In the matter of the proposed Hungarian "Act No. … of 2017 on the Transparency of Organisations Receiving Foreign Funds".

OPINION

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1. We are asked to advise on the legality of the Bill "on the Transparency of Organisations Receiving Foreign Funds" ("the proposed Law"), published on 11 April 2017 and amended on 8 June 2017. We understand it is likely to be adopted by the Hungarian Parliament on 13 June. We are asked to consider its legality as matter of the fundamental freedoms of EU law. We are not asked to advise as to its legality under the Hungarian Constitution, or in relation to EU law on data protection.

Summary

2. The proposed Law applies to "associations and foundations" that qualify as Civil Society Organisations ("CSOs") as defined in the CSO Act[1] and are not otherwise excluded by Article 1(4)(b) and (c) ("**relevant CSOs**"). Where a relevant CSO receives direct or indirect funding in excess of the level provided in the proposed Law, it must register itself as an 'organisation receiving foreign funding', declare the source and level of the foreign funding (which is subsequently disclosed publicly) and identify itself as an 'organisation receiving foreign funding' on its publicity and other materials. Failure to do so leads to fines and potentially being struck off the register and unable to operate.

3. We are satisfied that the proposed Law constitutes a serious breach of EU law. The measure is effectively a registration/authorisation requirement that discriminates directly on the basis of nationality (or geographical origin), and consequently as a matter of well-established EU law is an unlawful restriction. In the context of the free movement of capital the Court stated in Case C-386/04 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* [2006] ECR I-08203 ("*Stauffer*") §40 in relation to the differential application of a tax exemption entitlement for

[1] Act CLXXV of 2011 of the Freedom of association, the public benefit status and the operation and support of civil society organisations. See below.

charitable foundations: a "*Member State cannot deny the foundation the right to equal treatment solely on the ground that it is not established in its territory*". That must be all the more so where the restriction goes even further, namely where it is based not on where the CSO is established, but purely on the basis of whether a particular amount of its direct or indirect funding is not 'Hungarian'. Just as in *Stauffer* it was unlawful to refuse a tax exemption to charitable organisations established outside the Member State in circumstances where the exemption was available to charities established in the Member State, so necessarily, it must be unlawful to treat organisations that receive donations from outside the Member State (Hungary) differently to those that receive donations from within the Member State. The relevant question is whether the restriction or rule actually or potentially affects the establishment's activities falling within the scope of EU law. As set out in paragraphs 33 to 34 and 77 below, the proposed Law potentially affects the exercise of EU fundamental freedoms.

4. It is not just free movement of capital that is potentially affected. Civil society organisations, the people and bodies who support them and the people and bodies that benefit from their services, may carry out activities that are 'economic', that is normally provided for remuneration. They form part of the EU economy, including in relation to their role in employing workers. The economic role played by 'not for profit' organisations was recognised as early as 1999 in Case C-172/98, *Commission v Belgium* [1999] ECR I-3999. The Commission brought proceedings against Belgium in respect of a law that restricted non profit making associations and institutions promoting the public interest from using their legal personality against third parties unless three fifths of the Board members were of Belgian nationality. The Commission, the Court and the Advocate General all agreed that freedom of establishment was engaged because of the economic activities that such not for profit organisations could perform. The economic activities of not for profit organisations is increasingly important to the EU economy, with the growth of social enterprises, namely organisations that operate, either for-profit or non-profit, actively performing socially beneficial economic activities.[2] The proposed Law involves serious potential restrictions on fundamental freedoms connected with the activities of relevant CSOs.

5. Even assuming there was scope for justification of a restrictive measure that directly discriminated on the basis of nationality/geographical origin, it would have to be

[2] Available at http://ecnl.org/wp-content/uploads/2015/07/ECNL-Economic-Activities.pdf see, §4.1.

based on an overriding public policy interest and proportionate to that interest, that is, Hungary would have to be able to show that the aim could not be achieved by a less restrictive means and that the measure was not a means of arbitrary discrimination or a disguised restriction. Thus, in Case C-318/07 *Persche v Finanzamt Lüdenscheid* [2009] ECR 33 ("*Persche*"), the Court held that it was not proportionate for a Member State to refuse a tax benefit in respect of a donation made to a charity in another Member States where such a benefit would have been available had the donation been made in the donor's Member State, despite the administrative difficulties that entailed for the tax authorities.

6. Here, no permissible justification has been provided; indeed the justification is on its own terms unlawful because it is based on a claimed 'need' to know national origin of the funding for its own sake. In no sense can such a restriction be necessary or proportionate to any legitimate aim in this context. There is no overriding public interest to justify such a measure. Indeed, the measures at issue amount to arbitrary discrimination.

7. Further, the proposed Law would contravene a number of the rights protected by the EU Charter of Fundamental Rights, which is incorporated into EU law.

8. We note that whilst the proposed Law is at present restricted to certain classes of CSOs, the Hungarian Government may at some point in the future decide to extend it more widely to cover a wider range of entities that have their main establishment outside Hungary or receive funding from outside Hungary. The EU law issues addressed in this advice are therefore potentially of relevance to a wider range of bodies. Such laws would, for the same reasons as set out below, be manifestly unlawful under EU law.

The proposed Law

Organisations covered

9. The proposed Law covers "**associations and foundations".** We are instructed that, whether an organisation qualifies as an 'association' or 'foundation' depends on how it is set up rather than the service it delivers.

10. However, Article 1(4) provides that the following are excluded:

> *"a. associations and foundations which are not regarded as CSOs;*

b. associations that fall under the scope of Act No.1 of 2004 on Sports;

c. organisations pursuing religious activities;

d. *the ethnic minority organisations and ethnic minority associations as per Act CLXXIX of 2011, as well as the foundations that are, based on their deed of foundation, engaged in activities directly related to the protection and representation of the interests of a given ethnic minority or to the cultural autonomy of the ethnic minority."*

11. As regards (a), the 'Detailed Statement of Reasons' at the end of the proposed Law explains that the proposed Law applies "*to only those organisations registered as association or foundations that are registered as civil society organisations pursuant to Act CLXXV of 2011 of the Freedom of association, the public benefit status and the operation and support of civil society organisations*" ("the CSO Act").

12. Section 2(6) of the CSO Act defines a CSO as:

    a. a civil company;
    b. an association registered in Hungary, excluding political parties, trade unions and mutual associations; or
    c. a foundation, excluding public foundations and party foundations. (emphasis added)

13. Since the proposed Law is limited to 'associations and foundations' that are *also* CSOs as defined in the CSO Act, the proposed Law does not apply to political parties, trade unions, mutual associations, public foundations and party foundations. Since the proposed Law only applies to an 'association' or a 'foundation', it does not apply to other legal forms of organization, such as a 'civil company' or legal entities formed pursuant to Act V on the Civil Code, whether for profit or not for profit.[3]

14. Section 13 of the CSO Act requires CSOs to be registered:

    "(1) Civil society organisations shall be registered by the competent general courts according to the Act on the Registration of Civil Society Organisations and on the Related Procedural Regulations.

