

Legal Analysis: Hungary's Special Tax on Migration-Related Activities

November 2018

This is a summary legal analysis of the Hungarian law, Section 253 of Act XLI of 2018, which, as of August 25, 2018, imposes a special tax on migration-related activities and financing. This analysis is produced by the Open Society Justice Initiative and the Hungarian Helsinki Committee and focuses on the law's violations of the European Convention on Human Rights, as well as the OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association.

1. Introduction

1. On August 25, 2018, a new law came into effect in Hungary levying a 25% tax on financing or activities “supporting” immigration or “promoting” migration in Hungary.”¹
2. This law, Section 253 of Act XLI of 2018 (“Section 253”), restricts internationally protected work of human rights’ NGOs in Hungary. Furthermore, it violates the rights to freedom of expression, freedom of association, non-discrimination, effective remedies, and property, recognized by the European human rights legal framework.
3. This document sets forth an analysis of Section 253 by two nongovernmental organizations, the Open Society Justice Initiative and the Hungarian Helsinki Committee, which concludes that Section 253 fails to comply with the European Convention on Human Rights. Additional detailed analyses can be found in Open Society Foundation’s and Hungarian Helsinki Committee’s applications to the European Court of Human Rights challenging Section 253.²

2. The terms of Section 253

4. Act XLI of 2018 entered into force on August 25, 2018. Section 253 imposes a 25% tax on (a) financial support for “immigration supporting activity” in Hungary; and (b) financial support “to the operations of an organization with a seat in Hungary that

1 Section 253(1) and (4). It is unclear from the translation whether “immigration supporting activity” in the first clause means the same as “activities to promote migration” in the second clause. There are two differences between these two clauses: (a) the first uses the term “support”; the second uses the term “promote”; and (b) the first refers to “immigration”, while the second refers to “migration”. “Support” and “promote” seem to be used interchangeably; “migration,” however, seems much broader than “immigration”.

2 The applications are available at <https://www.opensocietyfoundations.org/litigation/open-society-institute-budapest-v-hungary> and https://www.helsinki.hu/wp-content/uploads/Application_HHC_25_percent.pdf.

carries out activities to promote migration,”³ regardless “of where this organization carries out its activity.”⁴

5. The tax proposal was first introduced as part of the “Stop Soros Package” on February 13, 2018. It was adopted by Parliament on July 20 after no consultation with NGOs, experts, or the general public, in contravention of Recommendation CM/Rec(2007)14 on the Legal Status of Non-Governmental Organizations in Europe⁵ and the OSCE/ODIHR Guidelines of Freedom of Association.⁶
6. The language of the second prong of Section 253 suggests that even if a donor provides financial support to an organization with a seat in Hungary for activities completely unrelated to migration, that financial support could still be subject to the 25% tax if the organization carries out any activities that could be considered to “promote migration.”
7. The penalty for failure to pay the tax is 50% of the tax deficiency. It could be increased to 200% if an organization fails to declare income that may be subject to the tax, and such a failure is qualified by tax authorities as a concealment of revenue.⁷
8. An “immigration supporting activity” is defined to be:

“[a]ny programme, action or activity that is directly or indirectly aimed at promoting immigration (the permanent relocation of people from their country of residence to another country, excluding ... [the exercise of free movement or residence, e.g., of nationals of EU and EEA members states]⁸) ... and is realised as part of (a) carrying out media campaigns and media seminars and participating in such activities; (b) organising education; (c) building and operating networks; or (d) propaganda activities that portray immigration in a positive light.”⁹
9. The primary taxable entity is the donor. The donor is obliged to declare to the grantee by the 15th day of the month following its granting of funds that it has paid the tax.¹⁰ If the donor fails to pay the tax or make this declaration, the grantee (the organization

3 Section 253(1) and (4). It is unclear from the translation whether “immigration supporting activity” in the first clause means the same as “activities to promote migration” in the second clause. There are two differences between these two clauses: (a) the first uses the term “support”; the second uses the term “promote”; and (b) the first refers to “immigration”, while the second refers to “migration”. “Support” and “promote” seem to be used interchangeably; “migration,” however, seems much broader than “immigration”.

