
Analysis of Hungarian Parliament Bill T/14967 in light of EU rules on anti-money laundering and terrorist financing and free movement of capital

Summary

The proposed law requires certain NGOs receiving over EUR 23,000 per year from outside Hungary to: register as an ‘organisation receiving support from abroad’; display this label on its website and publications; report the personal details of each donor. Failure to register will lead to a fine of up to EUR 2,900 and, ultimately, dissolution of the organisation. The proposed law states that it is designed, in part to combat money laundering and terrorist financing. The proposed law violates the following rules of EU law.

- Directive 2015/849 on anti-money laundering and terrorist financing.

The directive requires national authorities to carry out a risk assessment of the NGOs targeted to prove that they are at risk of being used for money laundering and terrorist financing. No NGO specific risk assessment has been carried out. The government has not produced any publicly available evidence to suggest that these organisations are at risk so as to justify the proposed measures.

The proposed law must also comply with the EU Charter of Fundamental Rights. The law would interfere with the right to protection of personal data because it requires the details of donors to be published. The law would also interfere with freedom of expression and of association. First, it imposes extremely severe sanctions for non-compliance. Second, it undermines public trust in NGOs, which will prevent them performing their core tasks. NGOs allow the public to participate in the democratic process by informing them of developments in law and policy, representing their views to government and holding governments accountable to their legal obligations. For NGOs to play these roles they require public trust. Otherwise, the public is unlikely to believe the information they provide or coordinate their activities of civic participation through these NGOs, or provide donations on which NGOs survive.

A government is allowed to limit rights in the public interest. But it must not restrict them more than is strictly necessary. The proposed law imposes a disproportionate interference with these rights because existing national rules already provide the authorities with sufficient information and powers to fight money laundering and terrorist financing.

- Article 63 of the Treaty on the Functioning of the European Union and Directive 88/361 concerning free movement of capital.

EU law prohibits governments from restricting the free flow of capital between EU countries. This includes donations made to charitable organisations. According to EU law, any measure likely to deter people from transferring capital between countries, amounts to a restriction. The proposed law would require the personal details of people making donations from another EU country to be reported. This is likely to deter people and organisations from making donations. Although a government is allowed to restrict free movement of capital in the interest of public security, the authorities must prove that there is a genuine and serious threat. The government has provided no evidence that these organisations pose any such threat.

The bill

The proposed ‘Law on the Transparency of Organisations Receiving Support from Abroad’ (Hungarian Parliament Bill T/14967) states that it is designed, in part, to combat money laundering and terrorist financing.¹

The bill applies exclusively to associations and foundations receiving support from abroad (foreign funding), and specifically excludes sports and religious associations and other organisations such as public foundations or trade unions. It requires an NGO receiving over EUR 23,000 per year from outside Hungary to register as an ‘organisation receiving foreign funding’, to display this label on its website and publications and to report the personal details of each donor. It will also affect organisations that receive funding from abroad indirectly (e.g., through re-granting schemes). Failure to register will lead to a fine of up to EUR 2,900 and, ultimately, dissolution of the organisation through a simplified procedure. The bill’s definition of foreign funding includes donations from private individuals and EU funds, unless the latter are first paid through a government institution.

The EU directive on anti-money laundering and terrorist financing

Money laundering and terrorist financing are tightly regulated by EU law under the anti-money laundering and terrorist financing directive.² This directive is designed to implement a series of recommendations made by the Financial Action Task Force (FATF). The FATF is an intergovernmental organisation that sets standards on money laundering and terrorist financing and evaluates government implementation of these.

Under EU rules, national law must be compatible with EU law. Because of this, the Hungarian bill needs to be in line with the EU directive’s requirements. Importantly, the Hungarian bill also needs to be in line with the EU’s Charter of Fundamental Rights. The directive also needs to be interpreted in a way that is compatible with the recommendations of the FATF.

The directive obliges national governments to prohibit money laundering and terrorist financing. That is (broadly speaking), governments have to prevent criminals using banks and other businesses from transferring money or property that has come from criminal activity, and to prevent transfers of money that will fund terrorist activities. The directive is designed to cover companies and professions whose business involves handling and transferring money and property. For example, banks, insurance companies, gambling companies, lawyers, estate agents and accountants. The directive does not expressly cover the activities of NGOs, nor of the broader category of non-profit organisations.

The directive requires governments to carry out a risk assessment of various categories of organisations to determine whether they are at risk of being used for money laundering or terrorist financing.