    (2) If the civil society organisation's application for registration is submitted by way of electronic means with an instrument of constitution drawn up according to the standard instrument of constitution form defined in specific other legislation enclosed, the court shall adopt a decision within fifteen days of receipt of the

[3] Certain corporate entity types provided for by the Civil Code (a general partnership, limited partnership, limited liability company, or shareholder company) that are generally utilized to pursue profit-generating activities may be also formed as the non profit versions of such entity types, if the intention is for the entity not to generate profit. Such not-for-profit companies are governed by Section 9/F of Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings.

application.

(3) The particulars of civil society organizations are stored in an electronic public register integrated at the national level, and shall be available to the general public free of charge." (emphasis added)

15. Section 17(1) of the CSO Act provides that "*a civil society organisation may not be established for the principal purpose of pursuing economic-business activities*" (emphasis added). Economic-business activities are defined as:

> "*any economic activity pursued commercially for the purpose of or resulting in receiving income or accumulating assets, excluding: a) the acceptance of donations (gifts), b) activities performed for the objectives laid down in the instrument of constitution (including public benefit activities), c) the placement of funds into deposits, securities, company shares, d) the acquisition of real estate property, transferring the rights to use or ownership rights of such property*": s. 2(11).

16. The CSO Act stipulates that an organisation is deemed to be established for primarily entrepreneurial activity if 60% or more of the organisation's revenue comes from this activity.[4]

17. The fact that economic-business activities are not prohibited is confirmed by section 17(3), which makes clear that:

> "*(3) A civil society organisation may pursue activities in connection with the objective laid down in its instrument of constitution (hereinafter referred to as "core activity"), including public benefit activities and may also engage in economic-business activities so as to ensure the economic conditions for achieving its goals, provided that this does not jeopardize its core activity.*"

18. And further, by section 18, the CSO Act provides:

> "*(1) Civil society organisations may pursue:*
> *a) core (public benefit) activities, and*
> *b) economic-business activities.*
>
> *(2) Any profit from economic-business activities pursued under Subsection (3) of Section 17 may comprise revenue for the civil society organisation.*"

19. Thus, CSOs may carry out activities that have economic value (or are normally provided for remuneration), including profit making activities, albeit that the principal purpose of CSOs cannot be the pursuit of "economic-business activities". This is in accordance with various international instruments that emphasise the importance of CSOs being able to carry on economic activities. Thus, the Council of Europe Recommendation on the legal status of NGOs in Europe provides at

[4] Section 2(7) of the Act CLXXV/2011. Taken from: http://ecnl.org/wp- content/uploads/2015/07/ECNL-Economic-Activities.pdf .

paragraph 14 that:

> "NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorization being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned."[5]

20. Article 190 of the OSCE/ODIHR Joint Guidelines on Freedom of Association recently adopted by the Venice Commission at its 101th Plenary Session further provides:

> "In order to pursue their objectives, associations should be able to both generate income from their activities and to seek it from public and private sources within and beyond the state in which they are established. It is important for this purpose that associations are able to approach the widest range of possible donors. The income can be in the form of cash, other forms of financial instruments, proceeds from the sale of property and goods or equipment belonging to the association, as well as in the form of other benefits attributed"[6]

'Foreign funds' under the proposed Law

21. As regards the nature of the funding covered, Article 1(2) of the proposed Law states that "*For the purposes of this Act, regardless of its legal title, any financial or other economic support originating directly or indirectly from abroad . . . shall be regarded as financial support*". That definition is extremely broad, in terms of the character of the benefit, the activities affected and geographical origin. It seems to cover any receipt of money or benefit that is quantifiable in monetary terms, which 'originates' from somewhere located geographically outside Hungary. The term 'originating … from' is also very vague:

    a. Donations from anywhere outside Hungary count as "foreign funds", for example, donations received from a Hungarian citizen working in Austria.

    b. Donations "originating directly or indirectly . . . from abroad" count as foreign funds. For example, in the case of a person living in Hungary who is financially supported by relatives abroad, any donations by that person to a relevant CSO appear to qualify as 'foreign funds'.

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[5] Council of Europe: Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe.

[6] Available at: http://www.osce.org/odihr/132371 .

c. The law is not limited to payments, but includes any "*economic support*". For example, the provision of a building in Hungary or of staff for a relevant CSO seems likely to be 'economic support'. If this was provided by a person resident in Romania this would presumably be 'foreign funds'. Similarly, if a company or CSO outside Hungary seconded a staff member to assist a relevant CSO (whether inside or outside Hungary) the benefit of that staff member appears to be 'foreign funds'.

d. The law applies to benefits *originating from* abroad. For example, where a relevant CSO receives 'economic support' free or at a reduced-cost, for example, accommodation or food for staff attending a conference abroad, these appear to be 'foreign funds'.

e. The law is not limited to charitable donations, but appears to apply to any 'economic support' such as service provision or other activities. For example, where a relevant CSO charges for providing services outside Hungary, the payments for those charges appear to be 'foreign funds'. Where a relevant CSO charges for services provided *inside* Hungary, any payments made by persons who derived their funds from outside Hungary (e.g. by working abroad or receiving remittances from relatives abroad) would also be 'foreign funds'.

22. The scope of the proposed Law is therefore impossibly broad and vague. Compliance with the law would appear to require each relevant CSO that receives any payment or other 'economic support' at all and for any purpose, to enquire of the person making the donation or paying for a service whether its source is or was from outside Hungary. Only a relevant CSO that is sure its *total* income will fall below the level applied by the law could disregard that obligation.

23. Funds received by an association or foundation "as an EU fund" are only not treated as 'foreign funds' *if* they are paid "*through a [Hungarian] budgetary institution according to separate law*."[7] We understand that this means that only funds that come from the EU, which are paid *via* the Hungarian Government (the 'budgetary institutions') are excluded from treatment as 'foreign funds'. In all other cases, money deriving from EU funds counts as 'foreign funds'. Accordingly, where there is

[7] Article 1(3) of the proposed Law.

direct payment of EU funds to an organisation, or payment of such funds indirectly, through for example, another Government or foundation to a relevant CSO, those funds are 'foreign funds' under the proposed Law.

Level of 'foreign funds' that triggers registration requirement

24. Article 1(2) of the proposed Law provides that if a certain level of 'foreign funds' are received (more than HUF 7.2 million (EUR 24,000-*tran.*)) in one tax year the relevant CSO would be required to register as a 'organisation receiving foreign funding'. This is irrespective of the percentage of the organisation's funds received from outside Hungary. Even if 1% of an organisation's funds were from foreign sources, where the amount provided exceeded the threshold of HUF 7.2 million, the organisation would have to register as a 'organisation receiving foreign funding', albeit that 99% of its income originated entirely from Hungary.