4 Legislative Intent to Act No. XLI of 2018, “Specific reasons,” p. 1.

5 This Recommendation states that “NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation” (para. 77).

6 The OSCE-ODIHR Guidelines on Freedom of Association, state that “[a]ssociations should be consulted in the process of introducing and implementing any regulations or practices that concern their operations” (para. 106).

7 Section 215(3) and (4) of Act CL of 2017.

8 See Legislative Intent to Act No. XLI of 2018, “Specific reasons,” p. 1; and Act 1 of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence, Section (1)(1).

9 Section 253(2).

10 Section 253(5), (6) and (8)(a).

that receives funds) must pay the tax by the 15th day of the month following its use of the grant funds.¹¹ Political parties are not obliged to pay the tax.¹²

10. Section 253(3) sets forth two tax bases: the amount of the financial assistance in case the donor is the taxpayer (see also Sections 253(1) and (5)); and “the costs incurred during performing” the immigration supporting activity, if the taxpayer is the grantee (see also Sections 253 (2) and (7)).

3. International standards

11. Non-governmental organizations (hereinafter “NGOs”) play an important role in modern democratic societies. They enable individuals to associate in order to promote certain goals and/or pursue certain agendas. Members of NGOs, as well as NGOs themselves, enjoy human rights, including freedom of association and freedom of expression. These rights are enshrined in numerous international legal instruments.

3.1 Freedom of association

12. International bodies have increasingly recognized that the ability to seek, secure and use resources is a vital component of the right to freedom of association. In 1998, the UN General Assembly declared that “everyone has the right, individually and in association with others, to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means”.¹³
13. In 2013, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association concluded, after a thorough analysis of the prevailing instruments, that the ability to access financial resources is a component of the right to freedom of association regardless of whether the resources are to be used to promote human rights. He reasoned, *inter alia*, that:

The ability to seek, secure and use resources is essential to the existence and effective operations of any association, no matter how small. The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.¹⁴

11 Section 253(6), (7) and (8)(b), and “Detailed Reasoning” of section 250, Bill T625.

12 Section 253 (5).

13 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Human Rights Defenders) of 9 December 1998, GA Res. 53/144, Annex, art. 13

14 Un Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 24 April 2013, para. 8

14. In 2016, the UN Human Rights Council passed a resolution “[r]ecognising that the ability to seek, secure and use resources is essential to the existence and sustainable operation of civil society actors, and that undue restrictions on funding to civil society actors undermine the right to freedom of association”; the Council “underline[d] the importance of the ability to solicit, receive and utilise resources for their work.”¹⁵
15. The European Court of Human Rights also has recognized that receiving and using financial donations is part of the right to freedom of association.¹⁶ The Court has not yet had the opportunity to address the *giving* of funds, but it is logical to assume that the giving of funds is equally protected. For instance, the Court has held that “the obligation to contribute financially to an association can resemble . . . that of joining an association and can constitute an interference with the negative aspect of the right to freedom of association.”¹⁷ If being forced to pay an association is a violation of the negative aspect of freedom of association, then being prevented from funding an association should be a violation of the positive aspect of the right (that is, the right to associate with others). Providing funds to a group, especially consistently over time in a structured relationship, is a core way for one entity to associate, and demonstrate support for common objectives, with another entity.

3.2 Freedom of expression

16. The right to freedom of expression guarantees the freedom “to seek and impart information and ideas without interference by public authority and regardless of frontiers.”¹⁸ The right to distribute information is a core element of the right to freedom of expression under European Convention on Human Rights (ECHR) Article 10,¹⁹ and “there exists a strong public interest in enabling . . . groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest.”²⁰ As the European Court has repeatedly affirmed, “Freedom of expression is applicable to information or ideas that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.”²¹ The right to freedom of expression applies to advocacy even concerning matters that are currently illegal under national law.²² As stated by the OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, “Associations shall have the right to freedom of expression

15 UN Human Rights Council Resolution 32/31, adopted 1 July 2016, preambular para. 13 and operative para. 8.

16 European Court of Human Rights. *Ramazanova v. Azerbaijan* (2007), para. 59.

17 European Court of Human Rights. *Geotech Kancev GmbH v. Germany* (2016), para. 53; *Vörður Ólafsson v. Iceland* (2010), para. 48

