Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 14 January 2020[1]

Case C-78/18

European Commission
v
Hungary

(Transparency of associations)

(Action for failure to fulfil obligations — Free movement of capital — Articles 63 TFEU and 65 TFEU — Respect for private life — Protection of personal data — Freedom of association — Transparency — Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union — Foreign donations to non-governmental organisations which carry on their activity in a Member State — National legislation imposing on non-governmental organisations in receipt of support from abroad legally binding obligations of registration, declaration and transparency which can be enforced)

1. In an action brought by the Commission, the Court is required to adjudicate on whether Hungary, in establishing by law[2] certain restrictions on donations received from abroad for the benefit of so-called 'civil society organisations', has failed to fulfil the obligations incumbent on it under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. The Court must rule on the action for failure to fulfil obligations brought by the Commission, by again approaching the judicial review of a Member State's actions in such a way that, in its analysis, the fundamental freedoms laid down in the Treaties dovetail harmoniously with the rights protected by the Charter.

I. Legislative framework

A. EU law

1. FEU Treaty

3. Article 63 TFEU reads:

'1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

1 Original language: Spanish.

2 A külföldről támogatott szervezetek átláthatóságáról szóló 2017. évi LXXVI. törvény ((Law No LXXVI of 2017 on the transparency of organisations which receive support from abroad; 'Law No LXXVI of 2017').

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

4. Article 65 TFEU provides:

'1. The provisions of Article 63 shall be without prejudice to the right of Member States:

a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

…'

2. The Charter

5. Article 7 states:

'Everyone has the right to respect for his or her private and family life, home and communications.'

6. Article 8 stipulates:

'1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.'

7. In accordance with Article 12(1):

'Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.'

8. Article 52 provides:

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

…

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

…'

B. National law. Law No LXXVI of 2017

9. The preamble states:

'… organisations established in accordance with the freedom of association are an expression of the self-organisation of society and their activities contribute to democratic scrutiny of and public debate about public issues … such organisations perform a decisive role in the formation of public opinion,

– … the transparency of associations and foundations in society is overwhelmingly in the public interest,

– … support from unknown foreign sources to organisations established in accordance with the freedom of association 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 … may jeopardise the political and economic interests of the country and the ability of legal institutions to operate free from interference.'

10. In accordance with Article 1:

'1. For the purposes of the application of this law, "organisation in receipt of support from abroad" means every association or foundation which benefits from funding within the meaning of paragraph 2.

2. For the purposes of this law, any donation of money or other assets coming directly or indirectly from abroad, regardless of the legal instrument, shall be treated as support where, in a given financial year, that donation — alone or cumulatively — comes to double the amount stipulated in Paragraph 6(1)(b) of Law No LIII of 2017 on the prevention of and fight against money laundering and terrorist financing ("the Pmt Law").[3]

3. That calculation of the amount of support for the purposes of paragraph 2 shall not include support received by the association or foundation under a special legal rule, such as funding from the European Union channelled through a [Hungarian] financial institution.

4. This law shall not apply to:

a) associations and foundations which are not regarded as civil society organisations;

b) associations covered by Law No I of 2004 on sport;

c) organisations which carry on a religious activity;

3 7.2 million Hungarian forint (HUF) (around EUR 24 000).

d) organisations and associations for national minorities covered by Law No CLXXIX of 2011 on the rights of national minorities, and foundations which, in accordance with their constitution, carry on an activity directly connected to the cultural autonomy of a national minority or which represent and protect the interests of a particular national minority.'

11. Paragraph 2 provides:

'1. Every association and foundation within the meaning of Paragraph 1(1) must, within 15 days, give notice of the fact that it has become an organisation in receipt of support from abroad where the amount of support it has received in the year in question comes to double the amount stipulated in Paragraph 6(1)(b) of the [Pmt] Law.

2. An organisation in receipt of support from abroad must send the declaration referred to in paragraph 1 to the court with jurisdiction for the place of its registered office ("the court for the place of registration") and provide the information specified in Annex I.[4] The court for the place of registration shall include the declaration in the records relating to the association or foundation in the register of civil organisations and other organisations considered to be non-commercial ("the register") and shall record the association or foundation as an organisation in receipt of support from abroad.

3. Applying by analogy the rules laid down in paragraph 1, the organisation in receipt of support from abroad must forward to the court for the place of registration, at the same time as its calculation of the amount received, a declaration containing the information specified in Annex I relating to support received in the previous year. The declaration must set out, for the year in question,

a) where the support is less than HUF 500 000[5] per donor, the information set out in Annex I, point (A), part II,

b) where the support is equal to or more than HUF 500 000 per donor, the information set out in Annex I, point (B), part II.

4. By the 15th day of each month, the court for the place of registration must send to the minister with responsibility for management of the civil information portal the name, registered office and tax identifier of the associations and foundations which it has entered in the register as organisations in receipt of support from abroad in the previous month. The minister shall disseminate without delay the information forwarded to it in order to ensure that the information is freely available to the public on the electronic platform set up for that purpose.

5. After making its declaration for the purposes of paragraph 1, the organisation in receipt of support from abroad must indicate without delay on its homepage and in its publications … that it has been classified as an organisation in receipt of support from abroad within the meaning of this law.

6. The organisation in receipt of support from abroad shall continue to be bound by the obligation laid down in paragraph 5 for as long as it is classified as [such] an organisation for the purposes of this law.'

12. In accordance with Paragraph 3:

'1. If the association or foundation fails to comply with the obligations imposed on it under this law, the public prosecutor must, upon becoming aware of this … require the association or foundation to comply with its obligations within the next 30 days.

4 That information concerns the identity of the organisation in receipt of support and that of the donor, in addition to the amount of the support by reference to the thresholds laid down in subparagraph (3) of that provision and a statement of whether the donations are of cash or other assets.

5 Around EUR 1 500.

2. If the organisation in receipt of support from abroad fails to comply with the obligation indicated by the public prosecutor, the latter must again require it to comply with the obligations imposed on it by this law within 15 days. Within 15 days of the expiry of that time limit without any response, the public prosecutor shall apply to the competent court for the imposition of a fine under Paragraph 37(2) of Law No CLXXXI of 2011 on the registration of civil society organisations with the courts and on the applicable rules and procedures.[6]

3. After forwarding a fresh communication to the organisation under paragraph 2, the public prosecutor shall act in accordance with the principle of proportionality, applying by analogy the rules laid down in Law No CLXXV of 2011 on the right of association, the status of a not-for-profit association and the funding of civil society organisations,[7] and in Law No CLXXXI of 2011 on the registration of civil society organisations with the courts and on the applicable rules and procedures.'[8]

13. Paragraph 4 is worded as follows:

'1. Where, during the year following the tax year referred to in Paragraph 2(3), the contribution of cash or other assets from which the organisation in receipt of foreign assistance has benefitted does not come to double the amount indicated in Paragraph 6(1) of the Pmt Law, the association or foundation shall cease to be regarded as an organisation in receipt of support from abroad and it shall communicate that information — applying by analogy the rules relating to the declaration — within 30 days of the adoption of its annual report for the year in which that situation arises. Pursuant to Paragraph 2(4), the court for the place of registration shall notify this fact to the minister with responsibility for management of the civil information portal, who shall remove without delay the data of the organisation concerned from the electronic platform set up for that purpose.

2. Following the declaration referred to in paragraph 1, the court with jurisdiction for the place of registration shall delete from the register the information that the association or foundation is an organisation in receipt of support from abroad.'

II. The pre-litigation procedure

14. On 14 July 2017, the Commission sent the Hungarian Government a letter of formal notice in relation to Law No LXXVI of 2017, on the grounds that that law breached the obligations laid down in Article 63 TFEU and Articles 7, 8 and 12 of the Charter.

15. The letter of formal notice granted the Hungarian Government a period of one month within which to submit its comments. The Hungarian Government requested an extension, which the Commission refused to grant.

6 That provision reads: 'If it is clear from the application for amendment that the organisation, or, in the case of a foundation, the founder(s), failed to submit the application for amendment within the period allowed, the court may impose a fine of between HUF 10 000 and HUF 900 000 on the organisation, the founder of the foundation or, where there is more than one founder, the founders jointly.'