The consequences of the proposed Law applying: registration and publication requirements

25. The consequence of receiving 'foreign funds' above the statutory level is that the relevant CSO would have to register as an 'organisation receiving foreign funding' on the court register. Each year, the organisation would have to provide to the Registering Court a declaration of details of its funding.[8] This declaration must identify each supporter who provided 'foreign funds' of more than HUF 500,000 (EUR 1,600-*tran.*) in the tax year in question, and state and provide "*sum per transaction, the exact source (in case of a natural person: name, country, city, in any other case: name, registered address)*", and state the aggregate amount of 'financial support' and the aggregate amount of 'economic support'. The CSO must also provide the aggregate amounts of 'financial support' and 'economic support' received from those supporters who individually provided less than HUF 500,000 in that year. The Registering Court will attach this declaration to the data in the Register.[9] We understand that this data, including the personal data of the supporters, will be made public. This raises serious concerns regarding data protection,[10] (which are beyond the scope of this opinion).

26. The Registering Court "*shall send the names, registered addresses and tax numbers of associations and foundations which registered as organisations receiving foreign funding*" to

[8] Article 2(3) of, and Annex no. 1 to, the proposed Law.
[9] Article 2(2) of the proposed Law.
[10] And possible breaches of EU law in that regard.

the Minister in charge of the Civil Information Portal, which he would publish, so that the information is available to the public free of charge.[11]

27. All relevant CSOs which are 'organisations receiving foreign funding' under the proposed Law would have to make that fact publicly known on their website, in their press products and other publications published by them "*as defined in the Act on the Freedom of Press and the Fundamental Rules of Media Content.*"[12] If a relevant CSO receives less than the sum specified in Article 1(2) in a subsequent tax year, it shall declare this to the Registering Court, and the CSO will no longer have the status of an 'organisation receiving foreign funding', the reference to this on the Register is to be removed, and the Minister will delete the data of the CSO from the electronic platform.[13]

28. The Act CLXXXI of 2011 on the Court Regulation of Civil Society Organisations and the Related Rules of Procedure ("CSO Registration Act"), lays down the mechanism of "legal supervision" of CSOs for alleged non-compliance with legal requirements. Under Article 3(2) of the proposed Law, the public prosecutor shall make an application under the CSO Registration Act for the Registration Court to fine a CSO which has failed to comply with demands to register as an organisation receiving foreign funding. Under Article 3(3) of the proposed Law, where the public prosecutor considers the CSO still continues to fail to meet its obligations, the prosecutor shall "act in accordance with" the CSO Registration Act. Under sections 71/C(1)(d) and 71/E(1)(a) of the CSO Registration Act, the prosecutor may apply to the Registration Court to exercise "legal supervision" of the CSO. The Court's powers, under section 71/G(2), are to: fine the CSO; overturn a resolution of the CSO and order it to adopt a new resolution; convene the executive body of the CSO; appoint a supervising commissioner of the CSO for a maximum period of 90 days; or terminate the CSO.

29. Accordingly, the proposed Law prescribes that where a relevant CSO receives any financial or other economic benefit originating directly or indirectly from abroad in excess of the stated sum, the Court may terminate the CSO, unless it complies with particular registration and declaration requirements as set out in the proposed Law and summarised above. Further, the law as amended envisages the possibility of the

[11] Article 2(4) of the proposed Law.
[12] Article 2(5) of the proposed Law.
[13] Article 4 of the proposed Law.

Court ordering the CSO to adopt a resolution and appointing a supervising commissioner for 90 days. The scope of such powers or their purpose is unclear. However, they potentially envisage state involvement in the internal activities of the relevant CSO.

The proposed law 'falls within the scope' of EU law

30. The proposed Law falls within the scope of EU law.

31. EU law guarantees four fundamental freedoms, the free movement of goods, services, persons and capital. These are provided for in the Treaty on the Functioning of the European Union ("TFEU"). The internal market is described in Article 26 of the TFEU as:

> "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*".

32. Pursuant to Article 26(3) of the TFEU, it is for the Council, on a proposal from the Commission, to determine the guidelines and conditions necessary to ensure balanced progress in all sectors concerned. Accordingly, the Council has adopted Directives in the context of services, establishment and capital, which provide guidance additional to that set out in the relevant Treaty articles.

33. In our view each of the four freedoms is potentially engaged by the proposed Law. We focus on two as most relevant to the situation for relevant CSOs:

    a. The freedom of movement of capital and payments, specifically the EU law freedom of relevant CSOs to receive payments, whether as donations or for services, from any source, without arbitrary Government discrimination on grounds of nationality or other unjustified interference with that freedom;

    b. The freedom to provide services and the right to establishment, specifically, the freedom of individuals outside Hungary to provide services to relevant CSOs and to receive services from relevant CSOs, without restriction and in particular, without discrimination on grounds of nationality/geographical origin and the freedom of non-Hungarian individuals/companies to establish or take part in the establishment of a relevant CSO in Hungary without restriction and certainly without restriction based on discrimination.

34. We note that freedom of movement of goods and workers are also both potentially

engaged by the proposed Law since the proposed Law potentially restricts the exercise of each of those freedoms; the right of non-Hungarian workers to come to Hungary to work in relevant CSOs, the right of non-Hungarian individuals and companies to provide goods to relevant CSOs and the right of relevant CSOs to receive and supply goods to individuals and legal entities outside Hungary. All of these are potentially affected by the proposed Law.

The proposed law falls within the scope of EU law on free movement of capital and payments

35. Freedom of movement of capital and payments is provided in Article 63(1) and (2) TFEU:

> "*Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.*
>
> *"within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and third countries shall be prohibited."* (emphasis added)

36. Donations made to a CSO in one Member State by a person living in another Member State fall within the scope of free movement of capital and payments provisions of the TFEU: *Persche*. These provisions apply to "*the transfer of assets which can include both sums of money and movable and immovable property*": *Persche* §26. Direct investments also fall under this provision, see Case C-589/13 *F.E. Familienprivatsiftung Eisenstadt* [2015] ECR 612; and Annex I to Council Directive 88/361/EEC of 24 June 1988, which specifically provides that capital movements includes gifts and endowments and relates to all transactions and dealings with capital.

37. Since Article 63(1) and (2) are expressed to apply to movements of capital and payments between Member States and third countries, donations made from a third country to a civil society organisation in a Member State also fall under these provisions.[14]

38. It follows that any payments to relevant CSOs from outside Hungary, whether from EU Member States or third countries, constitute movements of capital or payments under Article 63, as do direct investments.

39. Some measures are considered 'too uncertain' or 'indirect' a hindrance on freedom of

[14] In *Persche* the Court explicitly referred to donations made *to* a third country: §70.

movement of capital or payments to engage those rights: Case C-190/98 *Graf* [2000] ECR I 493 §25, Case C-211/08 *Commission v Spain* [2010] ECR 5267 at §73. That is not the case here. We explain below why we consider the proposed Law not only engages those rights, but also violates them.

