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***ENFORCING THE EU  
COURT OF JUSTICE'S  
JUDGMENT ON  
THE HUNGARIAN  
NGO LAW: 3 KEY  
RECOMMENDATIONS  
TO THE EUROPEAN  
COMMISSION***

## Key points

Six months ago, the Court of Justice of the EU condemned Hungary for the violation of EU law and the EU Charter of Fundamental Rights on grounds of its restrictive legislation on the financing of NGOs. With its judgment, the Court made it clear that similar rules, which are essentially aimed at destroying the reputations and finances of independent civil society organisations, are unlawful in the EU.

To date, however, no steps have been taken by Hungary to comply with the judgment. On the contrary, the law is being relied on to restrict NGOs' access to EU funding.

The enforcement of this judgment bears great importance not only to the financing and operations of NGOs and to the protection of those who support them. It is also key to safeguard the ability of Hungarian citizens to rely on the services NGOs provide and on their crucial contribution to a free democratic debate. Ultimately, it is an integral part of the EU's efforts to safeguard the proper functioning of democracy and the rule of law in Hungary and in all the other Member States.

In the light of this, this policy brief, drafted by Liberties with the support of the Hungarian Civil Liberties Union, the Hungarian Helsinki Committee and Amnesty International Hungary, calls on the European Commission to take a firm stance on Hungary's compliance with this Court of Justice judgment. To that effect, it makes 3 key recommendations:

1 - Make clear that the Court of Justice's ruling requires the law to be repealed: a correct reading of the Court of Justice's decision leaves no margin for the Hungarian government to comply by merely amending the provisions of the existing law. The Commission should therefore take the position that compliance with the ruling requires the Hungarian government to repeal the law as a whole.

2 - Should Hungary propose amendments, ensure a strict and prompt compliance check: Hungary may refuse to repeal the law and rather propose changes to its provisions. In such case, a strict and prompt compliance check by the Commission will be necessary to avoid that the implementation of the judgment is delayed and that rules unduly harassing and damaging independent NGOs are maintained.

3 - Set a deadline to return to the Court of Justice: the Commission has the power to return to the Court of Justice and ask for the imposition of fines if Hungary fails to comply with the judgment. The Commission should make it clear to the Hungarian government that it will use this power within a set timeframe.

## Introduction

In its **judgment** of 18 June 2020 in case C-78/18, the EU Court of Justice (CJEU) upheld the infringement action brought by the European Commission against Hungary on grounds of its Law No LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad ('NGO law').

The CJEU agreed with the Commission that the measures applicable to civil society organisations receiving foreign donations introduced by the Hungarian government by means of that law are discriminatory and unjustified. Accordingly, the CJEU condemned Hungary for breaching EU rules on the free movement of capital (Article 63 of the Treaty on the Functioning of the EU) as well as fundamental rights enshrined in the EU Charter of Fundamental Rights, in particular the organisations' right to freedom of association (Article 12 of the Charter) and the donors' rights to respect for private life and to the protection of personal data (Articles 7 and 8 of the Charter).

After 6 months since the CJEU pronounced itself, Hungary has taken no concrete steps to implement the ruling.

The Constitutional Court has not yet lifted its decision to **stay** the proceedings brought before it on the compatibility of the law with Hungary's Fundamental Law, made at the time when the CJEU had not yet rendered its decision. A **draft law** submitted to the parliament by the opposition Hungarian Socialist Party (MSZP) immediately after the ruling

was issued, aimed at rolling back the registration and reporting system put in place by the contested law, remained dead letter. The ruling party Fidesz voted against the motion to debate this bill in September, making it clear that the government has no intention to engage in genuine efforts to implement the CJEU ruling. The government's determination not to step back on the NGO law's goal, i.e. that of stigmatising and publicly discrediting independent civil society organisations, was already clear from the **public statements** made by the Hungarian Prime Minister in the aftermath of the judgment. This was also reflected in the reaction to the ruling by the **Minister of Justice**, who said to interpret the ruling as essentially confirming the law's legitimacy, implying that only the tools with which to achieve this goal would be changed.