7 Under Paragraph 3 of the Law on civil society organisations, the right of association must not infringe Paragraph (C), subparagraph 2, of the Fundamental Law, nor must it entail an infringement or an incitement to commit an infringement or involve the breach of the rights and freedoms of other persons. Pursuant to that provision, the right of association does not cover the creation of armed organisations or the creation of organisations whose purpose is to carry out a public function which, according to statute, falls within the exclusive remit of a State body.

8 Within the framework of the 'common rules applicable to judicial review' laid down by that law, Paragraph 71/G provides that the competent court may take the following measures, depending on the circumstances: (a) impose a fine of HUF 10 000 to HUF 900 000 on the organisation or representative; (b) annul the unlawful … decision of the organisation and, if necessary, order the adoption of a fresh decision within an appropriate time limit; (c) if it is likely that the proper operation of the organisation can be restored by summoning its principal body, summon the decision-making body of the organisation or entrust that task to an appropriate person or organisation, with the cost to be borne by the organisation; (d) appoint an administrator for a maximum period of 90 days if it is not possible to ensure by other means that the proper operation of the organisation is restored and if, in view of the outcome, that is particularly justified in the light of the operation of the organisation or other circumstances; (e) dissolve the organisation.

16. The Hungarian Government replied to the Commission by letters of 14 August and 7 September 2017, disputing the complaints set out in the letter of formal notice.

17. Since it was not satisfied with the Hungarian Government's response, the Commission issued a reasoned opinion on 5 October 2017, in which it:

1) stated that, by Law No LXXVI of 2017, and contrary to the provisions of EU law cited above, Hungary had introduced discriminatory, unnecessary and unjustified restrictions in respect of foreign donations to civil society organisations in Hungary; and

2) called on the Hungarian Government to adopt the necessary measures to comply with the opinion or to submit comments within one month.

18. The Hungarian Government was again refused an extension of the time limit granted and it replied to the Commission's reasoned opinion on 5 December 2017, rejecting the claim that it was in breach of its obligations.

19. On 7 December 2017, the Commission decided to bring this action.

III. Procedure before the Court of Justice and forms of order sought by the parties

20. The action for failure to fulfil obligations was lodged with the Court of Justice on 6 February 2018.

21. The Commission claims that the Court of Justice should declare that, as a result of the adoption of Law No LXXVI of 2017, Hungary has failed to fulfil its obligations imposed under Article 63 TFEU and Articles 7, 8 and 12 of the Charter by introducing discriminatory, unnecessary and unjustified restrictions on foreign donations to civil society organisations. The Commission also seeks an order for costs against that Member State.

22. The Hungarian Government claims that the action should be ruled inadmissible or, in the alternative, dismissed on the grounds that it lacks any basis, and that the Commission should be ordered to pay the costs.

23. By order of the President of the Court of Justice of 26 September 2018, the Kingdom of Sweden was granted leave to intervene in support of the Commission's submissions.

24. A hearing was held on 22 October 2019, which was attended by the Hungarian Government, the Swedish Government and the Commission.

IV. Analysis

A. Inadmissibility of the action

1. The parties' positions

25. The Hungarian Government submits that the action is inadmissible on account of irregularities committed during the pre-litigation procedure. The Hungarian Government contends that the Commission set shorter than usual time limits for the presentation of comments and wrongly refused to grant it the extensions requested.

26. In the Hungarian Government's submission, those irregularities breach of the duty of sincere cooperation (Article 4(3) TEU), the right to good administration (Article 41 of the Charter), more specifically, the right to be heard, and the general principle of the rights of defence.

27. The Commission maintains that the time limits were not unfair or unreasonably short and that they did not prevent the Hungarian Government from lodging detailed comments on the alleged failure to fulfil obligations.

28. As regards the time limit for submitting comments on the letter of formal notice, the Commission argues that an extension of that time limit was conditional on Hungary's compliance with it and on the preparation by Hungary of a realistic timetable of measures for compliance with the letter of formal notice.[9] The Commission further submits that, when the time limits were set, account was taken of the fact that Hungary had decided not to continue the dialogue with the Commission, meaning that their brevity is attributable to that Member State's conduct.

2. Assessment

29. The Court has held that 'the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under [EU] law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission.'[10]

30. With the aim of fulfilling that dual purpose, 'the Commission must allow Member States a reasonable period to reply to the letter of formal notice and to comply with a reasoned opinion, or, where appropriate, to prepare their defence.'[11]

31. The usual period set by the Commission in pre-litigation procedures is two months.[12] However, that does not mean that the Commission must confine itself to that period in all cases: as indicated, what matters is that the period should be 'reasonable'.

32. However, the *reasonableness* of the period cannot be determined in the abstract but rather by reference to the dual purpose it serves.[13] In particular, the Member State must be in a position to prepare the defence of its position against the allegations made by the Commission.

33. In order to determine whether the period allowed by the Commission is reasonable in a particular case, 'account must be taken of all the circumstances of the case.'[14] For example, 'very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member Sate concerned is fully aware of the Commission's views long before the procedure starts.'[15]

9 The Hungarian Government rejects that argument in its rejoinder, claiming that it amounts to ignoring the rationale for the pre-litigation procedure, the aim of which is to offer the Member State the opportunity to comply with the obligation at issue or to assert its rights of defence against that obligation.

10 Judgment of 2 February 1988, *Commission* v *Belgium* (293/85, EU:C:1988:40, 'judgment in *Commission* v *Belgium*'), paragraph 13.

11 Ibid., paragraph 14.

12 Paragraphs 9 and 18 of the Hungarian Government's defence.

13 Thus, in the judgment of 31 January 1984, *Commission* v *Ireland* (74/82, EU:C:1984:34), paragraphs 13 and 14, the Court found that, although it was 'unreasonable … to allow a Member State five days to amend legislation which has been applied for more than 40 years and which, moreover, has not given rise to any action on the part of the Commission over the period which has elapsed since the accession of [the] Member State', and although there was no evidence of any urgency, that was not sufficient 'to render the action inadmissible' (italics added).

14 Judgment of 13 December 2001, *Commission* v *France* (C-1/00, EU:C:2001:687), paragraph 65.

15 Judgment in *Commission* v *Belgium*, paragraph 14.

34. The Commission submits that, in this case, an extension of the time limit for responding to the reasoned opinion could have been granted only in order to enable the Member State to adopt the measures necessary for it to comply with the reasoned opinion. [16] The Commission further submits that the Hungarian Government did not state in its request for an extension that this was its intention.

35. That contention does not take into account the second of the objectives served by the pre-litigation procedure, which is to enable the Member State to prepare its defence against the allegations made against it. Therefore, it is not compatible with the settled case-law of the Court.

36. However, the decisive point for the present purposes is whether the Commission's conduct made it difficult for the Member State to prepare its defence. It is for the Member State to adduce evidence of such difficulty. [17]

37. The Hungarian Government has not succeeded in establishing that the time limits granted had a negative impact on the defence of its position. Even though it might be correct to complain that the Commission imposed on it a time limit (one month) that was shorter than the usual time limit that it was the Commission's practice to impose (two months), the latter was, de facto, the period that the Hungarian Government had to respond to both the letter of formal notice and the reasoned opinion. [18]

38. In those circumstances, I believe that the Hungarian Government was able to mount an adequate defence by ultimately benefitting from the time limit which it initially requested.

39. The fact that the Commission decided to bring its action just two days after receiving the Hungarian Government's reply to the reasoned opinion is irrelevant for the purpose of the inadmissibility of the action.

40. It is for the Commission to choose when to commence proceedings against a Member State for failure to fulfil obligations, while 'the considerations which determine that choice cannot affect the admissibility of the action' for 'the Commission is entitled to decide, in its discretion, on what date it may be appropriate to bring an action and it is thus not for the Court, in principle, to review the exercise of that discretion'. [19]

41. The Hungarian Government submits that two days were insufficient for the Commission to form a view on its reply to the reasoned opinion. [20] The Commission responds that it decided to bring the action after conducting a completely professional examination of the Hungarian Government's reply. [21]

42. I have already drawn attention to the Commission's competence to choose the time when it decides to commence this type of action. On that basis, I see no reason for the claim that the Commission adopted its decision in this case without giving the Hungarian Government's comments due consideration.

