LEGAL OPINION

HUNGARY'S 2023 SOVEREIGN DEFENSE AUTHORITY LAW

RIGHTS DEMOCRACY RECLAIM

July 2024

Legal Opinion

On the compatibility of Act LXXXVIII of 2023 on the Protection of National Sovereignty

with EU primary and secondary law

This document is the second version of the Legal Opinion first published in May 2024. This version includes:

- Updates on the latest investigations and reports of the Sovereignty Protection Office on opposition politicians, civil society and independent journalism. Some of the uncertainties regarding the scope of the Law included in the first version of the Legal Opinion have been clarified in light of the Office's activities.
- The results of a report published by the Civilization Coalition on the chilling effect caused by the Sovereignty Protection Law on civil society.
- The inclusion of a section explaining how the analysed law violates the conditions needed for Hungary to receive EU funds under the different conditionality regimes.
- Minor editorial changes.

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0. EXECUTIVE SUMMARY & RECOMMENDATIONS

This executive summary distils the key findings of our comprehensive legal opinion regarding the Hungarian Act LXXXVIII of 2023 on the protection of national sovereignty (hereafter: the 'National Sovereignty Law' or 'the Law') and the establishment of the Sovereignty Protection Office.

Our analysis indicates substantial non-compliance with EU law, specifically highlighting breaches in Articles 2 and 10 of the Treaty on European Union (TEU), the freedoms of the internal market, and the fundamental rights outlined in the EU Charter of Fundamental Rights, in addition to violations of the General Data Protection Regulation (GDPR), the Services Directive, and the Presumption of Innocence Directive.

Specifically, this legal memo:

- Summarizes the law provisions and identifies key legal concerns (§ 1).
- Shows that even though the law falls under the scope of EU law:
    - The Office processes personal data in breach of the GDPR (§ 2.1), and
    - The Law violates the free movement of goods, services, capitals and workers (§ 2.2).
- Explains how, despite being bound by the Charter, the law violates:
    - The rights to privacy and data protection through the Office's intrusive investigations (§ 3.1),
    - The right to freedom of expression and association by creating a hostile environment for CSO, media and citizens (§ 3.2),
    - The presumption of innocence since the law is liable to coerce individuals into self-incrimination without proper judicial oversight. (§ 3.3),
    - The right to non-discrimination on the basis of nationality and political opinion (§ 3.4)
    - The right to an effective remedy since the activities of the Office cannot be challenged before a court (§3.5).
- Explains how the law, due to the seriousness and systemic breaches of the rights and freedoms protected by the Treaties, generates a chilling effect that undermines the participation of citizens in democratic life, infringing the values of Articles 2 and 10 TEU (§4).
- Provides procedural recommendations by explaining why the Commission should shorten the infringement procedure and request interim measures against the Law (§5).
- Explains how the Law impedes Hungary from receiving its share of frozen EU funds, and why additional funds must be blocked on top of those (§6).

In light of the above, RECLAIM urges the European Commission to:

- Speed up the pre-litigation procedure and bring Hungary to the Court of Justice of the European Union Court (CJEU) as early as possible, to minimise the harm done by the Sovereignty Protection to civil society and democratic pluralism in Hungary.

- Seek interim measures in light of the irreparability of the damage created by the operations of the Sovereignty Protection Office.

- Block any release of funds under the three conditionality regimes and consider augmenting the volume of frozen funds.

Additionally, Member States are encouraged to:

- Back a Commission lawsuit or independently lodge a complaint against Hungary for non-compliance with EU law, as outlined in Article 259 TFEU

1. Analysis of the content of the Law

1. The Hungarian Parliament adopted on 12 December 2023 the National Sovereignty Law.[1] The Law creates a "Sovereignty Protection Office" (hereafter, the 'Office') a state administration organ whose activities are aimed at protecting 'national sovereignty' and for which it carries out "*analytical, assessment, proposal-making and investigative activities*".[2]

2. One of the purposes of the Office is the investigation of activities carried out "*in the interests of another State* […] *foreign organ or organisation and natural person*" – without the need for any financial transactions taking place to establish that a person is acting in the interest of a foreigner – as well as those "*whose activity funded with supports from abroad may exert influence on the outcome of elections*" or "*perform or support activities aimed at influencing the will of voters*".[3] The Office investigates both natural and legal persons carrying out those activities.[4]

3. The Law does not delimit its territorial nor temporal scope. Hence, the Office can investigate not only activities occurring in Hungary, but also those taking place abroad, as well as activities that occurred before the entry into force of the Law. In fact, the Office has already investigated facts that took place as early as 2010.[5]

4. The Office may also recommend the Hungarian parliamentary committee on national security to summon the investigated parties as well as third persons not cooperating with the investigation for a hearing.

5. The Office publishes the reports of its individual investigations, as well as annual 'sovereignty reports' on legislation that 'affects' national sovereignty,[6] adopting recommendations directed to all three branches of state and evaluating their performance regarding the implementation of past recommendations.[7]

6. In addition, the Law also introduces a new category of felony, on the 'illegal influence of the will of voters. Although this inclusion is worrisome from a fundamental rights

[1] The Hungarian government has provided a translation of the law into English here. The Hungarian Helsinki Committee has carried out an unofficial translation of the law, with the intention of better reflecting the "original terminology, wording and aim of the Act", here.
[2] National Sovereignty Law, section 1.
[3] Ibid, section 3.
[4] See, in this regard, the National Sovereignty Law, sections 2 and 3.
[5] RECLAIM, 'Letter sent by the Hungarian Sovereignty Protection Authority to Transparency International Hungary on 18 June 2024' <https://e038c6a4-24a2-4083-adc4-424355961a5a.usrfiles.com/ugd/e038c6_a58968e1a0a940e8960219f1154acd75.pdf>, pp 3 and 4.
[6] On aspects like the effectiveness of the application of these laws, problems encountered in implementation and the application of law, as well as analysis of the legal and administrative practice. See National Sovereignty Law, section 6.
[7] Ibid.

perspective,[8] this legal opinion focuses on the role and powers of the Office and their impact upon the EU's fundamental freedoms and rights.

7. The Office itself has no law enforcement nor sanctioning powers and, apart from the introduction of the new felony category, the Law does not define any other activity as illegal. If the Office, in the course of its investigations, gathers information that could lead to the opening of administrative or criminal proceedings, it shall forward it to the competent authorities to carry such proceedings.[9]

1.1. Updates on the implementation of the Law

8. In practice, the above means that the Office carries out targeted, privacy invasive smear campaigns against the opposition parties, civil society and the media – and, potentially, even judges. Some of the investigations carried out by the Office are the following:

    - An on-going investigation on Péter Magyar, the main figure in the opposition to Orbán.[10]
    - A report identifying journalists working in media outlets like the New York Times or the CNN, Hungarian and international NGOs staff and a former NATO commander, among others, as part of a "foreign network violating Hungary's sovereignty".[11]
    - An on-going investigation requested by the Hungarian parliament on the actions of opposition MEPs – including their voting records – on EU actions on Hungary related mostly with the rule of law, like Article 7 TEU procedures or fund freezing under the different conditionality regimes.[12]

[8] See, in this regard, Council of Europe Venice Commission, 'Opinion on Act LXXXVIII of 2023 on the Protection of National Sovereignty' (2024) <https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2024)001-e> accessed 2 April 2024, p 17-10; Amnesty International and Hungarian Helsinki Committee, 'Hungary's Act on the Protection of National Sovereignty in Breach of EU Law' (2024) <https://helsinki.hu/en/wp-content/uploads/sites/2/2024/02/Sovereignty_Protection_Act_breaches_EU_law_2024.pdf>.

[9] National Sovereignty Law, section 11.

[10] 'Hungary Investigates Orban Critic Magyar over Funding' *Reuters* (19 April 2024) <https://www.reuters.com/world/europe/hungary-investigates-orban-critic-magyar-over-funding-2024-04-19/> accessed 14 May 2024.

[11] See RECLAIM translation of 'Report on the investigation of footage published on social platform X' <https://0c6cee7b-8032-4c0b-8154-d4a585930004.usrfiles.com/ugd/0c6cee_66b62d530701422c82e67c21bc770276.pdf> and Sovereignty Protection Office Facebook post of 27 May 2024 <https://www.facebook.com/photo/?fbid=122149076222184259&set=a.122115783212184259>.

[12] See RECLAIM translation of 'Report of 6 May 2024 by the Committee on European Affairs of the Hungarian National Assembly on its investigative activities aimed at "exposing the political actions of the left against Hungarian interests in Brussels"' <https://0c6cee7b-8032-4c0b-8154-d4a585930004.usrfiles.com/ugd/0c6cee_713a47ff5cc14cd3aa4013a9d25d2898.pdf>.

- An on-going investigation on Transparency International Hungary and Átlátszó for their contribution, among other things, on the rule of law reports and EU fund conditionality mechanisms.[13]

- A report on the war in Ukraine suggesting that local opposition politicians – including MEPs – and independent media are 'foreign agents' following the Western narrative imposed by, among others, President von der Leyen, VP Věra Jourová, HRVP Josep Borrell, and EUCO President Charles Michel. The report also tries to improve the government's pro-Russian image by blaming the parties to the right of Fidesz for legitimising the Russian attack on Ukraine.[14]

9. In addition, it can signal other public authorities to address certain topics or to operate against certain organisations or individuals, as well as recommend the introduction of legislative initiatives.

10. In the coming sub-sections, we will address the three most problematic aspects of the Law: its chilling effect, its unfettered investigative powers and its discrimination on the basis of nationality and political opinion.

1.2. THE NATIONAL SOVEREIGNTY LAW GENERATES A CHILLING EFFECT ON CITIZENS

11. The concept of chilling effect may be defined "*as the negative effect any state action has on natural and/or legal persons, and which results in pre-emptively dissuading them from exercising their rights or fulfilling their professional obligations, for fear of being subject to formal state proceedings which could lead to sanctions or informal consequences such as threats, attacks or smear campaigns*".[15] The reference to state action should be understood in broader terms, referring to "*any measure, practice or omission by public authorities which may deter natural and/or legal persons from exercising any of the rights provided to them*".[16] It is possible to identify three deliberate methods aimed at dissuading natural or legal persons from exercising their rights:[17]

    - The adoption of ambiguous legal provisions.

    - The arbitrary enforcement of these provisions against the most vocal critics of the autocratic government and its authorities (e.g., opposition political parties and politicians, civil society groups, activists, judges, prosecutors etc.) with the

[13] See RECLAIM translation of 'Letter sent by the Hungarian Sovereignty Protection Authority to Transparency International Hungary on 18 June 2024' (n 5).
[14] See RECLAIM translation of 'Extracts from the Sovereignty Protection Office report of 4 July 2024 on the war in Ukraine' <https://e038c6a4-24a2-4083-adc4-424355961a5a.usrfiles.com/ugd/e038c6_1784548a5c7a423bad75b73c6050935a.pdf>.
[15] Laurent Pech, 'The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, the Rule of Law and Fundamental Rights in the EU' (Open Society European Policy Institute 2021), p 4.
[16] ibid.
[17] ibid.

aim to intimidate them and reinforce the idea among the general public that the opposition is illegitimate; and

- The adoption of disproportionate sanctions aimed at discouraging people from voicing their dissent and exercising their rights and freedoms.

12. The Law meets all three conditions. First, it is deliberately ambiguous. The main objective of the Office is the defence of "*national sovereignty*" in the interest of the protection of "*constitutional identity*".[18] For that purpose, it investigates vaguely defined activities and makes recommendations and proposals on the protection of sovereignty.[19] **National sovereignty is not defined** in the text of the Law, and neither sovereignty nor constitutional identity have been clearly defined in the case-law of the Hungarian Constitutional Court.[20]

13. More specifically, the Office investigates activities carried out "*in the interests of another state*" or of a "*foreign organ or organisation and natural person if they can harm or jeopardise the sovereignty of Hungary*".[21] Those activities include advocacy and activities aimed at "*influencing democratic discourse and state and social decision-making*". The Office also seeks to "*ensure transparency in social decision-making processes*". None of the aforementioned terms ('acting in the interest of', 'advocacy', 'harming national sovereignty', 'influencing democratic discourse or social or state decision-making' nor 'transparency in social decision-making') are defined in the Law. As a result, the Law **is ambiguous as to which behaviours can trigger an investigation (or any other action) by the Office**.

