Decree purports to prohibit Hungarian Courts from granting interim relief in cases involving issues of EU law, it is contrary to EU law and likely to give rise to breaches of the Charter.

The Expulsion Decree

16. Sections 4 and 5 of the Expulsion Decree provide for derogations, during the period of the *"state of danger"*, from Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence and Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals. The effect of these derogations is to remove the right to apply for interim relief from certain persons who are subject to expulsion decisions.

Provisions applicable to EEA nationals and their family members

17. Section 5(2) of the Expulsion Decree provides:

> *"During the state of danger, the aliens policing authority shall enforce the ordered expulsion of an EEA national or a family member of an EEA national due to an epidemiological infringement violating Section 361 of the Criminal Code, and imposed on the basis of Section 40(2)(c) of the Act on Free Movement* [i.e. Act I of 2007], *to be carried out with an official escort.* ***The expelled EEA national or family member of an EEA national cannot apply for interim relief during the administrative court action against the decision****."*

18. As to the legislation to which this provision refers:

    18.1. We are instructed that the effect of Section 361 of the Criminal Code is (in broad terms) to criminalise breaches of quarantine restrictions. The maximum penalty for a violation of Section 361 is 90 days' detention (and, in the case of some types of violation, the maximum penalty is lower).

18.2. Section 40(2)(c) of the Act on Free Movement provides that the competent immigration authority may expel from Hungary an EEA national or a family member of an EEA national who "*represents a genuine, present and sufficiently serious threat affecting public policy, public security or national security of Hungary, if granted the right of entry or residence*".

18.3. We are instructed that a person does not need to be convicted of an offence under Section 361 of the Criminal Code for Section 5(2) of the Expulsion Decree to be engaged. Rather, Section 5(2) is engaged where (i) a law enforcement agency considers that a person has engaged in conduct that would amount to a violation of Section 361 of the Criminal Code, and declares him/her a threat to public order; and (ii) the aliens policing authority expels the person under Section 40(2)(c) of the Act on Free Movement on that basis.

19. EU citizens and their family members have extensive rights of free movement and residence in other Member States, by virtue of Articles 20-21 TFEU and the Citizens' Rights Directive (Directive 2004/38/EC). The extent to which Member States are permitted to restrict the exercise of those rights is defined by Articles 27-33 of the Citizens' Rights Directive. Those Articles include the following provisions:

19.1. Member States may, subject to the provisions of Articles 27-33, restrict the freedom of movement and residence of EU citizens and their family members "*on grounds of public policy, public security or public health*", but these grounds "*shall not be invoked to serve economic ends*" (Article 27(1)).

19.2. "*Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted*" (Article 27(2)).[8]

19.3. Article 28 sets out a non-exhaustive list of factors to be considered prior to any expulsion decision on grounds of public policy or public security, and affords heightened protection against expulsion to persons with a right of permanent residence, persons who have resided in the host Member State for the previous 10

[8] This reflects the principles developed in C-30/77 *R v Bouchereau* [1978] 1 QB 732 and subsequent cases.

years, and minors. Specifically, Article 28(3) stipulates that EU citizens who are minors and/or have resided for the previous 10 years can only be expelled on *"imperative grounds of public security"*.[9]

19.4. Article 29 limits the extent to which public health grounds can be invoked to justify restrictions on freedom of movement. In particular, diseases occurring more than three months after a person's arrival (after which time they are in effect treated as integrated, if lawfully resident) cannot constitute grounds for expulsion.

19.5. Articles 30 and 31 provide that anyone whose rights of freedom of movement and/or residence are to be restricted on grounds of public policy, public security or public health must be notified in writing, and have access to judicial (and, where appropriate, administrative) redress procedures to appeal against or seek review of the relevant decision.

19.6. Article 31(2) provides:

> *"Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:*
>
> - *where the expulsion decision is based on a previous judicial decision; or*
> - *where the persons concerned have had previous access to judicial review; or*
> - *where the expulsion decision is based on imperative grounds of public security under Article 28(3)".*

19.7. "*Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29"* (Article 33(1)).