The proposed law is within scope of EU law on freedom to provide services & freedom of establishment

40. Freedom to provide services is relevant because a relevant CSO in Hungary may wish to receive services at a reduced cost from outside Hungary, which could constitute 'economic support' covered by the proposed Law, i.e. 'foreign funds'. Equally, individuals from outside Hungary may come to Hungary to receive services from a relevant CSO, for which they may pay money that would constitute 'foreign funds' within the proposed Law. In either of these contexts, the proposed Law would act as an actual or potential restriction on freedom to provide and receive services since CSOs might be reticent to provide those services in such a way that could bring them within the scope of the proposed Law and risk them being labeled 'organisations receiving foreign funding'.

41. Freedom to provide services is guaranteed by Article 56 of the TFEU, which provides:

> "*Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.*"

42. The freedom to provide services applies only to 'services' that are "normally provided for remuneration": Article 57. However, the Court has held that this does not necessarily require that payment is made for those service by the service recipient or that the service is provided for profit: see e.g. Case C-159/90 *Society for the Protection of Unborn Children Ireland v Grogan* [1991] ECR 1-4685; Case C-352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, §16; Joined Cases C-51/96 & C-191/97 *Deliège* [2000] ECR I-2549, §56; Case C-281/06 *Jundt* [2007] ECR 816. Nor, moreover, is there any need in that regard for the person providing the service to be seeking to make a profit, see, inter alia, C-157/99 *Smits & Peerbooms* [2001] ECR I-5473, §§50 and 52.

43. It is settled case-law that Article 56 TFEU requires the elimination of all discrimination against providers of services based on grounds of nationality, or the

fact that they are established in a Member State other than that where the services are to be provided. Article 56 requires the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services, see Joined Cases C-369/96 & C-376/96 *Arblade & Others* [1999] ECR I-8453, §33; Case C-518/09 *Commission v Portugal* [2011] ECR 501 §63 and the case-law cited; Case C-577/10, *Commission v Belgium* [2012] ECR 814 §§37-38.

44. The Court of Justice case-law on services was analysed by Advocate-General Kokott in Case C-74/16 *Congregacion de Escuelas Pias Provincia Betania v Ayuntamiento de Getafe*, 16 February 2017. The case concerned the Spanish tax exemption for economic activities of the Catholic Church under competition law:

> "*39. An economic activity is any activity consisting in offering goods and services on a specific market. In that connection, the lack of a profit motive or lack of an intention to achieve a profit are not in themselves enough to rebut the presumption of an economic activity as long as goods and services are offered.*[15]
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> *41. Whether the educational activity is to be classified as an economic activity is dependent on an overall assessment of the circumstances of the specific case which is a matter for the national court. In that connection, regard must be had both to the financing of the education and to the tasks and objectives of the body running the school realised through the education provided.*
>
> *42. Where a church institution operates its educational establishments wholly or predominantly in a commercial manner, and provides the instruction given there essentially in exchange for the financial contributions and other payments or donations in kind*[16] *made by the pupils or their parents, it is offering services within the meaning of Article 56 TFEU*[17] *and, consequently, becomes economically active.*
>
> *43. That is not the case, by contrast, where the church institution does not operate its educational establishments in a commercial manner but as part of its general mission in the social, cultural and educational sector and has no recourse, or only marginal recourse, to pupil or parent contributions for the financing of the instruction provided there. In such a case it is not offering services within the meaning of Article 56 TFEU*[18] *and is thus also not economically active.*" (emphasis added)

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[15] A-G Opinion footnote: "In the same vein, judgments of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paras. 122 to 124), and of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, para. 27). See also judgment of 18 December 2007, *Jundt* (C-181/06, EU:C:2007:816, para. 33)."

[16] A-G Opinion footnote: "This refers, inter alia, to donations in kind by pupils and their parents and also the private financing of certain constructions or building works."

[17] A-G Opinion footnote: "To this effect, see - in relation to private educational establishments - judgments of 7 December 1993, *Wirth* (C-109/92, EU:C:1993:916, para. 17), and of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492, para. 40), and *Commission v Germany* (C-318/05, EU:C:2007:495, para. 69)."

[18] A-G Opinion footnote: "To this effect, see - in relation to state educational establishments - judgments of 27 September 1988, *Humbel and Edel* (263/86, EU:C:1988:451, paras. 17 and 18); of 7 December 1993, *Wirth* (C-109/92, EU:C:1993:916, paras. 15 and 16); and of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492, para. 39); and *Commission v Germany* (C-318/05, EU:C:2007:495, para. 68). As the EFTA Court emphasizes, this case-

45. Freedom of establishment is guaranteed by Article 49 of the TFEU, which provides:

> "*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.*" (emphasis added)

46. Article 55 of the TFEU in addition provides:

> "*Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.*" (emphasis added)

47. The proposed Law engages freedom of establishment because it acts as an actual or potential restriction on the establishment of or investment in a relevant CSO by a non-Hungarian national or an establishment or individual based in another EU Member State.

48. Article 54, second paragraph, suggests that freedom of establishment does not extend to legal persons that are non-profit-making.[19] However, a non-restrictive approach has been taken by the Court in that regard: see C-172/98 *Commission v Belgium,* referred to in paragraph 4 above. That case concerned a restriction relating to non-profit-making associations and institutions promoting the public interest, namely the Law of 1921, which provided that '*... the association may not rely on its legal personality against third parties ... unless three fifths of the members are of Belgian nationality.*' Accordingly, it was a directly discriminatory provision that affected the rights of an establishment depending on whether or not it had a particular level of Belgian (as opposed to non-Belgian) participation. This is directly analogous to the proposed law, which prohibits establishments that have a particular level of non-Hungarian funding unless they comply with additional registration requirements. In

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law which was decided in connection with freedom to provide services may be transposed to competition law and to the sector of State aid, judgment of 21 February 2008, *Private Barnehagers v EFTA Surveillance Authority* (E-5/07, Report of the EFTA Court, 2008, 61, paras. 80 to 83). The Commission makes the same point in paras. 28 to 30 of its Notice on the notion of State aid (OJ 2016 C 262, p. 1)."

[19] Arguably, that provision also applies to services by virtue of Article 62 (albeit that it is difficult to see how).

his Opinion of 28 January 1999, Advocate General Cosmas stated:

> "*11. First of all, as the Commission correctly states, the national legislation at issue clearly falls within the scope of the EC Treaty even though it relates to non-profit making associations. While those associations do not have the objective of maximising or redistributing profits, they may provide services in return for payment or receive income, thus participating in economic life. They are therefore governed by the Community rules on freedom of establishment*."