18 European Convention on Human Rights, art. 10.

19 European Court of Human Rights, *Open Door and Dublin Well Woman v. Ireland* (1992), para. 73.

20 European Court of Human Rights, *Steel and Morris v. United Kingdom* (2005), para. 89.

21 European Court of Human Rights, *Open Door and Dublin Well Woman v. Ireland* (1992), paras. 71 et seq.

22 European Court of Human Rights, *Women on Waves and Others v. Portugal* (2009).

and opinion through their objectives and activities ... [and] shall have the right to participate in matters of political and public debate, regardless of whether the position taken is in accord with government policy or advocates a change in the law.”²³

17. The right to freedom of expression also protects the right of donors to provide financial support for expressive activities (e.g., preparing or distributing materials, building and operating networks, engaging in advocacy and dissent), including relating to the rights of migrants. The European Court has recognized that Article 10 protects financial contributions to produce “publications and other means of communication.”²⁴ Moreover, Article 10 protects the right of donors to provide funding, including for migrants’ rights, as a form of protest or “expression of opinion” against the Government’s violations of those rights. Article 10 “protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed...” The Court considers that the same can be said for any individual who may wish to convey his or her opinion by using non-verbal and symbolic means of expression.”²⁵

3.3 Legality, legitimacy, and necessity

18. Interferences with the rights to freedom of association and expression can be justifiable only if they meet a three-pronged test: they must be prescribed by law (legality), pursue a legitimate aim (legitimacy), and be necessary and proportionate in a democratic society (necessity). The government bears the burden of proving each of these prongs.²⁶
19. *Legality*: Any limitation must be prescribed by law in clear and precise terms. Moreover, the rule needs to be foreseeable: it must be formulated with sufficient precision to enable the person concerned – if need be with appropriate advice – to regulate his/her conduct.²⁷ The overbreadth of the legal provisions of Section 253 reduces the foreseeability of their application.²⁸
20. *Legitimacy*: The interference or restriction must have a legitimate aim, as set out in the exhaustive list of grounds of limitation in the International standards, including ECHR Articles 10 and 11.
21. In order to establish that the asserted aim is not the predominant purpose, “direct proof” of an ulterior motive is unnecessary. Rather, what is relevant is the “totality”

23 OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association (2015), Principle 6, para. 31.

24 European Court of Human Rights, *Bowman v. United Kingdom* (1998), paras. 33 and 47.

25 European Court of Human Rights. *Murat Vural v. Turkey* (2015), para. 53 (Court found a violation of Art 10 where the applicant, who had poured paint on a statue of Atatürk as a form of protest, was convicted and sentenced to prison).

26 UN Human Rights Committee, UN Doc. CCPR/C/115/D/2011/2010, Views adopted 29 October 2015, para. 7.3.

27 European Court of Human Rights, *Gaweda v. Poland* (2002), para. 40 (regarding art. 10).

28 European Court of Human Rights, *Dink v. Turkey* (2010), para. 116; European Court of Human Rights, *Tatar v. Hungary* (2012), para. 31 (regarding art.10).

of the circumstances in the case, including “information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts.”²⁹ Article 18 of the European Convention on Human Rights establishes that “the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

22. Four cases decided by the European Court of Human Rights are of special relevance here, as they underscore the need to identify the actual purposes of a State action: *Ilgar Mammadov v. Azerbaijan* (2014), *Rasul Jafarov v. Azerbaijan* (2016), *Rashad Hasanov and Others v. Azerbaijan* (2018), and *United Macedonian Organization Ilinden-Pirin v. Bulgaria* (2001). In *Ilgar Mammadov v. Azerbaijan* (2014), regarding criminal prosecution of an individual who had “been involved in various political organizations and local and international non-governmental organizations for a number of years”³⁰ the Court held that “the actual purpose of the impugned measures [regarding criminalisation] was to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed was the true information that the Government were trying to hide.”³¹
23. In *Rasul Jafarov v. Azerbaijan* (2016), where “a well-known civil society activist and human rights defender, co-founder of [...] a non-governmental organization (NGO) specialising in the protection of human rights”, was criminally prosecuted, the Court held that “the charges against the applicant were not based on a ‘reasonable suspicion’ within the meaning of Article 5 § 1 (c) of the Convention.”³²
24. In *Rashad Hasanov and Others v. Azerbaijan* (2018), the ECtHR, citing *Merabishvili v. Georgia* (2017), found that the purpose of the applicants’ arrest and pre-trial detention was to “silence and punish the applicants [civil society activists] for their active social and political engagement.”³³
25. In *United Macedonian Organisation Ilinden-Pirin v. Bulgaria* (2001), the Court interpreted the restrictions to Article 11 in light of Article 18. According to the Court, restrictions to freedom of association