20. Section 5(2) of the Expulsion Decree is plainly within the scope of EU law, and is inconsistent with Article 31(2) of the Citizens' Rights Directive:

20.1. Article 31(2) of the Citizens' Rights Directive stipulates that, where an application for interim relief is made in respect of an expulsion decision, the applicant must not be expelled until the application has been determined, subject to three narrow exceptions. This presupposes that an EU citizen or family member who is subject to an expulsion decision should have the possibility to apply for interim relief, and is consistent with the principle in *Factortame* (see above). The effect of Section 5(2) of the Expulsion Decree, however, is to impose a blanket bar on the availability of

[9] A minor can also be expelled if the expulsion is necessary for his/her best interests.

interim relief to all persons who have been made subject to an expulsion decision under Section 40(2)(c) of the Act on Free Movement on the basis that a law enforcement agency considers that they have engaged in conduct amounting to an epidemiological infringement and has declared them to be a threat to public order on such grounds.[10]

20.2. The exceptions stipulated by Article 31(2) of the Citizens' Rights Directive are where the expulsion decision is based on a previous judicial decision or "*imperative grounds of public security*", or the persons concerned have had previous access to judicial review. Even where one of those exceptions applies, however, Article 31(2) simply permits removal prior to the determination of an application for interim relief – it does not say that a person may be denied the possibility of applying for interim relief at all. In any event, persons who have been made subject to an expulsion decision under Section 40(2)(c) of the Act on Free Movement on the basis that they have engaged (or are believed to have engaged) in conduct that would amount to an epidemiological infringement will not necessarily fall within any of the exceptions set out in Article 31(2) of the Citizens' Rights Directive. In this regard, it should be noted (i) that the threshold of "*imperative grounds of public security*" is higher than that stipulated in Section 40(2)(c) of the Act on Free Movement ("*represents a genuine, present and sufficiently serious threat affecting public policy, public security or national security*");[11] and (ii) that the maximum penalty for an epidemiological infringement is only 90 days' detention, which we are instructed indicates that it is a relatively minor offence in the wider context of the system of sanctions in Hungarian law.

21. We also consider that the denial of the possibility to apply for interim relief is likely, at least in certain cases, to breach Article 47 of the Charter, which provides: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy…*". Expulsion will commonly involve substantial interferences with a variety of EU law rights, including (e.g.) the right to respect for private and family life guaranteed by Article 7 of the Charter. In some cases, expulsion will give rise to serious and irreparable harm, e.g. through the break-up of a family unit. As such, interim relief may be necessary if a person subject to an expulsion decision is to have an effective remedy.

[10] Note that, even if an EU citizen or family member has been convicted of an epidemiological infringement, it would be contrary to Article 27(2) of the Citizens' Rights Directive to expel him/her as an automatic consequence of that conviction.

[11] On the high bar that "*imperative grounds of public security*" represents, see C-145/09 *Land Baden-Württemberg v Tsakouridis* [2011] 2 CMLR 11, 261, §§39-41.

22. <u>We therefore consider that Section 5(2) of the Expulsion Decree is (i) inconsistent with the Citizens' Rights Directive, and thus contrary to EU law; and (ii) likely to give rise to breaches of the Charter.</u>

<u>Provisions applicable to Third-Country Nationals</u>

23. Section 5(1) of the Expulsion Decree provides:

> *"A third-country national, who has been expelled due to an epidemiological infringement violating Section 361 of Act C of 2012 on the Criminal Code…, and imposed on the basis of Section 43(2)(d) of the Act on Third-Country Nationals* [i.e. Act II of 2007], ***<u>cannot apply for interim relief during the administrative court action against the decision</u>***."

24. Section 43(2)(d) of the Act on Third-Country Nationals provides that the immigration authority *"shall order the expulsion of a third-country national under immigration laws…whose entry and residence represents a threat to national security, public security or public policy"*. As with Section 5(2) of the Expulsion Decree, we are instructed that a person does not need to be convicted of an offence under Section 361 of the Criminal Code for Section 5(1) to be engaged – Section 5(1) is engaged where the immigration authority expels a person under Section 43(2)(d) of the Act on Third-Country Nationals, on the basis that a law enforcement agency has concluded that he/she has committed an epidemiological infringement and is a threat to public order.