49. The Court took the same approach, stating more shortly:

> "*12. The Belgian Laws at issue regulate the right to form, in Belgium, associations with legal personality and nationals of the other Member States are among the persons to whom they apply. Those Laws thus affect one of the fundamental freedoms guaranteed by the Treaty and accordingly fall within its field of application*."

50. Similarly, *Stauffer* concerned a non profit making organisation (a charitable foundation) which took profits from rental of a property owned in Germany. The Court reiterated that "*the concept of establishment within the meaning of the Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons*": §18. Advocate General Stix-Hackl stated:

> "*48. Legal persons which, as in the present case, do not seek to maximise their profits, may also therefore carry on a profit-making activity: Case 221/85 Commission v Belgium [1987] ECR 719, and Case C-70/95 Sodemare and Others [1997] ECR I3395. Even though, as a charitable foundation, the foundation may not seek to maximise its profits in renting out the property, its rental activity is <u>an activity for a consideration</u> and thus constitutes participation in economic life, which is not completely insignificant. As a result, renting out the property in Munich is an autonomous profit-making activity for the purposes of freedom of establishment.*"

51. The Court did not disagree, but considered the particular activity was not a 'permanent presence' and so was not establishment: §§19-20.

52. <u>Freedom of movement of workers</u> is guaranteed by Article 45 of the TFEU, which provides:

> "*1. Freedom of movement for workers shall be secured within the Union.*
>
> *2. Such freedom of movement shall entail the abolition of <u>any</u> discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*" (emphasis added)

53. The proposed Law engages the freedom of movement of workers because it appears to treat as 'foreign funds':

a. any funds provided to a relevant CSO which funds originate from wages paid to a Hungarian citizen from their work abroad, or to another EU national who had exercised their freedom of movement as a worker.

b. any voluntary or reduced cost work provided to a relevant CSO by a Hungarian citizen employed abroad or by another EU national who had exercised their freedom of movement as a worker, since this may be 'economic support'.

54. We have considered the application of freedom of movement of goods, which is guaranteed by Article 30 of the TFEU and provides for a "*prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect*" and Article 34 [and 35]: "*quantitative restrictions on imports [and exports] and all measures having equivalent effect shall be prohibited between Member States*" (subject only to the limited exceptions provided in Article 36, which must not "*constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States*.") The proposed Law applies to the movement of goods that constitute economic support (or the sale of goods by relevant CSOs outside Hungary. However, since the provisions of free movement of capital and payments apply to gifts of movable property (see *Persche* above), we have not considered this provision further.

The proposed law entails unlawful discrimination on the basis of nationality

55. Discrimination based on nationality is prohibited by Article 18 TFEU, which provides:

> "*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*"

56. The proposed Law violates the prohibition on discrimination on grounds of nationality. See for an application of that rule, Case C-172/98 *Commission v Belgium,* at paragraph 4 above.

57. The proposed Law explicitly applies only to relevant CSOs that receive payments or economic support originating from outside Hungary. It has no application to relevant CSOs that are entirely supported by the Hungarian State or by EU funds provided by the Hungarian State. The 'General Statement of Reasons' provides that the purpose of the proposed Law is to "*to show which organisations can be considered as*

organisations receiving foreign funding."

58. The proposed Law directly discriminates on the basis of the state from which the funds or economic support originates. Such a distinction manifestly falls within the prohibition on nationality discrimination, see Case C-309/89 *Codorniu SA v Council* [1994] ECR I 1853 §26 and C-172/98 *Commission v Belgium*.

59. Furthermore, the proposed Law constitutes direct/indirect nationality discrimination, since it is more likely to apply to donations and payments from non-Hungarian nationals (whether legal or real persons).

Prohibition on discrimination: freedom of movement of capital and payments

60. Article 65 of the TFEU provides:

> *1. The provisions of Article 63 shall be without prejudice to the right of Member States:*
>
> *(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;*
>
> *(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.*
>
> *3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.* (emphasis added)

61. In *Persche* the Court considered the application of Article 65(1) and (3) to national tax legislation which distinguished between a charitable donation made in the same member State to one made to a different member State. The Court ruled, at §41, that:

> *"to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or it must be justified by an overriding reason in the public interest, such as the need to safeguard effective fiscal supervision. In order to be justified, moreover, the difference in treatment must not go beyond what is necessary in order to attain the objective of the legislation in question." see, to that effect, Centro di Musicologia Walter Stauffer, §32 and the case-law cited."*

62. We consider that the same approach must be taken to the application of Article 65(1) and (3) to national laws on declarations of payments or capital which draw a distinction based on the Member State from which the payment or capital originates.

63. The proposed Law does not meet this requirement; it is manifestly arbitrary discrimination.

64. The stated purpose of the proposed Law, namely to label CSOs receiving more than a certain amount of funding from outside Hungary as 'foreign funded', cannot be legitimate under Article 65(1)(b). Article 65(1)(b) does allow states to impose restrictions in two contexts:

    c. First, to "lay down procedures for the declaration of capital movements for purposes of administrative or statistical information"
    d. Secondly, to take measures for the purposes of "public policy or public security".

65. In either case however, the measures must not constitute arbitrary discrimination or a disguised restriction: Article 65(3).

66. Here, it is impossible to see how either of those exceptions could apply. Not only is there no evidence to support the alleged need, there is also no evidence that the proposed Law could meet any such need. We note in that regard, that the proposed Law fails to treat comparable cases in a comparable way. The following bodies are exempted from its provisions: trade unions, political foundations, public foundations, civil companies, not-for-profit companies, organisations pursuing 'religious activities', sports clubs and ethnic minority associations and foundations related to their protection and representation. This difference in treatment is not mentioned by the proponents of the proposed Law. If the proposed Law was really for the purposes of reporting of capital movements and payments, it would not make such a distinction.

Prohibition on discrimination: freedom to provide services

67. As regards Article 56 of the TFEU, the freedom to provide services, discrimination based on nationality is prohibited: Case C-33/74 *van Binsbergen* [1974] ECR 1307; Case C-297/80 *Webb* [1981] ECR 3305; Case C-205/84 *Commission v Germany* [1988] ECR 3755.

68. The prohibition on nationality discrimination is further articulated in Article 14(1) of the Services Directive, which provides:

> "*Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following:*
>
> *(1) discriminatory requirements based directly or indirectly on nationality*"

69. Further:

a. by Article 15 of the Services Directive, Member States are obliged to examine their legal systems and ensure that where there are national legal obligations for providers to take a particular legal form, those requirements are non-discriminatory: see Article 15(2)(b) and 15(3)(a) of the Services Directive.

b. Article 16(1) of the Services Directive provides that:

> *1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.*
> *Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:*
>
> *(a)non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;*
> *(b)necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;*
> *(c)proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.*

c. Article 20(1) of the Services Directive provides:

> *2. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.*

70. The proposed Law manifestly infringes these provisions of the Services Directive. It requires a relevant CSO receiving remuneration for a service, to report such remuneration if it originates from a person (whether a service recipient or not) who lives or earns outside Hungary. The law thus makes a distinction between recipients of services from relevant CSOs where remuneration originates outside of Hungary and those where it does not. The law does not respect the right of relevant CSOs

established in Hungary to provide services outside Hungary, or the right of persons outside Hungary to receive services from relevant CSOs based in Hungary, whether whilst visiting Hungary or otherwise.

