LEGAL BRIEFING

European Union Law and Romanian Draft Law 140/2017 on Associations and Foundations

Introduction

1. This memo considers Romanian Draft Law 140/2017 on associations and foundations, as adopted by the Senate on 20 November 2017 ("Draft Law"), and its compliance (or lack thereof) with the law of the European Union (EU). This memo does not address other sources of international or regional law. It is consistent with the Opinion issued by the Expert Council of the Conference of INGOs of the Council of Europe on 11 December 2017 and the letter issued by Romanian civil society organisations on 8 June 2017.

2. This analysis is based on an unofficial translation of the Draft Law.

3. We note at the outset the existence of a disturbing trend in parts of Europe, and around the world, of governments that are increasing regulatory burdens on civil society organizations (CSOs). Invoking the objectives of transparency and accountability, governments have adopted laws and regulations that impose onerous reporting requirements concerning sources and amounts of funds received. As noted by the EU Fundamental Rights Agency in its just-released report on civil society:

> Member States have a variety of legitimate interests in adopting legislation and administrative rules that might affect civil society organisations, including in the area of tax law, or with respect to transparency, electoral and lobbying laws. However, even if not

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meant to negatively affect CSOs, such measures can have an undue impact on them and hence have a chilling effect.[1]

4. Since 2012, some 70 governments have enacted over 120 legal initiatives that have the effect of restricting civil society and the rights to freedom of association. More than 40 are currently considering such pieces of legislation.[2]

5. Moreover, governments often use transparency and accountability to characterize CSOs as foreign and unrepresentative, and their leadership as a privileged elite.[3]

6. Governments are obliged by international and European law and standards to make information publicly available, especially about their use of public finances. In contrast, CSOs, and other non-governmental entities, are not obliged by international or European law to disclose information about their donors – unless they receive significant public funds or benefits, in which case they may be required to report on the amount, source, and use of only those funds.

7. The Venice Commission, in reviewing Hungary's 2017 law on the transparency of funds from abroad to CSOs, set forth its conclusion as follows:

   The Commission considers that it is legitimate for States to monitor, in the general interest, who the main sponsors of civil society organisations are. It could also be legitimate, in order to secure transparency, to publicly disclose the identity of the main sponsors. Disclosing the identity of all sponsors, including minor ones, is, however excessive and also unnecessary, in particular with regard to the requirements of the right to privacy as enshrined under Article 8 ECHR.[4]

8. We – international and Romanian CSOs – embrace transparency rules to the extent that they promote accountability, do not place individuals or CSOs at risk of vilification or any sort of employment, societal or physical retaliation, and are not disproportionate to a legitimate aim (i.e., do not impede the work of CSOs to a degree that cannot be justified by the benefit of the reporting or disclosure requirement).

EU law context

9. The EU Treaties - the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) - do not give the EU competence over national laws governing civil society organisations (CSOs).

10. Nevertheless, the object or effect of a national law affecting CSOs may fall within the scope of EU law, if it affects:

    a) EU fundamental freedoms of CSOs or their members/supporters;

    b) Other EU law rights of CSOs or their members/supporters;

    c) CSO activities relevant to EU institutions;

[1] *Challenges facing civil society organisations working on human rights in the EU,* http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-human-rights-eu, at p. 9.

[2] *Distract, Divide, Detach: Using Transparency and Accountability to Justify Regulation of Civil Society Organizations* (Transparency and Accountability Initiative: December 2017), at http://www.transparency-initiative.org/uncategorized/1996/distract-divide-detach-using-transparency-accountability-justify-regulation-csos/. See also the International Center for Not-for-Profit Law.

[3] Distract, Divide, supra.

[4] Opinion on Hungary's Draft Law on the Transparency of Organisations Receiving Support from Abroad, adopted by the Venice Commission at is session on 16-17 June 2017, at paras. 52-53.

d) CSO activities relevant to the implementation of EU law;

e) EU funding of CSOs.