25. We consider that Section 5(1) of the Expulsion Decree gives rise to a clear breach of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (**"the Returns Directive"**):

    25.1. Article 13(1) of the Returns Directive provides that a third-country national who is subject to a removal decision *"shall be afforded an effective remedy to appeal against or seek review of decisions related to return…before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence"*.[12]

    25.2. Article 13(2) stipulates that such an authority or body *"shall have the power to review decisions related to return…including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national*

[12] The CJEU has very recently emphasised, in the context of a reference from Hungary under Article 267 TFEU, the need for an effective remedy under Article 13 of the Returns Directive: C-924/19 PPU and C-925/19 PPU <u>*FMS v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*</u> (14 May 2020).

legislation". As such, third-country nationals are entitled, as a matter of EU law, to apply for interim relief when challenging an expulsion decision. The effect of Section 5(1) of the Expulsion Decree is to deny them that right.

25.3. Article 2(2)(b) of the Returns Directive provides that Member States may decide not to apply the Directive to third-country nationals who *"are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures"*. This does not, however, permit Member States to introduce legislation like Section 5(1) of the Expulsion Decree, the effect of which is to deny the protection of Article 13(2) of the Returns Directive to persons who have not been convicted of any offence (and whose expulsion therefore cannot constitute a criminal law sanction, or a consequence of a criminal law sanction).

26. Further, the denial of the possibility to apply for interim relief is likely, at least in some cases, to give rise to violations of the Charter: the reasoning at paragraph 21 above in relation to EEA nationals and their family members applies to third-country nationals too. Indeed, it is likely that expulsions of third-country nationals will in some cases give rise to even graver violations of fundamental rights, e.g. through persons being returned to states in which there is a real risk of their being killed or subjected to torture or inhuman or degrading treatment or punishment (contrary to Articles 2 and 4 of the Charter).

27. <u>We therefore consider that Section 5(1) of the Expulsion Decree is (i) inconsistent with the Returns Directive, and thus contrary to EU law; and (ii) likely to give rise to breaches of the Charter.</u>

<u>The Data Protection Decree</u>

28. Section 1 of the Data Protection Decree makes provision, until the termination of the "*state of danger*", in relation to personal data that are processed *"in order to prevent, identify and detect coronavirus cases, as well as prevent its spread, including the organization of the coordinated performance of tasks by the public bodies in relation to this"*. In broad terms, Section 1 purports to suspend certain provisions of the GDPR in relation to data processed for such purposes, for the duration of the "*state of danger*".

Suspension of Articles 15-22 GDPR

29. Section 1(2) of the Data Protection Decree stipulates that, in relation to such data processing, all measures to be taken in relation to requests submitted for the purpose of exercising rights under Articles 15-22 GDPR "*must be suspended until the termination of the state of danger, furthermore, the starting date of the applicable time limits for these measures shall be the day after the termination of the state of danger*". The purported suspension of parts of the GDPR is plainly a matter falling within the scope of EU law.

30. Articles 15-22 GDPR include the following:

    30.1. Article 15 provides that a data subject has the right to obtain from a data controller confirmation as to whether or not personal data concerning him/her are being processed and, where that is the case, access to the personal data and certain information in relation to the data (e.g. the purposes of the processing).

    30.2. Article 16 provides that a data subject has the right to obtain from a data controller, without undue delay, the rectification of inaccurate personal data concerning him/her.

    30.3. Article 17 provides, subject to various exceptions, that a data subject has the right to obtain from a data controller the erasure of personal data concerning him/her without undue delay.

    30.4. Article 18 provides that, in certain circumstances, a data subject may require a data controller to restrict the processing of his/her personal data in certain ways.

    30.5. Article 20 provides for a right to data portability, i.e. a data subject has the right, in certain circumstances, to require a data controller to provide him/her with his/her personal data in a machine-readable format, and to transmit those data to another controller without hindrance.

    30.6. Article 21 provides that a data subject has a right to object to certain processing of personal data concerning him/her.

    30.7. Article 22 provides, subject to certain exceptions, that a data subject has the right not to be subject to certain decisions based solely on automated processing.

31. Article 12 GDPR includes the following provisions in relation to requests made under Articles 15-22:

    31.1. "*The controller shall provide information on action taken on a request under Articles 15 to 22 to the data subject without undue delay and in any event within one month of receipt of*

the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. The controller shall inform the data subject of any such extension within one month of receipt of the request, together with reasons for the delay…" (Article 12(3)).

31.2. *"If the controller does not take action on the request of the data subject, the controller shall inform the data subject without delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy"* (Article 12(4)).

31.3. Article 12(5) provides that a controller may refuse to act on requests which are *"manifestly unfounded or excessive"*.