14. The broadness and ambiguity of the Law is exemplified by the comments made by Tamás Lánczi, the president of the Office, when asked in an interview about the tasks of the said body:

> "*Hungarian sovereignty is not only to be defended in elections, as sovereignty has many aspects. These include economic, political and cultural aspects. There is also the issue of the media. We will also conduct research and studies in these dimensions to see to what extent Hungarian sovereignty is asserted in these areas*."[22]

15. As a result of the lack of clarity within the Law, the Office can arbitrarily enforce its powers against those behaviours and actors that it believes to be 'harming national sovereignty'. It is illustrative, in this regard, that the current president of the Office, when working as the editor-in-chief of a Hungarian journal, published a list of names

[18] Even though section 1 of the National Sovereignty Law argues that the aim of the Office is the protection of 'constitutional identity', it is worth noting that such term is only mentioned once, while national sovereignty is referred to almost 40 times. See Council of Europe Venice Commission (n 8).
[19] National Sovereignty Law, section 2.
[20] Amnesty International and Hungarian Helsinki Committee (n 8), p 5.
[21] Ibid, section 3.
[22] Patrik Máté, 'Lánczi Tamás: Résen Kell Lennünk' *Magyar Nemzet* (23 January 2024) <https://magyarnemzet.hu/belfold/2024/01/lanczi-tamas-resen-kell-lennunk>.

of NGO workers, journalists and professors.[23] In the article, they were accused of being 'Soros-Mercenaries' and of serving foreign powers, and portrayed them as the enemy of the nation. A national court ruled the publication unlawful due to its "*fearmongering*" character and granted compensation for damages to the private and public figures listed therein.[24] As already shown by the pattern of the Office's investigations, the same arbitrary action against civil society, journalism and opposition politicians is to be expected by an Office led by Mr. Lánczi.

16. Sadly, the chilling effect generated by the Law is already tangible in the Hungarian society. A survey carried out by the Hungarian Civilization Coalition in February 2024 – before the start of the Office's investigations –has found that **the Office causes fear and self-censorship among civil society organisations, hindering cooperation between them, and making EU funding being "*perceived as a threat*"**.[25] More than 60% of respondents believed the Law will cause a chilling effect, while a third did not have it clear at the moment and were waiting to see how the Law would be applied.[26]

17. In addition, the Office has unrestricted investigative and public shaming powers, which deter individuals from exercising their rights, as we will develop through the following section.

1.3. THE LAW VESTS THE OFFICE WITH UNFETTERED (AND UNCHALLENGEABLE) INVESTIGATIVE POWERS

18. In order to carry out its ambiguous, broad mandate, the Office is provided with unrestrained investigation powers. **It can access all data** and request written or oral information from **state or local governments, from the organisation or person under investigation or any other organisation or person that may be 'related' to the case** under investigation.[27] This includes, notably, information from the National Information Centre,[28] which centralises the databases from both law enforcement

[23] Csanády András, 'A spekuláns emberei' (*Figyelő*, 4 November 2018) <https://figyelo.hu/print-rovatok/matrix/a-spekulans-emberei-6473/> accessed 4 April 2024; K-Monitor, 'Adatbázis: Lánczi Tamás | K-Monitor' (*K-Monitor*) <https://adatbazis.k-monitor.hu/adatbazis/cimkek/lanczi-tamas> accessed 4 April 2024.

[24] Lengyel Tibor, 'Bíróság: Jogsértő és félelemkeltő volt a Figyelő feketelistája, mindenkinek jár a bocsánatkérés és a sérelemdíj' *hvg.hu* (28 September 2022) <https://hvg.hu/itthon/20220928_Jogsertes_birosag_itelet_Figyelo_Sorosugynokozos_listazas_serelemdij> accessed 4 April 2024; Kriszta Pokol, 'Victory against Figyelő: Don't Blacklist Individuals – Even If You Are the Regime' (*Hungarian Helsinki Committee*, 7 December 2022) <https://helsinki.hu/en/victory-against-figyelo-dont-blacklist-individuals-even-if-you-are-the-regime/> accessed 4 April 2024.

[25] Civilization Coalition, 'From Chilling Effect to Immediate Harm: Consequences of the Sovereignty Protection Act' (2024) <https://helsinki.hu/wp-content/uploads/2024/06/Consequences-of-the-Sovereignty-Protection-Act.pdf>, p 5.

[26] ibid, p 3.

[27] National Sovereignty Law, section 8.

[28] Ibid, section 26.

bodies and security services[29] or information from the tax authorities.[30] In addition, according to the Sovereignty Protection Office's website, the Office has initiated cooperation with the National Bank of Hungary, the National Tax and Customs Administration, the Chamber of Hungarian Auditors, the National Authority for Data Protection and Freedom of Information and the National Media and Infocommunications Authority.[31]

19. Given that the Law provides no definition of the territorial nor temporal scope of the Office's investigations, it can **investigate activities that took place in but also outside Hungary** – as shown by the investigations on the activities of MEPs in Brussels – **as well as activities carried out before the entry into force of the Law** – as is the case with the report launched against Transparency International and Átlátszó.

20. If the Office wants to question third parties "related" to the case – whatever the Office decides that to be – and they do not cooperate, the Office can disclose their names and criticize them in its annual report.[32] The Office may also recommend the national security committee of the Hungarian parliamentary committee on national security to summon the party under investigation or those who do not cooperate with the Office's information requests to a hearing. Apart from those shaming tools, the Office does not have any law enforcement powers; it cannot enter premises, confiscate materials nor compel compliance with its requests in any other way.

21. The Office has three types of powers:

    (i) First, the Office **publicly humiliates and stigmatises those persons carrying activities it finds censurable**. It does so by publishing the results of its arbitrary investigations in its webpage,[33] which may be given enhanced outreach through the publications and conferences of its 'Research Institute',[34] and by recommending the summoning of the investigated person before the parliamentary committee on national security.[35]

    (ii) The second category of powers refers to the Office's role as **a liaison to law enforcement**, since the invasive information it gathers can give rise to the initiation of criminal, administrative or other proceedings.[36] The Office can gather such data but, unlike law enforcement bodies, its investigations are not subject to any procedural safeguard.

[29] Milieu Consulting SRL, 'National Intelligence Authorities and Surveillance in the EU: Fundamental Rights Safeguards and Remedies. Country: Hungary' (European Union Agency for Fundamental Rights 2022), p 4.
[30] National Sovereignty Law, section 35.
[31] See the entry in the Sovereignty Protection Office's website 'Együttműködési kezdeményezések' (*Szuverenitásvédelmi Hivatal*) <https://szuverenitasvedelmihivatal.hu/hirek/egyuttmukodesi-kezdemenyezesek>.
[32] Ibid, sections 7 and 12.
[33] The webpage of the Office is https://szuverenitasvedelmihivatal.hu/.
[34] National Sovereignty Law, sections 6 and 13.
[35] Ibid, section 12.
[36] Ibid, section 11.

(iii) Last, the Office acts as a **'sovereignty' watchdog of the three State powers**. It can recommend the government to introduce legislative initiatives, it acts as a legislative advisory body, and it evaluates the 'sovereignty performance' of all three branches of the state and all territorial levels of the administration.[37]

22. The Office's powers are unfettered. Despite their deeply invasive nature, the Law **does not provide any administrative nor judicial remedies** against the Office's investigations, its publications nor its capacity to recommend the parliamentary committee on national security to summon the investigated person to a hearing.[38]

23. As a result of the ambiguous and vague drafting of the law, that allows for arbitrary enforcement, as well as the possible consequences for the investigated persons, the Law creates a chilling effect on natural and legal persons, Hungarians and non-Hungarians alike.

1.4. THE OFFICE IS A POLITICISED BODY SET TO DISCRIMINATE ON THE BASIS OF NATIONALITY AND POLITICAL OPINION

24. Furthermore, the Law is designed to discriminate on the basis of nationality and political opinion. The preamble of the Law is unequivocal; its target is, in essence, any activity with direct or indirect connections to foreign persons, organisations or states.

> "*Hungary's sovereignty is increasingly under unlawful attack. For years now, there have been attempts to exert influence* […] *by foreign organisations and individuals seeking to assert their own interests in Hungary, in opposition to Hungarian interests and rules.*
>
> *The 2022 parliamentary election campaign has already been influenced by direct foreign funding, as confirmed by the national security investigation that revealed the support of the united left-wing opposition*. […]
>
> *In order to ensure democratic debate, transparency in public and social decision-making processes, disclosure of foreign interference attempts and the prevention of such attempts, an independent body should be set up to investigate them*" (emphasis added).

25. In addition to increased surveillance of any activity which the Office portrays as pursuing a 'foreign interest', the Law has the potential to target individuals on the basis of their political opinion. In fact, as the preamble of the Law suggests and the pattern of investigations show, the Law is being used to target the opposition to Fidesz.

26. The fact that the Office can be politicised is also reflected in the system of appointment of its president.[39] The President of Hungary chooses the president of the Office for a term of six years, on the recommendation from the Prime Minister.

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[37] Ibid, sections 2 and 6.
[38] Ibid, sections 6 and 8.
[39] Council of Europe Venice Commission (n 8), paras 39-40.

This provides clear incentives for the president of the Office to align with the interests of the President of Hungary, who can decide to appoint him or her for a second term.[40] In fact, the president of the Office, Mr. Lánczi Tamás, is a figure of outmost loyalty to Fidesz, who will not shy away to chase anyone who is critical with the party.

Who is Lánczi Tamás?

Tamás Lánczi, the president of the Sovereignty Protection Office, has worked throughout his career at several positions amplifying the government messages and reinforcing Orbán and Fidesz's narrative.[41] In fact, he has been part of Orbán's speechwriting team,[42] he has served as Chief of Staff to the leader of the Fidesz parliamentary group[43] and has also worked as an analyst at the party's think-tank.[44] Lánczi later became editor-in-chief of Figyelő – which, as stated above (para 15) published the list of the NGOs accused of being 'Soros mercenaries'. More recently, he held a senior position at the public media, whose bias is acknowledged even by Fidesz public figures.[45]

In March 2024, he even argued that "[I]*f someone is working to deprive Hungary of the subsidies it is entitled to, and is proud to do so, what does it amount to?* [...] *The legislators and the law enforcers have a responsibility to clarify what they consider to be treason*".[46] In essence, this means that he believes that those cooperating with the Rule of Law cycle and EU fund conditionality are traitors. The investigation against Transparency International Hungary proves that he is already putting those ideas into practice.

27. It is worth noting that the Office has already launched its first investigation, directed against Péter Magyar – a popular public figure who is openly critical with the

[40] National Sovereignty Law, section 14(1).
[41] K-Monitor (n 23); Mizsur András, 'Orbán beszédírója volt, asszisztált a civilek listázásához, most megkapja a Szuverenitásvédelmi Hivatalt' (*telex*, 30 December 2023) <https://telex.hu/belfold/2023/12/30/lanczi-tamas-szuverenitasvedelmi-hivatal-kinevezes-mtva-szazadveg-figyelo-sajto-soros-gyorgy> accessed 9 May 2024.
[42] Mizsur (n 41); Csaba Lencsés, 'Gyurcsány Adatban, Orbán Poénban Hisz - ORIGO' <https://www.origo.hu/itthon/2007/04/20070408hiaba> accessed 13 May 2024.
[43] Mizsur (n 41).
[44] K-Monitor (n 23); Mizsur (n 41); Katalin Erdélyi, 'Tens of Billions of Forints in Contracts Awarded to Pro-Government Think Tanks' (*English*, 8 December 2023) <https://english.atlatszo.hu/2023/12/08/tens-of-billions-of-forints-in-contracts-awarded-to-pro-government-think-tanks/> accessed 13 May 2024; Fazekas Zsuzsanna, 'Századvég: a kormány think tankje vagy egyszerű pénzszivattyú?' (*Magyarnarancs.hu*, 23 December 2020) <https://magyarnarancs.hu/belpol/szazadveg-a-kormany-think-tankje-vagy-egyszeru-penzszivattyu-234438> accessed 13 May 2024; M.László Ferenc, 'Századvég-sztori: milliárdos birodalmat épít Orbán háttérembere' (*hvg.hu*, 30 October 2012) <https://hvg.hu/itthon/20121029_szazadveg_kiterjedt_megbizasok_kormany> accessed 9 May 2024.
[45] Mizsur (n 41).
[46] 'Lánczi Tamás: Résen Kell Lennünk + Videó' (*Hír TV*, 17 March 2024) <https://hirtv.hu/bayer_show/lanczi-tamas-resen-kell-lennunk-video-2582048>.

government and who plans to run for the European Parliament elections.[47] In a statement of the Office, the body argued that "*the same interest group and network of foreign and Hungarian actors that supported the opposition* […] *before the 2022 parliamentary elections,* […] *is now targeting the Hungarian elections again*".[48] The president of the Office has even argued that the said group "will *try to influence the results of the June elections for local representatives and the European Parliament*".[49] The openly politicised Office is already on the hunt for the opposition.

28. It follows from the Hungarian legislature's intention, as described in the Law's preamble, that the Office's activities are intended to target, on the one hand, foreign persons and Hungarian persons which engage with the former and, on the other hand, citizens on the basis of their political opinion. This is further evidenced by the strong links between the president of the Office and the government and by the first investigation launched by the Office.