11. If a national law affecting CSOs falls within the scope of EU law, then that law must comply with the EU Charter of Fundamental Rights (CFR):

[A]ccording to the Court's settled case law, the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law.

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

12. The jurisprudence of the Court of Justice of the EU on the scope of EU law is unclear and still developing. The Court has ruled that:

a) the concept of 'implementing Union law', as referred to in Article 51 CFR, requires a certain degree of connection to EU law above and beyond the matters covered being closely related to, or one of those matters having an indirect impact on, the other (C-206/13 *Siragusa* judgment of 6 March 2014, para. 24; C-562/12 *Liivimaa Lihaveis MTÜ*, judgment of 17 September 2014, para. 62).

b) the "objective of protecting fundamental rights in EU law . . . is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States. The reason for pursuing that objective is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law". See *Siragusa*, paras. 31 and 32; See also Case C-198/13 *Julian Hernández*, judgment of 10 July 2014, ECLI:EU:C:2014:2055, para. 47; Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para. 3; Case C 399/11 *Melloni* EU:C:2013:107, para. 60.

c) one of the circumstances in which the CFR applies is where *national legislation* involves the implementation of EU law, in which case, "some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it", *Siragusa*, para. 25.

Relevant provisions of the Draft Law

13. The Draft Law would amend Law 26/2000 on associations and foundations ("Current Law"), by amending articles 38, 41, and 42, and inserting a new article, known as 48^1, following the existing article 48.

14. The most important changes made by the law are set forth in article 48^1, which requires all CSOs to publish every six months in the Official Gazette, financial statements stating the individual or activity generating each income ("publication requirement"); any failure to publish such a declaration would lead to the suspension of the association, foundation, or federation's functioning for 30 days and the immediate cessation of its activities entirely if the statement is not then published within 30 days according to the conditions provided for in Chapter IX, which provides for the dissolution and liquidation of associations and foundations.

15. The Draft Law also would amend articles 38, 41, and 42 governing the situations in which an association or foundation may be recognized by the Government of Romania as having "public utility status" ("Public Utility Associations," PUAs). This status permits the association/foundation to receive public funds: art 41.

16. To be eligible for public utility status under the Draft Law, a PUA must, for two years before recognition, and thereafter, not have carried / carry out "any kind of political activities: fundraising or campaigns to support or oppose a political party of a candidate for political office to which s/he may be appointed or elected" ("Public Utility Political Activity Prohibition"): arts 38(1)(e) and 41 (c).

17. The right of PUAs to free use of public property and access to funding from central and local budgets is allocated under an algorithm that provides, for example, 10% of funds for "national values & national minorities - traditions and cultural assets": art 41 (a).

18. A more detailed analysis of the content of the Draft Law is set out in *Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, prepared by the Expert Council of the Conference of INGOs of the Council of Europe*, 11 December 2017, paras. 10-19 and 52-55.

Would the Draft Law violate EU law?

Affects EU fundamental freedoms of CSOs, members, or supporters?

19. The four EU fundamental freedoms are free movement of persons, freedom of establishment, free movement of services, and free movement of capital.

20. The Treaty prohibits not only discrimination on grounds of nationality (whether it is direct (motivated) or unjustified and indirect (unmotivated)) but also unjustified restrictions on such movement which are not discriminatory

21. Article 48 of the Current Law authorizes associations and foundations to "engage in any other direct economic activity if they are of an auxiliary nature and are closely related to the primary purpose of the legal entity." Since the CSOs engage in economic activity (albeit without seeking, overall, to make a profit), capital receipts by them and payment fall, in principle, within the scope of Treaty provisions on free movement of capital.[5]

Violation of Treaty provisions on free movement of capital

22. The Draft Law does not discriminate between Romanian and external funding. It may however amount to a 'restriction' under EU law. This concept is a wide one, covering "rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially" the exercise of a fundamental freedom. Case C-98/14, *Berlington Hungary* [2015] ECR 386, paras. 40-42 & 27. There is no need to prove the *effect* of the national rules; potential effect is sufficient.