71. The proposed Law makes access to such services within Hungary subject to a requirement based on nationality discrimination contrary to Article 16. It subjects a recipient of services to discriminatory requirements based on nationality and place of residence. For example, a relevant CSO considering providing services to persons in other member States (of any nationality) is more likely to obtain some funding originating outside Hungary than a CSO concerned exclusively with service provision in Hungary.

72. As regards establishment, Article 55 of the TFEU, set out in paragraph 55 above includes a specific prohibition on nationality discrimination, as does Article 45(2) of the TFEU for workers, set out at paragraph 52 above. Further, Chapter III, Articles 9-15 of the Services Directive, prohibits Member States from making access to, or the provision of, their services subject to authorisation requirements that are directly or indirectly discriminatory on the basis of nationality: see specifically Articles 14(1), 9(1)(a) and 10(2)(a) Services Directive. Further, authorisation procedures must not be dissuasive: Article 13(2). We consider that all those provisions are breached by the proposed law.

The proposed Law is an unlawful restriction on EU fundamental freedoms

73. The proposed Law unlawfully restricts the freedom of movement of capital and payments, the freedom to provide services, freedom of establishment and the free movement of workers.

The proposed law is a restriction on EU fundamental freedoms

74. The concept of '*restrictions*' in EU law is a wide one, covering: "*rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially*" the exercise of a fundamental freedom: Case C-98/14, *Berlington Hungary and Others* [2015] ECR 386, §§40-42 and 27. It is important in that regard, that there is no need for effect to be proved; the rule is that a *potential* effect is sufficient.

75. The proposed Law is capable of hindering the exercise of the freedom of movement of capital of relevant CSOs and of donors and service recipients, inside and outside Hungary. The law inhibits relevant CSOs from seeking or accepting investment,

donations, payments or assistance in kind, and it inhibits natural and legal persons from making such provision. We have set out above, at paragaraph 21 the breadth of the payments to which the proposed Law would apply. These impose a potentially substantial administrative burden on relevant CSOs and potential donors/payers to establish whether any particular funds or payment *might*, directly or indirectly, 'originate' from outside Hungary. Relevant CSOs and potential donors/payers may prefer to avoid this administrative burden and the associated risk of error or criticism involved in determining this question.

76. Relevant CSOs may seek to avoid the administrative burdens of becoming an 'organisation receiving foreign funding' and/or the potential detriment that being labelled an 'organisation receiving foreign funding' may cause to their ability to raise funds/assistance and/or engage in activities in Hungary and abroad. As regards both, classification as an 'organisation receiving foreign funding' may inhibit individuals and organisations from donating/investing, including because their personal details would be made public. Further, classification as an "organisation receiving foreign funding" may prejudice the organisation's ability to provide goods and services generally and may inhibit recipients from seeking the organisation's services or working with such an organisation. A relevant CSO may decide not to accept a reduced cost capital item, for example, computers supplied at less than cost, from outside Hungary. CSOs may avoid fund raising or payments which cannot establish the national "origin" of funds, such as street collections and other forms of anonymous donation, or selling items to the general public to raise funds. This seems especially likely for CSOs where such fund-raising would put the CSO over the statutory level for labelling as an 'organisation receiving foreign funding'.

77. The proposed law restricts the freedom to provide and receive services (and potentially goods):

    a. a relevant CSO that provides services to individuals in other Member States may decide not to do so, or not to expand its service provision since to do so, it must receive 'foreign funds' (whether as funding, donations or payments) and it wishes to avoid the administrative and reputational costs of involved.

    b. an actual or potential recipient of the service may be prevented from receiving the service because the CSO in Hungary does not want to accept payment for it, on the basis that such payment would constitute 'foreign funds' and bring

the CSO under the proposed Law.

c. a relevant CSO may decide not to accept reduced price/free services from another Member State, for example publishing services or computer services, on the basis that that could amount to receipt of 'economic support' under the proposed Law.

d. a relevant CSO may decide not accept volunteer staff (funded by another organisation for example) from outside Hungary, or subsidized or free goods from a donor in another Member State, on the basis that these too could amount to receipt of 'economic support' under the proposed Law. The proposed Law thus potentially affects the free movement of goods and workers.

78. The proposed Law is targeted at the free movement of capital and payments and the cross-border provision of services/right of establishment. It is aimed at sources of funding from outside Hungary (direct and indirect) as evidenced by the following matters:

a. the fact that CSOs receiving "foreign funds" above the statutory threshold are to be legally labelled as "organisations receiving foreign funds" and required to include a statement in all their publications that they are such an organisation;

b. the fact that the proposed Law is put before Parliament at a time when other measures are being taken to undermine 'non-Hungarian' organisations, in particular, the Central European University, in respect of which the Commission commenced infringement proceedings against Hungary on 26 April;[19]

c. the nature of the organisations that are excluded from the proposed Law (for example political foundations); and

d. the lack of any transparency in relation to 'Hungarian' direct or indirect funding.

79. The above factors all suggest a disincentive purpose as well as likely effect.

The proposed Law constitutes an unlawful restriction under the Services Directive

80. The Services Directive imposes specific prohibitions on restrictions on the cross-border provision of services. As set out above, at paragraph 42 , the EU freedom to provide services relates to those provided for remuneration, whether or not by the recipient of the services. The Services Directive is therefore of particular relevance to the freedom of relevant CSOs to receive services from other Member States, where these services are provide at nil or reduced cost *to the CSO*, and which may therefore be classified as 'foreign funds' under the proposed Law.

81. Article 19 of the Services Directive prohibits Member States from requiring recipients of services from other Member States to make a declaration in relation those services. Indeed, it is specific in prohibiting limits on financial assistance from other Member States. It provides:

> "*Prohibited restrictions*
>
> *Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, <u>in particular</u> the following requirements:*
>
> *(a) an obligation to obtain authorisation from or to make a declaration to their competent authorities;*
>
> *(b) discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided.*" (emphasis added)

82. The proposed Law would breach Article 19(a). A relevant CSO must 'make a declaration to the competent authorities' about its receipt of services by a provider established in another Member State where it receives services at a nil or reduced-cost if the "economic support" of those services, taken together with any other such payments/benefits, exceeds the threshold in the proposed Law.

83. The proposed Law would also breach Article 19(b). The threshold of the proposed Law represents a discriminatory limit on the provision of nil or reduced-costs services *by reason of the fact that* a provider established in another Member State.