2. The law hampers the proper functioning of the internal market

29. The powers provided to the Office interfere with norms of primary and secondary EU legislation. More specifically, it does not abide by the provisions of the General Data Protection Regulation (from now on, the 'GDPR' – Section 2.1), the Services Directive, the free movement of services and the freedom of establishment (Section 2.2.2), the free movement of capital (Section 2.2.3), the free movement of goods (Section 2.2.4) and the free movement of workers (Section 2.2.5). The Law does not fall under any of the legal derogations from those provisions, hence violating them.

2.1. THE LAW MANIFESTLY BREACHES THE GDPR

2.1.1. THE GDPR IS APPLICABLE TO THE PROCESSING CARRIED OUT BY THE OFFICE

30. Since the Office's activities do not safeguard essential state functions and do not pertain to law enforcement, it cannot benefit from the exceptions provided for in Article 2(2) of the GDPR. Its data processing is, thus, subject to the said regulation.

31. According to Article 3 GDPR, the GDPR applies "*to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the*

[47] Barnóczki Brigitta and Pál Tamás, 'A Szuverenitásvédelmi Hivatal külföldi finanszírozást gyanít Magyar Péter mögött' *telex* (18 April 2024) <https://telex.hu/belfold/2024/04/18/szuverenitasvedelmi-hivatal-vizsgalat-kulfoldi-finanszirozasi-kiserlet-magyar-nemzet> accessed 19 April 2024; Magyar Nemzet, 'Magyar Péter Mögött Bajnai Gordon Elhíresült Cége Áll' <https://magyarnemzet.hu/belfold/2024/04/magyar-peter-mogott-bajnai-gordon-elhiresult-cege-all#google_vignette> accessed 19 April 2024.

[48] Benics Márk, 'Megindítja az első vizsgálatát a Szuverenitásvédelmi Hivatal' (*444*, 18 April 2024) <https://444.hu/2024/04/18/meginditja-az-elso-vizsgalatat-a-szuverenitasvedelmi-hivatal> accessed 23 April 2024.

[49] Munkatársunktól, 'Lánczi Tamás: Ugyanolyan külföldi befolyásolási kísérlet készülhet, mint amilyennel 2022-ben próbálkoztak' (19 April 2024) <https://magyarnemzet.hu/belfold/2024/04/lanczi-tamas-ugyanolyan-kulfoldi-befolyasolasi-kiserlet-keszulhet-mint-amilyennel-2022-ben-probalkoztak#google_vignette> accessed 23 April 2024.

Union". Article 4(7) GDPR defines as controller "*the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data*".

32. Despite the GDPR being applicable to any entity – be it public or private – it carves out certain processing of personal data from its scope. In the case at hand, that could in principle include the exception of Article 2(2), letter (a) "*in the course of an activity which falls outside* the *scope of Union law*" or (d) "*by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security*" of the GDPR. However, neither of the two exceptions are applicable to the activities of the Office.

33. The Court of Justice (or the 'Court') interprets the exceptions of Article 2(2) GDPR strictly, to guarantee the high level of protection of natural persons that Recital 10 GDPR mandates.[50] Hence, the Court argued in *Latvijas Republikas Saeima* that Article 2(2)(a) GDPR is only applicable when state authorities are processing personal data in the context of activities meant to safeguard national security or of an activity that "*can be classified in the same category*", that is, "*those that are intended to protect essential State functions and the fundamental interests of society*".[51] According to the Court, those activities remain within the competences of the Member States as per Article 4(2) TEU.[52]

34. In this vein, the Court has consistently held that Article 4(2) TEU cannot be understood as providing Member States with the possibility to invoke 'national identity' as a general ground for derogating from fundamental principles and fundamental rights applicable in the Union legal order.[53] The Court has accepted as a fundamental interest of society for instance, ensuring the continuity of public services in the petroleum, telecommunications or energy sectors.[54]

35. The case *Österreichische Datenschutzbehörde* is illustrative as to the strictness of the Court's approach when addressing 'national security' justifications by the Member States when the latter try to derogate from EU law. In that case, the Court clarified that even a parliamentary committee on national security had to comply with the GDPR when scrutinising political influence over the intelligence services. The Court considered the exception of Article 2(2)(a) GDPR inapplicable, since that political scrutiny did not concern national security.[55]

36. That same reasoning is applicable to the activities of the Office, which is not entrusted with tasks related to national security and that does not protect essential

[50] Case C-439/19 *Latvijas Republikas Saeima* [2021] ECLI:EU:C:2021:504, para 62.
[51] ibid, paras 66 and 67.
[52] Case C-33/22 *Österreichische Datenschutzbehörde* [2024] ECLI:EU:C:2024:46, para 47.
[53] It is settled case-law of the Court that "*the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law*". See, to that effect, ibid, para 50; Case C-623/17 Privacy International [2020] ECLI:EU:C:2020:790, para 44.
[54] Case C-106/22 *Xella Magyarország* [2023] ECLI:EU:C:2023:568, paras 67-68.
[55] Case C-33/22 Österreichische Datenschutzbehörde [2024] ECLI:EU:C:2024:46, para 57.

state functions nor fundamental interests of society. That is so since (i) the Office does not investigate illegal behaviour and (ii) the Office's powers are limited to social shaming.

37. First, it is worth noting that the Office's activities do not constitute law enforcement. The Office does not investigate nor prosecute criminal or administrative offences: if it encounters any information related to such behaviours the Office forwards it to the relevant authority.[56] **The Office investigates activities regardless of their lawfulness** and can use its public shaming tools **to discipline the behaviours it finds censurable**. Its role is akin to the political scrutiny carried out in the case *Österreichische Datenschutzbehörde*, with the difference that the Office scrutinises matters related to the undefined and ambiguous field of 'national sovereignty' and investigates *any* natural or legal person.

38. The Office cannot be said to protect essential state functions for the part of its investigations dealing with lawful activities. If an activity is **lawful under national law, it means that the national legislature has not identified it as a threat** to essential state functions nor to the fundamental interests of society. Hence, it cannot be considered as falling within the remit of Article 2(2)(a) GDPR. **To hold otherwise** would be incompatible with the strict interpretation given by the Court to the said provision, as it **would allow the Member States to qualify as a 'threat to a fundamental interest of society' behaviours which are merely unwelcome by the executive**.

39. However, even when the Office investigates unlawful activities, its powers, due to their nature, are incapable of protecting state functions or fundamental interests of society. As stated above (para 21), the Law provides the Office with three main powers: public humiliation, law enforcement liaison and watchdog of state authorities. None of them entail binding competences – the Office's powers are limited to investigating, reporting, and issuing recommendations. The weapon of the Office, as recognised by its president, is its ability to shape public opinion.[57]

40. **A body that lacks decision-making powers and, hence, that cannot compel individuals, is unable to protect essential state functions nor the fundamental interests of society**. Taking, for example, the list of activities referred to in the Court's case-law as protecting the said interests, it seems evident that the guarantee of energy supply will unlikely be achieved by publicly shaming energy companies. Similarly, the continuity of telecommunication services cannot realistically be ensured by publishing reports, however solemn their tone may be. And even when the Office gathers information about illegal behaviours of investigated persons, it is the authority with powers to initiate criminal or administrative proceedings the one that can guarantee that laws are complied with – and the one whose activities could fall under Article 2(2)(a) GDPR. Therefore, the Office lacks any substantive power to protect national security, essential state functions nor any fundamental interest of

[56] National Sovereignty Law, section 11.
[57] Máté (n 22).

society and its activities cannot be considered as falling within the exception of Article 2(2)(a) GDPR.

41. Second, the exception of Article 2(2)(d) GDPR is also inapplicable to the processing carried out by the Office. As clarified by the Court in *Latvijas Republikas Saeima*, that exception is meant to carve out the processing of personal data carried out by law enforcement authorities, those who exercise public authority and public powers for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.[58] Such authorities are subject to the Law Enforcement Directive,[59] which keeps a relation of *lex specialis* with the GDPR.[60] And, pursuant to recitals 11 and 12 of the Law Enforcement Directive, even law enforcement authorities may be subject to the rules of the GDPR, insofar as their processing of personal data does not pursue the investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

42. As stated above, the Office does not seek to prevent, investigate, detect nor prosecute criminal offences nor to safeguard against and prevent threats to public security. Even if it can forward information to law enforcement authorities, those referrals are a side-effect of the Office's broad investigative powers, but not the purpose of its investigations, recommendations and publications, which deal with the 'exercise of national sovereignty'.

43. Therefore, the Office:

- Does not contribute to the protection of national security, essential state functions nor fundamental interests of society.
- Does not carry out law enforcement activities.
- Is bound by the provisions of the GDPR.

2.1.2. THE OFFICE'S PROCESSING OF PERSONAL DATA IS INCOMPATIBLE WITH THE GDPR

44. When executing its tasks, the processing of personal data carried out by the Office is unlawful, non-transparent, unaccountable and follows a data maximisation approach.

The Office's processing of personal data is unlawful.

45. According to Article 5(1)(a) GDPR, the processing of personal data shall be lawful, which means that it should rely on one of the six grounds for lawful processing of Article 6(1) GDPR. For two of those six grounds, those of letters (c) "*processing is necessary for compliance with a legal obligation to which the controller is subject*" and (e) "*processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller*", Article 6(3)

[58] Case C-439/19 Latvijas Republikas Saeima [2021] ECLI:EU:C:2021:504, paras 69-70.
[59] Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data [2016] OJ L119/89.
[60] Case C-439/19 Latvijas Republikas Saeima [2021] ECLI:EU:C:2021:504, paras 69-70.

GDPR requires that the processing shall be laid down either on Union or Member State law to which the controller is subject (henceforth, the 'legal basis'). According to Article 6(3) GDPR, such legal basis shall "*meet an objective of public interest and be proportionate to the legitimate aim pursued*". According to Recital 41 GDPR, such basis shall be "*clear and precise and its application should be foreseeable*" in line with the requirements of both CJEU and ECtHR case-law.

46. In addition, when the personal data is processed pursuant to a legal basis but for a purpose different from the one of their original collection, Article 6(4) GDPR mandates such legal basis to have as a legitimate objective one of the listed objectives of Article 23(1) GDPR. Those include national security, defence, public security or "*other important objectives of general public interest* […], *in particular an important economic or financial interest* […], *including monetary, budgetary and taxation a matters, public health and social security*" – Article 23(1) letters (a), (b), (c) and (e) GDPR.

47. The Office could rely on the ground of Article 6(1)(e) GDPR – as it allegedly carries a task in the public interest – to process personal data. In that case, the Law needs to comply with the requirements of Article 6(3) GDPR. In addition, since the Office will gather data from local and national governments and any other public persons and will process it for a purpose other than that for which those governments collected the data, the Law also needs to comply with Article 6(4) GDPR.

48. However, the Law is unforeseeable, it is unnecessary to attain its alleged objectives and it is blatantly disproportionate. As stated above (para 13), the Law is completely vague concerning the scope of its activities, the grounds for the launching of its investigations and its potential targets. Hence, its ambiguity makes it impossible for data subjects to foresee its application and understand when the Office may interfere with their rights to personal data nor how they should adapt their conduct to avoid any such interference.

49. Admittedly, the aims sought by the Law could be considered legitimate. According to its preamble, the setting up of the Office aims at "*promoting democratic discourse, meeting the requirement of transparency of state and social decision-making processes, revealing foreign interference attempts*". A priori, even if excessively broad and ambiguous, those objectives could be legitimate and could fall under the category of "*other important objectives of general public interest*" of Article 23(1)(e) GDPR.

50. However, those aims are not attained by the Office's activities. That is evidenced by both the letter of the Law and the context within which it is executed. First, the Law does not promote democratic discourse. Rather to the contrary, given the chilling effect it generates (see Sections 1.2 and 1.3, above and 3.2, below), the Office quashes public debate. Second, the Office does not promote transparency of 'social decision-making'; it subjects critical voices with the government to stigmatisation and smear campaigns. This is exemplified by the very first Office investigation, which, as stated in paragraph 27, targets a public figure that has been very vocal – and popular – against Orbán's government. The Office is targeting anyone who

speaks up against the government, and it will certainly not investigate those loyal to Fidesz. Hence, rather than providing transparency on decision-making, the Law exposes and harasses those who stand against the government.