“should not be used to hinder the freedom of association of groups disliked by the authorities or advocating ideas that the authorities would like to suppress. Therefore, in cases where the circumstances are such as to raise doubts in that regard, the Court must verify whether an apparently neutral measure interfering with a political party’s activities in effect seeks to penalise it on account of the views or the policies that it promotes. [...] Indeed, Article 18 of the Convention

29 Cf. European Court of Human Rights, *Merabishvili v. Georgia* (2017), para. 317 (regarding interpretation of art. 18 ECHR). See also European Court of Human Rights, *Rashad Hasanov v. Azerbaijan* (2018), para. 118 and *Rasul Jafarov v. Azerbaijan*, (2016), para. 162.

30 European Court of Human Rights, *Ilgar Mammadov v. Azerbaijan* (2014), para. 6-11.

31 European Court of Human Rights, *Ilgar Mammadov v. Azerbaijan* (2014), para. 143.

32 European Court of Human Rights, *Rasul Jafarov v. Azerbaijan* (2016), para. 6, 119, 125 and 133.

33 European Court of Human Rights, *Rashad Hasanov and Others v. Azerbaijan* (2018), paras. 125-127.

provides that any restrictions permitted to the rights enshrined in it must not be applied for a purpose other than those for which they have been prescribed ...
.”³⁴

This reasoning should apply to NGOs as well to political parties.

26. *Necessity in a democratic society*: The restriction must be necessary and proportional. Public authorities need to be able to demonstrate that the measure can truly be effective to reach the legitimate aim, responds to a pressing social need, and is necessary in addition to already existing measures; and that there is a proportionate relationship between the effects of the measure concerned and the rights affected.³⁵ As stated by the European Court concerning freedom of expression, “[t]he nature and severity of the sanctions imposed are... factors to be taken into account when assessing the proportionality of the interference,”³⁶ and the chilling effect of a provision is relevant to its proportionality.³⁷ Even the imposition of a mild administrative sanction can “have an undesirable chilling effect on public speech.”³⁸ The same can be said in regard to freedom of association. In *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (2009), the ECtHR reiterated that “the exceptions to freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a ‘pressing social need’; thus, the notion ‘necessary’ does not have the flexibility of such expressions as ‘useful’ or ‘desirable’.”³⁹

3.4 The right to property

27. In *Markcx v. Belgium*, the European Court recognised that the right to dispose of one’s property is an element of the right to property, as guaranteed by Article 1 of Protocol No. 1 to the ECHR.⁴⁰ An interference with one’s right to property is only permissible if it is (i) prescribed by law; (ii) in the general interest of the community and the requirements of the protection of the individual’s fundamental rights; and (iii) proportionate.
28. *Legality*: Article 1 of Protocol No. 1 states that any interference should be “subject to the conditions provided for by law,” which includes the requirement of

34 European Court of Human Rights, *The Case of United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria* (2005), para. 83.

35 Venice Commission, *Joint Opinion on the Provisions of Hungary’s So-Called “Stop Soros” Draft Legislative Package which directly affect NGOs*, adopted 22-23 June 2018, para. 53.

36 European Court of Human Rights, *Baka v. Hungary* (2016), para. 160. See also: European Court of Human Rights, *Guja v. Moldova* (2008) para. 95, and European Court of Human Rights, *Morice v. France* (2015), para. 127. See also European Court of Human Rights, *Cumhuriyet Vakfı and Others v. Turkey* (2013), paras. 62 and 63.

37 European Court of Human Rights, *Lombardo and Others v. Malta* (2007), para. 61. See also: In *Lewandowska-Malec v Poland* (2012), para. 70 and *Gra Stiftung Gegen Rassismus und Antisemitismus v. Switzerland* (2018), paras. 77-78.