23. It follows that adoption of the Publication Requirement of the Draft Law may infringe the **free movement of capital and payments (**TFEU art 63(1) and (2)) by imposing unjustified and disproportionate requirements on the recipient of such capital transfers / payments. The Publication Requirement would appear to require publication, every six months, in the Official Gazette, of the names of each individual who provides income, regardless of the amount of the income they provide. To collect the name of each such

5 The Hungarian law Lex:NGO was found by the European Commission to fall within the scope of EU law on the free movement of capital Commission press release, 7 December 2017, IP/17/5003.

individual, and to arrange for an entry of every single such name, on a six monthly-basis, imposes a considerable administrative burden.

24. There is no apparent justification for imposing on all CSOs the requirement of publication of all such names, every six months, and the burden of doing so appears disproportionate to any public interest in transparency.

25. For these reasons, adoption of the Draft Law would appear to violate TFEU art 63(1) and (2).

26. We do not have information on whether a requirement to publish that information for each source of income is imposed upon similarly placed for-profit enterprises, such as those providing services to, or contracted by, national or local government. However, unless it is, the imposition of this requirement selectively on CSOs would appear to be a disproportionate, unjustified requirement that is also discriminatory as between commercial and non-commercial organizations. Equality is a general principle of EU law, and unjustified discrimination between different kinds of organizations violates that principle.

27. We do not explore here whether the Publication Requirement would also affect the freedom of establishment.

Art 12 CFR read with Treaty provisions on free movement of capital

28. The interpretation of the TFEU - which includes the provisions on restrictions on free movement of capital - must comply with the Charter of Fundamental Rights. The Grand Chamber of the CJEU has ruled that, "[A]ccording to the Court's settled case law, the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law." Joined Cases C-411/10 & C-493/10 *N.S.* [2011] ECR I 13905, para.77.[6]

29. EU law therefore precludes national laws amounting to restrictions on the EU law rights of CSOs to free movement of capital and payment where those restrictions would violate the rights of those CSOs under CFR.

30. Article 12.1 of the CFR guarantees, within the scope of EU law, that "*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** . . . "* While article 12 of the CFR recognizes the right to freedom of association in general terms, it should be read in light of the jurisprudence of the European Court of Human Rights (EctHR), in accordance with CFR art. 52(3).[7]

31. Article 11 of the European Convention on Human Rights (ECHR) establishes that any restrictions on the right to freedom of association should be "prescribed by law" and *"necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*" The ECtHR has stated that the expression "prescribed by law" in Article 11 not only requires that the restriction should have a basis in domestic law, but also refer to the quality of the law in question: "*The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in*

[6] The European Commission found the Hungarian law Lex:NGO to violate the the right to freedom of association under the Charter, read with the provisions on free movement of capital: Commission press release, 7 December 2017, IP/17/5003

7 Art. 52(3) of the CFR states "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" or "more extensive" than the rights in the Convention.

the circumstances, the consequences which a given action may entail" (Maestri v. Italy, 2004, para. 41).

32. International human rights law has prohibited absolute restrictions on freedom of association and a test of proportionality has to be applied in regard to precisely drafted legitimate aims.[8] The ECtHR must, therefore, analyze the restriction *"in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts"* (*The United Communist Party of Turkey v. Turkey*, 1998, para. 47).

33. The ECtHR has applied strict scrutiny to restrictions on the right to freedom of association, where political discourse and participation is at stake, due to the close relationship between the latter discourse and democracy. In the case of *The United Communist Party of Turkey v. Turkey* (1998), the ECtHR stated:

> Democracy is without doubt a fundamental feature of the European public order […]. That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights […]. The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention […]; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society […]. In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is "necessary in a democratic society". The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from "democratic society". […] [T]he Court has on many occasions stated, for example, that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment […].
>
> Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. […] [S]uch scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future." (paras. 45-46)

34. It follows that a national law *may* violate art 12.1 CFR, read in conjunction with TEU provisions on the free movement of capital.

35. By imposing the unjustified and disproportionate Publication Requirement, the Draft Law would violate art 12.1 of the CFR, read in conjunction with TFEU provisions on the free movement of capital.