51. Third and last, the Law does not seek to reveal foreign interference attempts. The Office is meant to target anyone deemed as pursuing a 'foreign' interest – even if they are unrelated to any foreign person or capital – whenever that could harm 'national sovereignty', without defining any of those terms.[61] Under such pretext, Hungarian and non-Hungarian data subjects can be investigated for carrying out activities related to the EU rule of law mechanisms or even for organising LGBTIQ+ demonstrations – since the Union and the LGBTIQ+ community are frequently portrayed by the government as alien to Hungary and a threat to its sovereignty.[62]

52. In addition, the Law is also disproportionate.[63] According to the Court in *Digital Rights Ireland*, the legislature's discretion is limited when interfering with the right to data protection, particularly in light of its role guaranteeing respect for private and family life.[64] Hence, any interference should be limited to what is strictly necessary.[65] In that case, the Court ruled the Data Retention Directive was uncompliant with the Charter of Fundamental Rights of the EU (hereafter, 'CFREU' or the 'Charter') on the grounds, inter alia, that (i) the data retained need not keep relation to the aim of the directive (in that case, public security), (ii) the directive did not determine any limits to the access and use by national authorities of the personal data (nor on the type of personal data retained neither on the individuals affected, and it did not provide exceptions for communications subject to professional secrecy) and (iii) to the lack of procedural guarantees for individuals.[66]

53. Similar deficiencies can be observed in the Law. The powers of the Office are not limited to what is strictly necessary to attain its aim. Rather to the contrary, the Office can access all data gathered by local and national governments, including law enforcement and intelligence agencies. It can also request information from any private person, insofar as it is 'related' to the case under investigation – whatever the Office decides that to be. The Office does not need to justify why a particular activity needs to be investigated in the first place why it needs the data it requests nor for which purposes or for how long– as it made clear with its investigation to

[61] National Sovereignty Law, section 3.
[62] See Fidesz, 'Brüsszel Hiába Támadja a Gyermekvédelmi Törvényt!' <https://www.facebook.com/FideszHU/videos/366341815985256/?ref=embed_video&t=0> accessed 12 April 2024; Zoltán Kottász, '"The EU Acts like a Globalist Political Steamroller": An Interview with MEP Tamás Deutsch' (3 March 2024) <https://europeanconservative.com/articles/interviews/the-eu-acts-like-a-globalist-political-steamroller-an-interview-with-tamas-deutsch/> accessed 22 April 2024.
[63] See, in this regard, the examination of the necessity and proportionality of the Law when restricting fundamental rights made by the Venice Commission in its report: Council of Europe Venice Commission (n 8), pp 12-15.
[64] Joined Cases C-293/12 and C-594/12 Digital Rights Ireland [2014] ECLI:EU:C:2014:238, paras 47 and 48.
[65] ibid, para 52.
[66] ibid, paras 57-67.

Transparency International Hungary. The processing carried out by the Office includes secrets protected by law and classified information.

54. As a result, the legal basis for the processing of personal data carried out by the Office does not meet the requirements of Articles 6(1)(e) and 6(3) GDPR. Hence, such processing lacks a legal ground for processing and breaches Article 5(1) GDPR. In addition, as the legal basis pursues an objective different than that of Article 23(1) GPDR, the further processing of personal data for a purpose other than that for which it was collected is unlawful under Article 6(4) GDPR.

55. Insofar as the Office may also obtain personal data directly from data subjects, it could try to base the processing of such data on the latter's consent, as provided for in Article 6(1)(a) GDPR. However, the consent provided by data subjects in such circumstance will never meet the requirements of Article 4(11) GDPR, since it needs, inter alia, to be freely given. Naturally, consent is not freely given when data subjects can face negative consequences if they do not provide it.[67] That is the case with the Office, which can use its public shaming tools when data subjects refuse to cooperate with its investigations.

56. For the sake of completeness, since the Office may have access to any personal data gathered by public and private persons, it can process special categories of personal data as listed in Article 9(1) GDPR. Given the politically driven mandate of the Office and the frequent targeting by the government of the LGBTIQ+ community, that data could include, for instance, personal data revealing political opinions or sexual orientation.

57. The prohibition to process special categories of personal data of Article 9(1) GDPR can only be lifted under one of the grounds of Article 9(2) GDPR. In what concerns us now, that includes "*reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject*". For the reasons stated above, even if the aim of the Law could seem legitimate, it is unnecessary and totally disproportionate and, hence, the Law is also incompatible with Article 9(2)(g) GDPR. As a result, the processing of special categories of personal data by the Office also violates the GDPR.

The Office's processing of personal data is non-transparent.

58. Since the Office does not provide data subjects with the information it is required pursuant to the GDPR, neither with the opportunity for them to exercise their rights before the controller or a court, its processing is non-transparent and unaccountable.

59. According to Article 5(1)(a), the data processing shall be transparent. The requirements of transparency are fleshed out in Articles 12 and 14 GDPR, pursuant to which controllers must provide data subjects with certain information when the

[67] European Data Protection Board, 'Guidelines 05/2020 on Consent under Regulation 2016/679' (2020), p 7.

personal data processed has not been obtained from them. That includes the categories of personal data processed, the purposes of the processing and the rights that data subjects are entitled to pursuant to Articles 15 to 22 GDPR. In addition, controllers shall ensure that data subjects can exercise the rights that the GDPR grants them.

60. Article 23 allows Member States to restrict the obligations imposed upon controllers and the rights provided to data subjects in Articles 12 to 22 GDPR. However, any such restriction shall respect the "*essence of the fundamental rights and freedoms and* [be] *a necessary and proportionate measure in a democratic society*" to safeguard one of the objectives listed therein.

61. According to the provisions of the Law, the data subjects need not be notified when an investigation is launched against them. This means that data subjects will not receive the information mandated by Articles 12 and 14 GDPR. Since they ignore that their data is being processed by the Office, data subjects cannot exercise their rights pursuant to Articles 15 to 22 GDPR. And, even if they proactively looked for that information, they would never be able to find it, as the Office does not have a publicly available privacy policy for the processing of data within its investigations.[68] As the Law is restricting the rights provided by Articles 12 to 22 GDPR, it needs to comply with the requirements of Article 23 of the same regulation.

62. However, as stated above (para 48 et seq.), even if the aims of the Law could fall under the objective listed in Article 23(1)(e) GDPR, it is unnecessary and disproportionate. Hence, since the Law does not comply with Article 23 GDPR, it unlawfully restricts the rights and obligations provided for in Articles 12 to 22 GDPR.

63. As a result of the above, the processing of personal data carried out by the Office also breaches Article 5(1)(a) GDPR.

The Office's processing of personal data follows a 'data maximisation' approach.

64. According to Article 5(1)(c) GDPR, the personal data shall be "*adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed*". Pursuant to Article 5(1)(e) GDPR, the personal data shall also be kept "*for no longer than is necessary for the purposes for which the personal data are processed*".

65. The data processing carried out by the Office does not abide by the aforementioned principles. The Law does not provide any safeguards in terms of data minimisation, as the Office can gather as much information as it wants without needing to specify why it is relevant to an investigation. Similarly, the Law does not provide any storage limitation periods. The Office can assemble personal data ranging from healthcare systems to police records and can process it for as long as it desires. This amounts

[68] As of the date of writing of this legal opinion, the Sovereignty Protection Office only has a publicly available privacy policy for the processing of personal data carried out as a result of the use of its webpage by users. See 'Adatvédelmi Nyilatkozat' (*Szuverenitásvédelmi Hivatal*) <https://szuverenitasvedelmihivatal.hu/adatvedelmi-nyilatkozat/>.

to a serious violation of the principles of data minimisation and storage limitation of Article 5(1)(c) and (e) GDPR.

2.2. THE LAW BREACHES THE FREE MOVEMENT OF SERVICES, GOODS, CAPITALS AND PERSONS

66. The Law breaches the free movements of services, goods, capitals and persons since, first, it is indirectly discriminatory on the basis of nationality and, second, the chilling effect it creates is likely to deter the exercise of the freedoms.

2.2.1. THE FREEDOMS PROHIBIT DIRECT AND INDIRECT DISCRIMINATION ON THE BASIS OF NATIONALITY AS WELL AS MEASURES THAT DISSUADE THEIR EXERCISE

67. The TFEU prohibits Member States from introducing any restrictions to the intra-European movement of goods (both imports and exports, as per Articles 34 and 35 TFEU), services (Article 56 TFEU), workers (Article 45 TFEU) and capital (Article 63 TFEU). The Treaties also impede Member States from restricting nationals of a Member State from establishing themselves in another Member State (Article 49 TFEU).

68. According to settled case-law of the Court, those prohibitions preclude Member States from introducing not only directly discriminatory measures, but also those measures that, while being indistinctly applicable, essentially affect the goods, services, capitals and persons of other Member States.[69] The freedoms prevent as well the introduction of measures which dissuade their exercise or that hinder access to markets to the nationals of other Member States.[70]

69. In addition, the Court has recognised that the freedoms can be restricted not only through provisions of national law, but also through other behaviours which, when attributed to the state, can hamper the free movement. That was the case in *AGM COS MET*, where the statements made by an official within the authority of his office and that were attributable to the State – arguing that certain machinery was incompliant with EU law requirements, when that was false – have the power to restrict the fundamental freedoms.[71] Similarly, the Court argued in *Fra.bo* that when a person holds the authority to *de facto* regulate the entry of products into a market, it shall ensure that its activities do not dissuade the nationals of other Member States from exercising their freedoms.[72]

70. The Court has also recognised that any restrictions to the fundamental freedoms need to use objective and specific criteria that are known in advance to all persons concerned, so as to avoid that the discretion of national authorities is not exercised

[69] Case C-437/17 Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach [2019] ECLI:EU:C:2019:193, paras 18-19; Case C-591/17 Austria v Germany [2019] ECLI:EU:C:2019:504, paras 40-42.
[70] Case C-341/05 Laval [2007] ECLI:EU:C:2007:809, paras 98-99; Case C-110/05 Commission v Italy (trailers) [2009] ECLI:EU:C:2009:66, paras 56-57; Case C-78/18 Commission v Hungary (transparency of associations) [2020] ECLI:EU:C:2020:476, paras 52-53.
[71] Case C-470/03 A.G.M.-COS.MET [2007] ECLI:EU:C:2007:213, para 66.
[72] Case C-171/11 Fra.bo [2012] ECLI:EU:C:2012:453, paras 30-32.

arbitrarily.[73] Hence, the lack of legal certainty is also capable of restricting the freedoms.

71. Member States may justify restrictions to the free movements only insofar as (i) they pursue overriding reasons of general interest and given that (ii) the measures are suitable for attaining such objective and (iii) do not go beyond what is necessary to achieve it.[74] Any person negatively affected by those derogations must have access to effective legal redress.[75] The Court also clarified in *Carpenter* that derogations from the freedoms shall take fundamental rights into account.[76]

2.2.2. THE LAW BREACHES THE SERVICES DIRECTIVE AND THE FREE MOVEMENT OF SERVICES

72. The National Sovereignty Law is incompatible with the free movement of services since:

    (i) It indirectly discriminates service providers on the basis of nationality; (para 75)

    (ii) It mandates the Office to publish opinions on the investigated parties that are attributable to the State and that obstruct the cross-border provision of services for those persons, with the fear of being investigated deterring service providers in general; (paras 76 and 77)

    (iii) Cannot be validly justified on reasons of general interest (para 78).

73. The Services Directive – which gives expression to the freedom to provide services and the freedom of establishment under primary law – and in particular Article 14(1) impedes Member States from making the exercise of and access to services subject to discriminatory requirements based on nationality. Similarly, under Article 14(2) of the same directive providers cannot be restricted from choosing between setting a principal or a secondary establishment in a Member State.

74. In the present case, the Law is indirectly discriminatory. It targets *any* non-Hungarian organization and individual who asserts its own interests in Hungary, as well as Hungarians who are considered as pursuing foreign interests. The Office scrutinises "*interest representation activities*", "*information manipulation and disinformation activities*" as well as "*activities aimed at influencing democratic discourse*".[77]

75. Even if the Law applies indistinctly to Hungarians and non-Hungarians alike, in practice it substantially discriminates foreign persons. Whenever foreigners assert their own interests, they are considered, just because of their nationality, potential threats to Hungarian sovereignty, which is not the case for Hungarians who are seen as pursuing their own interests in Hungary. Following the Law's logic, any non-Hungarian civil society organisation, consultancy or even European institution, body, office or agency who carries out 'advocacy' on their own objectives can be a

[73] Case C-777/18 Megyei Kormányhivatal [2020] ECLI:EU:C:2020:745, para 62.
[74] Case C-110/05 Commission v Italy (trailers) [2009] ECLI:EU:C:2009:66, para 59.
[75] Case C-54/99 Église de Scientologie [2000] ECLI:EU:C:2000:124, para 17.
[76] Case C-60/00 Carpenter [2002] ECLI:EU:C:2002:434, paras 40-41.
[77] National Sovereignty Law, section 3.

potential threat to national sovereignty. Even the statements of EU institutions in support of Ukraine have been considered by the Office as threats to Hungarian sovereignty.[78]

76. Once a report has been published by the Office, whose statements are attributable to the State, the investigated person will face significantly greater challenges when exercising their freedom to provide services. **The Office has the power to convert any natural or legal person – Hungarian or not – into a social 'pariah'**. The uncertainty on the use of the Office's powers can reasonably **lead individuals to avoid any contact with persons already investigated by the Office, by fear of 'contagion'**. Just to put an example, we can imagine that the journal Átlátszó, after being targeted by the Office, will have it substantially more difficult to obtain revenues from advertising.[79] The fear of contagion works in both directions: by preventing Hungarian persons from requesting the services of foreign investigated persons and vice versa. In practice, the Office has the power to de facto regulate the entrance of services in the market, since it can deny the entrance to the investigated providers.