38 European Court of Human Rights, *Tatar and Faber* (2012), para. 41.

39 European Court of Human Rights, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (2009), para. 67.

40 European Court of Human Rights, *Markcx v. Belgium* (1979), para. 63.

foreseeability.⁴¹ It also refers to the “quality of the law, requiring it to be compatible with the rule of law.”⁴²

29. *General interest of the community*: Measures that do not pursue legitimate aims do not promote the general interest of the community.⁴³
30. *Lack of proportionality*: There must be a reasonable relationship between the means employed and the aim sought to be realized by any measures applied, including those designed to control the use of the property at issue.⁴⁴ This requires a fair balance between the general interest of the community and fundamental rights.⁴⁵

4. Legal analysis

31. Section 253, by imposing a 25% tax, will reduce the amount of funds that NGOs working on migration issues in Hungary will be able to access. By imposing costs and administrative burdens on donors, the tax likely will discourage donors from giving funds to groups engaged in migration supporting activities; and it likely will discourage NGOs from working on migration issues at all by requiring them to forfeit to the government 25% of all funds they would otherwise receive even if work on migration were only a small percentage of their overall effort. Section 253 thus interferes with the rights to freedom of association of persons who work for, or are members of, NGOs that are affected by the tax, the NGOs themselves, and also donors who seek to provide funds to these organizations.
32. To the extent that the tax will discourage the carrying out of “media campaigns,” “propaganda activities that portray immigration in a positive light,” other expressive activities, and funding for all such expressive activities, the tax also interferes with the right to freedom of expression of persons working for and with NGOs and donors.
33. Such interference with the rights to freedom of association and expression can be justifiable only if they are in accordance with the law, pursue a legitimate aim, and are necessary and proportionate in a democratic society. As set forth in paragraphs 34-45, Section 253 fails on all three grounds.

41 European Court of Human Rights, *Beyeler vs Italy* (2000), para. 109. See also: *Hentrich v. France* (1995), para. 42.

42 European Court of Human Rights, *James and Others v. United Kingdom* (1986), para. 67. See also: *Smirnov v. Russia* (2007), paras. 55- 56.

43 European Court of Human Rights, *Beyeler v. Italy* (2000), para. 111.

44 European Court of Human Rights, *Zelenchuk and Tsytsyura v. Ukraine* (2018), para. 101; European Court of Human Rights, *Hutten-Czapska v. Poland* (2006), para. 167.

45 See, amongst other cases: European Court of Human Rights, *Hutten-Czapska v. Poland* (2006), para. 167; *Former King of Greece and Others* (2000), para. 89; *Pressos Compania Naviera S.A. and Others v. Belgium* (1995), para. 38; *Sporrong and Lönnroth v. Sweden* (1982).

4.1 The restrictions imposed by Section 253 are not prescribed by law

34. As noted in paragraph 19, limitations on the rights of freedom of association and expression, to be prescribed by law, must be foreseeable. Section 253 lacks foreseeability because it is not clear when an organization becomes, or ceases to be, one that “carries out activities to promote migration” such that all funding received by the organization starts to be taxed at 25%, pursuant to Section 253(1).
35. Section 253 also contains a number of vague terms without precise definition in Hungarian law, increasing the law’s uncertainty. For example, the scope of activities that could be interpreted to “indirectly” promote immigration is vast and impossible to foresee.
36. Section 253 in relevant part defines immigration supporting activity as “any programme, action or activity that is directly or indirectly aimed at promoting immigration... and is realised as part of... (a) carrying out media campaigns... (c) building and operating networks,”⁴⁶ but does not specify what a network is (how many people, what relations between them or what degree of organization would be necessary for a group to become a network), what constitutes the “building” of a network, or how far efforts to “build” a network must go to be taxable (for example, do initial consultations about the possibility of creating a network already fall under the scope of the law?). It is also unclear at what point regular communications of an organization become a “campaign”, or what differentiates a campaign from the organization informing the public about its activities through its regular channels (social media, website, etc.).
37. “For domestic law to meet [the requirements established by the European Convention], it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention.”⁴⁷ The examples above make clear that Section 253 does not afford such protection and could be applied in an arbitrary manner.

4.2 Section 253 pursues the illegitimate aim of dismantling civil society

38. Section 253 pursues predominantly illegitimate aims, including the dismantling of civil society. The law’s Legislative Intent, its text, and the circumstances surrounding its adoption demonstrate its illegitimate purpose, and fall outside the scope of any of the legitimate aims exhaustively listed by Articles 10 and 11 of the European Convention on Human Rights.⁴⁸
39. The “Legislative Intent” justifies imposition of the tax on “organizations that support immigration” on the ground that they “lead to an increase of immigration.”⁴⁹ While

⁴⁶ Section 253 (2).