32. Article 23 GDPR provides that Member State law *"may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22"*. Any such restriction must respect *"the essence of the fundamental rights and freedoms"* and be *"a necessary and proportionate measure in a democratic society"* to safeguard (inter alia) public security, the protection of the data subject or the rights and freedoms of others.

33. Thus, it is in principle permissible for a Member State to derogate from the provisions of Articles 12-22 of the GDPR. We consider, however, that the derogation in Section 1(2) of the Data Protection Decree does <u>not</u> satisfy the requirements of Article 23 GDPR, and is thus contrary to EU law. Our reasons are as follows:

33.1. The derogation is of sweeping breadth: it prohibits for a theoretically indefinite period <u>all</u> measures to give effect to <u>all</u> of the rights in Articles 15-22 GDPR, in relation to personal data that are being processed for certain purposes. It should be noted that the derogation does not merely permit data controllers to refrain from complying with Articles 15-22 GDPR – it <u>obliges</u> them to refrain from taking any steps to comply. We do not see how such a sweeping measure could be compatible with the essence of the rights in Articles 15-22 GDPR.

33.2. Further and in any event, we consider that such a sweeping measure is manifestly not *"necessary and proportionate…in a democratic society"*:

33.2.1. In order to be *"necessary in a democratic society"*, a derogation from a fundamental right must be *"justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued"*: C-112/00 <u>*Schmidberger, Internationale Transporte und Planzüge v Austria*</u> [2003] 2 CMLR 34, §79.

33.2.2. It is unclear what (if any) legitimate aim or pressing social need the derogation is intended to promote.

33.2.3. Even if the aim of the derogation is in some way to facilitate efforts to address Covid-19, we consider the derogation from Articles 15-22 GDPR to be disproportionate. The derogation is in blanket terms, and takes no account of whether, in any particular case, a data controller could take steps towards compliance with a request before the end of the "*state of danger*", without in any way undermining efforts to combat Covid-19. In particular, it is quite extraordinary that there should be a blanket prohibition on data controllers taking steps to respond to a request to rectify erroneous personal data that is being processed in relation to Covid-19. We therefore consider that the derogation goes far beyond anything which might be necessary to combat Covid-19, and that it is therefore disproportionate.

34. The derogation from Articles 15-22 GDPR is also likely to give rise to breaches of Article 8 of the Charter, which provides that "*everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified*". Section 1(2) of the Data Protection Decree prohibits data controllers from giving effect to those rights. The Decree may also give rise to breaches of Article 11 of the Charter, which provides for freedom to receive and impart information – the effect of Section 1(2) is to prohibit data controllers from imparting certain information to data subjects, and thus to prevent data subjects from receiving such information. Article 52 of the Charter provides for limitations on the rights therein, but stipulates that such limitations must be necessary and proportionate. For the reasons above, we consider that the derogation in Section 1(2) of the Data Protection Decree does not satisfy these requirements.

35. We therefore consider that Section 1(2) of the Data Protection Decree is (i) inconsistent with the GDPR, and thus contrary to EU law; and (ii) likely to give rise to breaches of the Charter.

Postponement of the start date of time limits for procedures under Articles 77-79 GDPR

36. In addition, Section 1(4) of the Data Protection Decree provides:

> *"With regards to data processing for the purpose specified in paragraph (1)* [i.e. processing for purposes relating to Covid-19]*, in the event that the rights determined in Article 77-79 of the General Data Protection Regulation…are enforced, the starting date of the time limit for*

the procedure based on the notification, request or statement of claim shall be the day following the termination of the state of danger."

37. Articles 77-79 GDPR provide as follows:

    37.1. Article 77 provides that every data subject shall have the right to complain to a supervisory authority if he/she considers that the processing of personal data relating to him/her infringes the GDPR. This right is expressly without prejudice to any other administrative or judicial remedy.

    37.2. Article 78 provides for rights of effective remedy against the supervisory authority. Specifically, it provides (i) that each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them; and (ii) that each data subject shall have the right to an effective judicial remedy where a supervisory authority *"does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77"*.

    37.3. Article 79 provides that each data subject shall have the right to an effective judicial remedy against a controller or processor if he/she considers that the processing of personal data relating to him/her infringes the GDPR. This right is expressly without prejudice to any administrative or non-judicial remedy, including the right to lodge a complaint under Article 77.

