

THE USE OF EU LAW TO PROTECT CIVIC SPACE

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I. INTRODUCTION: PURPOSE AND OVERVIEW OF THIS BRIEFING

This briefing is intended for civil society organisations, lawyers and academics. It discusses the situations to which European Union (EU) law can apply and the legal arguments that may be made to both advance the work of civil society organisations (CSOs) and challenge national laws and government actions that threaten them.

CSOs play a crucial role in monitoring, reporting on and challenging unlawful acts of states. In recent years, several EU governments have taken measures to restrict the operating space for civil society by adopting and implementing laws to restrict and undermine the actions of CSOs. Some, in addition, have engaged in vilification and harassment of CSO staff members and other activists.¹

Civil society actors in Europe have traditionally sought protection for their and others' rights under the European Convention on Human Rights (ECHR) by filing cases against their governments before the European Court of Human Rights. Given that the Court grants standing to individuals and CSOs directly, and provides remedies for violations of human rights, including rights to freedom of expression, association and assembly, the Court has been well utilised by these actors.

In contrast, EU law and institutions have been underutilised. This briefing aims to demonstrate the potential of EU law to be a powerful tool in defending civic space. In particular, EU law includes strong prohibitions of discrimination, and detailed protections in areas such as personal data and migration; and the EU Charter of Fundamental Rights (CFR) offers more, and more detailed, protections of certain rights than does the European Convention on Human Rights.² National judges can invoke EU law directly to suspend and nullify national laws. Even the lowest level of national courts and tribunals have these powers, and they also have the authority to refer questions of EU law to the Court of Justice of the European Union (CJEU), leading to rulings that apply EU-wide.

The exact boundaries of EU law can be complicated and unclear. A law or government action may have a sufficient connection to EU law because of what a law states, because of why it was adopted, *or* because of the impact of the law or action on civil society. When measures arguably come within the scope of EU law, CSOs need to know how to invoke EU law arguments effectively to persuade judges of national courts and the CJEU, and to call on the European Commission to use its powers, to instruct governments to comply with EU law.

This briefing draws on EU legislation and the jurisprudence of the CJEU to explore the situations in which EU law may govern situations of CSOs affected by national laws and actions. It begins by outlining the key sources of EU law and basic legal considerations about the law's scope. The paper then addresses EU law issues of general relevance to CSOs, including effective judicial protection, discrimination on various grounds, and data protection. It concludes with suggestions of various arguments that may be made to

¹ See Fundamental Rights Agency, *Challenges facing civil society organisations working on human rights in the EU* (January 2018).

² See, e.g., Judgment of the Court of Justice of the EU, C-528/15 *Al Chodor*, EU:C:2017:213, paragraph 37, that ECHR sets a 'minimum threshold of protection' and that the CFR may require more extensive protections..

justify the application of EU law to key aspects and activities of CSOs: their funding, administration, staffing, provision of services (material support, advice, and representation, including legal representation), and campaigning and advocacy.

This briefing will be complemented by a handbook on legal avenues available for bringing cases and complaints, to be published by the European Centre for Not-for-Profit Law (ECNL). That handbook will include a section on how EU law can be used by national courts, the Commission, and the CJEU. Accordingly, those topics are not addressed here.

II. SCOPE OF EUROPEAN UNION LAW – THE BASICS

A. Key sources and terms of EU law

The two key EU Treaties are the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). While the TEU sets out the objectives and principles of the EU, the TFEU provides the organisational and functional details. The TFEU also defines the four freedoms that govern the EU single market: the free movement of goods, services, capital and persons.

Another key legal document is the Charter of Fundamental Rights (CFR), which has ‘the same legal value as’ the TEU and TFEU (TEU art. 6). It guarantees, among others, rights relevant to the activities of CSOs, including freedom of association and of expression, the right to non-discrimination and equality before the law. Judgments of the CJEU also show that EU Treaties and measures under them must be interpreted in keeping with the general principles of EU law, which include fundamental rights also set forth in the CFR, such as the right to a fair hearing, equal treatment, legal certainty, protection of legitimate expectations and proportionality.³

The Treaties and the Charter make up the EU’s primary law. Using the powers set forth in the Treaties, EU bodies make secondary EU law: regulations, directives, decisions, recommendations and opinions.

This briefing uses the following terms:

- **EU values:** Set out in TEU art. 2, these inform the interpretation of the Treaties and measures under them.

ARTICLE 2 of the TREATY OF THE EUROPEAN UNION

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

³ C-5/88 *Wachauf*, para. 17; C-402/05 *Kadi*, para. 326; C-619/19 *Commission v. Poland*, para. 54; C-319/99 *Mulligan* [2002] ECR I-5719, para. 46.

- **EU competences:** These are set out in the EU Treaties, including the powers of the EU institutions to make regulations and directives. The EU has no powers other than those conferred by the Treaties (TEU art. 5). EU law may not apply where a Treaty power to make legislation for that situation has not yet been used.⁴
- **Situations governed by EU law:** Encompass those where the Treaties, or other EU legislation, require or limit the exercise of powers by Member States. These situations collectively are referred to as ‘the scope of EU law’. This does not mean that EU law governs *all* aspects of these situations. Whether a situation is governed, in whole or in part, by EU law is sometimes obvious, or it can be doubtful and only a court can finally resolve the question.

B. When is a situation governed by EU law?

EU law applies to two broad categories of measures: (1) those that explicitly implement EU law; and (2) those that otherwise relate to situations governed by EU law, in particular, where the measures jeopardise the attainment of an objective of EU law.

1. National measures that explicitly give effect to EU law

Where national legislation or actions of Member States refer explicitly to EU law, it will generally be easy to show that EU law applies to the situations affected by these measures.⁵

EU regulations – made by the European Council and European Parliament – bind Member States and all persons to whom they apply. Where a regulation requires national implementing measures or actions, these are governed by EU law.⁶

EU Member States must transpose and implement any directive addressed to them (TFEU art. 288(3)). National law measures transposing a directive must comply with EU law; situations under them are governed by EU law. In these cases, national courts must do the following:

- They must interpret national law in accordance with EU law, namely, the Treaties, directives, regulations and the Charter of Fundamental Rights.⁷
- National courts must refuse to apply any national law that cannot be interpreted to comply with directly effective EU law (for instance, because the plain words of the national law do not allow that interpretation). ‘A provision of EU law will be accorded direct effect provided that it is intended to confer rights on individuals and that it is sufficiently clear, precise and unconditional.’⁸

⁴ C-427/06 *Bartsch* (Grand Chamber), 23 September 2008.

⁵ For example, European Arrest Warrants are established by EU law, so their use must comply with EU law, see C-404/14 *Aranyosi*, ECLI:EU:C:2016:198, para. 84.