16 Paragraph 16 of the Commission's reply.

17 Judgment of 18 July 2007, *Commission* v *Germany* (C-490/04, EU:C:2007:430), paragraph 26.

18 The letter of formal notice of 14 July 2017 was answered by the Hungarian Government by letters of 14 August and 7 September 2017. The reply to the reasoned opinion of 5 October 2017 was sent on 5 December 2017.

19 Judgment of 19 September 2017, *Commission* v *Ireland* (registration tax) (C-552/15, EU:C:2017:698), paragraph 34.

20 Paragraph 25 of the Hungarian Government's defence.

21 Paragraph 11 of the Commission's reply.

43. The reply to the reasoned opinion constitutes the final stage of a procedure in which the parties involved are fully aware of the respective positions. That being so, once the different stages of the pre-litigation procedure are finished, two days may be sufficient to decide on the next step, that is, to bring proceedings for failure to fulfil obligations.

44. A reply to the reasoned opinion which, as in this case, simply repeats the position that Hungary adopted from the outset was sufficient for the Commission to conclude that that Member State's legal position, of which it was already aware, had not changed during the procedure. Accordingly, the decision to bring proceedings does not need to be examined in any greater detail than it was throughout the pre-litigation procedure.

45. Although, as stated, the decision was taken on 7 December 2017, the application was lodged with the Court of Justice on 6 February 2018. The application includes many references to the Hungarian Government's reply, which is evidence of a detailed examination of its position. It is untenable to argue, therefore, that the Commission neglected to scrutinise the reply to the reasoned opinion.

46. Finally, the important point is that the pre-litigation procedure enabled the Hungarian Government to set out its arguments before the Commission and, ultimately, before the Court of Justice, free from any restriction of its right of defence.

47. It seems barely necessary to state that, for the purpose of adjudicating on this action, the Court of Justice has at its disposal all the documents produced by the Hungarian Government in the pre-litigation stage and, of course, its arguments in defence and rejoinder in these judicial proceedings. In those circumstances, I believe that Hungary's right of defence has been respected.

B. The parties' submissions on the substance

48. The Commission alleges, first, that Hungary has infringed the free movement of capital (Article 63 TFEU) and, second, 'separately',[22] that Hungary has infringed a number of rights and freedoms recognised by the Charter.

49. For the reasons I shall explain,[23] I believe that those two complaints should not be examined 'separately' but rather in an integrated way.

1. Submissions of the Commission and the Swedish Government

50. The Commission and the Swedish Government both contend that the donations governed by Law No LXXVI of 2017 are a form of movement (transfer) of capital. That Law includes an indirect discriminatory restriction on the free movement of capital, based on nationality, which cannot be justified by an objective difference, as regards transparency and control, between the situation of donors resident in Hungary and donors resident abroad.

51. Even if Law No LXXVI of 2017 were applicable in a non-discriminatory way, that would not prevent it from constituting a restriction on the free movement of capital, given the onerous nature of the obligations of declaration, registration and publication it imposes, in addition to their associated deterrent effects. Moreover, the fact that the obligations of declaration and publication are *ex post* does not affect their restrictiveness even though they are less onerous than an *ex ante* obligation.

22 Paragraph 90 of the application.

23 See points 93 to 113 below.

52. Furthermore, the grounds of public policy and transparency on which the Hungarian Government relies do not justify legislation which: (a) stigmatises organisations in receipt of support from abroad (not all such organisations because it excludes some, such as sporting and religious organisations, without any objective reason); and (b) proceeds on the basis that activities which benefit from such support are unlawful.

53. In addition, those measures are not appropriate for achieving the objectives pursued by the national legislature.

– As regards the protection of public policy and public security, even allowing the Member States a certain amount of discretion (Article 4(2) TEU), the Hungarian Government has not established that the organisations concerned represent a sufficiently serious threat to sovereignty and the constitutional order.

– Nor has the Hungarian Government established that the fight against money laundering and terrorist financing makes it necessary to disclose the funding by foreign capital of Hungarian not-for-profit organisations or explained how the disputed measures contribute to that fight.

54. At all events, those measures, which are additional to others already applicable to civil society organisations, are disproportionate and it would be possible to create others which are less restrictive.

55. As regards Article 12 of the Charter, the requirements, formalities and penalties laid down by Law No LXXVI of 2017 infringe the freedom of association of civil society organisations, which has an impact on their operation, organisation and funding. The penalties, in particular, constitute a legal risk to the existence of such organisations because they include the possibility that an organisation may be wound up.

56. Furthermore, the restrictions on the freedom of association are unjustified because they do not meet the objectives at which they are purportedly aimed.

57. The system of penalties laid down does not respect the principle of proportionality either: a measure such as winding-up can only be envisaged as a last resort in exceptionally serious situations and not as a penalty for minor infringements, particularly those of an administrative nature.

58. As concerns Articles 7 and 8 of the Charter, Law No LXXVI of 2017 constitutes an unjustified and disproportionate interference with the rights of those who make donations to respect for their privacy and to the protection of their personal data.

59. Without denying that it is possible for the transparency of civil society organisations and the fight against anonymous donations to be general interest objectives, it seems excessive to categorise donors whose gifts exceed HUF 500 000 as ‘public actors’ deserving of less protection of their personal data (which enables, inter alia, the publication of their names in a publicly accessible register). That automatically gives transparency precedence over respect for donors’ fundamental rights.

2. The Hungarian Government’s response

60. The Hungarian Government maintains that the background to Law No LXXVI of 2017 is the Union’s concern with ensuring the transparency and traceability of capital movements, in the interests of combating money laundering and terrorist financing.

61. That Law does not constitute an indirect discriminatory restriction based on nationality and instead concerns the source of the support. Further, it also applies to support from abroad donated by Hungarian nationals, and the Commission has been unable to establish that the persons who donate those sums in practice are predominantly foreign nationals. In any event, the criterion relating to the source of the support is justified because support from a domestic source is easier to control than support from abroad.

62. The disputed measures do not have a deterrent effect because they do not impose any new administrative obligations on those concerned. Moreover, the publication obligations are neutral and do not affect the average donor but rather donors who contribute more than HUF 500 000. The Court of Justice has allowed *ex post* obligations like these.

63. As regards the justification for the measures, the aims of Law No LXXVI of 2017 are set out below.

– To enhance the transparency of civil society organisations as a result of their growing influence on the formation of public opinion and on public life. Far from criticising their role, the legislature was seeking to recognise and encourage them, provided that they operate within the law. In that regard, civil society organisations are treated more favourably than political parties, which cannot receive support from abroad.

– To contribute to the fight against money laundering and terrorist financing.

64. Law No LXXVI of 2017 does not pursue those objectives inconsistently: it excludes some financial support because, if that support comes from Hungarian sources, it can be controlled under pre-existing legislation and, in the case of religious or sporting associations, their specific legal nature requires their exclusion.

65. As regards the proportionality of the measures, the concept of 'support' has been defined in such a way that it is no less indeterminate than other comparable definitions used by EU law.

66. It is not true that the pre-existing legislation imposed on civil society organisations the obligation to notify donations received. Furthermore, measures like those suggested by the Commission would be far more intrusive.

67. The obligations of registration and publication do not apply systematically but rather only within the limits laid down by the Law. Those limits address the need torestrict the information to significant funding from abroad and are well in excess of the average donations made in practice.

68. As regards penalties, the Law creates an incremental set of measures, which are applicable in stages and subject to judicial scrutiny, with winding-up as the last resort for cases where a clear and persistent intention of breaching the law has been established.

69. Law No LXXVI of 2017 has not limited the substance of the freedom of association and instead respects that freedom while governing its exercise. The obligations of registration and publication are confined to the disclosure of a neutral event (the receipt of a certain level of financial support from abroad) and they do not involve the stigmatising and deterrent effects alleged by the Commission.

70. The objective of transparency justifies the adoption of (non-prohibitive) declaratory measures which are normally applicable to political parties and, therefore, also to civil society organisations, to which the European Court of Human Rights (ECtHR) attaches comparable importance.

