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(VENICE COMMISSION)

HUNGARY

OPINION

**ON ACT LXXXVIII OF 2023 ON THE PROTECTION OF
NATIONAL SOVEREIGNTY**

**Adopted by the Venice Commission
at its 138th Plenary Session
(Venice, 15-16 March 2024)**

on the basis of comments by

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I. Introduction

1. By letter of 11 December 2023, the then President of the Monitoring Committee of the Council of Europe's Parliamentary Assembly (PACE), Mr Piero Fassino, requested an Opinion of the Venice Commission on Act LXXXVIII of 2023 of Hungary on the Protection of National Sovereignty ([CDL-REF\(2024\)006](#), hereafter referred to as "the Act").
2. Mr Richard Barrett, Ms Veronika Bílková, Mr Michael Frendo, Mr Oliver Kask and Ms Katharina Pabel acted as rapporteurs for this opinion.
3. On 15-16 February 2024, a delegation of the Commission composed of Mr Richard Barrett, Ms Veronika Bílková and Mr Michael Frendo, accompanied by Mr Michael Janssen from the Secretariat of the Venice Commission, travelled to Budapest and had meetings with representatives of the governing and opposition parties, the Committee on National Security of the Hungarian Parliament, the Hungarian Government, the Sovereignty Protection Office, the National Election Office and the State Audit Office of Hungary, and with representatives of several non-governmental organisations. The Commission is grateful to the Hungarian authorities for the excellent organisation of this visit.
4. This Opinion was prepared in reliance on the English translation of the Act. The translation may not accurately reflect the original version on all points.
5. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 15-16 February 2024. The draft opinion was examined at the joint meeting of the Sub-Commissions on Democratic Institutions and Federal and Regional State on 14 March 2024. Following an exchange of views with Mr Balázs Orbán, Political Director of the Prime Minister of Hungary, it was adopted by the Venice Commission at its 138th Plenary Session (Venice, 15-16 March 2024).

II. Background and scope of the Opinion

6. On 21 November 2023, an individual MP¹ submitted the Bill on the Protection of National Sovereignty to the Hungarian Parliament (including a "justification").² On 12 December 2023, Parliament passed the *Act LXXXVIII on the Protection of National Sovereignty*, by 141 votes and 50 against.³ On 21 December 2023, the President of Hungary ordered the publication of the Act.⁴ By virtue of its section 21, the Act – with the exception of one provision – entered into force one day after its promulgation,⁵ i.e. on 22 December 2023.
7. The Act provides for the establishment of a new State body, the Sovereignty Protection Office, which is endowed with analytical, evaluative, proposal-making as well as investigative competences. The Act regulates the legal status, composition and activities of the Office. It also amends several other legal acts, *inter alia* the *Act XXXVI of 2013 on Election Procedure*⁶ and the *Criminal Code*.⁷ The amendment to the *Act XXXVI of 2013 on Election Procedure* provides for a new prohibition for candidates and nominating organisations in elections to use foreign support

¹ Mr Máté Kocsis from the ruling Fidesz party.

² For an unofficial translation of the Bill including the justification, see *Hungarian Helsinki Committee*, online at <https://helsinki.hu/en/wp-content/uploads/sites/2/2023/11/Defence-of-Sovereignty-bill-T06222-EN.pdf>.

³ The governing parties Fidesz–KDNP hold 135 out of the 199 seats in Parliament.

⁴ President Novák orders publication of National Sovereignty Protection Act, *About Hungary*, 21 December 2023, online at <https://abouthungary.hu/news-in-brief/president-novak-orders-publication-of-national-sovereignty-protection-act>

⁵ See the Official Gazette Magyar Közlöny 185, 21.12.2023, pp. 10 429-10 438.

⁶ An English translation of the *Act on Election Procedure* (as in force on 5 January 2024) is available at <https://njt.hu/jogszabaly/en/2013-36-00-00>.

⁷ An English translation of the *Criminal Code* (as in force on 1 January 2023) is available at <https://njt.hu/jogszabaly/en/2012-100-00-00>.

and an obligation to declare that they do not use such support. The amendment to the *Criminal Code* consists in the introduction of a new criminal offence, “Illegal influence of the will of voters” (article 350/A of the *Criminal Code*), and corresponding revisions in the provisions on penalties (article 52 of the *Criminal Code*) and on definitions (article 459(1) of the *Criminal Code*).