⁶ C-592/11 *Ketelä* [2012] ECLI:EU:C:2012:673, para. 35

⁷ Joined Cases C-411/10 & C-493/10 *N.S. and Others* [2011] ECR I-13905, para. 77.

⁸ Craig P and De Burca, ‘EU Law: Text, Cases, and Materials’ (5th Edn, OUP 2011), p. 188

2. National measures that do not refer to EU law but relate to a situation governed by EU law

Even where national laws or actions do *not* mention EU law, they can still be challenged where they relate to a situation governed by EU law. For this to apply, it must be shown that there are “provisions of EU law in the subject area concerned [which impose an] obligation on Member States with regard to the situation at issue”.⁹ But also, the “concept of ‘implementing Union law’, as referred to in ... the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other”.¹⁰

In *El Dridi*, the CJEU ruled that TEU art. 4(3) means that ‘States may not apply rules, even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.’¹¹

Whether the provisions of EU law do impose an obligation on Member States depends on factors which include the following:

- a) are there specific rules of EU law on the matter or capable of affecting it?
- b) does the national law pursue objectives other than those covered by EU law (even if the law is capable of affecting EU objectives)?¹²

National measures are governed by EU law if they jeopardise the attainment of an objective of the Treaties, or of the EU measures adopted under them. This follows from the *duty of sincere co-operation* in TEU art. 4(3), which states:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

So, showing that a situation is governed by EU law, and therefore also the Charter of Fundamental Rights of the EU, depends on identifying particular provisions of the EU Treaties or measures adopted under them that govern aspects of the situation.

⁹ C-144/95 *Maurin* [1996] ECR I 2909, paras. 11 & 12.

¹⁰ C-562/12 *Liivimaa Lihaveis*, para. 62.

¹¹ C-61/11 *El Dridi*, 28 April 2011, para. 55.

¹² C-206/13 *Siragusa*, EU:C:2014:126, para. 25

STRICTER MEASURES THAN REQUIRED – WITHIN SCOPE OF EU LAW?

Some EU directives require Member States to adopt minimum standards for prohibiting undesirable behaviour, such as money laundering, employment discrimination and facilitating irregular migration. When national laws impose stricter rules than those required by the directives, these must not breach other EU law rules, such as free movement of capital. See C-235/14 *Safe Interenvíos*, below, para. 111.

CJEU judgments, however, do not offer clear guidance as to when EU law (including the CFR) will apply because of the connection between these stricter national laws and the EU directive they aim to implement. The CJEU reached different conclusions in the following cases without setting forth tests or criteria that could justify the varied results.

In C-406/15 *Milkova*, the CJEU considered national rules that imposed stricter restrictions on an employer’s freedom to dismiss a person on grounds of illness than required by Employment Equal Treatment Directive 2000/78. The CJEU Advocate-General considered that Article 7 of the Directive “places measures of positive discrimination outside the ambit of that directive” (para 72). The CJEU disagreed, ruling that the national law fell ‘within the implementation of EU law, which means that, in the present case, the general principles of EU law, including the principle of equal treatment, and of the Charter are applicable’ (paras. 52-54).

In C-243/16 *Miravittles Ciurana*, Spanish law implementing the Second Company Law Directive 2012/30 imposed civil liability on a director for a creditor’s losses arising from a failure to comply with Article 19 of that Directive. The CJEU Advocate-General concluded that the national laws fell under the Directive because they made its rules more effective (para. 55). But the CJEU ruled that Article 19 did not impose any specific obligation on the Member States, and so the national rule fell outside the scope of EU law (para. 34).

In C-235/14 *Safe Interenvíos*, the CJEU ruled that ‘Member States retained the power to provide for such stricter provisions outside the framework of the regime’ established by Money Laundering Directive 2005/60 (para. 77). It is unclear whether the CJEU’s approach to the new Money Laundering Directive 2015/849 would be the same, or whether stricter measures based on the objectives of the Directive would be governed by EU law.

Like the directives above, the Facilitation Directive 2002/90 sets minimum standards for state laws combatting facilitation of irregular migration. The CJEU has never considered whether stricter measures against facilitation are covered by EU law.

C. The Charter applies only in situations governed by EU law

In the leading case of *Fransson*, the CJEU stated: ‘The Court’s settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the

European Union are applicable *in all situations governed by European Union law*, but not outside such situations.¹³

CFR art. 51(1) states that the CFR applies to the Member States only where they are ‘implementing EU law’. In many cases, the CJEU has applied the CFR where the Member State’s law or actions affected EU law rights, even though the Member State was not *explicitly* ‘implementing’ EU law or denied any sufficient connection to EU law.¹⁴ This includes when apparently purely ‘national’ law actions impede rights under EU law.¹⁵ Like the CJEU in *Fransson*, this briefing does not distinguish between ‘situations governed by EU law’ and situations where a Member State ‘is implementing EU law’, within the meaning of CFR art. 51(1).

The CFR does not extend the competences or scope of EU law.¹⁶ It follows that the situations governed by EU law – and therefore to which the CFR may apply – are those *governed by the EU Treaties or the regulations and directives adopted under them*. The CFR does not apply independently of the Treaties or other EU legislation.

Although the CFR has no independent application, it is relevant to the *interpretation* of the Treaties and other EU legislation, and therefore to their precise scope. As stated by the Grand Chamber of the CJEU: “Since the fundamental rights guaranteed by the Charter must ... be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.”¹⁷

III. EU law issues of general relevance to civil society

A. What is meant by ‘civil society’ under EU law?

The EU Treaties require the EU institutions to be open to and consult with civil society – see TEU art. 11(2) and TFEU art. 15(1) - and this is reiterated in directives and regulations.¹⁸ However, EU law does not define ‘civil society’.

This briefing uses the terms civil society organisation, non-governmental organisation (NGO), and non-profit organisation interchangeably as they are commonly used by the

¹³ C-617/10 *Fransson* (Grand Chamber), 26 February 2013, para. 19 (emphasis added). This applies ‘irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.’ C-64/16 *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para. 29; C-619/18 *Commission v Poland*, 24 June 2019, para. 50.

¹⁴ C-617/10 *Fransson* para. 16; Joined Cases C-411/10 & C-493/10 *N.S.* [2011] ECR I-13905, para. 62; C-650/13 *Delvigne* ECLI:EU:C:2015:648, para. 24.

¹⁵ See e.g. C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972, para. 63.

¹⁶ C-617/10 *Fransson* para. 23, referencing CFR art. 51(2).

¹⁷ C-617/10 *Fransson* para. 21.

¹⁸ Examples include Regulation 168/2007 establishing a European Union Agency for Fundamental Rights; Directive (EU) 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled; and Directive (EU) 2019/883 on port reception facilities for the delivery of waste from ships.