84. For example, a relevant CSO given free or reduced cost computer support originating by a donor or business outside Hungary, would have to declare that as 'foreign funding' if the total of such payments/benefits exceeded the threshold, which is also a 'discriminatory limit on the grant of financial assistance'.

85. Article 16(2) prohibits a Member State from imposing:

> "*(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive of other instruments of Community law*"

86. The effect of the proposed Law is to require that, where the threshold is met for a particular relevant CSO, the name of every individual or organisation from outside Hungary that provided a service amounting to pecuniary benefit to that CSO and the pecuniary value of those services be stated on the relevant register. This is prohibited by Article 16(2). Moreover, the fact that failure to comply leads to removal from the register, necessarily means that the proposed Law involves an authorisation requirement.

There is no permissible justification for the restrictions imposed by the proposed Law

87. We consider the measures cannot be justified. Even assuming there was some basis for saying that justification could be provided on the basis of 'public policy exceptions', namely on the grounds of public order, public security and public health and protection of the environment,[20] none of the potential justifications given, in our view, come anywhere close to what would be needed; namely, a proportionate measure necessary to meeting an overriding public policy requirement.

88. The 'General Statement of Reasons' provides that the purpose of the proposed Law is to "*to show which organisations can be considered as organisations receiving foreign funding.*"

89. As we have already stated, that 'purpose' is itself impermissible as a matter of EU law, which prohibits differences in treatment based on nationality, as made clear in Article 18 TFEU: Case C-309/89 *Codorniu SA v Council* [1994] ECR I 1853 §26 and in the relevant provisions set out above, at paragraphs 60, 67, 69, 72. Thus, the bald admission that the purpose of the proposed Law is to show that a particular organisation is not Hungarian (or 'foreign funded', even if by Hungarians) means the Law fails at the first hurdle. This is not a legitimate aim; it is manifestly unlawful. In the specific context of charities, the Court has stated that differences in treatment based on nationality are not permissible, even where one of the objectives is to

[20] Articles 36 and 52(1) of the TFEU.

prevent the reduction of tax revenues: see for example *Persche* §46 (cited above) and *Stauffer* §59 (cited above) in the context of freedom of movement of capital. See further, in the context of freedom to provide services C-136/00 *Danner* [2002] ECR I-8147 §56; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849 §77.

90. The further explanations of the purpose of the legislation, that is, to show that the organisation is 'foreign funded' are said to be threefold:

    a. The "*public interest to ensure that the whole of society as well as the individual citizens can clearly see what interests these organisations represent.*"

    b. The risk of "*foreign interest groups trying to use civil society organisations for their own purposes*", which "*may pose an increasing danger to the national security and sovereignty of Hungary.*" It is said that this can be done by funding "*whereby the operation of the civil society organisation can be influenced directly or indirectly*". It is further said that "*the influence may target the adoption of certain political or economic decisions, the setting of the course of certain special policies, or in a broader sense, even the transformation of the operation of democratic state institutions*."

    c. The need "*to take into account*" "*the challenges posed by the non-transparent transfers of funds in terms of money laundering and financing of terrorism*".

91. These supposed purposes are contradicted by the discriminatory nature of the law and to its broad and vague requirements.

92. First, there is no need for the policy to be discriminatory to meet the justifications set out above. Assuming a need for a transparency of funding requirement, that need could be met by the disclosure of <u>all</u> funding (or all funding above a certain level), irrespective of its 'national origin'. No explanation has been given as to why funds and economic support originating from 'Hungarian' sources does not need to be disclosed, or could not be disclosed.

93. Secondly, we understand that the relevant laws relating to CSOs already provide for disclosure obligations. This underlines that the measure is adopted for a different purpose, namely to stigmatise CSOs that receive 'foreign funding'.

94. Thirdly, the measures could not in any event meet the purpose/justification claimed.

95. Fourthly, the operation of the measures would not serve the aims of transparency,

including combatting the money laundering and the funding of terrorism. The proposed Law is vague and potentially very wide. It may be impossible for organisations to be confident whether the origin of each item of funding or assistance is 'foreign' or 'Hungarian'.

96. As regards the third part of the justification, we note that a regional body of the Financial Action Task Force ("FATF") has found that Hungary is only partially compliant with Recommendation 8, which provides that countries should review the adequacy of their laws and regulations that relate to non profit organisations which have been identified as vulnerable to terrorist financing. In particular, FATF recommended, in 2016, that: "*Hungary should ensure an adequate level of CSO transparency and control over funds raised by CSOs*".[21] Accordingly, we envisage that Hungary may seek to rely on this in order to justify the proposed Law as falling within either the "public order" or "public security" justifications. However, our view is that this would not assist it in light of the discriminatory and partial nature of the measures.

97. Further, as noted in footnote 5 of the Hungarian Foundation for Civil Liberties and Helsinki Foundation's useful note of 11 April 2017 on the proposed Law:[22]

> "*The international policies developed by FATF (Recommendation 1, 8 and the Interpretive Notes of the Financial Action Task Force (FATF)) and the Directive (EU) 2015/849 do not provide the basis for introducing reporting/transparency rules on associations/foundations receiving foreign funding as such. Furthermore, the draft law does not follow the risk-based and proportional approach required by FATF which asks that the government first identify which NGOs are at risk for counter-terrorism financing purposes before imposing further legal measures. Considering this, the draft law may also be in violation of the Directive (EU) 2015/849. The Directive requires a risk-assessment, evidence-based decision-making, and proportionate approach that considers the specific needs and the nature of the business of the entities affected. The Directive asks countries to align their approach with FATF recommendations, as well as the Union data protection law and the protection of fundamental rights as enshrined in the Charter. As we discuss below the draft law violates several fundamental freedoms as well.*"

98. There is also no evidential basis identified, at all, for the assertion that Hungary's sovereignty is under threat and would somehow be protected by the proposed Law or that the proposed Law could somehow assist in relation to terrorism or money laundering.

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[21] This recommendation comes from a 2016 report issued by MONEYVAL which operates under the Council of Europe http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/MER- Hungary-2016.pdf .

[22] http://www.helsinki.hu/wp-content/uploads/NGO-Bill-HU-short-analysis-0411-final.pdf .

99. For these reasons, even if the proposed Law had a legitimate basis, the Law can in no way be said to be necessary or proportionate to meet the alleged 'public policy' need.