[8] International Covenant on Civil and Political Rights, art. 22(2), American Convention on Human Rights, art. 16(2), African Charter on Human and Peoples' Rights, art. 11, and ECHR, art. 11(2).

Violation of Art 12 CFR by the Political Activity Prohibition

36. The Political Activity Prohibition applies only to PUAs.

37. The law as drafted may not be "formulated with sufficient precision" (see *Maestri v Italy*, cited above). The term "any kind of political activities" in Articles 38(1)(e) and 41 (c) of the Draft Law may be unclear. The law's text leaves it unclear if this phrase is *limited* by the text that follows it ("fundraising or campaigns to support or oppose a political party of a candidate for political office to which s/he may be appointed or elected") or that this following text merely states *examples* of such activities.

38. If the Draft Law would, as properly interpreted, bar CSOs which are (or wish to be recognized as) "public utility associations" only from "fundraising or campaigns to support or oppose a political party of a candidate for political office to which s/he may be appointed or elected," the law must still be closely scrutinized to ensure compliance with EU fundamental rights. However, it may be a proportionate and justified restriction on the rights of PUAs under Art 12 CFR, as a measure to mitigate the risks of corrupt collusion between PUAs and political candidates. Also, if PUAs are awarded public contracts, such rules could be justified to achieve the objective of EU Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply, contracts and public service contracts including that in Article 2: "*Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."*

39. If, however, the Draft Law may be interpreted so as to bar CSOs which are (or wish to be recognized as) "public utility associations," from "fundraising or campaigns," not only to "support or oppose a political party of a candidate for political office to which s/he may be appointed or elected," but also to support or oppose other activities which are understood broadly as "political," it may be in breach of Art 12 CFR. Thus, the Draft Law could not, consistent with Art 12 CFR, be interpreted to apply to activities such as public awareness-raising, campaigning, or fundraising which relate to government, public affairs, or fundamental values, but which do not "support or oppose a political party of a candidate for political office to which s/he may be appointed or elected." The Council of Europe and other inter-governmental bodies have repeatedly underscored the essential contributions made by CSOs to the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities.

Affects other EU law rights of CSOs or their members/supporters

40. EU law governs processing of **personal data** through Directive 1995/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article 8 of the CFR guarantees, within the scope of EU law, that "*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."*

41. The Publication Requirement appears to require the publication of personal data, that is, the name of every person who is a source of income of a CSO. The publication of every name, regardless of the size or significance of the income provided appears unjustified and disproportionate to any public interest, and adoption of this would violate Directive 1995/46 as well as Art 8 CFR 8 (Protection of Personal Data), read with Directive 1995/46.

Affects CSO activities relevant to the implementation of EU law

42. CSOs support and advocate for the implementation of EU law by, for example: assisting individuals and organizations to enjoy rights arising from EU law, by representing them to government bodies, courts and tribunals; researching and reporting to the public on gaps or shortcomings in the implementation of EU law; advocating to the government, EU, and other international bodies on the implementation of EU law.

43. For example, CSO assistance to (or research, information, or advocacy about) citizens who have exercised freedom of movement relates to TEU Art 20(2)(a) ("the right to move and reside freely within the territory of the Member States") (and/or the more specific Treaty provisions and Directive 2004/38); CSO assistance etc. to asylum-seekers and irregular migrants of 3rd-country nationality relates to the EU Directives and EU Regulation forming the Common European Asylum System; CSO assistance to workers on equal pay, working time, holiday leave and race discrimination relates to the relevant EU Directives.

44. **These activities of CSOs appear to fall within the scope of EU law.** That result follows from the logic of the Treaty, including the following provisions:

    a) TEU Art 17.1 imposes on the Commission the duty to "ensure the application of the Treaties and of measures adopted by the institutions pursuant to them" and to "oversee the application of Union law under the control of the Court of Justice of the European Union".

    b) TEU Art 11 guarantees the right of civil society to make its views known to the Commission and to the other EU institutions;

    c) TEU Art 19 imposes on the Court of Justice of the European Union "the duty to ensure that in the interpretation and application of the Treaties the law is observed" and requires that Member States "shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law".

    d) The requirement of access to courts that uphold EU law is an aspect of the 'rule of law,' one of the values on which the EU is founded: TEU Art 2.

    e) Art 11 CFR therefore guarantees the freedom to impart information and ideas on the interpretation and application of EU law.