United Nations, the Council of Europe, and other bodies to refer to voluntary and self-governing bodies that pursue essentially non-profit-making objectives in the collective interest.¹⁹

In 2007, the Committee of Ministers of the Council of Europe stated that ‘NGOs are voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members. They do not include political parties. NGOs encompass bodies or organisations established both by individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based. NGOs can be either informal bodies or organisations or ones which have legal personality. NGOs can be national or international in their composition and sphere of operation.’²⁰

In his final report to the Human Rights Council, the first UN Special Rapporteur on the rights to freedom of peaceful assembly and of association noted that civil society can be viewed as ‘a voluntary manifestation of associational life, with an existence and purpose that exists outside of and largely independent of the state and the market, that is inherently collective in nature, working in various ways towards common purposes that do not conflict with the principles of the United Nations.’²¹

B. EU Competence to Regulate Certain Activities of Civil Society Organisations

Under international law, governments may not *require* associations of people to register as associations; however, those associations that want to register, for instance to be able to own a bank account or enter into contracts, may legitimately be regulated, and international bodies have set out standards for such regulation. For instance, any registration procedures should be ‘transparent, non-discriminatory, expeditious, inexpensive, allow for the possibility to appeal and avoid requiring re-registration’; any prohibition or dissolution of CSOs should always be a last resort. States should protect the rights of CSOs and their members to freedom of expression (including the right to advocate before international bodies), association, assembly and petition, to request and receive information held by public authorities, and to ‘solicit, receive and utilise resources’.²²

The EU does not have a specific legal competence to make laws governing CSOs or civic activism. However, the EU does have specific competences in various related areas: over the internal market within which all CSOs raise and spend funds and engage in activities; in policy areas in which many CSOs work; and over aspects of criminal procedure and

¹⁹ See for example Council of Europe Committee of Ministers Recommendation CM/Rec14 (2007), 2007, para. 1; European Commission Discussion Paper ‘The Commission and Non-Governmental Organisations: Building a Stronger Partnership’, 2000, pp. 3-4; OHCHR guide ‘Civil Society Space and the United Nations Human Rights System’, p. 3.

²⁰ Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe.

²¹ UN Doc. A/HRC/35/28, 29 June 2017, para 10-12.

²² OSCE/ODIHR-Venice Commission, Joint Guidelines on Freedom of Association, 2015, para. 35; UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report A/HRC/20/27, 2012, para. 64; and UN Declaration on Human Rights Defenders, art. 13.

prohibitions on discrimination based on nationality, sex, sexual orientation, age, race, disability and religion. EU law governs the activities of EU institutions and participation in them by CSOs and imposes on all Member States a duty of sincere cooperation with the EU to uphold EU law.

NON-PROFIT BODIES CAN RELY ON EU SINGLE MARKET RULES

Civil society organisations, the people and bodies that support them and the people and bodies that benefit from their services, can rely on EU law rights to the free movement of capital and services and the freedom of establishment. The CJEU has ruled that each of these rights can apply to non-profit organisations.

In *C-172/98 Commission v Belgium* [1999] ECR I-3999, the CJEU examined a Belgian law that discriminated against non-profit associations that had non-Belgian board members. The Commission, the Advocate General and eventually the Court all agreed that the EU freedom of establishment was engaged because of the economic activities that non-profit organisations could perform.

In *C-386/04 Centro di Musicologia Walter Stauffer*, *C-318/07 Persche* and *C-25/10 Missionswerk Werner Heukelbach*, the CJEU ruled that EU rules on free movement of capital apply to donations of money and goods by a donor in one EU state to a charity in another, and that the cross-border donor has the right to the same tax exemptions as a donor to a charity in the same state. In *C-153/08 Commission v Spain*, a tax exemption limited to Spanish non-profits was found to be contrary to the freedom to provide services of non-profits in other EU states.

The CJEU has rejected government arguments that these freedoms only apply to undertakings which have the overall objective of making a “profit” (*C-172/98 Commission v Belgium*). While TFEU 58 states that the right to equal treatment of subsidiaries does not apply to legal persons “which are non-profit-making”, as the case-law shows, this does not relate to activities which are intended to generate income or capital.

C. Some EU law issues may be relevant to any aspects of CSO operations.

1. Effective judicial protection in fields covered by EU law

TEU art. 19.1(2) states: ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’ Art 19.1(2) applies “irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter”.²³

This duty requires, among other measures, that national courts and tribunals that may apply EU law must be able to meet EU law standards of judicial independence, as developed under CFR art. 47.²⁴

²³ *C-64/16 Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para. 29; *C-619/18 Commission v Poland*, Judgment 24 June 2019, paras. 50.

²⁴ *C-619/18 Commission v Poland*, paras. 57-58.

ARTICLE 47 of the EU CHARTER OF FUNDAMENTAL RIGHTS

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
3. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

This does not mean that EU law *governs a particular case* within the jurisdiction of such a court or tribunal. EU law only governs a legal case where its facts are connected to EU law. In those cases, CFR 47 requires states to ensure that ‘any person whose rights guaranteed by EU law might be infringed is entitled to an effective judicial remedy’.²⁵ ‘Person’ includes individuals and bodies like CSOs.²⁶

In a situation where individuals have an EU law right to a remedy, EU law may therefore also govern a national law which restricts a CSO from helping that individual access that remedy. This is so even though the remedy is not one the CSO is using on its own behalf (see below under ‘Other EU laws affecting CSO service provision’).

In some states, national laws (such as ‘actio popularis’) allow CSOs to bring legal challenges to measures which do not directly affect their legal situation but that do violate the rights of others. If a CSO used this legal standing to challenge national measures which undermine judicial independence of courts that apply EU law, the challenge could include reliance on EU law standards of judicial independence, where these are higher than national standards.

The TEU 19 duty on states to secure effective legal protection in the fields governed by EU law is not limited to ensuring the independence of courts. This duty should also apply to other aspects of effective legal protection, interpreted in accordance with CFR 47. These include restrictions on access to courts, such as excessive costs or pre-litigation delays;²⁷ denial of legal aid;²⁸ and the obligation of states to respect and implement court rulings.

2. The rule of law

The TEU art. 19 duty to ensure effective legal protection is part of the rule of law, one of the founding values of the EU (TEU art. 2). A breach of those values can lead to action by the political institutions of the EU under TEU art. 7. But a breach of the values is not, alone, enough for judicial institutions to have power to find a breach of EU law. EU law only *governs* national situations which have a sufficient connection to EU competence

²⁵ C-119/15 *Biuro podróży ‘Partner’*, 21 December 2016, para. 27.

²⁶ C-279/09 *DEB*, 22 December 2010.

²⁷ C-73/16 *Puškár*, 27 September 2017, paras. 62-76.

²⁸ CFR art. 47.3 and C-279/09 *DEB*.