38. We are instructed that Section 1(4) of the Data Protection Decree does not prevent a data subject from making a complaint under Article 77 GDPR during the *"state of danger"*, but that it purports to postpone the start of the 3-month period (prescribed by Article 78 GDPR) for the supervisory authority to inform a data subject on the progress or outcome of such a complaint – the 3-month period will only start to run from the end of the *"state of danger"*, and not from the lodging of the complaint. We are unaware of any basis on which Hungary would be entitled to extend the period for the supervisory authority to respond to a complaint in this way. We therefore consider that Section 1(4) of the Data Protection Decree breaches Article 78 GDPR.

39. We are instructed that it is unclear what effect, if any, Section 1(4) of the Data Protection Decree has on legal proceedings initiated under Articles 78 or 79 GDPR, since those Articles do not stipulate any time limit within which a court/tribunal must progress or determine a claim. If, however, courts/tribunals fail to progress and determine claims with sufficient promptness, this may mean that some data subjects suffer irremediable

prejudice in the meantime, such that there is a violation of the right to an effective remedy under (i) Articles 78 and/or 79 GDPR; and/or (ii) Article 47 of the Charter (as well as a violation of Article 8 of the Charter, which enshrines the right to protection of personal data).

40. We therefore consider (i) that Section 1(4) of the Data Protection Decree is inconsistent with the GDPR, and thus contrary to EU law; and (ii) that any delays in the progression or determination of legal proceedings initiated under Articles 78 and/or 79 GDPR may give rise to breaches of those provisions and of the Charter.

THE CRIMINALISATION PROVISIONS IN THE CORONAVIRUS ACT

41. Section 10 of the Coronavirus Act inserts new criminal offences into the Criminal Code.

42. Section 10(2) creates a new offence of "*Obstructing epidemic containment*". It provides

> "*Section 322/A*
>
> *(1) A person who obstructs the carrying out*
> *a) of an epidemiological isolation, observation, quarantine or monitoring ordered for the prevention of the introduction or spread of an infectious disease subject to compulsory quarantine,*
> *b) of an epidemiological isolation, observation, quarantine or monitoring during an epidemic,*
> *c) of a phytosanitary- or epizootic-related measure ordered to prevent the importation, exportation or spread of an infectious animal disease or a plant quarantine pest, or to eliminate its occurrence,*
> *is guilty of a felony and shall be punished by imprisonment for up to three years.*
>
> *(2) The punishment shall be imprisonment for one to five years if the criminal offence is committed by a group.*
> *(3) The punishment shall be imprisonment for two to eight years if the criminal offence causes death.*
> *(4) A person who commits preparation for obstructing epidemic containment shall be punished by imprisonment for up to one year.*"

43. Section 10(2) replaces the existing Section 337, as follows (with the additions to the Code underlined):

> "***Section 337*** *(1) A person who, at a site of public danger and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact <u>with regard to the public danger</u> that is capable of causing disturbance or unrest in a larger group of persons at the site of public danger is guilty of a felony and shall be punished by imprisonment for up to three years.*
>
> *<u>(2) A person who, during the period of a special legal order and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of</u>*

hindering or preventing the efficiency of protection is guilty of a felony and shall be punished by imprisonment for one to five years".

44. Section 337(2) is inconsistent with EU law in a number of respects.

The requirements of the e-Commerce Directive

45. First, it is inconsistent with the requirements of Directive 2000/31/EC on electronic commerce (**"the e-Commerce Directive"**).

46. Article 3(2) of the e-Commerce Directive provides that Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

47. The "*coordinated field*", as defined by Article 2(h), includes requirements with which an information society service provider has to comply in respect of "*the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service … or requirements concerning the liability of the service provider*". Requirements fall within the coordinated field "*regardless of whether they are of a general nature or specifically designed for* [information society services]".

48. Section 337(2) of the Criminal Code, in criminalising the dissemination of any untrue fact or any misrepresented true fact, imposes requirements regarding the quality and content of information society services and as such falls within the coordinated field.