In addition, the Tempus Foundation, a public foundation operated by the government, which is responsible for the management and distribution of EU funds under shared management, has been implementing the contested law. Tempus has been requiring civil society organisations to declare being registered as a foreign-funded organisation in accordance with the 2017 NGO law as a precondition to access to EU funding. The Hungarian Civil Liberties Union for Europe and the Hungarian Helsinki Committee already brought to the Commission's attention the **case** of Tempus' rejection of the application by a human rights education NGO for funding under Erasmus+ over non-compliance with this requirement.

Since then, compliance with the 2017 NGO law has been included as an eligibility requirement in Tempus' calls for proposals, preventing and dissuading concerned civil society organisations from applying and thus benefitting from EU funding.

Based on an analysis of the judgment and of the legal and political context in which it was delivered, this policy brief features 3 recommendations addressed to the European Commission to make sure that the CJEU ruling is promptly and effectively enforced.

## **1 – Make clear to the Hungarian government that the CJEU ruling requires the law to be repealed**

The CJEU ruling exposes the substantially flawed basic premise upon which the provisions contained in the Hungarian 2017 NGO law rests. This premise is clearly spelled out in the law's preamble, which states that support granted to civil society organisations by persons established 'abroad' is 'liable to be used by foreign public interest groups to promote, through the social influence of those organisations, their own interests rather than community objectives in the social and political life of Hungary' and thus to 'jeopardise the political and economic interests of the country and the ability of legal institutions to operate free from interference'.

The CJEU makes clear in its judgement that the law "can be justified neither by an overriding reason in the public interest linked to

increasing the transparency of the financing of associations nor by the grounds of public policy and public security" (paragraph 96 of the ruling).

Indeed, according to the CJEU, while the objective of increasing the transparency on the financing of associations may be legitimate, in this case this objective is pursued on the basis of the unsupported and unjustified presumptions. That is, that financial support for civil society organisations from another Member State or a third country is intrinsically liable to jeopardise the political and economic interests of the State and the ability of its institutions to operate free from interference (paragraph 86 of the judgment). Accordingly, the CJEU also affirms that the same unsupported and unjustified presumption cannot be relied on to argue for "the existence of a genuine, present and sufficiently serious threat to a fundamental interest of society" (paragraph 93-95 of the judgment).

On this basis, the CJEU did not even find it necessary to examine the necessity and proportionality of the specific measures imposed by the law in question. This shows that there is no margin for the Hungarian government to ensure compliance with the CJEU ruling by merely amending the provisions of the existing law. As it is the basic premise on which the law rests that was contested, the Commission should make clear to the Hungarian government that compliance with the CJEU ruling requires the Hungarian government to repeal the law as a whole.

## **2 - Should amendments be proposed, ensure a strict and prompt compliance check**

Relying on the CJEU's statements that, in principle, the objective of ensuring the transparency of organisations' financing may be regarded as a legitimate one, the Hungarian government may well decide to engage in a façade compliance with the judgment. This could result in the government refusing to repeal the law, but rather making cosmetic changes to its provisions while maintaining its function and purpose to harass and damage the reputation of civil society organisations and deter them from accessing funding.

This would pose two risks to the proper implementation of the judgment. First, it would allow Hungary to draw the Commission into a senseless dialogue which could delay implementation of the judgment by several months, as well as delaying further action by the Commission before the CJEU for the imposition of financial penalties.

Second, unless the Commission applies thorough scrutiny, it could lead to the judgment being ineffective in practice. The Hungarian government previously took a minimalistic approach to implementing the CJEU judgment on the forced early retirement of judges, which did not result in the reversal of measures to purge the judiciary. In effect, the Commission considered Hungary to have complied with the letter of the CJEU's ruling, even though the government was able to execute its policy. Similarly, the Commission considered Hungary to have complied with

the CJEU's ruling on the independence of its Data Protection Authority, even though in practice the government did not reverse the impugned measures.

To avoid a similar situation where the Hungarian government frustrates genuine compliance with the CJEU judgment on the 2017 NGO law that the Commission should consider three issues in applying close scrutiny to any measures taken.