(see above). However, the use of the TEU art. 7 procedure does not prevent national courts from finding that the claimed breach of the values is also a breach of EU law.²⁹

3. Discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

States sometimes target CSOs that provide services and campaign to promote equality and eliminate discrimination. They have also targeted CSOs for their equal recruitment practices – for instance, where they have led to a relatively high number of women or LGBTI staff, or volunteers who are openly gay.

EU law may govern national measures like these, because of EU law prohibitions on discrimination. EU Directives adopted under TEU art. 13 require states to adopt national laws to combat discrimination in employment and self-employment, on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.³⁰ For discrimination on grounds of sex or racial or ethnic origin, directives also cover access to goods and services.³¹

The Equality Directives combatting discrimination are commonly relied on in cases of actual or threatened discrimination by an employer, contractor or service provider, which disadvantages an *individual*.³²

But the *object* of the Directives is to eliminate discrimination in the fields covered by the Directives. For example, Articles 2 of Directive 2000/78 (equal treatment in employment and occupation) and Directive 2000/43 (equal treatment on grounds of racial or ethnic origin) state: ‘the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to’.

Where a CSO is providing services or campaigning for the elimination of discrimination in the fields covered by EU Directives, EU law may govern national interference with that CSO aimed at, or affecting, those services or campaigns.

EXAMPLES

1. A state adopts a new law on CSO registration, requiring “respect for family values”, and refuses to re-register any LGBTI CSOs. These CSOs claim the new law is governed by TEU 4 art. read with the EU Directive on eliminating discrimination on grounds of sexual orientation in employment and occupation, because LGBTI CSOs materials, advice and representation play a significant role in implementing this EU law.

²⁹ C-619/18 *Commission v Poland*, explained in A-G Opinion, para. 50.

³⁰ Directive 2006/54/EC on equal opportunities and equal treatment of women and men in employment and occupation; Directive 2010/41/EU on equal treatment between men and women engaged in a self-employed capacity; Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (on the grounds of religion or belief, disability, age or sexual orientation).

³¹ Directive 2004/113 on equal treatment of men and women in goods and services; Directive 2000/43 on equal treatment on grounds of racial or ethnic origin.

³² See C-303/06 *Coleman* (employer’s discrimination on grounds of disability of worker’s child) and C-83-14 *CEZ v Nikolova* (electricity company racial discrimination disadvantaging customer).

2. A state bars CSOs which provide abortion counselling from receiving national funds. The CSOs argue that this situation is governed by EU law because the national measure discriminates on grounds of sex, in the field of access to services, contrary to Directive 2004/113.³³

4. EU data protection rules

EU General Data Protection Regulation 2016/679 (GDPR) governs national measures concerning the personal data of individuals held by CSOs, such as that relating to their staff, volunteers, funders and service users. National laws requiring CSOs to gather personal data, to disclose it to government bodies, or to publish it, must not breach the GDPR and may, because they affect processing of personal data, be governed by EU law.

EXAMPLE

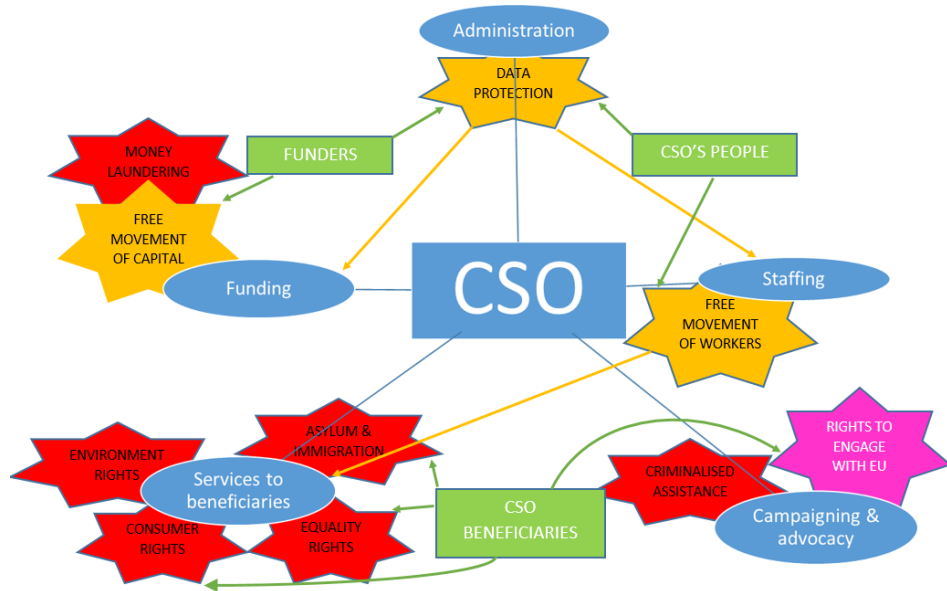
A new law requires CSOs to publish the names and addresses of their members and donors if the Government decides the CSO has acted “contrary to national values”. A CSO members and donors claim that the Government decision falls under the EU General Data Protection Regulation because it leads to disclosure of their personal data, and that it violates the prohibition on discrimination on grounds of political opinion under CFR art. 21.

In *C-78/18 Commission v Hungary* (pending) against Hungary’s *Law LXXVI of 2017, on the transparency of organisations that receive financial support from abroad*, the Commission argues that the situation is governed by EU law because there is a discriminatory restriction on free movement of capital, and therefore CFR *also* applies, including CFR art. 7 on personal data.

³³ For implementation of Directive 2004/113, including application to medical services, see <https://ec.europa.eu/social/BlobServlet?docId=3695&langId=en>

IV. EU LAW ARGUMENTS TO ADDRESS PARTICULAR ASPECTS OF THE WORK OF CSOS

Different areas of EU law overlap with different aspects of CSO work.



This section sets out EU law arguments that CSOs could use to challenge national measures that affect different aspects of their activities:

- **Funding:** seeking and receiving financial and other kinds of material support;
- **Administration:** CSO formation, registration, record-keeping and reporting;
- **Staffing and volunteers:** people who do the work of the CSO;
- **Service provision:** helping beneficiaries of the CSO with material support, advice and representation, including legal representation;
- **Campaigning and advocacy:** organising public and private efforts to change how government and others act, including litigation.

For each aspect, the briefing sets out any clear EU law that can be relied on, as well as potential legal arguments for new areas. The law and cases referenced may seem unconnected to CSOs, but they provide guidance on how EU law might apply.

A. CSO FUNDING

CSOs may depend on donations and other kinds of material support. National laws and actions can block, restrict or weaken funding of CSOs, including by affecting funders. EU law may govern these national measures, for example, because:

- EU funding is involved;
- EU rules on free movement of capital apply;

- EU rules on money laundering or terrorist financing apply; or
- EU data protection rules apply (see ‘EU data protection rules’, section III.C.4, above).