The EU Charter of Fundamental Rights (the "Charter")

100. The Charter forms part of EU law by virtue of Article 6(1) TEU. By Article 51(1) of the Charter *"The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."*

101. As set out above, EU law is necessarily engaged by the proposed Law. We consider that in addition to the matters referred to above, the proposed law would engage the following provisions of the Charter:

a. Article 11 (freedom of expression/information), which provides for the right to hold opinions as well as to impart information and ideas without interference from public authorities;[23]

b. Article 12 (freedom of association), which provides for the right to freedom of peaceful assembly and to freedom of association at all levels, and in particular in political, trade union and civic matters;[24]

c. Article 16 and 17 (the right to conduct a business and property), which provides for the recognition of the freedom to conduct a business in accordance with EU law and protection against expropriation of property without due compensation;

d. Articles 7 and 8 (private life and data protection – in relation to disclosure obligation), which provides for respect for private and family life, home and communications and that personal data has to be processed fairly, either for legitimate reasons provided for by law or with the consent of the person concerned who shall have access to such data and the right to have it rectified – the publication of names of individuals and details of their transactions would engage both of these articles; and

e. Article 21 (2) discrimination based on nationality.

[23] This right corresponds to Article 10 of the European Convention of Human Rights (the "Convention").
[24] Corresponding to Article 11 of the Convention.

102. The consequence of the proposed Law is that a CSO which does not comply with it could be subject to sanctions by a Court, including the appointment of a supervising commissioner and ultimately closure of the CSO. Accordingly, the registration requirements are necessarily directly restrictive of the rights guaranteed by Articles 11, 12, 16 and 17 in so far as those rights cannot be exercised unless the registration requirements are complied with.

103. Article 52 (3) provides:

> *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."*

104. In *Case of the Moscow Branch of The Salvation Army v. Russia,* Application no. 72881/01, judgment 5 January 2007,[25] the European Court of Human Rights made the following statements in relation to such restrictions (emphasis added):

> *"59. The Court further reiterates that the right to form an association is an inherent part of the right set forth in Article 11 [Article 12 Charter]. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions (see Sidiropoulos and Others v. Greece, 10 July 1998, §40, Reports of Judgments and Decisions 1998‑IV).*
>
> *60. As has been stated many times in the Court's judgments, not only is political democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from "democratic society" (see United Communist Party of Turkey & Others v. Turkey, 30 January 1998, §§43-45, Reports 1998-I, and Refah Partisi (the Welfare Party) & Others v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§86-89, ECHR 2003‑II).*

[25] Available at http://hudoc.echr.coe.int/eng?i=001-77249 .

61. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those proclaiming or teaching religion, are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively (see Gorzelik and Others v. Poland [GC], no. 44158/98, §92, ECHR 2004-I).

62. The State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a "pressing social need"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable" (see Gorzelik and Others, cited above, §§94-95, with further references)."

105. In that case, re-registration was refused to a religious organisation because of its foreign funding and the location of its 'principal' outside Russia. In the context of the proposed Law the position is not therefore identical, in that registration will not be refused on the basis of foreign funding, which instead imposes an additional registration requirement. Nevertheless, the reasoning of the Court is helpful:

"*81. Russian authorities held that since the applicant's founders were foreign nationals, in that it was subordinate to the central office in London and had the word "branch" in its name, it must have been a representative office of a foreign religious organisation ineligible for "re-registration" as a religious organisation under Russian law.*

82. The Court observes, firstly, that the Religions Act did indeed prohibit foreign nationals from being founders of Russian religious organisations. It finds, however, no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as regards their ability to exercise the right to freedom of religion through participation in the life of organised religious communities….

86. It follows that the arguments pertaining to the applicant's alleged "foreign origin" were neither "relevant and sufficient" for refusing its re-registration, nor "prescribed by law"."

106. CSOs have been recognised as playing a crucial role in modern democratic societies, acting in a public watchdog role similar to that of the press.[26] The freedom of such organisations to access funding has moreover been recognised as an essential element of the right to freedom of thought, conscience, religion or belief, that is,

[26] ECtHR, *Vides Aizsatdizības Klubs v Latvia*, Application No. 57829/00, Judgment of 27 May 2004, §42; ECtHR, *Animal Defenders International v The United Kingdom*, Application No. 48876/08, Judgment of 22 April 2013, §103.

necessary to render those rights effective.[27] Thus, it has been recognised that reporting and funding restrictions potentially inhibit the exercise of the right of freedom of association. The United Nations Human Rights Council resolution 22/6 (adopted on 21 March 2013) calls upon States to ensure that reporting requirements "*do not inhibit functional autonomy* [of associations]" and "*do not discriminatorily impose restrictions on potential sources of funding*". The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has stated that fundraising activities are protected under Article 22 of the ICCPR (Freedom of Association), and funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with that right.[28] The same UN Special Rapporteur has also stated that "*legislation limiting foreign funding to registered associations only,* […] *violates international human rights norms and standards pertaining to freedom of association.*"[29]

107. In the Fundamental Principles on the Legal Status of Non-governmental Organisations in Europe, the Council of Europe states: "*NGOs should be free to solicit and receive funding – cash or –in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties*".[30]

108. Any interferences in those rights must be justified as strictly in pursuit of a legitimate aim, and necessary and proportionate: see also Article 52 of the Charter.

109. For all the reasons set out above, the proposed Law is not in pursuit of a legitimate aim (i.e. identifying whether an organisation is foreign funded); is not capable of meeting any of the objectives as explained and is neither necessary nor proportionate; such objectives could be pursued through the use of a non-discriminatory rule covering all organisations, including in particular, political foundations.

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[27] Specific standards which relate to the ability of associations to access financial resources can be found in the UN Declaration on the elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (General Assembly Resolution 36/55), which in Article 6(f) explicitly refers to the freedom to access funding, stating that the right to freedom of thought, conscience, religion or belief shall include, inter alia, the freedom "*to solicit and received voluntary financial and other contributions from individuals and institutions.*"

[28] See A/HRC/23/39, second report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, §16.

[29] A/HRC/23/39 §27. See also comments of the Special Rapporteur on human rights defenders that: "*Governments must allow access by NGOs to foreign funding as a part of international co-operation, to which civil society is entitled to the same extent as Governments*" – A/59/401.

[30] Available at https://rm.coe.int/16807096b7 .

110. Finally, the Commissioner for Human Rights of the Council of Europe sent a public letter to the Hungarian authorities expressly his multiple concerns in relation to the proposed Law. It is attached here.[31] On 2 June, the Venice Commission of the Council of Europe gave a preliminary Opinion detailing numerous potential conflicts with human rights norms and recommending consultation and amendment of the Law.[31]

Conclusion

111. For all the reasons set out above, we consider that the proposed law constitutes a manifest breach of EU law, involving a directly discriminatory 'authorisation' requirement (and restrictive measure), being based on the national origin of the funding/investment or indirect assistance to organisations operating in Hungary.

112. Such discrimination is prohibited. In so far as there can be any argument to the contrary, the measures in any event cannot meet the most basic requirements of justification, namely to show that they are capable of meeting a legitimate objective and are strictly necessary and proportionate to that objective, that is, could not be met by less restrictive measures.

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ANGELINE WELSH

Matrix chambers

11 June 2017

[31] Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)002-e .