First, the strict approach taken in this case by the CJEU on the existence of a justification for the new registration and reporting requirements imposed by the NGO law. The Hungarian government may argue that to comply with the CJEU judgment it suffices to better target the application of the law to foreign-funded civil society organisations which, based on their "significant influence on public life and public debate", are liable to be used to promote the interests of the foreign groups supporting them rather than community objectives in the social and political life of Hungary (as stated in the NGO law's preamble). However, as the NGO law itself acknowledges, civil society organisations are by their nature meant to "contribute (...) to democratic scrutiny of and public debate about public issues" and "perform a decisive role in the formation of public opinion". Indeed, the role of non-governmental organisations in contributing to discussions on issues of public interest was reaffirmed by the CJEU (see paragraph 112) and is consistently recognised in human rights jurisprudence (see among others ECtHR judgments in *Gorzelik and others v Poland* (2004), *Társaság a Szabadságjogokért*

v. Hungary (2009) and *Magyar Helsinki Bizottság v. Hungary* (2016)). This means that any civil society organisation which does its job well, will inevitably have a “significant influence on public life and public debate”. Such influence clearly cannot be regarded as a reason to restrict the possibility for such organisations to receive funding, including from foreign sources — and vice-versa, for donors, including those established in other Member States, to support them. As the CJEU judgement makes clear, the assumption that civil society organisations in receipt of financial support from abroad are likely to promote interests that “may jeopardise the political and economic interests of the country and the ability of legal institutions to operate free from interference”, as the NGO law affirms, has no objective foundation.

The second element the Commission should build on is the central role of fundamental rights standards in the CJEU judgment. The CJEU strongly reaffirms that any measure restricting one of the EU fundamental freedoms must, to be permissible, not only fall under one of the exceptions provided by the Treaty or be justified on the basis of an overriding public interest. It must also comply with fundamental rights as enshrined in the Charter (see paragraphs 101 to 103 of the judgment). This should translate into a particularly strict check by the Commission of the necessity and proportionality of any possible amendments to the 2017 NGO law which the Hungarian government may put forward in an attempt to feign implementation of the CJEU judgment.

This point appears particularly important to bear in mind in case the Hungarian government purports to comply with the CJEU judgment by revising the donations thresholds and by taking a more circumscribed identification of those civil society organisations that would be subject to the new requirements. Such amendments would demonstrate a degree of consideration for the principles of necessity and proportionality that might serve to mitigate concerns as regards the respect of EU rules on the free movement of capital. In that connection, the assessment over the compatibility of restrictions would take into account that transparency is an objective of general interest recognised by the EU, and that states enjoy a margin of appreciation in defining what constitutes a threat to public order. However, similar amendments would not be sufficient to remedy the serious interferences with fundamental rights.

This is true, first and foremost, as regards the interference with freedom of association. The CJEU identifies such interference in the creation by the contested provisions of a “generalised climate of mistrust” vis-à-vis concerned civil society organisations (paragraphs 57, 58 and 118), and in the “deterrent effect” on the civil society organisations’ access to funding (paragraph 116), which has an impact on their actions and operations (paragraph 118). It is unlikely that such deterrent effect would be offset by makes changes to the law that relate to how it is applied, but that leave its overall framework and rationale unaffected. Such changes would clearly not remedy the absence of convincing and compelling reasons demonstrating the “pressing social need” that is

required by freedom of association standards to justify the necessity of a particular restriction. As consistently underlined by the ECtHR, the term “necessary” does not have the flexibility of such expressions as “useful” or “desirable” (see for example *Gorzelik and Others v. Poland*, cited, paragraph 57). In addition, the scrutiny must be particularly careful where, as in this case, measures are likely to affect non-governmental organisations playing a “social watchdog” role (see *Társaság a Szabadságjogokért v. Hungary*, cited, paragraph 26).

Other fundamental rights standards would equally stand in the way of any arbitrary qualification by the Hungarian government of those civil society organisations liable to be exploited by foreign interest groups “to promote their own interests rather than community objectives in the social and political life of Hungary” and thus posing a “genuine, present and sufficiently serious threat to a fundamental interest of society”. Any identification of a threat to public order which is essentially based on an organisation’s capability of influencing public life or public debate in a direction other than what the state and its institutions consider “community objectives” would clearly be at odds with the right to freedom of expression. It derives from consistent ECtHR case-law that the ability of non-governmental organisations to contribute to the discussion of public affairs free from the interference of the state is instrumental to the protection of opinions and the freedom to express them (see ECtHR, *Freedom and Democracy Party (ÖZDEP) v. Turkey* (1999)). These include “ideas which challenge the existing order”, which, in a democratic society based

on the rule of law, must be afforded a proper opportunity of expression including through association and participation in the political process (see ECtHR, *United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria* (2006)). Restrictions that are meant to ultimately hinder the activity of organisations expressing views on social and political issues that differ from, or are critical to, those promoted by the government would constitute a clear violation of the right to freedom of expression as well as, possibly, of the principle of non-discrimination on grounds of political or other opinions.