45. The CJEU has ruled that the objective of the CFR is "to ensure that those rights are not infringed in areas of EU activity [and therefore] to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law", see *Siracusa* above.

46. Civil society organisations play an important role in the implementation of EU law, and therefore upholding its unity, primacy and effectiveness. It therefore arguably follows that national laws that burden or restrict such activities must comply with the requirements of EU law, including fundamental rights and other general principles of EU law.

47. Where CSOs engage in activities within the scope of EU law **fundraising for those CSO activities also falls within the scope of EU law**.

48. Adoption of the Publication Requirement in the Draft Law would violate the rights of CSOs to freedom of expression and association set out in CFR arts 11 and 12 (above), read in conjunction with the relevant general provisions of EU law and the more specific ones relating to the work of the CSOs in question.

49. This conclusion would be different if the Publication Requirement in the Draft Law excluded from its scope CSOs engaged in activities implementing EU law or otherwise within the scope of EU law. In that case, this basis for considering the law is within scope of EU law would not appear to apply.

Affects EU funding of CSOs

50. Funding provided by the Commission or other EU agencies falls within the scope of the EU law provisions authorising and governing that funding. When EU law requires the Romanian authorities to implement EU funding, the rules for implementation must comply with EU law, including CFR: C-562/12 *Liivimaa Lihaveis MTÜ*, judgment of 17 September 2014, ECLI:EU:C:2014:2229, paras. 62-65.

51. We do not have information on the detail of how EU funding is administered by Romanian national or local government and whether it is provided only, or on a preferential basis, to PUAs. However, if this is the case, then adoption of the Draft Law would appear to be an unjustified and disproportionate restriction on access of CSOs to EU funds, in violation of EU laws on EU funding; the Draft Law also violates the rights to freedom of expression and association set out in CFR arts 11 and 12 (above), read in conjunction with the EU law provisions governing EU funding.

The following organizations endorse this legal brief:

European Center for Not-for-Profit Law (ECNL)
FIDH (International Federation for Human Rights)
Norwegian Helsinki Committee
Open Society Justice Initiative
Activewatch
Agenția Împreună
APADOR-CH
ANOSR Alianța Națională a Organizatiilor Studentesti din Romania
ARC Asociația pentru Relații Comunitare
Comunitare
Ateliere fără Frontiere
Asociația Pro-Democrația
Asociația TechSoup
CENTRAS
Centrul pentru Inovare Publică
Centrul pentru Jurnalism Independent
Centrul pentru Legislație Non-Profit
Centrul pentru Politici Durabile Ecopolis
Centrul de Resurse pentru Participare Publică
CTR Consiliul Tineretului din România
Dizabnet– Federația prestatorilor de servicii pentru persoane cu dizabilități
Expert Forum
FDSC Fundatia pentru Dezvoltarea Societății Civile
FOND România
Federația Organizațiilor Neguvernamentale pentru Servicii Sociale
Federația ONG pentru Copil
Fundația Alături de Voi
Fundația Gabriel Tudor
Fundația Noi Orizonturi
Fundația pentru Parteneriat

Fundația PACT
Fundația Alpha Transilvană
Funky Citizens
Hospice România
Inițiativa România
Liga Apărării Drepturilor Omului (LADO)
Let's Do It Romania
Magicamp
Mediawise Society
Miliția Spurituală
One World Romania
Opportunity Associates Romania
Organizația Umanitară CONCORDIA
Organizația Suedeză pentru Ajutor Umanitar Individual
Rețeaua Națională a Muzeelor din România
Rise România
SAR
Salvați Copiii România
TERRA Mileniul III

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