1. EU funds

The use of EU funding is governed by the EU law measures authorising that funding, such as Regulation 1304/2013 on the European Social Fund. EU law could therefore be relied upon to challenge national decisions to refuse to allocate specific EU funds,³⁴ or national withdrawal of the approval of an NGO as a local action group under the European Agricultural Fund for Rural Development.³⁵

A national government decision not to apply to an EU institution for specific EU funds may fall outside the scope of EU law, as a purely national decision. However, if that decision were taken with the aim of jeopardising the achievement of an objective of EU law, it might be governed by TEU art. 4. For example, a Member State opposed to implementation of EU laws against global heating wants to prevent penalties for violations of these laws, and so refuses to seek EU funds to support citizens groups to report those violations. Because the state’s objective is to jeopardise the achievement of the objects of EU law, its decision not to seek funds is a breach of EU law.

2. EU rules on free movement of capital

National laws or actions may limit or block fund-raising by CSOs. Because these laws apply to movements of money – or property – they must not breach the EU’s single market rules on the *free movement of capital*.

TFEU art. 63 explicitly bars ‘restrictions’ on movements of capital or payments between a Member State and other Member States or third countries. TFEU art. 65 allows for national tax laws and requirements to declare capital transfers for administration or for reasons of public policy or public security. But these rules cannot be discriminatory on grounds of nationality of an EU state (TFEU art. 65(3)).

The CJEU has held that charitable donations count as ‘capital’ for the purposes of EU rules, and that EU rules on capital apply to charitable donations of every kind, ‘even if they are made in-kind in the form of everyday consumer goods.’³⁶

The EU rules on free movement of capital do not govern all national laws affecting capital movements within the EU. These EU rules apply where a Member State imposes, by law or other action:

- Discrimination on grounds of nationality of an EU member state on any capital movement, or
- Less favourable treatment of cross-border movements of capital than of movements within a state, including from or to a non-EU state.

³⁴ E.g., C-592/11 *Ketelä*.

³⁵ E.g., C-24/13 *Dél-Zempléni Nektár Leader Nonprofit*, EU:C:2014:40.

³⁶ C-318/07 *Persche* [2009] ECR 33, para. 30.

Special laws that bar or burden ‘foreign funding’ of CSOs are very likely to be prohibited by EU rules on free movement of capital. EU law bars national laws or actions that have the aim or effect of treating donations or material support from another country differently from those provided by natural or legal persons in the Member State concerned. Exceptions to this rule are narrow and hard for the state to justify.

In *Persche*, the CJEU held first, that EU rules on capital prohibit a national law, like the German one, which limits tax deductions to a charity registered in the member state concerned, and, second, that the State’s burden of additional administration for checking donations to charities in other Member States did not justify differential treatment.³⁷

In C-78/18 *Commission v Hungary* (pending), the Commission argues that Hungary’s *Law LXXVI of 2017, on the transparency of organisations that receive financial support from abroad* violates TFEU art 63. That law imposes additional requirements of reporting and publicity only on funding received from outside Hungary.

The EU rules against discrimination on free movement of capital can be used against national laws or rules which differentiate support from abroad:

- *explicitly*, as in *Persche*;
- *in a disguised way*, for example, where a state writes a law in a particular way with the aim of disproportionately affecting funding from abroad;
- *indirectly*, where the law has a disproportionate *effect* on funding from abroad, even though it cannot be shown that this is the aim.

Where a CSO considers that a law or practice discriminates against foreign funding, the evidence needed depends on the kind of discrimination claimed:

- reference in the law to the nationality of the funder shows *explicit discrimination*;
- where the law does not mention nationality, *disguised discrimination* could be shown by statements of government politicians or officials that the law is intended to affect or control foreign funding;
- where the law uses conditions that are a proxy for nationality, like residence, then *indirect discrimination* could be shown.

Where the language of the law is completely neutral between foreign and domestic funding, indirect discrimination could still be shown by evidence from CSOs that the law *in fact* applies disproportionately to foreign funding or to CSOs who receive foreign funding. In the field of free movement of services, the CJEU has ruled that EU law prohibits national rules which are *liable* to prohibit, impede or render less attractive the activities of a service provider established in another Member State, unless justified by overriding reasons in the public interest.³⁸ In that case the CJEU ruled that EU law prohibited a national tax which - as a matter of *fact* – fell more heavily on businesses with headquarters in other EU states, even though this was because of the way the retail sector

³⁷ *Persche*, paras. 50-70.

³⁸ C-385/12 *Hervis*, paras. 41-42.

was organised, rather than because the law drew a distinction based on nationality or location. In cases like this, evidence of the effect of the law may be crucial.³⁹

Where the law has a particularly dissuasive effect on foreign funders, the EU rule on free movement of capital may apply. In a series of cases the CJEU ruled that EU law prohibits national rules which would *in fact* dissuade cross-border bank lending.⁴⁰

Where discrimination or differential impact is shown, the Member State is required to show objective justification. This has two aspects:

- The Member State must show that the national legislation genuinely reflects a concern to attain a legitimate aim in a consistent and systematic manner.⁴¹ Any reasons invoked as justification ‘must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and by specific details substantiating its arguments’.⁴² So, where politicians have explained a new law as needed to attack civil society, this shows the true rationale, even if the law is neutrally stated .
- The Member State must show that the discriminatory measure is ‘justified by an overriding reason in the public interest’.⁴³ This is likely to be extremely hard to do, because in principle any measure that is so important it needs to be applied to foreign funding ought therefore to be applied to domestic funding too. For example, the Hungarian Government has argued that the 2017 foreign funding law is justified by reasons of public policy, but has not explained why such considerations do not apply in the same way to donations from Hungarian residents.

Where a national law rule differentiates against foreign funders, the situation is governed by EU law (the rules on capital). This means that in assessing any justification for the rule, the CFR provisions apply. This means that a national law which only causes a limited amount of nationality discrimination may nevertheless be found to violate EU law because, for example, it is a disproportionate interference with freedom of association (CFR art. 11), or discriminates on grounds of political opinion (CFR art. 21).

In *C-78/18 Commission v Hungary* (pending), the Commission argues that Hungary’s *Law LXXVI of 2017, on the transparency of organisations that receive financial support from abroad*, violates CFR art 7 (personal data) as it applies to EU rules on capital. The Commission argues that the national law ‘does not strike a fair balance between transparency interests and the right of donors and beneficiaries to protect their personal data. This relates in particular to the requirement to provide the Hungarian authorities with the exact amounts of transactions and detailed information about donors, which are then made public by the authorities.’⁴⁴

³⁹ C-98/14 *Berlington Hungary*, para. 32.

⁴⁰ C-484/93 *Svensson and Gustavsson*, para. 10; C-439/97 *Sandoz*, para. 19; C-222/97 *Trummer and Mayer*, para. 26.

⁴¹ C-52/16 & C-113/16 *SEGRO & Horváth*, para. 78.

⁴² *SEGRO & Horváth*, para. 85.