⁴⁷ European Court of Human Rights, *Koretskyy v. Ukraine* (2008), paras. 46-48.

⁴⁸ Even if the impugned legislation did pursue its professed aim (a fair distribution of public burdens) it would not be in line with the European Convention in Human Rights, as public burden sharing is not among the legitimate aims exhaustively listed by Articles 10 and 11 of the Convention.

⁴⁹ Legislative Intent, p. 1.

senior Government officials have repeatedly accused George Soros and “Soros organizations” of contributing to this outcome, they have offered no evidence to substantiate the claim. The Government bears the burden of establishing that any restrictions pursue a legitimate aim.⁵⁰

40. Moreover, the totality of the circumstances suggest that a predominant aim of section 253 is to dismantle civil society.
41. First, under Section 253, even if a funder provided financial support to a NGO for activities other than promoting migration, the entirety of that financial support could be subject to the 25% tax if the NGO carried out any activity, however small, to promote migration. The clear impact – and thus, it may be assumed, the likely aim – will be to deter NGOs from working on migration, and to deter donors from funding NGOs that work on migration. That deterrent, or chilling, impact is exacerbated by the lack of clarity of the provisions (see paragraphs 35-36).⁵¹
42. Second, the law’s adoption caps a multi-year series of government attacks against free media, the courts, and civil society organizations. As part of this broader assault, government officials have indicated that they will target civil society organizations. On 10 February 2017, Viktor Orbán stressed in his annual state of the nation speech that “we will also need to take up the struggle against international organizations’ increasingly strong activists.”⁵² On 5 July 2018, Zoltán Kovács, Spokesperson of the Government, stated in an interview on the national television station (M1) that “the activities of NGOs have to be kept in hand”.⁵³ On 16 July 2018, specifically in regard to the tax provision, Csaba Hende, President of Parliament’s Committee for Legislation, stated that: “steps have to be taken with the utmost rigour against the organizations supporting migration. This is facilitated by the Stop Soros law already in effect, the law on the Transparency of Organizations Supported from Abroad, and this will be facilitated by the special tax on migration as well.”⁵⁴ The Hungarian government has waged a virulent official campaign against George Soros, including

⁵⁰ See para. 18, supra.

⁵¹ European Court of Human Rights, *Cumhuriyet Vakfı and Others v. Turkey* (2013), paras. 62 and 63.

⁵² Victor Orbán. State of the Nation Speech, 10 February 2017. Available at: <http://www.kormany.hu/hu/a-miniszterelnok/beszede-publikaciok-interjuk/Orban-viktor-19-evertelko-beszede> (in Hungarian) and <http://www.kormany.hu/en/government-spokesperson/news/cooperation-with-germany-could-advance-to-a-new-level> (in English)

⁵³ Zoltán Kovács, Interview on the national television (M1), 5 July 2018. In: Office of the Spokesperson. Humánusabb, ha az EU helyben nyújt segítséget, 5 July 2018. Available at: <http://www.kormany.hu/hu/a-kormanysozivo/hirek/humanusabb-ha-az-eu-helyben-nyujt-segitseget> (in Hungarian) and <http://www.kormany.hu/en/government-spokesperson/news/cooperation-with-germany-could-advance-to-a-new-level> (in English).

⁵⁴ Csaba Hende, President of Parliament’s Committee for Legislation, Contribution to the Hungarian Parliament, 16 July 2018, available at: http://www.parlament.hu/felszolasok-keresese?p_auth=b7Y8KVvA&p_p_id=pairproxy_WAR_pairproxyporlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&pairproxy_WAR_pairproxyporlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D41%26p_uln%3D18%26p_felsz%3D26%26p_szoveg%3Dbev%3%A1ndorl%3%A1si%2520and%2520k%3BCl%3CB6nad%3CB3%26p_felszig%3D26

by prominently displaying billboards across Hungary with messages that attack him, and issuing statements against him and Open Society Foundations (OSF). The fact that government officials refer to the Act as the “Soros Tax” lends further weight to the inference that a predominant aim of the law is to impede the operation of NGOs that receive any funds from George Soros’s foundation.