49. Information society services[13] include websites which provide news information. Such websites provide information on demand, at a distance, by electronic means and which is

[13] Defined in article 2(a), by reference to Directive 98/34/EC. Since Directive 2015/1535 entered into force, the reference must be understood as being to article 1(1)(b) of the later Directive: see EU:C:2019:1112 *Airbnb Ireland UC* at §9. Article 1(1) of Directive 2015/1535 provides: '*For the purposes of this Directive, the following definitions apply:*
… (b) "service" means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.
For the purposes of this definition:
(i) "at a distance" means that the service is provided without the parties being simultaneously present;
(ii) "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
(iii) "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request".

normally provided for remuneration.[14] An information society service established in a Member State other than Hungary, providing services into Hungary, now finds that individuals providing reporting on Hungarian matters are committing a criminal offence, carrying a minimum term of one year's imprisonment, to the extent that their reporting of true facts could be characterised as a misrepresentation. This plainly has a chilling effect on journalists and restricts the provision of information society services. As noted in recital (9) to the e-Commerce Directive the free movement of information society services can in many cases be a specific reflection in EU law of the general principle of freedom of expression, as enshrined in Article 10(1) of the ECHR. The threat of prosecution plainly can chill the exercise of free speech rights.[15] The subjective and vague nature of the conduct proscribed by Section 337(2) is such that it prohibits legitimate reporting of true facts. There would be jurisdiction, as a matter of Hungarian law, over a foreign journalist (for example a French journalist) whose work is disseminated in Hungary because the act of dissemination in Hungary is committed within the territory of Hungary. A correspondent resident in Hungary but providing reporting to, for example, a French information society service, will be at particular risk of enforcement given their presence in the jurisdiction. In each situation, there is plainly a restriction on provision of the information society service.

50. Derogations from the prohibition of restrictions on the freedom to provide information society services are permitted. However, Article 3(4) of the e-Commerce Directive imposes conditions, both substantive and procedural, on the ability to so derogate. Those conditions have not been met in respect of the restriction in Section 337(2) of the Criminal Code.

51. As to the substantive requirements:

    51.1. First, Article 3(4)(a)(i) requires the measure to be necessary for reasons of public policy or the protection of public health. Whilst some instances of conduct which would be prohibited by Section 337(2) may well require to be restrained for reasons of public health, the breadth of the offence is such that it also penalises conduct which is not required to be prohibited for that reason. There is no requirement of a risk of harm to health. Conduct which is merely "*capable of hindering the efficiency of*

[14] The definition covers services (insofar as they represent an economic activity) that are not directly remunerated by those who receive them: see Joined Cases C-236/08 to C-238/08 *Google France SARL, Google Inc v Louis Vuitton Malletier SA* [2011] Bus LR 1.

[15] *Yilmaz Yildiz and others v Turkey*, Judgment of 14 October 2014 at §33.

protection" "*during the period of the special legal order*" is criminalised. There is no definition of the objective of the protection, nor or the measures in pursuit of that protection which, if hindered, will result in the commission of an offence. The conduct prohibited does not necessarily relate to a risk to health. It could extend, for example, to a risk to the efficiency of economic measures.

51.2. Second, Article 3(4)(a)(ii) and the body of Article 3(4) requires the measure to be taken against a "*given*" information society service which prejudices or presents a serious and grave risk of prejudice to the objectives in point (i). Section 337(2) is a general provision. No specific information society service has been identified which prejudices or presents a serious and grave risk of prejudicing public health; rather, the Section 337(2) offence is applicable to all information society services without qualification, with obvious chilling effects on free speech being risked thereby.

51.3. Third, the measure has to be proportionate. We have already outlined that the breadth of the offence goes beyond what is required for the protection of public health. An offence of such scope is not necessary to obtain this objective. The disproportionality of the provision is made plain by the contrast with Section 337(1). To offend under Section 337(1), the untrue or misrepresented true fact must relate to the public danger. By contrast, under Section 337(2) there is no requirement for the untrue or misrepresented fact to relate to the special legal order nor to Covid-19. In addition, the sanction imposed, with a minimum penalty of one year in prison (subject only, we understand, to the general mitigation provision in Section 83 of the Penal Code), is excessive, particularly in light of the absence of any required link between the conduct and any harm.

52. As to the procedural requirements for derogation:

52.1. First, the Member State in which the information society service is established is required to be contacted and asked to take measures against a service under that State's national provisions, which measures were then either not taken or were inadequate: see Article 3(4)(b) of the e-Commerce Directive, read with 3(1).

52.1.1. No risk has been identified in relation to any particular information society service and there is no provision of which we are aware requiring contact with the Member State in which the information society service to which a journalist suspected of offending is attached.