FATF rules and guidelines clarify three further requirements. First, the risk assessment must be precisely focused on the NGOs in question. That FATF defines NGOs as legal entities that primarily engage in receiving and distributing funds for certain charitable purposes. Second, within that group, the authorities must further

1 An English translation is available [here](#).

2 Directive 2015/849 on the use of the financial system for the purposes of money laundering or terrorist financing of 20 May 2015 (OJ L 141, 5.6.2015, 73). When national law regulates an issue already covered by EU law, the Court of Justice of the EU will consider that the national law falls within the scope of EU law. This is not altered by the fact that the government or the national law in question does not expressly refer to EU law or denies that the national law applies EU law. See e.g., CJEU, Joined Cases C-203/15 & C-698/15 *Tele2 Sverige AB*, 21 December 2016.

identify which categories of NGOs are at risk of terrorist financing. Third, where organisations are at risk, the authorities should first assess if existing national measures are sufficient to address the risk and, if not, adopt new measures. However, these measures must be proportionate to the risk as well as the size and nature of the organisation. Put otherwise, the measures that the authorities can require of the organisation must interfere as little as possible with their activities, while addressing the risk.

The national legislative context

Members of the Hungarian government have made a number of statements concerning the NGOs targeted by the bill. In January of 2017 the Vice President of Fidesz alleged that the NGOs concerned were ‘fake civil organisations’ that should be ‘swept out’ of the country. In February, the Prime Minister alleged that foreign organisations had ‘secretly used [NGOs] to influence Hungarian politics’, in particular to ‘bring hundreds of thousands of migrants into Europe’. The terms of the national consultation of April 2017, alleged that ‘foreign-supported’ NGOs were ‘meddling in the internal affairs’ of Hungary so as to ‘jeopardize’ Hungary’s independence.³ Members of the government also made similar statements made about the NGOs targeted by the present bill during 2014. State bodies carried out an audit of Hungarian foundations responsible for administering funds for NGOs and a criminal investigation was reportedly initiated by a state authority, the Governmental Control Office. These measures were later discontinued.⁴ Both the European Union Agency for Fundamental Rights and the Council of Europe’s Commissioner for Human Rights have expressed concern that these statements unfairly stigmatise and undermine the credibility of NGOs performing legitimate activities to protect and promote democracy, the rule of law and human rights.⁵ This suggests that the underlying motive of the legislation is less to address the risk of money laundering and terrorist financing, than to neutralise the ability of these organisations to perform watchdog activities towards the government.⁶

The potential damage caused to NGOs targeted by the bill

The measures proposed in the bill will result in serious damage to the NGOs being targeted because it will prevent them from being able to perform their core functions. NGOs play a vital role in facilitating the participation of the public in the democratic process by informing the public about developments in law and policy that may affect their rights. NGOs also provide the public with a means of channelling or representing their views towards government representatives in a coordinated and effective manner. Finally, NGOs also play a key role in ensuring that governments act within the limit of their national and international obligations

3 Hungarian Helsinki Committee, Hungarian Civil Liberties Union, ‘Short analysis of the proposed Hungarian bill on foreign-funded non-governmental organisations’, 11 April 2017.

4 Eotvis Karoly Policy Institute, Transparency International Hungary, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, ‘Timeline of governmental attacks against Hungarian NGO sphere’, 2014.

5 • European Union Agency for Fundamental Rights, ‘FRA expresses concern over threats to civil society and freedom of education in the EU’, 10 April 2017;

• Council of Europe Commissioner for Human Rights, ‘The shrinking space for human rights organisations’, 4 April 2017;

• Council of Europe Commissioner for Human Rights, ‘Commissioner expresses concern over NGOs in Hungary’, 27 July 2014.

6 See also: Conference of INGOs of the Council of Europe Expert Council on NGO Law, ‘Legal opinion on the Hungarian draft “Act on the Transparency of Organisations Supported from Abroad” (Hungarian Parliament Bill T/14967)’, 20 April 2017.

through dialogue with the government and, ultimately, through the courts.⁷ For NGOs to play these roles they require trust from members of the public. Without this trust, members of the public are unlikely to view information provided by NGOs as credible, will be unwilling to coordinate their activities of civic participation through these NGOs, will be unwilling to provide donations to NGOs which serve as a source of financial support and will be unwilling to use services provided by these NGOs to protect the rights of the public, such as legal advice and legal assistance.