71. The data to which Law No LXXVI of 2017 refers — the donor's name and city and country of residence — are not personal and, in any event, the obligations in that connection do not amount to an interference with rights protected by the Charter. Only part of the information requested, affecting only a negligible proportion of natural persons (3.6% of donors in 2015), is made public.

72. Any interference with the rights guaranteed by Articles 7 and 8 of the Charter is ultimately justified on general interest grounds recognised by the Union, such as greater transparency in the funding of civil society organisations and the fight against anonymous donations.

73. Lastly, it was necessary to fill the pre-existing legislative gap in this area. The fact that the measures are the same as those laid down by EU legislation in relation to European political parties is proof of their proportionality.

C. Preliminary assessment of the need to use integrated review criteria

1. The position of the Court of Justice

74. In his Opinion in *Commission* v *Hungary* (right of usufruct over agricultural land),[24] Advocate General Saugmandsgaard Øe noted that, for the first time, the Commission was seeking from the Court a declaration that a Member State — also Hungary — had failed to fulfil the obligations imposed by the Charter.[25]

75. That new complaint did not raise any issues of admissibility, for, as Advocate General Saugmandsgaard Øe observed, the obligations in respect of which the Commission may make a complaint of non-fulfilment to the Court under Article 258 TFEU include respect for the rights guaranteed by the Charter.[26]

76. The thorny question then (as now) was the fact that, according to the Commission, the Court was required to rule on an alleged infringement of the Charter independently of, and separately from, an infringement of the freedom of movement, also alleged to have been committed by Hungary in those proceedings.

77. In response to that argument, the Advocate General maintained that the Court could not examine the possible infringement of the Charter '*independently of the question of the infringement of freedoms of movement*.'[27] That was how the Court interpreted the issue in *SEGRO and Horváth*,[28] when it ruled on a case in which there was 'a *complete overlap* between the right to property and the free movement of capital.'[29]

78. However, in its judgment of 21 May 2019,[30] the Court preferred to examine in turn the infringement of Article 63 TFEU and the infringement of Article 17 of the Charter.

24 Case C-235/17, EU:C:2018:971; 'Opinion in *Commission* v *Hungary* (rights of usufruct over agricultural land)'.

25 Opinion in *Commission* v *Hungary* (rights of usufruct over agricultural land), point 64.

26 Ibid., point 66.

27 Ibid., point 76. Italics in the original. Position previously adopted in his Opinion in *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2017:410), point 121, following the case-law laid down in the judgment of 18 June 1991, *ERT* (C-260/89, EU:C:1991:254).

28 Judgment of 6 March 2018 (C-52/16 and C-113/16, EU:C:2018:157) ('judgment in *SEGRO and Horváth*'), paragraphs 127 and 128.

29 Opinion in *Commission* v *Hungary* (rights of usufruct over agricultural land), point 117. Italics in the original. In that case, Advocate General Saugmandsgaard Øe went on to state that 'the analyses to be carried out in order to establish both an interference with the rights guaranteed by Article 63 TFEU and Article 17 of the Charter and the impossibility of justifying that interference *are based on the same factors, leading to an outcome which is essentially identical*' (loc. cit., point 120; italics in the original). Thus, 'a separate examination of the legislation at issue in the light of Article 17 of the Charter in addition to the examination that has already been carried out under Article 63 TFEU' would constitute a clear 'artificiality' (ibid., point 121).

30 *Commission* v *Hungary* (rights of usufruct over agricultural land) (C-235/17, EU:C:2019:432, 'judgment in *Commission* v *Hungary* (rights of usufruct over agricultural land)').

– With regard to Article 63 TFEU, the Court held that the national provision restricted the right of the persons concerned to the free movement of capital. [31]

– Next, the Court looked at whether that restriction was justified, either by overriding reasons in the public interest or by the reasons referred to in Article 65 TFEU. [32]

– From the latter perspective, the Court found that national legislation which relies on both types of reason must be compatible with the rights guaranteed by the Charter. Accordingly. the compatibility of that legislation with EU law must be examined 'in the light both of the exceptions thus provided for by the Treaty and the … case-law, on the one hand, and of the fundamental rights guaranteed by the Charter, on the other hand'. [33]

– It was therefore necessary to determine whether the national provision also breached the fundamental right relied on at that time (the right to property safeguarded by Article 17 of the Charter). [34]

79. Having established both infringements — that of Article 63 TFEU and that of Article 17 of the Charter — the Court went on to determine whether each one was justified.

– In relation to the infringement of Article 63 TFEU, the Court rejected in turn the justification founded on certain objectives of general interest, [35] the justification deriving from infringement of the national legislation concerning exchange controls [36] and the justification based on the protection of public policy. [37]

– In relation to Article 17 of the Charter, the Court disagreed that there were public interest grounds which would justify deprivation of the right to property, while the national provision did not provide for the payment of fair compensation. [38]

80. The Court was undoubtedly seeking to link the fundamental freedoms safeguarded by the Treaties and the fundamental rights laid down in the Charter, but there is a certain risk of overlap in their analysis as Advocate General Saugmandsgaard Øe pointed out. [39]

81. Although that overlap would probably not have excessive practical consequences, I believe that it is possible to link the freedoms laid down in the Treaties and the rights laid down in the Charter in a way which enables the *integration* of both in a single set of review criteria.

31 Judgment in *Commission* v *Hungary* (rights of usufruct over agricultural land), paragraph 58. The restriction was derived from the fact that the persons concerned were deprived of both the possibility of continuing to enjoy their rights of usufruct over agricultural land and the possibility of alienating that right.

32 Ibid., paragraphs 59 and 60.

33 Ibid., paragraph 66.

34 Ibid., paragraph 86.

35 Ibid., paragraphs 90 to 101.

36 Ibid., paragraphs 102 to 109.

37 Ibid., paragraphs 110 to 122.

38 Ibid., paragraphs 123 to 129.

39 I refer to the quotation at footnote 28 of this Opinion. In reality, the establishment of each infringement and its possible justification are based on a substantially equivalent legal analysis. In the judgment in *Commission* v *Hungary* (rights of usufruct over agricultural land), paragraph 124, the Court confirmed that there were no public interest grounds to justify the infringement of Article 17 of the Charter, referring to the reasons why it had previously ruled out the existence of such grounds in relation to the infringement of Article 63 TFEU.

2. The search for integrated review criteria

82. In accordance with the Court's traditional approach, when assessing whether there has been an infringement of the freedoms protected by the Treaties, the fundamental rights only come into play in so far as the Member States have obstructed or restricted those freedoms relying on reasons or grounds accepted by EU law. [40]

83. Therefore, the rule is that the Court 'has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law.' [41] That is the criterion enabling the rights laid down in the Charter to be relied on against such legislation.

84. It might be possible to superimpose another approach, which is more focused on the applicability of the Charter, on that traditional approach when the Court interprets the freedoms laid down in the Treaties, of which the fundamental rights safeguarded by the Charter form an essential part.

85. As stated above, the Court 'has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law.' [42] When interpreting EU law (in so far as is relevant for the present purposes, Article 63 TFEU), it is undeniable that the effects of the Charter must be taken into account.

86. EU law as a whole, including both primary and secondary law, has been imbued with the content of the fundamental rights enshrined in the Charter, whose legal value is the same as that of the Treaties (Article 6(1) TEU). Furthermore, that occurred in a radical manner as befits a Union based on the values of respect for human dignity, freedom and human rights (Article 2 TEU) which places the individual at the heart of its activities (preamble to the Charter).

87. The entry into force of the Charter constituted the final transition from the previous legislative system to another which revolves around the figure of the citizen, that is to say an actor who holds rights which afford him a legal framework in which he can live autonomously and have the freedom to pursue the attainment of his own goals.

88. Therefore, in particular, the *traditional* freedoms protected by the Treaties can no longer be interpreted independently of the Charter, and the rights laid down therein must be treated as an integral part of the substance of those freedoms. In that connection, the Union safeguards those freedoms in a legislative context defined by the fundamental freedoms laid down in the Charter.