77. In addition to its discriminatory nature, the **total absence of legal certainty** regarding the terms used in the Law can **have a deterrent effect on the cross-border provision of services**, especially if operating on sensitive and highly politicised issues. That is particularly the case for civil society organisations,[80] given that the Hungarian government strives to maintain a hostile environment against them.[81] **By February 2024 – that is, even before the investigations of the Office began – one in six civil society organisations surveyed by the Civilization Coalition were already changing their activities as a result of the Law, particularly those working with foreign organisations.**[82] **Thus, the Law is denying both Hungarian and EU organisations from accessing each other's services**. This can be particularly relevant for EU institutions, as they will have it more difficult to make recourse to the services provided by Hungarian civil society on rule of law and EU funding mechanisms, given that those activities are in the crosshairs of the Office.

78. As stated above (para 48 et seq.), the Law is unclear and unforeseeable, unnecessary and generates a disproportionate effect to the free movement of services compared to the questionable benefit provided to 'national sovereignty'. As

[78] See RECLAIM translation of 'Extracts from the Sovereignty Protection Office report of 4 July 2024 on the war in Ukraine' (n 14).
[79] A report by Freedom House has noted that due to the climate of hostility of the Hungarian government to independent media, business are less likely to invest in advertising in those outlets, for fear of state retaliation. See Freedom House, 'Reviving News Media in an Embattled Europe' (2023), p 6.
[80] As recalled by the Court in *Commission v Hungary (leisure card)*, non-profit organisations can also benefit from the free movement of services. Case C-179/14 Commission v Hungary (leisure card) [2016] ECLI:EU:C:2016:108, paras 154-157.
[81] See, in this regard, RECLAIM, 'Hungary's 2021 Anti-NGO Law' <https://www.reclaiming.eu/_files/ugd/e038c6_44f6a85842ca4e8298c5f0085dd14462.pdf>.
[82] Civilization Coalition (n 25), p 4.

a result, the Law breaches Articles 14(1) and (2) of the Services Directive, as well as Articles 49 and 56 TFEU.

2.2.3. THE LAW BREACHES THE FREE MOVEMENT OF CAPITALS

79. Similarly, the Law breaches the free movement of capital since it (i) discriminates capital on the basis of its country of origin, (ii) generates a chilling effect over the cross-border movements of capital and (iii) statements of the Office will obstruct the free movement of capitals for the shamed persons.

80. Pursuant to Article 63 TFEU, Member States are precluded from establishing restrictions to the free movement of capitals. However, the use of foreign capitals is specifically targeted by the Law, which mandates the Office to investigate how natural or legal persons "*may exert influence on the outcome of elections*", or "*perform or support activities aimed at influencing the will of voters*" using foreign funding. It appears rather impossible to ascertain what the concepts 'outcome of elections', 'will of voters' and 'democratic discourse' mean, given the Law does not provide any definition. Hence, the Law has the potential to stigmatise anyone wishing to exercise the free movement of capitals in Hungary and whose acts may be censurable in the eyes of the Office.

81. The Court has already held that the attainment of transparency, as claimed by the Law, could justify a derogation to the market freedoms on grounds of public interest. However, as recalled by the Court in *Commission v Hungary (Transparency of associations)* Member States cannot justify their laws "*based on a presumption made on principle and applied indiscriminately that any financial support paid by a natural or legal person established in another Member State or in a third country and any civil society organisation receiving such financial support are 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*".[83]

82. The lack of precise criteria on the interpretation of the terms of the Law allows the Office to investigate any person receiving foreign capital who can, de facto, be subject to the presumption of serving foreign interests. The Law follows the same rationale and has the same blunt, blanket measures as the one examined by the Court in the preceding paragraph. The difference is that in the case of the National Sovereignty Law, the target is broadened to include not only civil society organisations but also any other natural or legal person who receives foreign funds. And, unlike the aforementioned transparency law, the National Sovereignty Law goes beyond 'just' labelling persons receiving foreign funds; it blatantly intrudes into their privacy to humiliate them publicly. In fact, the Civilization Coalition survey suggests that non-Hungarian donors may be discouraged from donating to civil society due to the Law.[84]

[83] Case C-78/18 Commission v Hungary (transparency of associations) [2020] ECLI:EU:C:2020:476, para 86.
[84] Civilization Coalition (n 25), p 3.

83. Last, as stated above for the free movement of services (para 76), any foreign person already publicly shamed by the Office will have it more difficult to exercise their free movement of their capital. Persons residing in Hungary will try to avoid being funded by foreign investigated persons to avoid being investigated 'by contagion'.

84. As a result, the Law breaches Article 63 TFEU and cannot be justified on the need to attain a legitimate interest.

2.2.4. THE LAW BREACHES THE FREE MOVEMENT OF GOODS

85. Articles 34 and 35 TFEU preclude Member States from imposing restrictions to the import and export of goods. According to the Court in *Commission v Italy (trailers)*, measures that deter demand from the side of consumers may also constitute restrictions to such free movement.[85]

86. In the case at hand, the Law has a clear impact over the consumption of foreign goods which, according to the Office, could be linked to foreign interests. The mere acquisition of those goods may make entities – either retailers or final consumers – subject to an investigation by the Office. 'Suspected' goods can range from publications related to EU policies or those about liberal democratic values to content that portrays the LGBTIQ+ community – already heavily targeted by the Hungarian government.

87. As with the previous two freedoms, foreign persons already investigated by the Office will find it substantially more difficult to provide goods in Hungary. Persons residing in Hungary will avoid purchasing goods from publicly shamed foreign persons to avoid being associated with them and, hence, investigated 'by contagion'.

88. Therefore, the Law hampers the access to the Hungarian market without being necessary and proportionate (para 48 et seq.), thus infringing Article 34 TFEU.

2.2.5. THE LAW BREACHES THE FREE MOVEMENT OF WORKERS

89. The law hampers the free movement of workers by making foreign workers less likely to be employed in Hungary, as well as Hungarian workers less likely to travel abroad.

90. Pursuant to Article 45 TFEU, Member States should abolish any discrimination based on nationality between workers of Member States. However, as stated above (para 75), the Law is indirectly discriminatory towards foreign nationals, and deters Union employers from hiring Hungarian workers, particularly for persons working in highly politicized sectors – like media or civil society – to avoid being subject to the extraterritorial scope of the Law. In addition, it may also deter Hungarian employers who want to hire workers from the Union – again, particularly those working in politicised sectors – since they can more easily be portrayed as pursuing foreign interests. Therefore, the Law breaches Article 45 TFEU.

[85] Case C-110/05 Commission v Italy (trailers) [2009] ECLI:EU:C:2009:66, para 57.

3. The Law infringes the Charter of Fundamental Rights of the EU

91. As explained in *Section 2* above, the Law falls within the scope of the GDPR, the Services Directive and the free movement of goods, services, workers, and capital. It follows from the Court's case-law that when Member States adopt measures that restrict the fundamental freedoms, those measures must be regarded as implementing Union law within the meaning of Article 51(1) CFREU. Hence, they must comply with the fundamental rights enshrined in the Charter.

92. According to Article 52(1) of the Charter, the rights provided for by the Charter can be limited given that those limitations are (i) provided by law, (ii) genuinely meet an objective of general interest recognised by the Union or the need to protect the rights and freedoms of others, (iii) are necessary and proportionate to meet those objectives and (iv) respect the essence of the right. As per Article 52(3) CFREU, when the rights of the Charter correspond to those of the European Convention of Human Rights ('ECHR'), the meaning and scope of those rights shall be the same. Therefore, the case-law of the European Court of Human Rights (hereafter 'ECtHR') also provides guidance to interpret the Charter.

93. Through the coming sections we will address whether the Law, when restricting the rights provided for by Union law, interferes with fundamental rights and, in that case, whether it can be justified pursuant to Article 52(1) CFREU.

3.1. The Law breaches the right to privacy and data protection

94. Due to the broad investigative and public shaming powers, the Law hampers the rights to private and family life and to data protection of individuals.

95. Article 7 CFREU, which corresponds to Article 8 ECHR,[86] enshrines the right to private and family life, home and communications. Article 8(1) CFREU protects personal data, and Article 8(2) CFREU guarantees that such data is processed fairly and for specified purposes, and that individuals have the right to access and rectify their personal data. Recital 2 GDPR states that the rules on the processing of personal data shall respect the fundamental rights of individuals, and Recital 10 argues that the regulation is needed to ensure a consistent high level of protection of natural persons.

96. The mere access and storage of personal data, irrespective of whether or not that data is sensitive or causes inconvenience on individuals and is subsequently used, amounts to an interference with the right to private and family life and to the protection of personal data.[87] As the Court noted in *Digital Rights Ireland*, the massive storage and subsequent use of personal data "*is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance*", thus making the interferences with the rights to privacy and

[86] Case C-78/18 Commission v Hungary (transparency of associations) [2020] ECLI:EU:C:2020:476, para 122.
[87] Case C-118/22 Natsionalna politsia [2024] ECLI:EU:C:2024:97, para 42.

data protection particularly serious.[88] The seriousness of the interference is qualified when the access to personal data relates to sensitive categories of data revealing, for instance, political opinion or sexual orientation.[89]

97. In addition, the ECtHR has noted that when a power vested in the administration is exercised in secret the risks of arbitrariness are heightened and, thus, the law shall delimit with precision the scope of such discretion.[90] That includes a clear delimitation of the conduct and persons potentially investigated, the duration of the interference and limitations to the subsequent use and communication of the gathered data.[91] In Zakharov v Russia, the ECtHR was vocal when warning about the threats of state surveillance: "*a system of secret surveillance set up to protect national security may undermine or even destroy democracy under the cloak of defending it*".[92] Hence, it is desirable to entrust supervisory control and review of the enforcement of secret surveillance measures to a judge; at the time the surveillance is ordered, while it is being carried out, after it has been terminated. That judicial control should provide adequate guarantees, especially since those persons subject to investigation measures are prevented from seeking an effective remedy of their own accord.[93]

98. In the case at hand, the Law allows the Office to access a wide array of categories of personal data, including sensitive ones. The Office can access all data gathered by public and private persons, without any limitation and without providing individuals with any safeguards whatsoever. It does so without notifying individuals that an investigation has been launched where their data will be processed and without being subject to any type of judicial supervision. Such blanket provisions, which entail a serious violation of the GDPR (see *Section 29* above), also breach the rights to private and family life and data protection of individuals. As with the restrictions to the rights and obligations of the GDPR (paras 48 et seq.), the Law is unnecessary to meet a legitimate objective and has a disproportionate impact over the rights provided in Articles 7 and 8 CFREU.

3.2. THE LAW BREACHES THE FREEDOM OF EXPRESSION AND THE FREEDOM OF ASSEMBLY AND ASSOCIATION

99. The Law breaches the freedoms of expression and association by allowing the Office to punish critical voices against the government, by creating a chilling effect that precludes citizens from speaking up and joining associations and by precluding access to funding to associations.

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[88] Joined Cases C-293/12 and C-594/12 Digital Rights Ireland [2014] ECLI:EU:C:2014:238, para 37.
[89] Joined Cases C-511/18, C-512/18 and C-520/18 La Quadrature du Net [2020] ECLI:EU:C:2020:791, para 117.
[90] ECtHR Roman Zakharov v. Russia [GC], no. 47143/06 [2015] ECLI:CE:ECHR:2015:1204JUD004714306, paras 229-230.
[91] ibid, para 231.
[92] ibid, para 234.
[93] ibid 233–234.