In light of these considerations, the bill would severely hamper the core functions of NGOs. First, the law would undermine NGOs' credibility in the eyes of the public by claiming that these organisations are unpatriotic and serve foreign interests. This would mean that the public would be: less likely to trust these organisations, or the information they provide or to support them when they critique government policies and laws or to donate to these organisations. Second, the law will dissuade foreign donors who are likely to be deterred by the fact that their personal details will be reported to the authorities. Third, the law will legitimate future government measures to harass and intimidate NGOs (similar to those that occurred during 2014) once they have been stigmatised in public discourse. These results can be observed in Russia as a consequence of similar legislation adopted in 2012, which has led to the closure of 27 NGOs.⁸

Legal analysis under the anti-money laundering and terrorist financing directive

Requirement for a risk assessment

The Hungarian government has not carried out a risk assessment specific to the NGOs that are currently targeted by the bill, as required by the directive, which has to be interpreted in line with FATF rules. The only risk assessment that has been carried out by the Hungarian government was a national assessment, which found the risk of NGOs to be low.⁹ In addition, NGOs have not been informed about the results of the na-

7 The vital roles played by NGOs for the protection and promotion of democracy, rights and rule of law have been recognised by the Council, Commission and Parliament of the EU as well as the Council of Europe, United Nations and OSCE.

See:

- Commission Communication, 'The roots of democracy and sustainable development: Europe's engagement with civil society in external relations', COM(2012) 492, 12 September 2012;
- Council Conclusions, 'The roots of democracy and sustainable development: Europe's engagement with civil society in external relations', 15 October 2012;
- UN Human Rights Council Resolution 32/31 on Civil society space, UN Doc. A/HRC/32/L.29, 27 June 2016;
- UN Human Rights Council Resolution 27/31 on Civil society space, UN Doc. A/HRC/RES/27/31, 3 October 2014;
- Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organisations in Europe, 10 October 2007;
- OSCE, Charter for European Security, Istanbul, 6 November 1999, Article 27.

8 Amnesty International, 'Russia: Agents of the people: Four years of "foreign agents" law in Russia: Consequences for the society', 18 November 2016.

9 Council of Europe's Committee of experts on the evaluation of anti-money laundering measures and the financing of terrorism (MONEYVAL), 'Anti-money laundering and counter-terrorist financing measures: Hungary', Fifth Round Mutual Evaluation Report, September 2016, MONEYVAL (2016) 13, paras 18 and 26.

tional assessment as required by the directive.¹⁰ The draft bill does not provide any evidence that the targeted organisations are of specific risk.

Requirement that measures be proportionate to the risk, size and nature of the organisation

Existing transparency laws in Hungary already require NGOs to provide information concerning donations.¹¹ These rules are sufficiently strict to allow for full transparency and allow the public to see where NGO funding comes from. In addition, existing rules in the field of criminal law and money laundering are sufficiently thorough to prevent the activities that the government wishes to regulate in the bill.

The bill also applies to funds from EU sources. Given that the EU has its own procedures to prevent money laundering and terrorist financing, including funds from the EU in the scope of the bill is also a disproportionate measure because it is not necessary to prevent money laundering or terrorist financing.¹²

Requirement for the bill to comply with the Charter of Fundamental Rights

Aside from violating the directive's requirement for a prior risk assessment of the targeted NGOs and the requirement of proportionality, if adopted the bill would apply the directive in a way that violates several provisions of the Charter of Fundamental Rights of the EU (CFR).¹³

Article 21 CFR prohibits discrimination on the basis of 'political or any other opinion'. The bill exempts religious organisations, sports organisations and associations and foundations that are not 'civil society organisations'. If the same level of risk (which apparently has been determined as low) applies to the non-profit sector as a whole, this places these other organisations in an objectively comparable situation. However, these bodies are exempted from the scope of the bill. Statements made by representatives of the government during 2014 and in January and February 2017 and the terms of the national consultation of April 2017, suggest that this unfavourable treatment is based on the opinions held by NGOs. Given that current national rules concerning transparency are already sufficient to address the risk of money laundering and terrorist financing, and considering the severity of the bill's sanctions and the high level of interference the bill's requirements would impose on the core functions of NGOs, such unfavourable treatment cannot be justified as necessary or proportionate. It therefore amounts to discrimination under Article 21 CFR.

Article 12 CFR protects the right to freedom of association. That is, to create an association, such as an NGO, in order to participate in (among other things) the democratic process.¹⁴ The severity of sanctions under the bill constitutes a serious interference with this right. The bill allows fines and dissolution to be imposed as a consequence of failing to fulfil an administrative requirement of registering as an organisation receiving foreign funding.

10 Article 25, Directive 2015/849.

11 Conference of INGOs of the Council of Europe Expert Council on NGO Law, 'Legal opinion on the Hungarian draft "Act on the Transparency of Organisations Supported from Abroad (Hungarian Parliament Bill T/14967)"', 20 April 2017.

12 Such as the European Anti-Fraud Office (OLAF) and the European Court of Auditors.

13 For analysis under relevant international human rights law see Hungarian Helsinki Committee, Hungarian Civil Liberties Union, 'Short analysis of the proposed Hungarian bill on foreign-funded non-governmental organisations', 11 April 2017.