89. Accordingly, if the compatibility of national legislation with any of those *traditional* freedoms is called into question, the Charter will be applicable both where the Member States seek to rely on one of the exceptions which the Treaties lay down in that regard and in any other situation in which the fundamental rights are affected. In other words, those rights do not come into play by way of Article 65 TFEU but instead do so directly and primarily by way of Article 63 TFEU.

90. That approach may not seem very far removed from that taken where the applicability of the Charter is linked to the application of a justification expressly allowed by the Treaties. However, I believe that the approaches differ in terms of their conceptual basis and their consequences.

40 Where a Member State relies on the Treaties 'in order to justify rules which are likely to obstruct the exercise of [a fundamental freedom], such justification, provided for by [EU] law, must be interpreted in the light of the general principles of law and in particular of fundamental rights', in such a way that 'the national rules in question can fall under the exceptions provided for by the [Treaties] only if they are compatible with the fundamental rights the observance of which is ensured by the Court' (judgment of 1 June 1991, *ERT* (C-260/89, EU:C:1991:254) paragraph 43).

41 Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105), paragraph 19.

42 Judgment in *Åkerberg Fransson*, paragraph 19.

91. The integration of the fundamental rights into the content of the freedoms safeguarded by the Treaties (required, as stated, following the entry into force of the Charter) means that the rights laid down in the Charter must be respected not only by national legislation which seeks to rely on EU law to limit those freedoms but also by legislation which, while not seeking to rely on EU law, contravenes or restricts those freedoms. Otherwise, the paradox would arise whereby Member States would have to respect the fundamental rights only where they were seeking to justify a restriction of the protected freedoms but not where they restrict those freedoms without recourse to any justification.

92. On that basis, the subject matter of any of the freedoms safeguarded by the Treaties must be considered to have been *redefined* by the integration of the rights laid down in the Charter into their definition.

93. Where, as in this instance, the free movement of capital is in issue, the transactions benefitting from that freedom are not only those liable to restriction under Articles 64 TFEU and 65 TFEU but also those liable to any other restriction, the scrutiny of which requires an examination of whether, pursuant to the Treaties, the fundamental rights concerned have been respected. Naturally, those rights may include the right to acquire property, the right to work and the freedom of association.

94. Restrictions of the fundamental freedoms permissible under the Treaties before the entry into force of the Charter had to comply with the requirements of necessity, appropriateness and proportionality, on which there is extensive case-law.

95. Now that the Charter has entered into force, it is necessary to determine when the examination of a hypothetical infringement of the free movement of capital must be carried out in line with that traditional technique (assessment of necessity, appropriateness and proportionality) and when it must be carried out in the light of the fundamental freedoms, that is, using more stringent review criteria.

96. In my view, if national legislation is called into question on the grounds of infringement of Article 63 TFEU without express reference to a possible breach of the Charter (in other words, if the complaint relates to the mere restriction of the free movement of capital as such, without associating that restriction with the breach of a particular fundamental right), the judicial test must be that always used by the Court for this task: the traditional test.

97. On the other hand, if the restriction of that freedom is the primary or direct cause of the infringement of a fundamental right (in other words, if the national legislation which limits the free movement of capital itself seeks to restrict a right or inevitably leads to that outcome), the judicial test must be that applicable to every breach of fundamental rights.

98. Therefore, there is a need to overcome the duplication of 'infringements of Article 63 TFEU', on the one hand, and 'infringements of the fundamental rights based on a restriction of Article 63 TFEU authorised by the Treaties', on the other.

99. Article 63 TFEU lays down a single freedom. That freedom likewise has a single purpose which is the free movement of capital, subject only to the limitations permitted by the Treaties; that includes respect for the fundamental rights, both where their exercise may be facilitated by the enjoyment of the freedom of capital and where their exercise may be undermined by curtailment of that freedom.

100. Accordingly, it is necessary to determine, in each case, whether the infringement of Article 63 TFEU flows from a limitation of the free movement of capital which is confined solely to the restriction of that movement as such or whether that restriction actually gives rise to the infringement of a fundamental right.[43] In both cases, the standard of review will include the traditional criteria (assessment of necessity, appropriateness and proportionality) but the stringency of those criteria will be qualified where the infringement of a fundamental right is at the heart of the matter.

101. Based on those propositions, I shall now go on to examine the Commission's action.

D. Restriction of the free movement of capital

102. At the heart of the Commission's complaint is the treatment which Law No LXXVI of 2017 affords to civil society organisations in receipt of funding from abroad. That treatment, through its features and its consequences, breaches the freedom of association (Article 12 of the Charter) and, collaterally, breaches the rights to respect for private life and the protection of personal data (Articles 7 and 8 of the Charter, respectively).

103. In view of the nature of the action, the contested legislation is, at first sight, liable to infringe Article 63 TFEU. If its rules were to constitute an unjustified restriction of the free movement of capital, they would be incompatible with that provision and could, at the same time, breach the rights recognised in the Charter.

104. It will therefore be necessary to establish:

– whether that legislation is concerned with a movement of capital and, if so, the conditions to which it makes that movement of capital subject;

– whether, if it is found that the legislation genuinely places conditions on capital movements, the conditions imposed amount to a breach of the fundamental rights relied on by the Commission, in which case they will constitute a restriction of the freedom safeguarded by Article 63 TFEU;

– lastly, whether that restriction can be justified under EU law, which would preclude it from being classified as improper and would, therefore, rule out the infringement alleged by the Commission.

1. Consideration of whether a capital movement exists and whether that capital movement is restricted by national law

105. Law No LXXVI of 2017 imposes on associations or foundations which receive support from abroad — with some exceptions — the obligation to notify the authorities of their status as an 'organisation in receipt of support from abroad' where the amount of support received reaches a specified threshold.

106. Those organisations or foundations must also notify certain particulars relating to the amount and nature of the support received and the donor's identity. The prescribed declaration is entered into a register which records the status of the organisation in receipt of support from abroad. All those details are published in that official register which can be accessed free of charge. The organisation in receipt of support from abroad must indicate that status on its homepage and in its publications.

43 A restriction of the free movement of capital can hardly be neutral from the perspective of the fundamental rights. For example, the right not to suffer discrimination would be fatally undermined by a measure selectively restricting that freedom, as, in general, would all the rights whose exercise may be facilitated by capital the movement of which is restricted. In contrast to those structural or basic effects are the characteristic effects of restrictions implemented specifically to the detriment of a right where that detriment is not merely collateral damage but the primary consequence of those restrictions.

107. The Hungarian Government does not even deny that the 'support' governed by Law No LXXVI of 2017 — Paragraph 1(2) of which defines that support as 'any donation of money or other assets … regardless of the legal instrument' — is a 'movement of capital'.

108. Such operations fall readily within the category of 'capital movements', as is clear from the nomenclature in Annex I to Directive 88/361/EEC,[44] which, in accordance with the case-law, still has the same indicative value for the purposes of defining the notion of capital movements.[45]

109. Under the legislation at issue in the action, capital movements in the form of support to a number of associations and foundations established in Hungary are not, therefore, completely free and are instead subject to certain conditions, in particular, the conditions set out above (recipients of support must declare it to the national authorities so that it can be registered and published).[46]

110. Those conditions apply by reference to the donor's registered office or address, since the decisive criterion is that the contribution must come 'directly or indirectly from abroad', as stipulated by Paragraph 1(2) of Law No LXXVI of 2017.

111. However, the 'foreign provenance' requirement is much more likely to affect nationals of other Member States than Hungarian nationals, even though the latter may also reside outside Hungary and, accordingly, be affected by the measures at issue.

112. I should point out, in that connection, that the Court has held that national legislation must be regarded as indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the State imposing that legislation.[47]

113. The Commission's complaints in this case do not constitute mere 'presumptions' as the Hungarian Government alleges. In its application, the Commission does not dispute the compatibility with EU law of a mere administrative practice but rather of legislation the application of which is capable of producing the effects it explains in its application.[48]

114. In addition to being primarily incumbent on foreign nationals and, in particular, on nationals of other Member States, it is my view that the conditions set out in Law No LXXVI of 2017 in relation to donations to specified associations and foundations amount to a *restriction* of such capital movements.