⁴³ *Persche*, para. 41

⁴⁴ European Commission Press Release, ‘Hungary: Commission launches infringement procedure for law on foreign-funded NGOs,’ 13 July 2017. http://europa.eu/rapid/press-release_IP-17-1982_en.htm

3. EU rules on money laundering and terrorist financing

EU Directive 2015/849 requires Member States to ensure that money laundering and terrorist financing are prohibited: art. 1. It sets out detailed rules on the practices which states must adopt. This Directive replaced Directive 2005/60 and was required to be transposed into national law by 26 June 2017: art. 67.

Directive 2015/849 does not fully harmonise national measures in this field. Article 5 explicitly allows stricter national provisions in the field covered by the Directive. But it is not clear when such stricter national provisions *create* a situation which is governed by EU law (see ‘Stricter measures than required’, above).

EXAMPLE

A Member State adopts a new national law against money-laundering, expressly implementing Directive 2015/849. This law imposes more requirements on non-profit organisations than it does on commercial bodies, claiming that non-profits pose a greater threat of money laundering. This differential treatment may be a violation of the EU law principle of equality, unless the state could show it was justified and proportionate.

B. CSO administration

National laws lay down requirements for formation and operation of CSOs. They may be used to impose unreasonable or discriminatory restrictions or conditions. EU law may govern these national measures, for example, because:

- EU rules on freedom of establishment apply;
- The CSO was created or recognised under specific EU laws; or
- EU data protection rules apply (see ‘EU data protection rules’, section III.C.4, above).

1. EU rules on freedom of establishment

A CSO established in one EU state may wish to establish a branch or sister organisation in another EU state, or already be operating one. National laws or actions that limit or prevent CSOs from opening offices in other EU countries may be governed by EU law. TFEU arts. 49 and 54 give ‘undertakings’ (or entities) established in one EU state an EU law right to establish branches or subsidiaries in other EU states. The CJEU has ruled that ‘the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment’.⁴⁵

⁴⁵ C-212/97 *Centros*, para. 27

Even though CSOs are not profit-making, where these laws affect the cross-border economy they must not breach the EU's single market rules on the *freedom of establishment* (see 'Non-profit bodies can rely on EU single market rules,' above).

2. CSOs created or recognised under specific EU laws

EU law may explicitly require or allow national authorities to create or recognise particular CSOs. These situations are governed by EU law, and thus the CFR applies.

For example, the rules of the EU's European Agricultural Fund for Rural Development (EAFRD)⁴⁶ require Member States to adopt a 'bottom-up approach with a decision-making power for local action groups concerning the elaboration and implementation of local development strategies'. The rules on which CSOs can be 'local action groups' under the EAFRD scheme are governed by EU law.

In *Dél-Zempléni Nektár Leader Nonprofit*, Hungary had changed national rules implementing the EAFRD scheme to bar non-profit making companies from being treated as a 'local action group'.⁴⁷ The CJEU ruled that such national rules must comply with the CFR and the general principles of EU law, including the principles of equal treatment, legal certainty, protection of legitimate expectations and proportionality.⁴⁸

The principle of equal treatment can be used to argue against measures that treat certain kinds of CSOs less favourably than others, which subject CSOs to more rigorous requirements than for-profit bodies, or which do not make sufficient allowance for the different nature of CSOs from, say, commercial organisations.

C. CSO STAFF AND VOLUNTEERS

The activities of individuals as CSO staff and volunteers may be restricted by national laws and actions. These people may have individual rights under EU law which can be used to challenge the national measures, for example, because:

- EU rules on free movement of persons apply;
- EU rules on immigration apply; or
- EU data protection rules apply (see 'EU data protection rules', section III.C.4, above).

1. EU rules on free movement of persons

EU law governs the free movement and residence of EU citizens and family members: TFEU arts. 20, 21, 45, 49 and 56 and Citizens Directive 2004/38. Any restrictions on movement or employment that apply to EU citizens or family members must comply with EU law.

⁴⁶ EU Regulation 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and Commission Regulation 1974/2006 laying down detailed rules for the application of Regulation No 1698/2005

⁴⁷ C-24/13 *Dél-Zempléni Nektár Leader Nonprofit*, EU:C:2014:40.

⁴⁸ *Id.*, para. 17.

EU law governs any Member State decision to refuse entry or to expel an EU citizen or family member from that state: Citizens Directive arts. 2, 3 and 27-33.

TFEU arts. 45, 49 and 56 and the Citizens Directive also apply to citizens of the European Free Trade Association (EFTA) – comprised of Switzerland and the states of the European Economic Area (EEA), namely, Iceland, Liechtenstein and Norway - and to their family members.⁴⁹

National measures that affect the free movement or residence of EU/EFTA citizens or family members are therefore governed by EU law, and the CFR applies. Using this argument, the Commission opened infringement proceedings in 2018 against Hungary concerning the July 2018 ‘Stop Soros’ law which prohibits the presence in the border zone of anyone who is subject to a procedure under the new criminal code provision criminalising assistance to apply for asylum or a residence permit.⁵⁰

Where a national measure affects only citizens of the Member State concerned—and has no connection to free movement to and from another Member State—it may not fall under EU law. But it can still do so if it deprives that citizen of the ‘genuine enjoyment of the substance of the rights attaching to the status of EU citizen’.⁵¹

EU law also prohibits any discrimination on nationality grounds as regards EU/EFTA citizens: TFEU art. 18 and, more specifically, Citizens Directive art. 24. Any restrictions on residence or movement under generally applicable laws, e.g., criminal laws, must be applied without discrimination on nationality grounds. EU law also governs the right of equal treatment as regards ‘social advantages’ of non-EU citizens who are family members of a Union citizen with the EU law right of residence or permanent residence in the Member State concerned: Citizens Directive art. 24. Also, these family members ‘shall be entitled to take up employment or self-employment’ in that Member State: Citizens Directive art. 23.

These EU laws govern national measures that treat CSOs’ freedoms to engage EU/EFTA citizens or resident family members in ways that are less favourable than engagement of EU/EFTA citizens with the nationality of that Member State. This clearly includes any person engaged as an employee or in any other paid capacity, since this falls under TFEU arts. 45 (workers), 49 (self-employed) or 56 (services provider). It also likely includes unpaid activities, as a ‘social advantage’ under Citizens Directive art. 23.

EXAMPLES

1. Police arrest an EU/EFTA citizen on her return to her country from a trip to Brussels and question her about her conversations with Commission officials. She claims the arrest is governed by TFEU art. 21 (right of free movement and residence) and TEU art. 11 (freedom to communicate with

⁴⁹ Under the EEA Agreement and EU-Switzerland Agreements and measures adopted under them.

⁵⁰ European Commission press release, ‘Asylum: Commission takes next step in infringement procedure against Hungary for criminalising activities in support of asylum applicants,’ 24 January 2019, http://europa.eu/rapid/press-release_IP-19-469_en.htm.