14 See OSCE/ODIHR and Venice Commission, 'Joint guidelines on freedom of association', 1 January 2015.

Furthermore, as discussed, the bill is likely to unduly undermine public trust in the NGOs targeted by the legislation. This interferes in their ability to perform the key tasks of an NGO, which are protected by the right to freedom of association. As discussed above, these tasks are the promotion of public participation in the democratic process and the promotion of government accountability to national and international law. The bill therefore breaches Article 12 CFR for two reasons. First, the sanctions constitute a disproportionate measure to punish failure to fulfil the administrative requirement of registering. Second, the bill constitutes a disproportionate interference with the right to the freedom of association that is not justified by any evidence to support the government's view that the bill is necessary to meet the aim of combating money laundering and terrorist financing, nor that existing transparency requirements are insufficient.

The same reasoning can be applied to the interference that the bill causes to Article 11 CFR, which protects freedom of expression. The sanctions, and the registration and labelling requirements in the bill interfere with the ability of NGOs to exercise free speech both because they threaten the continued operation of NGOs and because they unduly undermine the credibility of any opinions NGOs may express. Again, there is no evidence that these restrictions to freedom of expression are necessary to meet the aim of combating money laundering or terrorist financing, nor that existing national rules on transparency or anti-money laundering are insufficient.

The bill also violates the right to the protection of personal data guaranteed by Article 8 CFR because it obliges NGOs to reveal the name, country and city of each foreign donor, including private individuals. This means that individuals will be forced to disclose their opinions and beliefs. This interference cannot just be justified because there is no evidence that the NGOs targeted are at risk of money laundering or terrorist financing, or that this aim has not already been achieved by existing transparency requirements in national law.

The bill, if adopted, would therefore violate several provisions of the directive on anti-money laundering and terrorist financing and of the CFR.

EU law on free movement of capital

EU law prohibits restrictions on the free movement of capital and payments between EU countries.¹⁵ EU law does not only protect transfers of capital for commercial purposes. Gifts, endowments and inheritances are also protected by the legislation.¹⁶ This includes donations of money or property to charitable organisations.¹⁷

The Hungarian bill, if adopted, would amount to a restriction on the free movement of capital, because it creates an obstacle to donations from other EU countries. Under EU law, any measure that has the effect of deterring an individual from making cross-border transfers, will amount to an unlawful restriction.¹⁸

The Hungarian bill requires that the targeted NGOs provide the personal data (name, country, city and amount of the donation) of donors from other EU countries, for publication in the register of civil society or-

15 Article 63 of the Treaty on the Functioning of the European Union (TFEU); Directive 88/361 for the implementation of Article 67 of the Treaty of 24 June 1988 (OJ L 178, 8.7.1988, 5).

16 Directive 88/361, Annex I, XI B, D

17 CJEU, Case C-318/07 *Persche*, 27 January 2009, para. 30. Charitable foundations are also covered for cross-border transfers of income, for example, from rental of property in another EU country: CJEU Case C-386/04 *Stauffer*, 14 September 2006.

18 See: CJEU, Case C-484/93 *Svensson and Gustavsson*, 14 November 1995, para. 10; CJEU, Case C-222/97 *Trummer and Mayer*, 16 March 1999, para. 26; CJEU, Case C-439/97 *Sandoz*, 14 October 1999, para. 19.

ganisations. This requirement is likely to have the effect of deterring donors because it forces them to disclose their personal data. Furthermore, the legislative context demonstrates that the requirement is indeed intended as a deterrent for donors, because the NGOs in question have been highly stigmatised through the statements of government representatives.¹⁹

EU law allows a government to justify a restriction on the free movement of capital on the basis of public policy and public security.²⁰ However, EU law requires the government in question to prove that there is a genuine and sufficiently serious threat to public security.²¹ In the current context, the anti-money laundering and terrorist financing directive sets out the circumstances in which this is permitted.²² As discussed above, the Hungarian government has provided no evidence that the NGOs targeted by the bill are at risk of money laundering or terrorist financing, nor is there evidence that existing national transparency measures not already adequate.

The bill, if adopted, would therefore violate EU law on the free movement of capital.

19 By analogy see CJEU, Case 222/82 *Apple and Pear Development Council*, 13 December 1983 (para. 18). Here the Court of Justice found that a promotional campaign by a government body that encouraged the public to buy British agricultural produce could violate the prohibition on restrictions of imports from other EU countries. EU law prohibited the state from engaging ‘in any advertising intended to discourage the purchase of products of other Member States or to disparage those products in the eyes of consumers. Nor must it advise consumers to purchase domestic products solely by reason of their national origin’.

20 Article 65(1)(b), TFEU.

21 CJEU, Case 36/75 *Rutili*, 28 October 1975, paras 26-28; CJEU, Case C-348/96 *Calfa*, 19 January 1999, para. 21.

22 Article 75, TFEU.