115. Those conditions are, I repeat, liable to restrict the free movement of capital in view of the reasons set out below.

– They may have a negative impact on the funding of associations and foundations established in Hungary which receive money from abroad. To that extent, they negatively affect the exercise of the freedom of association safeguarded by Article 12 of the Charter.

44 Council Directive of 24 June 1988 for the implementation of Article 67 of the Treaty (that article was repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5).

45 Since there is no definition of the term 'capital movements' in the Treaties, the Court conferred indicative value on the nomenclature annexed to Directive 88/361, finding that, in accordance with its introduction, the list it includes is not exhaustive. See judgment of 27 January 2009, *Persche* (C-318/07, EU:C:2009:33), paragraph 24. Heading XI of that annex, entitled 'Personal capital movements', includes under B 'Gifts and endowments'.

46 At the hearing, the Hungarian government referred to Article 65 TFEU, regardless of the fact that, under paragraph 1(b) of that article, it is permitted 'to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information' but not of publication, as stipulated by the legislation at issue.

47 Judgment of 11 September 2008, *Petersen* (C-228/07, EU:C:2008:494), paragraphs 54 and 55.

48 Judgment of 19 December 2012, *Commission* v *Belgium* (C-577/10, EU:C:2012:814), paragraph 35.

– They are also capable of negatively affecting the rights to respect for private life and the protection of personal data (Articles 7 and 8 of the Charter) of those who make contributions from abroad to the civil society organisations concerned.

116. The restriction of capital movements does not end there and instead, as I shall discuss below, it constitutes a medium for the infringement of certain fundamental rights. That is why, as I argued above,[49] the standard of review must be the typical standard for such rights and not the typical standard for the traditional freedoms protected by the Treaties. That standard must therefore be qualified or enhanced in terms of its intensity and rigour.

2. Consideration of the interference with the fundamental rights safeguarded by Articles 7, 8 and 12 of the Charter

(a) Freedom of association

117. Article 12 of the Charter confers on everyone 'freedom of association at all levels, in particular in political, trade union and civic matters'.

118. In addition to its strictly personal dimension, that freedom has an objective dimension which makes it one of the pillars of pluralist societies, for its exercise enables the creation of entities that are essential in a democratic system. Those entities naturally include political parties but also all entities which assist with the shaping and expression of the cultural, religious, social and economic pluralism of society.

119. The entities affected by Law No LXXVI of 2017 ('civil society organisations') correspond to the second of the two groups referred to above, which makes it necessary to leave aside political parties and trade unions, whose specific features preclude their comparison with such entities.[50]

120. Although that Law does not preclude the creation of such entities or restrict their powers of self-organisation, it negatively affects their financing options, which amounts to an adverse effect on their viability and their survival and consequently undermines the attainment of their social objectives.[51]

121. The publication requirements imposed on gifts received from abroad may deter potential donors, with the consequent reduction in their gifts to associations. No matter how small it may be, that effect can still be significant as regards the finances of civil society organisations which tend to rely on donations from their members and supporters (some of these organisations also turn the refusal of all public funding into a point of principle, in order to retain their independence).

49 Point 113 above.

50 Political parties participate in the formation and expression of the will of the people as a means of shaping the will of the State. While they are not emanations of the State, political parties contribute to the selection of holders of public authority and, in that sense, they are particularly important for the stability of the State. That feature is the reason why some constitutional systems lay down conditions and safeguards which do not apply (and would not be justified) in relation to other associations. Although the latter participate in public life, they do not so much seek to *hold* power as to carry on their activities freely under the auspices of public authority, or, at most, to influence the exercise of that authority. That is why Article 12 of the Charter deals separately with associations 'in political, trade union and civic matters'. As the preamble to Law No LXXVI of 2017 states, civil society associations contribute to 'democratic scrutiny and public debate in relation to public matters' but their purpose is not to take power. The same is true of trades unions, whose activities in the sphere of employment relations means that they warrant a special set of provisions.

51 The ECtHR has held that the impact of certain measures of the public authorities on the financial capacity of associations to pursue their activities can amount to interference with the exercise of freedom of association safeguarded by Article 11 of the European Convention on Human Rights (ECHR). See ECtHR, judgment of 7 June 2007, *Parti Nationaliste Basque — Organisation Régionale d'Iparralde v. France* (CE:ECHR:2007:0607JUD007125101), §§ 37 and 38.

122. In particular, foreign donations, regardless of their economic significance, represent, for donors who are resident abroad, the most direct, if not the only, way of participating in the activities of the associations they support financially. Making it difficult for such persons to make financial contributions amounts to preventing them de facto from exercising freedom of association *tout court*: through financial support for an association, these persons come together with others to collectively pursue certain aims, which is ultimately what the freedom of association entails.

123. The Commission refers to the *stigmatising* effect created by the obligation of associations in receipt of gifts from abroad to *label themselves* as 'organisations in receipt of support from abroad'.[52] Furthermore, that effect is achieved through the clear emphasis in the preamble to Law No LXXVI of 2017 on the potential negative connotations of such gifts,[53] which could jeopardise the country's political and economic interests. A widespread cloud of suspicion thus hangs over donors, which is sufficient to dissuade some, or many, from contributing to the funding of civil society organisations.

124. It must be noted, furthermore, that, as the Hungarian Government accepted at the hearing, EU citizens have a qualified interest in participation in the economic, social and cultural life of the Member States as a whole and, therefore, in turning the ideal of 'an ever closer union' into reality. The rights of EU citizens to vote and to stand as candidates in municipal elections (unconnected to their status of nationals in the State of residence) and in elections to the European Parliament in any of its national constituencies are the institutional corollary of a shared interest in the public life of all the Member States. The freedom of citizens to associate and participate in this way in public debate in their respective societies is often confined to the right to contribute to the funding of a citizen's preferred associations in any of those States. All the more reason why it should not be possible for that means of collective involvement in civic affairs to be restricted or undermined.

125. Law No LXXVI of 2017 provides additionally for the possible compulsory dissolution of associations and foundations which do not fulfil the duties to notify and make public any gifts received, which constitutes the highest level of interference in their lives.[54] Even though that is applied as part of a scale of penalties, following a court decision, it is nonetheless an interference with the right guaranteed by Article 12 of the Charter.

(b) The rights to private life and the protection of personal data

126. Law No LXXVI of 2017 requires the entities concerned to notify the court for the place of registration of the amount of a donation from abroad together with the donor's name, city and country, regardless of whether the donor is an individual or a legal person.[55] The register in which those particulars are recorded is freely accessible.

127. Respect for the right to private life, in so far as it applies to the processing of personal data, concerns any information relating to an identified or identifiable individual.[56]

52 The Venice Commission also took that view in its opinion on the draft law (Opinion 889/2017 of 20 June 2017 on the draft law on the transparency of organisations receiving support from abroad (CDL-AD(2017)015); 'Venice Commission Opinion'), paragraphs 54 to 56. Although such *labelling* appears to be relatively neutral, the Venice Commission warned that it could have a stigmatising effect in the context prevailing in Hungary, characterised by clear political positions adopted against associations which receive funding from abroad (loc. cit., paragraph 65).

53 '… The support provided by unknown foreign sources to organisations established in accordance with the freedom of association is liable to be used by foreign 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 … may jeopardise the political and economic interests of the country in addition to the ability of legal institutions to operate free from interference'.

54 ECtHR, judgment of 11 October 2011, *Association Rhino and Others v. Switzerland* (CE:ECHR:2011:1011JUD004884807), § 54.

55 The Hungarian Government argues that the vast majority of donors are legal persons, which excludes the possibility of any interference with rights which can be held only by individuals. I agree with the Commission that, quite apart from the practical reality, the obligation at issue does not differentiate between legal persons and individuals: the latter are clearly subject to that obligation.

56 Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, paragraph 122.

128. Article 4(1) of Regulation (EU) 2016/679[57] provides that 'an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as *a name*, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person'.

129. Therefore, a name alone is sufficient for the purpose of establishing identity, which makes it possible to reject the Hungarian Government's submission that merely notifying a donor's name, city and country of residence is insufficient to identify that donor.