100. Article 11 of the Charter – which corresponds to Article 10 ECHR[94] – enshrines the right to freedom of expression, while Article 12(1) of the Charter – which corresponds to Article 11(1) ECHR[95] – grants the right to "*freedom of association at all levels, in particular in political, trade union and civic matters*". According to the jurisprudence of the ECtHR, there is a direct relationship between democracy, pluralism and freedom of association. In the words of the said court "*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*".[96]

101. The case-law of the ECtHR has established a strong link between the freedom of association and the freedom of expression, the latter being one of the purposes of the former.[97] It is well-established in that court's view that the freedom of association is instrumental to associations and individuals to further ideas which are less than widely accepted, or even shocking or disturbing, not only those favourably received or regarded as inoffensive or as a matter of indifference.[98] The Court recognised in *Commission v Hungary (Transparency of associations)* that legislation that renders significantly more difficult the actions or the operation of associations, by, inter alia, limiting their capacity to receive financial resources or exposing them to the threat of penalties, is classified as an interference in the right to freedom of association.[99]

102. The Law interferes with the freedoms of expression and association in a threefold way. First, the Law interferes with the rights of investigated persons, who can suffer retaliation – through the Office's public shaming – for exercising their rights in a critical manner with the government. Second, due to the ambiguity of its terms, its potential for arbitrary (and unchallengeable) enforcement and the disproportionate character of its social punishment, the Law generates a chilling effect over citizens in general. The ECtHR has recognised that the retaliation against individuals for their exercise of the freedom of expression may discourage other citizens from participating in public debate – thus interfering with their right to freedom of expression.[100] Third, the law creates a chilling effect on donors, hence precluding

[94] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation on Article 11.
[95] ibid, explanation on Article 12.
[96] ECtHR Gorzelik and Others v. Poland [GC], no. 44158/98 [2004] ECLI:CE:ECHR:2004:0217JUD004415898 para 92
[97]ECtHR Vörður Ólafsson v. Iceland, no. 20161/06 [2010] ECLI:CE:ECHR:2010:0427JUD002016106 para 46
[98] ECtHR Vona v. Hungary, no. 35943/10 [2013] ECLI:CE:ECHR:2013:0709JUD003594310 paras 57-66. In that instant case the Court found that an association reminiscent of the Hungarian Nazi movement, whose activists staged several rallies, marching wearing military-style uniforms and threatening armbands, in a military-like formation, giving salutes and issuing commands of the same kind, was not within the limits of legal and peaceful of articulating political views.
[99]Case C-78/18 Commission v Hungary (Transparency of associations) [2020] ECLI:EU:C:2020:476 paras 113-114.
[100] ECtHR Baka v Hungary no. 20261/12 [2016] ECLI:CE:ECHR:2016:0623JUD002026112, para 173.

associations from receiving financial resources from abroad, severely limiting their capacity to operate. As stated above (para 82), the Law follows the same aim of the one examined in *Commission v Hungary (Transparency of associations)* but employs a far greater intrusion on the right to privacy of both individuals and associations, in an attempt to preclude access to foreign funds.

103. The threefold interference caused by the Law on the freedoms of expression and association does not meet the requirements of being provided for by law, being necessary to meet a legitimate objective nor of being necessary and proportionate. A limitation fulfils the requirement of being provided for by law when the scope of that limitation is clearly and precisely defined. The ECtHR demands such law to be foreseeable, i.e. formulated with sufficient precision to enable the individual – if need be, with appropriate advice – to regulate his conduct.[101] However, since the Law does not provide for clear and precise definitions of its terms (para 13), it lacks foreseeability. Citizens have no certainty whatsoever on which conducts may be subject to investigation and public shaming by the Office. Hence, the first criterion of Article 52(1) CFREU – 'provided for by law' – is not fulfilled.[102]

104. Then, as argued in the sections before (para 48 et seq.), the limitation is not necessary to attain its alleged aims. In addition, the impact it has over the exercise of the freedom of expression and association is manifestly disproportionate. Such impact is not a collateral consequence of the Law: it is the aim of the Law itself. Silencing opposition parties, civil society and journalist is the underlying rationale of the creation of the Office.[103] The Office's powers have a dissuasive effect over organizations and individuals to the same severity to what the Court found in *Commission v Hungary (Transparency of associations)*.[104]

105. It follows from the above that the Law, breaches Articles 11 and 12 CFREU.

3.3. THE LAW BREACHES THE PRESUMPTION OF INNOCENCE

106. The Law breaches the presumption of innocence since, first, it grants powers to the Office to gather information from subjects which can later be used in criminal or administrative proceedings against them and, second, it allows the Office to portray investigated persons as guilty before there is a judicial decision on such question.

107. Articles 47 and 48 of the Charter enshrine, inter alia, the right to a fair trial and the presumption of innocence. Article 2 and recital 12 of the Presumption of Innocence

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[101] ECtHR N.F. v. Italy, no. 37119/97 [2001] ECLI:CE:ECHR:2001:0802JUD003711997 paras 26 and 29.

[102] ECtHR Ecodefence and Others v. Russia, nos. 9988/13 and 60 others [2022] ECLI:CE:ECHR:2022:0614JUD000998813 paras 117-118. This case was concerned with restrictions on the freedom of expression and association of Russian non-governmental organisations (NGOs) which had been categorised as "foreign agents" funded by "foreign sources" and engaging in "political activity".

[103] 'Országgyűlési Napló, 28 November 2023', p 13781.

[104] Case C-78/18 Commission v Hungary (Transparency of associations) [2020] ECLI:EU:C:2020:476 paras 115-119.

Directive[105] prescribe that the presumption of innocence applies to all suspected or accused persons throughout criminal proceedings: from the first moment of suspicion that a person has committed a criminal offence – identifying them as 'suspected' or 'accused' – until the final decision on whether that person has committed the criminal offence.

108. According to Article 7 and recitals 24 to 26 and of the aforementioned directive, the right to remain silent in relation to the charges and the right not to incriminate oneself are important aspects of the presumption of innocence. According to the ECtHR, the presumption of innocence includes the privilege against self-incrimination which, in turn, is made up of the right to silence and not to be compelled to produce inculpating evidence.[106] Compulsion, in that context, can take the form of the threat of sanctions or psychological pressure.[107] Furthermore, the presumption of innocence is violated if a person is presented as guilty in statements made by public officials before there is a judicial decision determining the person's guilt.[108] According to the ECtHR, those guarantees apply not only in criminal proceedings, but also to other parallel proceedings or investigations even if they are not binding on the investigated person.[109] Investigated persons shall be informed of their right to remain silent.[110]

109. According to the CJEU, the above guarantees apply in investigations conducted by public authorities if, in accordance with national legislation, "*the evidence obtained in those proceedings may be used in criminal proceedings against* [the] *person in order to establish that a criminal offence was committed*".[111]

110. The same safeguards and guarantees are applicable when Hungarian public authorities rely on the information provided to them by the Office to initiate criminal proceedings. As mentioned above (para 21), whenever the Office gathers information that could serve as a ground for the initiation or conduction of criminal or administrative proceedings, it shall send it to the authority competent to carry such proceedings.[112] In fact, the Law provides the Office with the power to access "*all data*", to make copies of all documents and to request "*written and oral*

[105] Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.
[106] ECtHR Heaney and McGuinness v. Ireland, no. 34720/97 [2000] ECLI:CE:ECHR:2000:1221JUD003472097 para 40. Security and public order cannot justify the suppression of these rights; see on this paras. 57-58.
[107] ECtHR Ibrahim and others v. the United Kingdom, nos 50541/08 and 3 others [2016] ECLI:CE:ECHR:2016:0913JUD005054108, paras 266 and 267.
[108] ECtHR Allenet de Ribemont v. France, no. 15175/89 [1995] ECLI:CE:ECHR:1995:0210JUD001517589 paras 32-41. And Presumption of Innocence Directive, article 4 and recitals 16 and 17.
[109] ECtHR Rywin v. Poland, no 6091/06 and 2 others [2016] ECLI:CE:ECHR:2016:0218JUD000609106, paras 207-208; ECtHR Karaman v. Germany, no 17103/10 [2014] ECLI:CE:ECHR:2014:0227JUD001710310, para 43.
[110] Presumption of Innocence Directive, recital 31; ECtHR Navone and others v. Monaco, no 62880/11 and 2 others [2013] ECLI:CE:ECHR:2013:1024JUD006288011, paras 70-74.
[111] Case C-481/19 DB v Consob [2021] ECLI:EU:C:2021:84 para 44.
[112] National Sovereignty Law, section 11.

information" from the investigated persons.[113] However, those subject to an investigation by the Office do not have the possibility to exercise their right to silence and not to incriminate themselves: while, in theory, they are not compelled to cooperate, they are threatened with being publicly shamed if they fail to do so "*without justification*", whatever the Office decides that to be.[114] In fact, the Law even refers to the investigated persons as "*obliged to comply*" with the investigation requests.[115]

111. Hence, the Office forcefully gathers evidence through threats of public shaming and without informing the individuals of their right to remain silent .That evidence is forwarded then to other public authorities to establish the criminal liability of those "*obliged to comply*" with the Office's requests, in a breach of their right to silence and, hence, of Articles 47 and 48 of the Charter.

112. Furthermore, the publishing on the Office's website of the "*the outcome of its specific investigations, which shall contain the facts revealed by the investigation as well as the resulting findings and conclusions*"[116] risks presenting the person subject to investigation as guilty before any judicial decision is taken on its criminal liability. The Office, made up of high-ranking public officials, will disclose any piece of information whereby the investigated organisations and people who are part of the former are guilty of, on the one hand, infringing Hungarian 'sovereignty', and, on the other, of potentially infringing any relevant piece of Hungarian legislation. Through such publishing, the Office could reflect its opinion that a person is guilty of a criminal or administrative offence, encouraging the public to believe so and prejudging the assessment of the facts by the competent judicial authority.[117] And thus infringing, once again, the presumption of innocence.

113. Since the Law pressures investigated persons to cooperate in the gathering of information that could subsequently be used in criminal proceedings against them, and allows the Office to publish information about the guilt of such investigated persons before a judicial decision is delivered on their criminal liability, the Law breaches Articles 2 and 7 of the Presumption of Innocence Directive, as well as Articles 47 and 48 of the Charter.

3.4. THE LAW BREACHES THE RIGHT TO NON-DISCRIMINATION

114. The Law treats citizens holding certain political opinions and foreign nationality less favourably without having an appropriate justification, in breach of Article 21 CFREU.

115. Article 21 CFREU – which corresponds to Article 14 of the ECHR[118] – prohibits any discrimination based, among other grounds, on 'political and other opinion', 'sexual

[113] Ibid, section 8.
[114] Ibid, section 7(4).
[115] Ibid, section 7(3).
[116] National Sovereignty Law, section 6.
[117] ECtHR Allenet de Ribemont v. France, no. 15175/89 [1995] ECLI:CE:ECHR:1995:0210JUD001517589 paras 32-41.
[118] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation to Article 21.

orientation' and 'nationality'. The ban of Article 21 CFREU covers both direct and indirect discrimination – those neutral provisions that put individuals at a comparative disadvantage, unless such treatment is justified on a legitimate aim and, it is necessary and proportionate.[119] According to the ECtHR case-law, the principle of non-discrimination is of a 'fundamental' nature and underlies the Convention together with the rule of law.[120] The ECtHR has attached particular importance to pluralism, tolerance and broadmindedness when referring to the hallmarks of a 'democratic society'.[121]

116. Although apparently neutral, the Law puts persons (i) with certain political and, in general with critical opinions towards the government and (ii) of a foreign nationality at a particular disadvantage.

117. It follows from the intention of the Hungarian legislature as stated in the Law's preamble, the ambiguity of the Law's terms and the close ties between the president of the Office and Fidesz, that the Office's activities are intended to discriminate on the basis of political opinion. The behaviours scrutinised by the Office include advocacy and general active participation in public and democratic life, whenever that is considered as carried out in the interest of 'foreign' persons. However, the Law does not define what 'Hungarian' or 'foreign' interests are. The appointment of Mr. Tamás as the president of the Office has to be understood against the backdrop of the Law's ambiguity. As shown by his political career, Mr. Tamás has very strong incentives to interpret 'Hungarian' interests as the government ones.

118. As a result, the Office virtually becomes the henchman of the government, targeting citizens who are critical with it. This reading of the Law is evidenced by the Law's preamble and the Office's pattern of investigations on opposition politicians, civil society and journalists. Hence, the underlying motive of the Law is to stigmatise on principle and indiscriminately anyone wishing to exercise their fundamental rights and freedoms in Hungary and who does not agree with the views of the government.