43. Third, the tax law, which was part of the original “Stop Soros Package” (proposed in February 2018), should be viewed in light of other provisions of the new “Stop Soros Package” (which was adopted on 20 June and entered into force on 1 July 2018), in particular, Section 353/A of the Criminal Code. The General Reasoning for Section 353/A expressly states that its aim is “to prevent Hungary from becoming a migrant country,” an aim that clearly breaches European values of democracy and pluralism that are fundamental to the Council of Europe.

4.3 Section 253 imposes restrictions not necessary in a democratic society

44. Section 253 is unnecessary because public authorities have not demonstrated that it responds to a pressing social need, that it can be effective in responding to that need, or that its impact on fundamental freedoms is proportionate to its impact in responding to the need.
45. While the Government has not shown that the tax would substantially advance a legitimate objective, the tax clearly would have a significantly deleterious impact on the exercise of the rights to freedom of association and expression of NGOs that work on migration, donors that fund such work, and the people who are associated with them – by cutting their funds, and thus their capacity to accomplish their mission, by at least 25%. It should be noted that only a handful of NGOs in Hungary currently work on migration matters, and those that do have relatively small budgets.

4.4 Right to Property

46. For the reasons set forth in the preceding section, Section 253 also fails to comply with the three-part test that restrictions on the right to property must meet in order to be justifiable.

4.5 Discrimination

47. The tax provision is also discriminatory in regard to NGOs working on immigration without offering an objective and reasonable justification.⁵⁵ Such NGOs are treated differently from two different categories of NGOs: (i) those working in other fields, and (ii) those that do not depend on donations. This is so even if – strictly for the sake of the argument – we examine the legislation in light of the professed aim of the law (“to contribute to the additional expenditures of the public finances caused by immigration”⁵⁶). As to the first category of NGOs treated differently without justification, the work of an organization which advocates to make public buildings

⁵⁵ See, *mutatis mutandis*, European Court of Human Rights, *Willis v UK*, para 48.

⁵⁶ Legislative Intent to Act XLI of 2018.

accessible to persons with disabilities will not be subject to a 25% tax or to further administrative requirements, although making buildings accessible inevitably requires expenditures in public budgets. As to the second category, if the justification for the tax is that increased immigration has increased the state budget, then there is no objective and reasonable justification for singling out for special tax burdens activities that are supported by donations; rather, the tax should apply equally, whether activities are financed by an organization's own resources or from outside sources. Hence, the tax law is a violation of Article 14 read in conjunction with Articles 10 and 11.

4.6 Right to an effective remedy

48. It is well established that “the interpretation and application of provisions concerning associations, including those that serve to restrict their operations, should be open to review by a court or other independent and impartial body.”⁵⁷ As stated in the OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, “Associations ... and all persons seeking to exercise their right to freedom of association shall have access to effective remedies in order to challenge or seek review of decisions affecting the exercise of their rights.”⁵⁸
49. In contravention of these well-settled principles, Section 253 is not reviewable for its compatibility with Hungary's Fundamental Law by any Hungarian Court. The Constitutional Court is the only court in Hungary that has the authority to review facial challenges to the constitutionality of laws. However, the tax law cannot be challenged on grounds that it violates rights to freedom of association, expression, or property before the Constitutional Court because Articles 37(4) and 24(2) of the Fundamental law (read together) bar the Constitutional Court from reviewing a challenge to the constitutionality of tax provisions unless the challenge is related to rights enumerated in Article 37(4), viz, “inherent rights to life and human dignity, the right to the protection of personal data, the right to freedom of thought, freedom of conscience and freedom of religion, or the rights in connection with Hungarian citizenship.”
50. The Constitutional Court may review the compatibility of tax provisions with international treaties (like the European Convention) with respect to other rights beyond those stated under Article 37(4) of the Fundamental Law, but such a claim cannot be brought by civil society organizations.⁵⁹

⁵⁷ OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, para. 22.

⁵⁸ *Id.*, Guideline 11.

⁵⁹ Article 24(2)(f) of the Hungarian Fundamental Law read in conjunction with Article 32(2) of the Constitutional Court Act (Act CLI of 2011).

5. Conclusion

51. For the above reasons, the Open Society Justice Initiative and the Hungarian Helsinki Committee respectfully submit that the Hungarian Government should be urged to repeal Section 253.