130. The Hungarian Government attempts to argue that those data are not personal (and are, therefore, outside the scope of Article 8 of the Charter) by relying on two judgments of the Court:

– judgment of 6 November 2003, *Lindqvist*,[58] from which it infers that it is not possible to identify a person from his/her name alone and that instead other, additional data are needed for that purpose, such as a telephone number or information relating to the person's working conditions or hobbies.[59]

– judgment of 9 November 2010, *Volker und Markus Schecke and Eifert*,[60] from which it infers that if a donor's address is not published, his/her name, city and country are not sufficient to identify that person.[61]

131. It is my view, rather, that those judgments of the Court undermine the Hungarian Government's position. As regards *Lindqvist*, that judgment found that the term 'any information relating to an identified or identifiable natural person … undoubtedly covers the name of a person in conjunction with his telephone coordinates or information about his working conditions or hobbies.'[62]

132. The obligation imposed by Law No LXXVI of 2017 means that a donor's name (which, I repeat, is sufficient by itself to identify that donor)[63] is inextricably linked to the information regarding a donation for the benefit of a particular association. That link alone reveals an affinity with that association which may help to ideologically *profile* the donor in the broadest sense of the term.[64]

133. The judgment in *Volker und Markus Schecke and Eifert* held that publication on a website of the names and municipalities of residence of the beneficiaries of certain government aid and the amount of that aid 'constitutes an interference with their private life within the meaning of Article 7 of the Charter' 'because the information becomes available to third parties'.[65] In my opinion, what is applicable to aid received by a person must also apply to the aid through which that person contributes to supporting an association.

57 Regulation of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation; 'GDPR') (OJ 2016 L 119, p. 1). Italics added.

58 Case C-101/01, EU:C:2003:596; 'judgment in *Lindqvist*'.

59 Paragraph 155 of the Hungarian Government's defence.

60 Cases C-92/09 and C-93/09, EU:C:2010:66; 'judgment in *Volker und Markus Schecke and Eifert*'.

61 Paragraph 154 of the Hungarian Government's defence.

62 Judgment in *Lindqvist*, paragraph 24.

63 By definition, a name *identifies* a person, even though, as the Hungarian Government contends at paragraph 156 of its defence, it is possible for many people to share the same name in the same city.

64 Under Article 4(4) of the GDPR, 'profiling' means 'any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements'.

65 Judgment in *Volker und Markus Schecke and Eifert*, paragraph 58, citing the judgment of 20 May 2003, *Österreichischer Rundfunk and Others* (C-465/00, C-138/01 and C-139/01, EU:C:2003:294), paragraph 74 of which states that the communication 'of data by name relating to the remuneration paid to … employees … infringes the right of the persons concerned to respect for private life … and constitutes an interference within the meaning of Article 8 of the Convention.'

134. Accordingly, the publication in a publicly accessible register of the names of natural persons who make donations from abroad to certain associations established in Hungary and the amounts of such donations is an interference in the private life of those persons as regards the processing of their personal data.

135. Furthermore, as I explained above, in so far as the data published (name and donation) enable the *ideological* profiling of donors, the latter may be deterred, or at least discouraged, from helping to support a civic organisation with which they wish to collaborate in the exercise of their freedom of association.

136. The publication of those data interferes not only with the rights safeguarded by Articles 7 and 8 of the Charter but also with the freedom of association, because its deterrent effect may have an impact on the financial position of civil society organisations and, therefore, on their ability to pursue their activities. [66]

3. Consideration of the justification for the interference identified

137. Can the interference which I have just examined be justified under Article 52(1) of the Charter? It should be recalled that, pursuant to that provision, 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

138. The measures at issue clearly fulfil the condition of having been provided for by law. I also believe that those measures do not infringe the *essence* of the rights concerned, although they do undermine those rights.

139. Whether that interference is necessary to meet a legitimate objective of general interest and whether that can be done proportionately, having ruled out the existence of less restrictive measures or solutions, is a different question.

(i) The need for and the effectiveness of the measures at issue

140. The Hungarian Government relies on the financial transparency of associations which receive support from abroad as a public interest ground. The Hungarian Government adds that that interest is closely linked to that of the protection of public policy and the fight against money laundering and terrorist financing.

141. The Commission submits that those objectives reflect in principle the aims which justify interference with the rights concerned. For my part, I agree with that assessment, which is also consistent with the case-law of the ECtHR. [67]

142. I also agree that Member States have a certain discretion when it comes to defining the general interest objectives they wish to promote. [68]

66 See points 140 and 141 above.

67 ECtHR, judgment of 17 February 2004, *Gorzelik and Others v. Poland* (CE:ECHR:2004:0217JUD004415898), §§ 94 and 95.

68 Judgment of 16 June 2011, *Commission* v *Austria* (C-10/10, EU:C:2011:399), paragraph 32.

143. The Court's case-law on reliance on public policy as a ground justifying the restriction of the freedoms laid down in the Treaties is applicable to limitations of the fundamental rights. Therefore, 'requirements of public security must … be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union' and 'public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'. [69]

144. On that basis, the public policy clause could legitimise measures imposed on associations and foundations suspected of breaching public policy (in other words, which pose a real and serious threat to it) but not general legislation which imposes, *ex ante*, on all associations and foundations, whatever their purpose and activities, the duty to publish donations from abroad. [70]

145. As regards the fight against money laundering and, in particular, terrorist financing, I agree with the Hungarian Government's contention that this could justify measures for the transparency and scrutiny of funding received by any natural or legal person. [71] Specifically, the requirement that legal persons established in a Member State must inform the authorities of their objectively *suspicious* funding sources appears in principle to be appropriate for preventing and prosecuting money laundering and the funding of terrorist activities. [72]

146. I do not believe that any of the above can reasonably be called into question. The Hungarian Government was unable to explain satisfactorily at the hearing why the common legislative provisions on the fight against money laundering are inadequate. [73]

147. Even if the connection between the measures at issue and the fight against money laundering were established (*quod non*), it is my view that the general and indiscriminate obligation to publish that information, including before it has been scrutinised by the authorities responsible for examining whether there is any evidence of money laundering, goes beyond what is strictly necessary to legitimise that interference.

148. Having set down those propositions, it is necessary to determine whether the measures adopted by the Hungarian legislature are *commensurate* with another of the objectives relied on, namely, transparency in the financing of civil society organisations. For the reasons I shall now explain, I believe that they are not.

149. Three factors in those measures are striking.

69 Judgment of 8 July 2010, *Commission* v *Portugal* (C-171/08, EU:C:2010:412), paragraph 73.

70 The Hungarian Government has also pleaded the protection of public security in the strict sense and, in particular, the need to eradicate the influence of organised crime on certain humanitarian organisations whose aims may coincide with the interests of international people trafficking networks (paragraphs 84 and 85 of the Hungarian Government's defence). Again, that interest could justify the adoption of specific measures against those particular entities but not the adoption of measures of general scope, like those at issue, against all civil society organisations.

71 According to the Commission (paragraphs 62 to 64 of its application), Hungary did not establish the existence of a definite risk in that sense. Even if there were such a risk, it would be regarded as common to all the Member States. The recommendations of the Groupe d'Action Financière (GAFI) in relation to the fight against money laundering and terrorist financing identify not-for-profit organisations as possible instruments for the commission of those illegal activities (GAFI (2012-2017), *Recommandations du GAFI — Normes internationales sur la lutte contre le blanchiment de capitaux et le financement du terrorisme et de la prolifération*, mise à jour novembre 2017 ('the GAFI Recommendations'), point 8. Whether the fact that the assessment of the risks faced may be inadequate legitimises, from the perspective of need, appropriateness and effectiveness, any measure adopted by the national legislature is a different matter.

72 It is not appropriate to categorise implicitly every donation from any Member State or third country as suspicious.

73 The Commission refers, in that connection, to the possibility that Member States may include civil society organisations within the scope of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73). That legislation is founded on a rigorous assessment of the existing risks.

– First, the measures do not concern all associations and foundations established in Hungary. They do not cover commercial companies, even though some of these (for example, those which own communications media) also 'perform a decisive role in the formation of public opinion'.[74]

– Second, no evidence has been adduced concerning how the information gathered genuinely serves to achieve the aims which justify it.