119. This is another piece in the bigger picture of harassment by the majoritarian party towards civil society and minorities like the LGBTIQ+ community. After passing an anti-NGO law that was declared incompatible with EU law by the Court of Justice,[122] the parliament adopted a new act which is still incompliant with the Court's judgment and that stigmatises civil society.[123] It is also worth noting that the Hungarian government has identified the LGBTIQ+ community as another frequent target, adopting a law that substantially censors any content depicting the LGBTIQ+

[119] ECtHR S.A.S. v. France [GC], no. 43835/11 [2014] ECLI:CE:ECHR:2014:0701JUD004383511, para 161.
[120] ibid 149; ECtHR Străin and Others v. Romania, no. 57001/00 [2005] ECLI:CE:ECHR:2005:0721JUD005700100 para 59.
[121] ECtHR Bączkowski and Others v. Poland, no. 1543/06 [2007] ECLI:CE:ECHR:2007:0503JUD000154306 para 63.
[122] See Case C-78/18 Commission v Hungary (transparency of associations) [2020] ECLI:EU:C:2020:476.
[123] See RECLAIM (n 81).

community in the country.[124] The Office will likely join the government's attacks against the LGBTIQ+ community,[125] and we expect the Office to apply the Law to discriminate individuals on the basis of their sexual orientation, gender identity or gender expression.

120. Moreover, the Law discriminates on grounds of nationality. The Law uses the notion of "foreign" to disparage and attack non-Hungarian organisations. Foreign persons carrying out activities and using their funds in Hungary are, just because of their nationality, made subject to the presumption of being a potential threat to the country. Since they cannot know when their activities can be categorised as exerting an "*influence on the outcome of elections*" or supporting "*activities aimed at influencing the will of voters*"[126] they can be subject to less favourable treatment for *any* of their actions, insofar as those are not aligned with the government's will.

121. The groups discriminated against by the Law are made subject to a comparative disadvantage in contrast to the rest of the citizens. As follows from the sections above, the targets of the Law see their fundamental freedoms, as well as their rights to privacy and data protection, rights of defence, freedoms of expression and association and right to an effective remedy substantially constrained. In the hostile environment thus created, those targeted by the Law they are meant to fear the undue presence of the Office.

122. As argued in paragraphs 48 et seq. of this Opinion, the Law is not necessary for a democratic society neither proportionate to the objective pursued. Hence, it follows from the above that the Law violates Article 21 of the Charter, since it puts at a comparative disadvantage certain citizens on the basis of their political and other opinions, as well as on the basis of their nationality.

3.5. THE LAW BREACHES THE RIGHT TO AN EFFECTIVE REMEDY

123. Since the Law breaches the rights and freedoms listed in the previous sections but does not provide any remedy to challenge such infringements, it violates Article 47 CFREU.

124. Article 47(1) of the Charter enshrines the right to an effective remedy; everyone whose rights and freedoms guaranteed by EU law have been infringed upon have

[124] In this regard, the European Commission has already launched infringement procedures against Hungary for the adoption of its anti-LGBTIQ+ law. See European Commission, 'EU Founding Values: Commission Starts Legal Action against Hungary and Poland for Violations of Fundamental Rights of LGBTIQ People' (2021) <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_21_3668/IP_21_3668_EN.pdf>.

[125] The Hungarian government has consistently adopted measures to diminish the protection of the LGBTIQ+ community in Hungary. See Háttér Society, 'The Hungarian State Does Not Protect but Actively Undermines the Freedom and Rights of LGBTQI People' <https://en.hatter.hu/news/the-hungarian-state-does-not-protect-but-actively-undermines-the-freedom-and-rights-of-lgbtqi> accessed 12 April 2024. The government has coupled its policy measures with a strong anti-LGBTIQ rhetoric. See Fidesz (n 62).

[126] National Sovereignty Law, section 3 (b) and (c).

the right to an effective remedy before a competent and impartial court.[127] The CJEU has maintained that judicial control of any decision of a national authority "*reflects a general principle of* [Union] *law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the* [ECHR]".[128] Article 13 ECHR requires the provision of a domestic remedy "*to deal with the substance of the relevant Convention complaint and to grant appropriate relief*".[129] According to the ECtHR, all acts of the administration and of the executive fall, in principle, within the scope of Article 13 ECHR.[130]

125. In the case of the Law, neither the investigations carried out by the Office, the publication of its (privacy invasive) reports nor the recommendations to the parliamentary committee on national security to summon investigated parties to a hearing[131] can be challenged before a court. Hence the Law does not provide for a judicial remedy to effectively redress violations by the Office of the rights to private and family life, freedom of association and assembly and the freedom of expression. Overall, there is no possibility to challenge abuses of power committed by the Office. In light of the above, the Law breaches Article 47 of the Charter.

126. In addition, as noted by the Hungarian Helsinki Committee and Amnesty International, the role of the Office as a watchdog over the state powers means that it can investigate judges who submit preliminary references on topics and laws related to 'national sovereignty'.[132] Such behaviour would undermine the correct functioning of the system enshrined in Article 267 TFEU – deterring judges from raising preliminary references – and could put undue pressure on Hungarian courts, hampering their independence and violating Article 19 TEU.[133]

4. The Law infringes the values of Article 2 TEU

127. As follows from the previous sections, the Law breaches the fundamental rights to privacy and data protection, freedom of expression and association, right to non-discrimination, the right to an effective remedy and the rights of defence, which give expression to the principles of democracy, rule of law and non-discrimination of

[127] Case C-222/84 *Johnston* ECLI:EU:C:1986:206, paras. 17-19. See also case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)* ECLI:EU:C:2022:99, para. 34.
[128] Case C-97/91 *Oleificio Borelli v Commission* ECLI:EU:C:1992:491 para. 14
[129] ECtHR Kaya v. Turkey, no. 22535/93 [1998] ECLI:CE:ECHR:1998:0219JUD002272993 para 106.
[130] ECtHR Al-Nashif v. Bulgaria, no. 50963/99 [2002] ECLI:CE:ECHR:2002:0620JUD005096399 para 137 where the Court stated that invoking the term 'national security' cannot justify 'doing away with remedies altogether', even when a wide margin of appreciation is afforded in the executive in matters of national security.
[131] According to the ECtHR, the proceedings before a parliamentary committee may also be subject to fair trial guarantees whenever they determine criminal charges. See ECtHR Demicoli v Malta, no. 13057/87 [1991] ECLI:CE:ECHR:1991:0827JUD001305787, paras 30-35.
[132] Amnesty International and Hungarian Helsinki Committee (n 8), pp 7-8.
[133] According to settled case-law of the Court, Article 19(1) TEU requires national courts to be independent, which entails, in turn, that they should be "*protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions*". See Case C-619/18 Commission v Poland (Independence of the supreme court) [2019] ECLI:EU:C:2019:531, paras 71-72.

Article 2 TEU. Due to the seriousness of the infringements and their pervasive character, the Law hampers the free participation of people in democratic life protected under Article 10 TEU as well as the values enshrined in Article 2 TEU.

128. The fundamental rights identified throughout the present Legal Opinion are essential building blocks of a functioning democracy. In fact, according to the Court, the right to freedom of expression enshrined in Article 11 CFREU constitutes "*an essential foundation of a pluralist, democratic society*".[134] The same is also true for the freedom of association protected under Article 12 CFREU, "*inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life*".[135] The way in which national legislation enshrines and national authorities apply those rights reveal the state of democracy in a country.[136]

129. The Court has recognised the value of the exercise of those rights by civil society organisations, and has ruled as incompatible with EU law national measures which, under the guise of promoting transparency, have the effect of stigmatising civil society.[137] Naturally, free press plays, as well, a 'pre-eminent' role in democratic health.[138] In the same vein, the Court recognised in *La Quadrature du Net* that serious invasions over the rights to privacy and data protection by public authorities can have a chilling effect on the exercise of the fundamental right to freedom of expression, with the subsequent impact on democracy.[139]

130. The principle of democracy is embodied in Article 10(1) TEU, according to which the functioning of the Union shall be founded on representative democracy.[140] Even though the said article relates to democracy at Union level, EU's democracy cannot function if the democratic system at the level of the Member States malfunctions.[141] Hence, Article 10(1) TEU necessarily means that Member States are obliged to respect the principle of democracy as well. This is, in fact, the European Commission's view, which has launched infringement procedures alleging violations

[134] Case C-507/18 Associazione Avvocatura per i diritti LGBTI [2020] ECLI:EU:C:2020:289, para 48.
[135] Case C-78/18 Commission v Hungary (transparency of associations) [2020] ECLI:EU:C:2020:476, para 112.
[136] ECtHR Gorzelik and Others v. Poland [GC], no. 44158/98 [2004] ECLI:CE:ECHR:2004:0217JUD004415898, para 88.
[137] Case C-78/18 Commission v Hungary (transparency of associations) [2020] ECLI:EU:C:2020:476, paras 118, 141-142.
[138] ECtHR Kuliś and Różycki v. Poland, no. 27209/03 [2009] ECLI:CE:ECHR:2009:1006JUD002720903, paras 30-31.
[139] Joined Cases C-511/18, C-512/18 and C-520/18 La Quadrature du Net [2020] ECLI:EU:C:2020:791, paras 113-117.
[140] Case C-418/18 P Puppinck and Others v Commission [2019] ECLI:EU:C:2019:1113, para 64.
[141] Luke Dimitrios Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023), p 204.

The Law infringes the values of Article 2 TEU

of Article 10 TEU against both Poland and Hungary – in the latter case, for the adoption of the Sovereignty Law.[142]

131. Article 10(1) TEU, in turn, fleshes out one of the founding values of the Union. According to Article 2 TEU:

> "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*."

132. Other values of Article 2 TEU are also given expression through the Charter's rights. That is the case with the right to access an effective remedy and a fair trial as established by Article 47 CFREU, which are pillars of the principle of effective judicial protection which, in turn, gives expression to the principle of the rule of law.[143] Similarly, the rights enshrined in Articles 20 and 21 of the Charter give concrete form to the principles of equality and of non-discrimination.

133. Compliance with Article 2 TEU is a precondition for accession to the Union and it is on such compliance that Member States are entitled to benefit from the rights granted by the Treaties.[144] It compiles a list of legal principles "*which are an integral part of the very identity of the European Union as a common legal order*" and which entail legally binding obligations.[145] As a result, Member States are not allowed to modify their legislation so as to bring about a reduction in the protection of those values.[146] According to the Court, even though Member States enjoy a certain degree of discretion in implementing the values of Article 2 TEU, this does not imply that the obligation as to the result to be achieved may vary from one Member State to another.[147]

134. The values of Article 2 TEU are not breached by any violation of their abovementioned 'building blocks'. Thus far, the Court of Justice, apart from providing some indications on the obligations deriving from Article 2 TEU, has not

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[142] European Commission, 'Rule of Law: Commission Launches Infringement Procedure against POLAND for Violating EU Law with the New Law Establishing a Special Committee' (2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3134>; European Commission, 'Rule of Law: Commission Decides to Launch Infringement Procedure against HUNGARY for Violating EU Law on the Defence of Sovereignty' <https://ec.europa.eu/commission/presscorner/detail/EN/inf_24_301>.

[143] Case C-64/16 Associação Sindical dos Juízes Portugueses [2017] ECLI:EU:C:2018:117, paras 34-36; Case C-619/18 Commission v Poland (Independence of the supreme court) [2019] ECLI:EU:C:2019:531, para 54.

[144] Joined Cases C-357/19 and C-547/19 Eurobox Promotion and others [2021] ECLI:EU:C:2021:1034, paras 160-162.

[145] Case C-204/21 Commission v Poland (Indépendance et vie privée des juges) [2023] ECLI:EU:C:2023:442, para 67.

[146] Joined Cases C-357/19 and C-547/19 Eurobox Promotion and others [2021] ECLI:EU:C:2021:1034, para 162 and the case-law cited therein.

[147] Case 156/21 Hungary v Parliament and Council (Conditionality mechanism) [2022] ECLI:EU:C:2022:97, para 233.

The Law infringes the values of Article 2 TEU

had the chance to rule on which behaviours entail a violation of the said provision. In the absence of case-law, the procedure of Article 7 TEU offers guidance on the threshold above which Article 2 TEU can be directly enforced against the Member States. Pursuant to Article 7(2) TEU, the European Council may determine that a Member State is committing a "*serious and persistent breach*" of the values of Article 2 TEU, a determination the Council may then use to suspend rights to the infringing Member State. The determination of a breach of Article 2 TEU for the purposes of infringement (court) procedures need not be as strict as for the (political) procedures of Article 7(2) TEU.[148] However, the violation of Article 2 TEU caused by the Sovereignty Law is so significant it even meets the strict 'serious and persistent' test of Article 7(2) TEU.

135. The ambiguous and arbitrary character of the Law, which is enforced through grave violations of the rights to privacy, data protection and non-discrimination, generates a chilling effect on the people's participation in democratic life. In practice, the Office has the power to act as a thought police, punishing legal behaviours on the basis of the presumed intention of their authors. Potentially, any gathering of individuals who meet to carry out an activity for an interest the Office deems non-Hungarian can suffer public humiliation and enhanced law enforcement prosecution.