⁵¹ C-34/09 *Ruiz Zambrano*, EU:C:2011:124, para. 41.

EU institutions) and is a violation of CFR art. 11 (freedom of speech) and CFR art. 21 (prohibition on discrimination on political grounds).

2. A national law requiring non-citizens of the state to register or report their CSO voluntary activities with the state would be governed by EU law if it treated EU/EFTA citizens and family members differently from its own citizens (discrimination). Even a neutrally-expressed law may do so as a disguised measure to check whether residence meets the conditions of EU law (conditions of residence under Citizens Directive). If EU law does govern the situation, then the national law must comply with that CFR, including the right to freedom of association.

2. EU rules on immigration

People who are not EU/EFTA citizens or their family members – third country nationals – may nevertheless have EU law rights to reside and/or to equal treatment under an EU measure on immigration or an EU agreement with a third country.

Directive 2003/109 on long-term residents, extended by Directive 2011/51, lays down minimum rights for long-term residents to be issued with a residence permit. Where a person has such a permit, a national measure restricting their residence or movement (such as the Hungarian 2018 Stop Soros law) may be governed by that Directive. Also, Article 11 of the Directive gives a right to equal treatment as regards employment, self-employment, education and vocational training, which may make the Directive govern a national law restricting CSO engagement of third country nationals with such a right to reside.

EU law may also govern restrictions on residence, movement or engagement as employees or volunteers of third country nationals who are legally resident on grounds of:

- studies, pupil exchange, unremunerated training or voluntary service: Directive 2004/114/EC;
- highly qualified employment: Directive 2009/50;
- scientific research: Directive 2005/71;
- family reunion: Directive 2003/86;
- asylum or subsidiary protection: International Protection Qualification Directive 2011/95;
- being a victim of trafficking: Directive 2004/81; or
- being a national of a state with which the UK has an Association Agreement covering legally resident nationals: Algeria, Morocco, Russia, Tunisia, and Turkey.

D. CSO PROVISION OF SERVICES

Many CSOs provide – or seek to provide – services to the public, individuals and other associations. These services can include financial support, material support, advice, and representation, including legal representation, and may be provided free at point of service or for a charge.

National laws and actions may restrict the freedom of CSOs to provide services. EU law may govern these situations, for example, because:

- EU rules on free movement of services apply;
- EU rules on procurement apply;
- The services fall under other specific EU rules, such as the right to receive advice;
- EU data protection rules apply (see ‘EU data protection rules’, section III.C.4, above).

1. EU rules on free movement of services

National laws or actions can limit or block the provision of services by CSOs. Even though CSOs are not profit-making, where these laws affect the cross-border economy they must not breach the EU’s single market rules concerning the *freedom of services*. National measures that effectively require an authorisation to provide services are governed by EU law, under Directive 2006/123 on services in the internal market.

2. EU rules on public procurement and provision of services

EU directives specifically govern procurement of services by public authorities of EU states, including from CSOs.⁵² So national rules and actions about such procurement of services are governed by EU law.

3. Other EU laws affecting service provision

EU law makes specific provision in certain fields of CSO activity. This does not mean that EU law governs all national measures affecting CSO activity in that field.

However, where EU law does make specific provision, and national law also makes specific, contradictory, provision, EU law may govern the situation. For example, the provision of *advice to asylum applicants* is specifically governed by the Asylum Procedures Directive 2013/32/EU and the Reception Conditions Directive 2013/33/EU. Under Asylum Procedures Directive art. 8, asylum-seekers should enjoy the right to advice and counselling, including at border crossing points and transit zones, at external borders. Under Reception Conditions Directive recital 21 and art. 5(1), asylum-seekers should enjoy the right to information on asylum procedures and to contact groups providing legal assistance. On this basis, it can be said that EU law governs national rules about providing information and advice to asylum applicants.

Similarly, the *right of asylum applicants to legal representation in an appeal* is specifically governed by Asylum Procedures Directive art. 20(1), 22(1): asylum-seekers should enjoy the right to free legal assistance and representation in asylum appeals; Reception Conditions Directive arts. 9(6), 10(2), 18(2)(b), (c): appeals about detention, and appeals about material conditions (Directive 2013/33, art. 26(2)); as well as appeals under the Dublin Regulation art. 27(5).

⁵² E.g., Public Contracts Directive 2014, Concessions Contracts Directive 2014, and Utilities Directive 2014.

Where a national law specifically restricts the freedom of persons to receive advice, representation or other support from CSOs in a field governed by EU law, then that law may have a close enough connection to EU law for the situation itself to be governed by EU law.

Using this argument, the Commission opened infringement proceedings in 2018 against Hungary concerning the July 2018 ‘Stop Soros’ law, which criminalises the provision of assistance to apply for asylum. The Commission considers that this law ‘curtails asylum applicants’ right to communicate with and be assisted by relevant national, international and non-governmental organisations’.⁵³

In other fields of EU law, the right to receive information, advice, assistance and representation from a CSO may not be specified by directives, but may nevertheless be necessarily implied by the requirement for effective enjoyment of EU rights. A national law that effectively limits (or bars) the right to receive this kind of help from a CSO may therefore be governed by EU law.

For example, Directive 2004/81 on **victims of trafficking** states that such victims ‘should be informed of the possibility of obtaining this residence permit and be given a period in which to reflect on their position’ (recital 11) and art. 5 lays down a mechanism by which states are to inform those victims of whom the state is already aware. However, the effective enjoyment of the rights under the Directive would be restricted by a national law that specifically barred CSOs from providing victims of trafficking with information about their rights, especially those of whom the state was not already aware. There is a good argument that such a law would fall within the scope of EU law.

More broadly, CFR art. 47 requires that every person have an EU law freedom to seek advice in connection with their right to a remedy for a violation of an EU law right. So, a national law that specifically barred CSOs from advising on violations of EU law would very likely be governed by the EU law in question, read with CFR art. 47.

Regulation and treatment of CSO rescuers may be governed by EU law. Where EU agencies, such as Frontex or Europol are involved, that connection may put the situation within the scope of EU law. Exclusively national actions concerning **border control on CSO rescue boats** at the external sea border are governed by EU Schengen Regulation 2016/399. This ‘lays down rules governing border control of persons crossing the external borders of the Member States of the Union’ (art. 1), defined to include the external *sea* borders of the EU and EFTA states⁵⁴ - the edge of their territorial waters. Art. 4 of the Regulation states: ‘[w]hen applying this Regulation, Member States shall act in full compliance with relevant EU law’ and states that EU law includes the CFR and relevant international law, including the 1951 Geneva Convention.