Similarly, it would be difficult to show that such limited amendments would address the CJEU’s concerns that reporting requirements expose donors – who cannot be considered as public figures for the mere fact of granting financial support to organisations participating in public life, as the CJEU stressed (see paragraph 131) – to violations of their privacy and right to protection of personal data.

The third issue to which the Commission should pay close attention to is the burden and threshold of proof. Replying to Hungary’s arguments that the Commission did not provide evidence of the impact of the NGO law on capital movements, the CJEU underlined that, where a violation of EU law “has its origin in the adoption of a legislative or regulatory measure whose existence and application are not contested”, a legal analysis of such measure is sufficient to prove the existence of such a violation (paragraphs 36 to 38 of the judgment). This means that if the Hungarian government purports to implement the judgment by merely

amending the NGO law, the burden of proof will fall on the government to demonstrate that such changes are adequate to remedy the violations established by the Commission and the CJEU.

As well as placing the burden of proof on Hungary, the Commission should impose a high evidence threshold, requiring clear and convincing proof that the proposed changes address the CJEU's concern that the very premise of the law is flawed. In considering such evidence, the Commission should take into account the [Venice Commission's view](#) that any possible amendments should be considered in the context of a pattern of continued attacks and smear campaigns against independent organisations in Hungary. Given these considerations, the Hungarian government is unlikely to be able to prove genuine compliance with the CJEU judgment by merely amending how the law is applied.

### **3 – Set a deadline to return to the CJEU**

If a Member State fails to comply with a judgement of the CJEU, the Commission has the power to take further action under Article 260 TFEU. If the matter is referred to the CJEU, and it is found that the Member State has not complied with the initial judgement, the CJEU may impose a fine in the form of a lump sum or penalty payment or both.

In examining the arguments put forward by Hungary as regards the alleged violation by

the Commission of the principles of sincere cooperation and of good administration in the pre-litigation procedure, the CJEU stressed that such a violation may be established only where “the Commission’s conduct made it more difficult for the Member State concerned to refute that institution’s complaints and thus infringed the rights of the defence”. This was not established in this case where, on the contrary, the CJEU accepted that the Commission duly took into consideration all the comments made by Hungary at the various stages of that procedure, despite the short time limits imposed on Hungary to address the Commission’s concerns. This shows that the CJEU shares the urgency of taking action and is aware of the Hungarian government’s obstructive behaviour and malicious reliance on the principles of sincere cooperation and good administration. The CJEU will with no doubt take this into account if the Commission further pursues enforcement action over non-compliance with the CJEU judgment.

The Commission should therefore make it clear to the Hungarian government that it is ready to return to the CJEU to seek financial penalties within a set timeframe. This is all the more importance given that there is ample evidence of the harmful effects of inaction by the Hungarian government in implementing the CJEU judgment, including as regards the disbursement of EU funding. This would also warrant the request by the Commission, when returning to the CJEU to enforce the judgment, for protective interim measures under Article 279 TFEU.

In that connection, it is imperative for the Commission not to delay its enforcement action in the event the Hungarian government decided to leave it to its Constitutional Court to decide on the fate of the NGO law instead of taking action in good faith to implement the CJEU judgment. On the contrary, the Commission should regard this as a violation of the principle of sincere cooperation to be raised in its further action under Article 260 TFEU.

## **Conclusion**

The enforcement of the CJEU's judgment on the Hungarian NGO law will not only substantially improve the conditions facing civil society organisations, their staff and donors. It will also benefit Hungarian citizens who rely on the services these organisations provide and the contribution they make to the proper functioning of democracy and the rule of law.

As such, the ability to ensure Hungary's compliance with this judgment affects the credibility of efforts by the Commission to protect the European values of democracy and the rule of law. Taking a firm stance on compliance would show that the Commission is genuinely willing to back up the **commitment** to 'pursue a strategic approach to infringement proceedings related to the rule of law building on the case-law of the CJEU', making 'full use of its powers to ensure the respect of EU law requirements relating to the rule of law'.