136. Hence, despite the ambiguity of the terms, some of the targets of the law are well-known in advance: the opposition parties, the civil society and the media. The members of the Hungarian government are not shy about it.[149] And, by extension, potentially anyone that establishes relations with them. That includes economic relations – either by trading goods, providing services or exchanging capital – and social ones – by sharing the same ideas, attending the same gatherings or belonging to the same organisations. Through its chilling effect and fear of contagion, the Office is meant to either silence critical voices or exclude them from society, targeting its actions on the basis of political opinion. Thus, the Law suffocates democratic debate.

137. The investigations are shielded from judicial oversight, which means that the uncertainty behind the terms of the Law will never be clarified, ensuring that such suffocation is persistent. And, thus, that individuals are not able to defend the rights they are entitled to pursuant to EU law before a court. Furthermore, the evidence gathered in violation of several fundamental rights may be used to launch administrative and criminal proceedings against investigated persons, contributing to a generalised feeling of fear and surveillance. Arbitrariness is, this way, guaranteed, with the assault over the rule of law reinforcing the violations of the principles of democracy and non-discrimination.

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[148] As noted by Spieker, the proceedings of Article 7 TEU are different from judicial review in their "logic and consequences". Hence, their benchmark for assessing compliance with Article 2 TEU may differ. See Luke Dimitrios Spieker, 'Briefing: How to Use Article 2 TEU in Infringement Procedures' <https://www.reclaiming.eu/_files/ugd/9e86a1_b09e640caaf04c14bbb62495c0ebf23d.pdf>, pp 2-3.

[149] 'Országgyűlési Napló, 28 November 2023' (n 103), p 13781.

The Law infringes the values of Article 2 TEU

138. As a result of the above, the Law uses the extremely grave infringements of the rights to privacy, data protection, freedoms of expression and association, right to non-discrimination, to an effective remedy and to the rights of defence (Articles 7, 8, 11, 12, 21 47 and 48 CFREU) to impinge upon the values of democracy, non-discrimination and the rule of law. The Law does not simply bring about a reduction to the overall protection given to Article 2 TEU: it attacks the very essence of the Union's foundational values in serious and persistent way. Thus, the Sovereignty Law breaches Article 2 TEU.

5. The Commission should shorten the infringement procedure and request interim measures.

139. Given the impact of the Law on the democratic participation of citizens, the European Commission should shorten the pre-litigation procedure.

140. Pursuant to Article 258 TFEU, the Commission enjoys discretion to define the period given to Member States to reply to the letters of formal notice, insofar as it is 'reasonable'. The Court recalled in *Commission v Hungary (CEU)*, that a short period may be 'reasonable' when justified on urgency or when the Member State is aware of the views of the Commission long before the procedure starts.[150]

141. As argued in the sections 3 and 4 above, the Law has the potential to generate a chilling effect on the exercise of fundamental rights which is so severe that it hampers the citizens' participation in the democratic life of the country. Hence, it is **crucial that the European Commission accelerates the infringement procedures** in the case at hand, to minimise, to the extent possible, the poisonous effects of the Law over the European democracy.

142. The acceleration of proceedings should be **coupled with a request for interim measures before the Court of Justice**.

143. Article 160 of the Rules of Procedure of the Court of Justice allows the Commission to request interim measures when bringing an infringement action under Article 258 TFEU. The Court may grant the measures only insofar as (i) they are justified prima facie in facts and law, (ii) they should be adopted urgently "*to avoid serious and irreparable harm to the applicant's interests*" and (iii) where appropriate, the weighing up of the interests at stake favour their adoption.[151] The aim of the measures seeks to guarantee that the time elapsed between the initiation of the proceedings and the delivery of the judgement does not hamper the effectiveness of judicial

[150] Case C-66/18 Commission v Hungary (CEU) [2020] ECLI:EU:C:2020:792, para 47.
[151] Case C-441/17 R Commission v Poland (Białowieża Forest) [2017] ECLI:EU:C:2017:877, para 29.

The Commission should shorten the infringement procedure and request interim measures.

protection.[152] The Court has the power to request states to suspend provisions of national law.[153]

144. The effectiveness of judicial protection in the case at hand requires the Court to grant interim measures suspending the application of the National Sovereignty Law. As stated in the sections above, the Law infringes several provisions of EU primary and secondary law, including – notably – the values of Article 2 TEU. Therefore, there exists, prima facie, a more than solid case regarding the Law's incompatibility with EU law.

145. In addition, the criterion of urgency is also met in the case at hand. In fact, the activities of the Office are likely to have a serious impact over citizens' participation in democratic life, which would be impossible to repair. First, the impact is irreparable for those individuals and organisations and that are investigated by the Office – most likely political parties, civil society and the media. The impact on their privacy caused by the investigation, the public shaming associated to the publications and hearings before the Hungarian parliament and the subsequent social backlash cannot be reversed. In addition, the damage created by the Law's chilling effect over the general public is also irreversible. The reduced public participation in the Hungarian political life caused by people's self-censoring will mark all policy developments at national and local levels throughout the duration of the proceedings.

146. Any weighing up of interests is favourable to the suspension of the Law. The Office is unnecessary to protect public interests, which are already guaranteed with the already existing institutions in Hungary. It is illustrative, in this regard, the opinion of the Venice Commission on the National Sovereignty Law, since this body "*fails to see the need for the establishment of a new body, in addition to the existing system of security services* […], *parliamentary committees, law enforcement authorities and courts. There is clearly an overlap with the ordinary institutions of the State without providing for the corresponding guarantees in respect of interferences in the exercise of fundamental rights.*"

147. Given that the suspension is prima facie justified in facts and law, that it needs to be adopted urgently to prevent irreparable damage and that it threatens no public interest, the suspension should be ordered by the Court.

6. The Law impedes Hungary from unfreezing its share of EU funds

148. The adoption of the Law exacerbates the rule of law and fundamental rights shortcomings identified by the EU institutions under the three EU fund conditionality regimes.

149. In general, the access to EU funding is conditional upon the Member States meeting certain criteria or adopting a list of reforms. EU fund conditionality is essentially

[152] Koen Lenaerts, Kathleen Gutman, and Janek Tomasz Nowak, *EU Procedural Law* (Oxford University Press 2023), point 13.01.
[153] See Case C-791/19 R Commission v Poland (Régime disciplinaire des juges) [2020] ECLI:EU:C:2020:277.

The Law impedes Hungary from unfreezing its share of EU funds

articulated under three different regimes: the enabling conditions of the Common Provisions Regulation[154] (for cohesion funds), the milestones and super milestones under the Recovery and Resilience Plans (for the Recovery and Resilience Facility)[155] and the rule of law conditionality mechanism[156] (dealing with the protection of the Union budget, applicable to all EU funds). Hungary must meet rule of law targets under the three regimes.

150. Under Article 15(1) of the Common Provisions Regulation, it is meant to ensure that all the programmes supported by the funds covered by the regulation – which operate under shared management – comply with CFREU (pursuant to the Horizontal Enabling Condition nº 3, or 'HEC 3').[157] Articles 38 to 40 of the regulation also require the establishment of monitoring committees for the supervision of the implementation of the funds, which shall include representatives from civil society.[158] HEC 3 then mandates Member States to set up complaints mechanisms for the flagging of violations of the Charter through the implementation of the funds. That includes the establishment of reporting arrangements to the referred monitoring committees.[159]

151. If the Commission finds that a Member State is not abiding by HEC 3 it will, following the established procedure, deny reimbursements for the funds covered by that regulation.[160] That was the case with Hungary when, in December 2022, the Commission considered that it did not comply with HEC 3 over concerns on independence of the judiciary, academic freedoms, LGBTIQ+ rights and asylum rights and, hence, denied reimbursements for about EUR 22 billion.[161] A year after, however, the Commission considered the country had adopted the necessary measures to comply with the conditions on independence of the judiciary of HEC 3 and, thus, decided to reimburse eligible expenditure of up to EUR 10.2 billion.[162]

152. The work of the Office makes the complaint system of CFREU breaches required by HEC 3 inoperable. As stated above (Section 1.2), the Law generates a chilling effect against anyone who speaks up against the government's actions including, naturally,

[154] Regulation (EU) 2021/1060 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] OJ L231/159 (the 'Common Provisions Regulation').
[155] Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility [2021] OJ L57/17 (the 'Recovery and Resilience Facility Regulation').
[156] Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget [2020] OJ LI433/1 (the 'Conditionality Regulation').
[157] See Common Provisions Regulation, Annex III, Horizontal Enabling condition 3.
[158] Ibid, Articles 8(1) and 39(1).
[159] Those reporting arrangements shall comply with the requirements set forth in Article 69(7) of the Common Provisions Regulation.
[160] Ibid, Article 15(3) to (6).
[161] European Commission, 'Questions and Answers on Hungary: Rule of Law and EU Funding' (2023).
[162] ibid

The Law impedes Hungary from unfreezing its share of EU funds

the way it handles the shared management funds falling under the Common Provisions Regulation. HEC 3 complaints system becomes ineffective when potential complainants fear retaliation. In addition, the Office also affects the way that monitoring committees work, by imposing self-censorship in civil society.

153. The malfunctioning of both the complaint system and of the surveillance of monitoring committees undermines the system that is meant to ensure that fundamental rights are complied with through the programmes. Thus, the Law jeopardises HEC 3 in its entirety, cross cutting all the rights of the Charter.

154. Furthermore, under the Council Implementing Decision of the Conditionality Regulation,[163] Hungary is meant to address anti-corruption and public procurement shortcomings to lift the 55% of budgetary commitments frozen for the programmes identified in such decision. Last, under the Recovery and Resilience Facility Regulation, Hungary is meant to address a series of milestones, 27 of which are 'super milestones' that must be met before receiving any payments under the facility.[164] Most of those relate to anti-corruption, judicial independence or public procurement.[165]

155. The regimes are intertwined, as some of the milestones under the Hungarian Recovery and Resilience Plan are linked to addressing the shortcomings identified within the Conditionality Regulation procedure. In particular, milestone 166 – one of the 'super milestones' – relates to the commitment made by Hungary under the Conditionality Regulation procedure for the establishment of an anti-corruption task force, in which "[r]*elevant non-governmental actors active in the field of anti-corruption shall be involved* […] *and their full, structured and effective participation shall be ensured*". The establishment of that task force was one of the reasons why the Council lowered the freezing of budgetary commitments from 65% -- as originally proposed by the Commission – to 55%. According to the Council, its establishment lowered the risks posed to the Union budget by Hungary's existing breaches of the rule of law.[166]

156. However, following the same rationale as above (paragraph 152), the Office hampers the "*full, structured and effective participation*" of NGOs in the anti-corruption task force. This amounts to a breach of both one of the commitments made by Hungary under the Conditionality Regulation and a super milestone of the Recovery and Resilience Facility.

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[163] Council Implementing Decision (EU) 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary [2022] OJ L325/94.
[164] See the Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary [2022]; András Schwarcz, 'Rule of Law-Related "Super Milestones" in the Recovery and Resilience Plans of Hungary and Poland' (Directorate-General for Internal Policies of the European Parliament 2023).
[165] András Schwarcz (n 164), p 2.
[166] Council Implementing Decision (EU) 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary [2022] OJ L325/94, recitals 38 and 60.

The Law impedes Hungary from unfreezing its share of EU funds

157. The breaches of the three conditionality regimes are evidenced by the investigations of the Office against Transparency International Hungary, an entity which belongs to both a monitoring committee under the Common Provisions Regulation and to the anti-corruption task force.[167] This organisation is being targeted precisely because of its watchdog role, as well as for providing EU institutions with relevant information on Hungary's anti-corruption and rule of law developments. The Office sends a very clear message to other organisations already belonging or wishing to join those committees: the safest behaviour is staying quiet.

158. The Law and the Office's activities should be taken into account by the EU institutions so that, unless the Law is repealed and the other remaining conditions are fulfilled:

- **The EUR 11.7 billion currently frozen under the Common Provisions Regulation are not reimbursed to Hungary; and, given the cross-cutting effects of the law on HEC 3 and all CFREU rights, increase the fund freezing to the remaining funds**. In addition, consider taking action for breaches of Articles 38 to 40 of the said regulation.
- **The EUR 6.3 billion currently frozen under the Conditionality Regulation procedure are not released, while the reasonable approximation to the risks posed by Hungary's breaches of the rule of law to the Union budget are reassessed and increased from 55%, thus expanding fund freezing**;
- **The EUR 6.5 billion under the Hungarian Recovery and Resilience Plan are not released**.

[167] Transparency International Hungary, 'Corruption Perceptions Index and Hungary's Track Record of Corruption, 2023' (2024), p 5; 'IKOP Plusz MB - Taglista | Széchenyi Terv Plusz' (*PALYAZAT.gov.hu*) <https://archive.palyazat.gov.hu/ikop-plusz-mb-taglista#> accessed 16 July 2024.

The Law impedes Hungary from unfreezing its share of EU funds

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