8. This Opinion focuses on the main elements of the Act, in particular the establishment and activities of the Office and the prohibition of foreign funding in electoral campaigns through amendments to the *Act on Election Procedure* and the *Criminal Code*. A number of additional elements and amendments to other laws will not be commented on in detail, which should not be interpreted as their approval by the Venice Commission.

9. In parallel with the Act, on 12 December 2023, Parliament adopted the 12th Amendment to the *Fundamental Law* (Constitution) of Hungary, adding in Article R(4), which prescribes the obligation for every organ of the State to protect the constitutional identity and Christian culture of Hungary, that “*in order to protect constitutional identity, an independent organ established by a cardinal Act shall operate*”.⁸ The addition to Article R(4) is considered by the authorities to be the constitutional-level foundation of the Sovereignty Protection Office.

10. The (draft) Act stirred criticism, in Hungary and abroad, both at the time of its consideration in the Parliament and after its adoption.

11. On 27 November 2023, the Council of Europe Commissioner for Human Rights issued a public statement, in which she noted that “*the proposal to establish an ‘Office for the Defence of Sovereignty’ in Hungary, that would be vested with broad powers to investigate any organisation or person suspected of serving foreign interests or threatening national sovereignty, poses a significant risk to human rights and should be abandoned*”.⁹ She also noted that “*the draft package of laws submitted to Parliament /.../ is so vague that the invasive scrutiny of the proposed Office could be weaponised against anybody who may be considered an adversary*”.¹⁰

12. At the same time, the co-rapporteurs for the monitoring of Hungary by PACE noted that the Bill “*contains provisions with potentially very far-reaching consequences on the functioning of democratic institutions, human rights and the rule of law*”¹¹ and called upon the Hungarian authorities to submit the bill to the Venice Commission for a review of its compatibility with European standards and to postpone the consideration of the Bill until the opinion has been issued and the Bill widely consulted with all relevant stakeholders.

13. In a joint statement, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the UN Special Rapporteur on the situation of human rights defenders voiced similar concerns about negative implications of the Bill on the “promotion and protection of fundamental rights in Hungary”.¹² The Media Freedom Rapid Response (MFRR) alliance bringing together several civil society organisations focused on media warned

⁸ Taken together, the constitutional amendment and the Act are often referred to as the ‘*national sovereignty protection*’ package.

⁹ Hungary: The proposal for a “defence of national sovereignty” package should be abandoned, *Council of Europe*, 27 November 2023, online a <https://www.coe.int/en/web/commissioner/-/hungary-the-proposal-for-a-defence-of-national-sovereignty-package-should-be-abandoned>

¹⁰ Hungary: The proposal for a “defence of national sovereignty” package should be abandoned, *Council of Europe*, 27 November 2023, online a <https://www.coe.int/en/web/commissioner/-/hungary-the-proposal-for-a-defence-of-national-sovereignty-package-should-be-abandoned>

¹¹ Hungary should submit the bill on the ‘defence of national sovereignty’ to the Venice Commission, PACE monitors say, *PACE*, 27 November 2023, online at <https://pace.coe.int/en/news/9289/hungary-should-submit-the-bill-on-the-defence-of-national-sovereignty-to-the-venice-commission-pace-monitors-say>

¹² Ref.: OL HUN 1/2023, *Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders*, 8 December 2023, p. 6. They also noted that “*this legislation seems to be part of a wider trend of legislative actions closing civic space and hampering democratic debate*”.

that the Bill would open the door to State “*pressure on those media that receive foreign funding and produce journalism critical of the government*”.¹³ Civil society organisations from Hungary drafted an online petition against the Act which has been, by 4 February 2024, signed by several dozens of organisations and over 15,000 individual citizens.¹⁴ Furthermore, the adoption of the Act on 12 December 2023 was followed by various critical statements by representatives of media and civil society organisations.¹⁵

14. On 18 January 2024, the European Parliament adopted a resolution on the situation in Hungary and frozen EU funds, in which it noted, *inter alia*, that “*the Hungarian National Assembly adopted a ‘national sovereignty protection’ package*” which “*provides the executive with even more opportunities to silence and stigmatise independent voices and opponents*”,¹⁶ and stressed that it expected prompt action in this respect from the EU bodies.

