How can EU law safeguard CSOs' access to funding: a landmark decision

European Center for Not-for-Profit Law

It is the news of the week: the European Court of Justice (ECJ) has officially sentenced **that Hungary's law on the transparency of organisations supported from abroad is in breach of EU law, including provisions of the Charter of Fundamental Rights of the EU ("CFR").**

Let us look closely at this decision and its ground-breaking implications not only for civil society organisations (CSOs) but also for individuals and legal entities operating inside and outside the EU. Over the past decade there has been a growing trend to restrict the amount and manner in which CSOs may receive funds from abroad: in Ukraine a similar draft law was introduced at the Parliament just a month ago. The decision on the Hungarian law sets a standard and provides strong arguments against laws that limit foreign funding to CSOs in other countries too.

What is the Hungarian Transparency Law about?

In 2017, the Hungarian Parliament approved Law No. LXXVI on the transparency of organisations supported from abroad ("Transparency Law"), regulating how CSOs supported from abroad have to register and report. As the first law of its kind in a European Union country, it was widely viewed as a major obstacle to the work and interactions of Hungarian CSOs. Back in 2017 ECNL highlighted the key concerns about the law, including how it violates international standards and stirs distrust and suspicion towards the sector.

The Preamble of the Transparency Law argued that support to local CSOs coming from abroad was "*liable to be used by foreign public interest groups to promote — through the social influence of those organisations — their own interests rather than community objectives in the social and political life of Hungary*", therefore interfering with and potentially threatening the political and economic interests of the country.

In particular, the law provides that:

- Any association or foundation supported from abroad – intended as "*any contribution of money or other assets coming directly or indirectly from abroad, regardless of legal title*" – that reaches a threshold of about €20,000 (twice the amount identified in the existing Anti-Money-Laundering Law, i.e., 7,2 million Hungarian forints), should officially register with the new status of "*organisation supported from abroad*";
- Any organisation must promptly report this registered status on its website homepage as well as in all its publications;
- Organisations must also declare the amount and source of each funding received and indicate respectively the donor's name, country and city of residence (or name and registration in the case of legal entities);
- Failure to comply with these obligations may result in high fines and possibly dissolution.

Who brought the case of breach of EU law before the ECJ and why?

The European Commission, with the support of Sweden, opened an infringement procedure against Hungary on the grounds of Article 258 of the Treaty on the Functioning of the EU (TFEU), arguing that the Transparency Law was in breach of the following EU law provisions:

- Article 63, Treaty of the European Union (TEU) on **freedom of movement of capital**, which establishes that:
  - All restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited;
  - All restrictions on payments between Member States and between Member States and third countries shall be prohibited.
- Articles 7 (**Respect for private and family life**), 8 (**Protection of personal data**) and 12 (**Freedom of assembly and association**) of the CFR.

What were the key arguments raised against the Hungarian Transparency Law?

According to the Commission and Sweden, the Law unduly restricts the freedom of movement of capital between Hungary on the one hand and other EU Member States and third countries on the other by establishing a different set of obligations for CSOs receiving funding from individuals/ legal entities having their residence or seat in the country and CSOs receiving funding originated from individuals/ legal entities situated abroad.

Aside from discriminating between CSOs on the grounds of the origin of their funding, it is also argued that the Law has the indirect effect of dissuading not only Hungarian CSOs from accepting funding from abroad, but also of discouraging individuals and legal persons from EU Member States and third countries from exercising their right to free movement of capital.

According to EU law (Article 65, TEU), restrictions to the free movement of capital can only be justified by an overriding reason in the public interest – namely of public policy and public security – and must be necessary and proportionate to the achievement of that interest. However, the Commission and Sweden argue that these two conditions are not met by the Law and they infringe the fundamental rights of respect for private/family life, personal data protection and freedom of association enshrined in the CFR.

What are the key findings/conclusions of the ECJ?