– Third, in addition to being insufficient from the perspective of the group of entities required to provide the information and from the perspective of their functionality, the measures are disproportionate in terms of their consequences.

150. With regard to the organisations concerned, Law No LXXVI of 2017 excludes those financed from national sources and applies only to those which receive financial support from abroad. Further, as concerns the latter, the Law exempts organisations which 'are not regarded as civil society organisations',[75] sporting organisations, organisations which perform a religious activity and organisations linked to national minorities.

151. I agree with the Commission that it is not clear why the Law is centred on donations from abroad, other than being based on a general presumption (in reality, a suspicion) of fraud committed by persons established abroad or in other Member States, which is incompatible with EU law.[76]

152. The argument put forward by Hungary to the effect that it is more difficult to control support from abroad is not consistent with the fact, also pointed out by the Commission, that the previous legislative framework already imposed on associations the obligation to provide detailed information concerning their funding sources, including those abroad.[77] At all events, that difficulty could have been countered using less restrictive measures, as I shall explain.

153. If the aim is genuinely to control funding from abroad, it is not particularly consistent with that aim to exempt sporting and religious associations and those connected to a national minority: any of these could also 'be used [from abroad] to promote — through the social influence of those organisations — their own interests rather than community objectives in the social and political life of Hungary', as the preamble to Law No LXXVI states.

154. None of the characteristics of those exempt associations relate to the specific features of their financing which would make them unsusceptible to the risks that, for any of the associations subject to the measures at issue, the receipt of funds from abroad might entail.[78]

155. Furthermore, the Commission has serious doubts about the usefulness of the information gathered: there is nothing to indicate whether it is made available to those in charge of the fight against money laundering and terrorist financing.[79] For my part, I can only share those doubts which the Hungarian Government did not succeed in dispelling at the hearing.

74 The preamble to Law No LXXVI refers to that factor to characterise civil society organisations.

75 Paragraph 1(4)(a) of Law No LXXVI of 2017 indicates as much. As the Hungarian Government stated at the hearing, in order to ascertain which organisations 'are not regarded as civil society organisations', regard must be had to Law No CLXXV of 2011 on the right of association, the status of not-for-profit association and the financing of civil society organisations. It is clear from Paragraph 2(6) of that law that associations registered in Hungary, with the exception of parties, foundations and, for certain purposes, mutual societies and trades unions, are considered to be 'non-governmental organisations'. I do not find that definition particularly helpful for the purposes of delimiting precisely the entities affected by Law No LXXVI of 2017. That vagueness of its scope *ratione personae* does not reflect the objectivity required of legislation which has such a direct impact on the exercise of a number of fundamental rights.

76 Judgment of 6 October 2009, *Commission* v *Spain* (C-153/08, EU:C:2009:618), paragraph 39.

77 Paragraphs 75 to 77 of the Commission's application and paragraphs 74 to 76 of its reply.

78 The Swedish Government also makes that point (paragraph 39 of its statement in intervention).

79 Paragraph 66 of the Commission's application.

156. In those circumstances, reliance on the transparency of associations is not consistent with the legal rules laid down. In particular, it does not legitimise the publication of the personal data of persons who contribute through their donations to the funding of the entities in question.

157. In addition to being inappropriate and of questionable effectiveness, the measures at issue are disproportionate.

(ii) Consideration of whether the measures are proportionate

158. I believe that it is disproportionate, first, that the limit in respect of the obligation to declare support received from abroad has been set at HUF 500 000. That is an excessively low threshold for a duty which, for the reasons set out, seriously undermines the exercise of the freedom of association and the rights to private life and the protection of personal data, since the information provided has to be published.

159. Second, the fact that *all* donations from abroad are treated the same, including those from the rest of the Member States, is also disproportionate, when, I repeat,[80] EU citizens may have an interest in participating in the public life of any of those States.

160. Third, the obligation to record the status of 'organisation in receipt of support from abroad' on an association's homepage and in its publications is, to my mind, also an excessive requirement. That is not solely because of the material burden which the recording of that fact may present but also because of the stigmatising effect associated with it, to which I have already referred.

161. Fourth, I believe that it is disproportionate that non-fulfilment of the obligations at issue can lead, ultimately, to the winding-up of the infringing association. That is certainly an extreme solution which, according to the Hungarian Government, constitutes a *staged* response to infringement of the law.[81] Those *stages* correspond to a first infringement (which is followed by a formal request from the public prosecutor), failure to comply with that request (involving the possible imposition of a fine) and failure to comply with a new request, which opens the door to other penalties, including dissolution.

162. The Hungarian Government contends that a conscious failure to respond to successive communications is not a 'minor administrative infringement' and warrants dissolution.[82] In my opinion, however, such a severe penalty requires rather more than a refusal, including a repeated refusal, to provide information such as that required by Law No LXXVI of 2017.[83]

(iii) Consideration of whether more proportionate restrictive measures are possible

163. The nature and scope of the measures at issue offer little leeway for proposing other alternatives in the same vein, that is, for envisaging measures focusing on the information which it is sought to make public.

80 See point 144 above.

81 Paragraph 122 of the Hungarian Government's defence.

82 Loc. ult. cit.

83 It must be stressed that, according to the ECtHR, dissolution is a measure which may be adopted only in the 'most serious cases'. ECtHR, judgment of 13 February 2003, *Refah Partisi (The Welfare Party) and Others v. Turkey* (CE:ECHR:2003:0213JUD004134098), § 100.

164. Such alternatives would involve the adoption of a different approach to attainment of the objectives of Law No LXXVI of 2017. It would be necessary, instead, to have regard to a rigorous, detailed assessment of the risks of instrumentalisation of associations, which would make it possible to identify those in a position to jeopardise those objectives. [84]

165. If the aim is to control irregular funding sources, the Commission draws attention to, for example, the implementation of obligations of notification and surveillance in relation to suspicious transactions from high-risk countries. I believe that this is the area where the best results of effective action by the public authorities can be expected.

166. On the other hand, it seems to me that it would be impossible to replace the obligation to register and publish the names of individuals who make donations to associations of their choice with an alternative measure, given that it intrudes radically into the sphere of the privacy safeguarded by the Charter.

167. As concerns the requirement that associations must indicate on their homepage and in their publications that they are recipients of foreign funding, I believe that this is also inappropriate because it may impede the exercise of freedom of association. [85]

168. Finally, excluding Member States from the requirement and restricting it solely to third countries would lessen the interference it represents with the right of EU citizens to participate, by association, in the public life of all the Member States. However, that geographical restriction does not entirely exclude the stigmatizing connotation which would continue to be detrimental to the associations concerned.

169. In so far as the obligations of registration and publication are not intrinsically capable of substitution by other, equivalent obligations, the system of penalties laid down is incompatible with the Charter. Accordingly, removal of the penalty of dissolution would not be sufficient to make good a system which, as long as it permits the imposition of penalties for the non-fulfilment of conditions incompatible with the Charter, cannot itself be rectified.

170. I consider, therefore, that Law No LXXVI of 2017 unduly restricts the free movement of capital guaranteed by Article 63 TFEU, in that it includes provisions which amount to unjustified interference with the fundamental rights protected by Articles 7, 8 and 12 of the Charter.

V. Costs

171. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Both those criteria are satisfied in this action.

84 That view is supported by the GAFI Recommendations (point 8). In the absence of that assessment, the legislation at issue confuses as one all civil society organisations (with the sole exception of three types of entity which, for the reasons already stated, are treated differently without justification from the perspective of the purpose of the legislation).

85 This is also stated in the Venice Commission Opinion, paragraph 67, fourth indent.

VI. Conclusions

172. For the reasons set out, I propose that the Court of Justice, allowing the Commission's action, should:

– Declare that Hungary has failed to fulfil the obligations incumbent on it under Article 63 TFEU by infringing Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union, in so far as the a külföldről támogatott szervezetek átláthatóságáról szóló 2017. évi LXXVI. törvény (Law No LXXVI of 2017 on the transparency of organisations which receive support from abroad) introduces unjustified restrictions in respect of donations from abroad received by certain associations and foundations established in Hungary.

– Order Hungary to pay the costs.