52.1.2. Further, and in any event, the measures taken within that Member State must be non-existent or inadequate. The adequacy of control over information society services in other Member States will be judged in light of the requirements of the Charter and Article 10(1) of the ECHR. Recital 9 of the e-Commerce Directive explains that "*directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of* [the right to free speech enshrined in Article 10(1) ECHR] *subject only to the restrictions laid down in paragraph (2) of that article and in Article 46(2) of the Treaty*". In light of the incompatibility of Section 377(2) with the right to freedom of expression (see further paragraphs 70 to 71 below), a Member State's refusal to prohibit certain conduct which would be criminalised under Section 377(2) will not be judged *"inadequate"* within the meaning of the Directive.

52.2. Second, Hungary is required to notify the Commission (as well as the Member State in which the related information society service is established) of its intention to take derogation measures (see Article 3(4)(b) of the e-Commerce Directive). We are unaware that any such notification has occurred.

53. Accordingly, neither the substantive nor procedural requirements for derogation have been satisfied.

54. We therefore consider that Section 337A of the Criminal Code is inconsistent with the requirements of Directive 2000/31/EC and thus contrary to EU law. Section 337A falls within the scope of this Directive and does not comply with the requirements for derogation from its requirements.

55. The provision in Section 337(2) is therefore unenforceable: see the decision of the Grand Chamber in EU:C:2019:1112 *Airbnb Ireland UC* at §§96-99 holding that a failure to notify the Commission in and of itself renders the domestic provision unenforceable, regardless of whether the measure satisfies the other conditions for derogation.

56. The Commission must urgently assess Section 337(2) of the Criminal Code and take action. The e-Commerce Directive requires the scrutiny of the Commission to be applied to measures which derogate from the prohibition on restricting freedom to provide information society services. Article 3(6) provides that the Commission "*shall examine the compatibility of the notified measures with community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission*

shall ask the Member State in question to retrain from taking any proposed measures or urgently to put an end to the measures in question".

The AVMS Directive

57. Section 337(2) of the Criminal Code is inconsistent with a number of provisions of the Audiovisual Media Services Directive (Directive 2010/13/EU, **"The AVMS Directive"**).

58. First, in relation to media providers based in other Member States, Article 3(1) of the AVMS Directive requires Member States to ensure freedom of reception and prohibits the restriction of retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by the Directive.

59. In criminalising the dissemination of any untrue fact or any misrepresented true fact, Section 337(2) of the Criminal Code restricts the freedom of reception in Hungary.

60. Although there is a possibility under Article 3(2) for derogation from the prohibition on restriction of retransmission, the conditions for derogation have not been satisfied in the case of Section 337(2) of the Criminal Code.

61. The analysis is similar to that under the e-Commerce Directive outlined above, which is not repeated in full.

62. As to the substantive requirements:

    62.1. First, the permissible basis for derogation is that there the service "*presents a serious and grave risk of prejudice to public health*". As outlined in paragraph 51.1 above, the breadth of Section 337(2) is such that there is no need for there to be a link between disseminated information and a risk to health.

    62.2. Second, the language of Article 3(2) requires that the risk to public health must be identified in relation to a particular audiovisual media service provider. Further, Article 3(2)(a) requires that during the previous 12 months the media service provider has on at least two prior occasions already performed one or more instances of conduct which prejudices or presents a serious and grave risk of prejudice to public health. However, Section 337(2) is a wholly general provision which does not satisfy these requirements.

    62.3. Third, any measures which provide for derogation are required to be proportionate, in light of the general principles of EU law and Article 3(2)(b) of the AVMS Directive (which indicates that the measures to be taken by the derogating Member State are

to be proportionate). For the reasons outlined above in relation to the e-Commerce Directive, this has not been satisfied.

63. As to the procedural requirements for derogation, Hungary is required under Article 3(2)(b) to notify the media service provider, the Member State having jurisdiction over that provider[16] and the Commission of the infringements alleged to have occurred in the preceding 12 months and the measures it intends to take should any such infringement occur again. Before any derogation, the media service provider is to be given the right to express its views (Article 3(2)(c)) and consultations with the Member State having jurisdiction and the Commission must not have resulted in amicable settlement (Article 3(2)(d)). Since no risk has been identified in relation to any particular media services provider, none of these requirements have been satisfied.