In establishing that the provisions of the Hungarian Transparency Law introduce "**discriminatory and unjustified restrictions on foreign donations to CSOs, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter**", the ECJ clarifies the following interpretative and standard-setting points:

1. ***Free movement of capital presupposes the presence of capital movements with a cross-border dimension, including "personal capital movements", such as inheritance, gifts, donations, endowments, etc.***

2. ***The concept of prohibited restrictions includes State measures of a discriminatory nature "in that they establish, "directly or indirectly, a difference in treatment between national movements of capital and cross-border movements of capital, which does not correspond to any objective difference in the situations and which are therefore suitable for dissuading natural or legal persons from other Member States or from third countries from cross-border capital movements".***

3. ***In targeting exclusively organisations receiving money from abroad, the Law is "stigmatising these associations and foundations" and "likely to create a climate of mistrust towards them".***

4. ***The provisions also reserve a different treatment between individuals/legal entities residing in the country and***

individuals/legal entities residing abroad and providing funding to Hungarian CSOs, therefore enacting an "indirect discrimination on the basis of nationality".

5. *In terms of legitimate interests justifying restrictions/derogations to the free movement of capital, the ECJ accepts that the objective of increasing transparency through reporting can be considered as an overriding public interest. Furthermore, the ECJ case law acknowledges that the objective of increasing the transparency of the funding of associations "may justify the adoption of national legislation which restricts the free movement of capital from third countries more heavily than it does the free movement of capital from other Member States." However, in this case, the reporting obligations "apply indiscriminately to all CSOs receiving, from any Member State other than Hungary or any third country, financial support of an amount reaching the thresholds provided for by that law [...] instead of targeting those which, having regard to their aims and the means at their disposal, are genuinely likely to have a significant influence on public life and public debate".*

6. *The objective of increasing transparency of foreign funding of associations for fear that some of that funding may interfere with the country's political and economic interest, as outlined in the Law's Preamble, cannot justify "a presumption made on principle" that any foreign funding offered and received by a CSO is "intrinsically liable to jeopardise the political and economic interests of the former Member State and the ability of its institutions to operate free from interference".*

7. *When the ECJ assesses whether the restrictions/derogations to EU law are justified on the basis of the EU Treaties or by overriding reasons in the public interest, it checks their compliance with relevant articles of the CFR (7, 8 and 12) and states that "provisions imposing or allowing the communication of personal data such as the name, place of residence or financial resources of natural persons to a public authority must be characterised, in the absence of the consent of those natural persons and irrespective of the subsequent use of the data at issue, as an interference in their private life and therefore as a limitation on the right guaranteed in Article 7 of the Charter, without prejudice to the potential justification of such provisions. The same is true of provisions providing for the dissemination of such data to the public." In the present case, such imposition is not justified as foreign*

> ***individuals/legal entities granting funding to CSOs in Hungary cannot even be regarded as "public figures" who cannot claim the same protection of the private lives as private persons.***

What happens now?

The ECJ decision is binding on the Hungarian state. Hungary now has an obligation to amend the provisions in breach of EU law and the CFR or repeal the law altogether. Failure to comply may lead to a second case being brought before the ECJ, which may result in a fine.

However, Hungarian CSOs may raise this decision of the ECJ in litigation before their national courts and invoke the direct disapplication of its provisions violating EU law, including the CFR. In other words, **EU law arguments can be used already in national court proceedings to ask the judges to directly disapply the national law incompatible with EU law.**

Check our EU Law Handbook for similar EU law arguments on these and other civic space restrictions! We offer guidance on:

- What EU law is and how it affects individuals and organisations;
- **When and how CSOs can challenge national provisions or measures that impact their mission, activities and operations on the basis of EU law, including the CFR;**
- Which legal avenues and resources are available for CSOs to defend their civic space within the EU law framework.

ECNL, in partnership with EFC and DAFNE, recently published a new Handbook on How to use EU law to protect civic space, intended to provide practical guidance for CSOs to advocate and litigate using EU law to protect their rights and civic space in the EU.

In Part II our Handbook, where we provide non-exhaustive list of practical examples of national measures affecting CSOs' fundamental rights and freedoms and potential EU law arguments to challenge such measures, we **had already outlined a similar example to the Hungarian Transparency Law and offered counter-arguments now included in the ECJ Decision** (see page 50, Example 4).