National actions to **penalise CSOs rescuers after the event** may also be governed by EU law. EU law may apply where the conduct penalised was facilitating the exercise of EU law rights by others, such as carrying passengers who seek to be admitted at the external sea border under the Schengen Regulation. It may also apply where the national law was

⁵³ European Commission press release, *supra* note 47, http://europa.eu/rapid/press-release_IP-19-469_en.htm.

⁵⁴ Except for those of Ireland and the UK, which are not bound by the Schengen Regulation.

adopted to transpose the Facilitation Directive (see ‘Stricter Measures Than Required’, above).

EXAMPLES

1. A mayor rejects a CSO bid under a tender to provide school trips, on the grounds that the CSO has immigrant volunteers. The CSO challenges the rejection as a violation of EU rules on public procurement, read with the CFR art. 21 prohibition on discrimination.
2. A government adopts a new law that bars CSO rescue boats from entering territorial waters, on the ground that they carry people who are not entitled to be admitted. The CSO claims that this national law is governed by the Schengen Regulation, and that the state has breached the resulting EU law duty to comply with the UN Convention for the Law of the Sea. It argues that EU law empowers national courts to set aside national law restrictions that prevent them from granting an injunction against the navy, and that EU law governs any penalty for alleged breaches of border control.

E. CSO CAMPAIGNING AND ADVOCACY

National laws or actions can limit or block CSO campaigning or advocacy activities, such as communications and demonstrations to the public, advocacy to institutions, and litigation by the CSO to challenge laws or actions of national authorities or those of the EU. These national laws or actions may be governed by EU law because:

- EU law provides specific rights in that field of campaigning;
- the national measures interfere with, limit or block CSO engagement with the EU institutions; or
- the measures interfere with CSO engagement in European Parliament elections.

1. Field-specific EU rights of civil society

In some fields, specific EU law governs civil society advocacy and campaigning at national level. EU law governs, for example:

- national rules for consultation of CSOs on assessments of **environmental** impact and on the legal costs of challenging decisions on environmental grounds;⁵⁵
- rights of **worker organisations** to be consulted by employers on changes to conditions;⁵⁶

⁵⁵ See Directive 85/337/EEC on environmental assessments, amended by Directive 2003/35/EC to implement the Aarhus Convention. Many states have implemented this in a highly restrictive way, see ‘Power for the people’, European Environmental Bureau, 24 April 2019, <https://eeb.org/locking-citizens-out-of-environmental-decision-making-is-a-threat-to-democracy-report-highlights-problems-across-the-eu/>.

⁵⁶ See e.g. Directive 75/129/EEC on collective redundancies; Directive 2001/23/EC on employees’ rights in the event of transfers of undertakings.

- rights of consumer organisations to challenge **unfair contract terms**,⁵⁷ and
- requirement to establish national race equality bodies to advise victims of **race discrimination**.⁵⁸

2. EU rules on engagement with the EU institutions

EU general law on engagement of civil society with EU institutions is an untested, but potentially powerful, basis for applying EU law to national laws or acts that restrict CSO advocacy on areas affected by EU policy.

EU law requires EU institutions to allow civil society to engage with them. TEU art. 11 states:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

The CJEU has yet to develop case law under these provisions. But TEU art. 11(2) necessarily includes the freedom of CSOs to communicate with EU institutions, and TEU art. 11(1) provides a basis for arguing that restrictions on CSO public statements and private discussions that concern EU law are also governed by EU law. The Treaties specifically establish the rights to petition the European Parliament, to start a Citizens' Initiative and to apply to the Ombudsman (TFEU arts. 24, 227 & 228). 'The right of petition is an instrument of citizen participation in the democratic life of the European Union. It is one of the means of ensuring direct dialogue between citizens of the European Union and their representatives.'⁵⁹

The Member States have the duty under TEU art. 4 to assist the EU institutions in carrying out their tasks under these provisions, and to 'refrain from any measure which could jeopardise the attainment of the objectives' of those provisions.⁶⁰ National laws or actions that aim to interfere with the expression and exchange of CSO views on EU issues, or that have that effect, may be governed by TEU art. 11 read with TEU art. 4, and therefore by EU law. Such measures could include those that jeopardise the freedom of CSOs to gather information about national compliance with EU law that they would use to report violations to EU institutions, or to rely on EU law before national courts. National measures affected could include laws on the operation of CSOs and actions against individual activists.

Specific EU laws may also be relevant. For example, the Regulation establishing the European Anti-Fraud Office (OLAF) explicitly allows OLAF to open an investigation

⁵⁷ Directive 1993/13 on unfair contract terms, art. 7(2).

⁵⁸ Directive 2000/43, art. 13.

⁵⁹ C-261/13 P *Schönberger v Parliament* (Grand Chamber), 9 December 2014, para. 17. The language of the CJEU judgment is that of TEU art. 10.3: 'Every citizen shall have the right to participate in the democratic life of the Union.'

⁶⁰ See sec. II.B.2, *supra*.

based on anonymous information and to ensure the protection of confidential sources.⁶¹ So EU law may govern national measures that interfere with the freedom of CSOs to communicate with OLAF.

National measures like these may also be governed by EU law because they affect the free movement of persons or goods.

EXAMPLES

1. Ruling party politicians use official speeches to incite public anger against CSOs that complain to the European Commission, and then extend the national law on registration of foreign lobbyists to any person who communicates with the EU, Council of Europe or UN. The CSOs argue that the national law falls within the scope of TEU art. 11(2) and TFEU arts. 24, 227 and 228 all read with TEU art. 4 and is in breach of those provisions and CFR.
2. A national CSO is raided by the police after holding a private discussion of a draft complaint to OLAF and a local convening addressed by staff of the EU Fundamental Rights Agency and MEPs. The CSO claims that the police action falls within the scope of TEU arts. 11(1), 11(2) and the OLAF Regulation, all read with TEU art. 4 and is in breach of them and CFR.

3. EU rules on participation in European Parliament elections

National measures to restrict non-party political CSO activities in elections to the European Parliament may be governed by EU law.

TEU 10 states that:

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament...
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

TFEU art. 224 and CFR art. 12(2) recognise the importance of ‘political parties at Union level.’

This means EU law may govern some national restrictions on CSOs to provide information and ideas relevant to European Parliament elections and political parties at EU level.

⁶¹ Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), especially arts. 4 (5)-(7), 5(1) & (5) and 10.

EXAMPLE

A Member State imposes a tax on activities of CSOs publicising the voting record of MEPs. This is claimed to be governed by TEU art. 10 read with TEU art. 4, and a national court is asked to invalidate the tax as contrary to EU law.

V. CONCLUSION

The CJEU has addressed the rights of CSOs in only a few cases. Nonetheless, its case-law in related areas, read together with the EU Treaties, secondary legislation, and the CFR, suggests that EU law may be found to govern numerous situations in which the rights of CSOs are impacted. This briefing paper has set out a few novel arguments in the hopes of sparking greater use of EU law which, over time, might lead to stronger protections for civil society than currently exist.