64. As with the derogations provided for in the e-Commerce Directive, the AVMS Directive prescribes a role for the Commission in assessing the compatibility of the measures with EU law: see Article 3(2), 3rd paragraph. Again, this is a reason why the Commission must act urgently to consider these measures.

65. As to media providers based in Hungary, although Article 4(1) of the AVMS Directive provides that Member States remain free to require media service providers under their jurisdiction (for example, those with a head office in Hungary) to comply with stricter rules in the fields coordinated by the Directive, those stricter rules are required to be "*in compliance with Union law*". As outlined immediately below, the requirements of EU law include the Charter (in particular Articles 11 and 49(3)) and the general principles of EU law. Section 337(2) of the Criminal Code is inconsistent with those provisions.

66. <u>We therefore consider that Section 337A of the Criminal Code is inconsistent with the requirements of the AVMS Directive and thus contrary to EU law. Section 337A falls within the scope of this Directive and does not comply with the requirements for derogation from its requirements.</u>

<u>The Charter</u>

67. Article 11 of the Charter provides that everyone has the right to freedom of expression, which includes the right to receive and impart information and ideas without interference by public authority and regardless of frontiers.

[16] Identified under the provisions of Article 2 of the AVMS Directive.

68. Article 52(1) of the Charter provides that "[a]*ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*".

69. The Charter is plainly applicable. Any derogation under the requirements of the e-Commerce Directive or the AVMS Directive must be in accordance with the requirements of the Charter. Further, the provision in Article 4(1) that any requirement of domestic law which is stricter than the requirements of the AVMS Directive be in accordance with Union law necessitates compliance with the Charter.

70. We consider that the offence in Section 377(2) is wider than permitted by Article 11 of the Charter. The prohibition of dissemination of certain facts is plainly a limitation on the freedom of expression. The breadth of the offence, outlined above in paragraph 51.1, is such that the conditions of necessity and proportionality imposed by Article 52(1) of the Charter are not satisfied. Conduct which is merely "*capable of hindering the efficiency of protection*" "*during the period of the special legal order*" is criminalised.

71. Further, Article 52 of the Charter requires that a measure be "*provided for by law*". Where an analogous requirement appears in the ECHR, the requirement is that the measure not only have an actual legal foundation, but that the law in question be (i) adequately accessible and (ii) formulated with sufficient precision. The point is that people must be able to ascertain and understand what the law is, so that they may regulate their conduct accordingly – see, e.g., Sunday Times v United Kingdom (1979-80) 2 EHRR 245 at §49. The offence in Section 337(2) falls foul of the "*formulated with sufficient precision*" requirement. It is wholly unclear, first, when reporting of a true fact will be classed as a "*misrepresentation*" of that fact and, second, when an untrue fact or misrepresented true fact will be classified as hindering or preventing the efficiency of protection. Indeed, the offence is vague as to the objective of the protection and the measures in pursuit of that protection which, if hindered, will result in the commission of an offence.

72. Article 49(3) of the Charter provides that "[t]*he severity of penalties must not be disproportionate to the criminal offence*". We consider the penalty of a minimum period of detention for one year is disproportionate, in light of the absence of any requirement of a link between the dissemination and any harm, and in the legitimate interest in reporting which such dissemination may pursue.

73. We therefore consider that Section 337A of the Criminal Code falls within the scope of application of the Charter and is inconsistent with the requirements of the Charter and thus contrary to EU law.

CONCLUSION

74. For the reasons above, we consider that the Coronavirus Act and certain Decrees issued thereunder violate both the foundational values of the EU (as set out in Article 2 TEU) and various specific provisions of EU law and the Charter.

75. As the Grand Chamber of the CJEU emphasised in the *Kadi* litigation relating to an earlier and different emergency context, and other ostensibly temporary measures: "*The Community is based on the rule of law inasmuch as neither its member states nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter …measures incompatible with respect for human rights are not acceptable in the Community*" (Joined Cases C-402/05P *Kadi v Council of the European Union* and C-415/05P *Al Barakaat International Foundation v Council of the European Union* [2009] 1 AC 1225, §§281-284). For the Hungarian Government to invoke an emergency context to take extraordinary and far reaching powers in breach of EU law and then (apparently) to bring them to an end at its discretion cannot, as a matter of principle, be a basis for avoiding that exercise of constitutional review. A failure to address breaches of EU law of the kind in issue in the present context would also set a dangerous precedent for the Union more broadly.

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