15. On 7 February 2024, the European Commission decided to open an infringement procedure by sending a letter of formal notice to Hungary for violations of EU law. It considered that the Act violated several provisions of primary and secondary EU law, among others the principle of democracy and the electoral rights of EU citizens, several fundamental rights enshrined in the EU Charter of Fundamental Rights, the data protection law and several rules applicable to the internal market.¹⁷

III. National and international legal framework

A. National Regulation

16. The *Fundamental Law of Hungary*,¹⁸ adopted in 2011 and amended 12 times since then, contains a comprehensive catalogue of fundamental human rights. Article VIII recognises “*the right to establish or join organisations*” (para 2). Article IX stipulates that “*everyone shall have the right to freedom of expression*” (para 1) and it also indicates that “*Hungary shall recognise and protect the freedom and diversity of the press and shall ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion*” (para 2). The right to privacy and to the protection of personal data is enshrined in Article VI (paras 1 and 3). By means of Article XXIII, “*every adult Hungarian citizen shall have the right to vote and to be voted for in elections of Members of the National Assembly, of local government representatives and mayors and of Members of the European Parliament*” (para 1).

¹³ Hungary: Draft Sovereignty Protection Act threatens independent media, *Article 19*, 4 December 2023, online at <https://www.article19.org/resources/hungary-draft-sovereignty-protection-act-threatens-independent-media/>

¹⁴ A demokrácia nem veszélyezteti Magyarország szuverenitását!, *Szabad*, online at <https://szabad.ahang.hu/petitions/a-demokracia-nem-veszelyezteti-magyarorszag-szuverenitasat>. The petition notes that “*the law is deliberately vague, so the new office will be able to point out that any public expression serves foreign interests and threatens Hungary sovereignty*”.

¹⁵ See, for instance, <https://telex.hu/english/2023/12/13/the-sovereignty-protection-authority-is-harmful-and-against-the-rule-of-law-yet-it-cannot-intimidate-independent-media>; <https://cpi.org/2023/12/hungarys-russian-style-national-sovereignty-bill-threatens-independent-media/>; <https://cz.boell.org/en/2023/12/18/hungarys-sovereignty-protection-act-eu>; <https://www.article19.org/resources/hungary-defence-of-national-sovereignty-act-must-be-repealed/>; <https://www.perspectives-budapest.com/post/hungary-s-defence-of-sovereignty-act-is-catch-all-wilfully-and-intentionally-left-very-vague-ma>; <https://helsinki.hu/en/sovereignty-protection-act-in-breach-of-eu-law/>.

¹⁶ European Parliament resolution of 18 January 2024 on the situation in Hungary and frozen EU funds (2024/2512(RSP)), para E of the preamble, online at <https://www.europarl.europa.eu/news/en/press-room/20240112IPR16780/the-hungarian-government-threatens-eu-values-institutions-and-funds-meps-say>.

¹⁷ European Commission, Infringement Decisions, 7 February 2024, Key decisions online at https://ec.europa.eu/commission/presscorner/detail/en/inf_24_301. Hungary has two months to reply to the letter of formal notice. If it does not address the grievances identified by the Commission, the Commission may decide to send a reasoned opinion as the next step in the infringement procedure.

¹⁸ An English translation of the Fundamental Law (as in force on 1 January 2024) is available at <https://njt.hu/jogszabaly/en/2011-4301-02-00>.

17. The relevance of the constitutional identity and Christian culture for Hungary was already highlighted in the Preamble (the National Avowal) of the new Constitution (2011), which declares “*that one thousand years ago our first king, Saint Stephen, set the Hungarian State on solid foundations, and made our country a part of Christian Europe*”. In 2018, by the Seventh amendment to the *Fundamental Law*, Article R paragraph 4 was introduced, stating that “*the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State*”, thereby transforming the preambular formula into a binding rule.¹⁹ The Twelfth Amendment, adopted on 12 December 2023, added the following provision to this article: “*In order to protect constitutional identity, an independent organ established by a cardinal Act shall operate*”. The Act, adopted on the same day, explicitly refers to this provision, denoting the Sovereignty Protection Office as a body established under Article R(4).

18. The Act directly relates to the subject matter of several ordinary laws, in the first place those amended by its provisions, *inter alia*, the *Act on Election Procedure* and the *Criminal Code*. It is also closely related to laws adopted previously to ensure transparency in the public area and/or limit foreign influence and prohibit or regulate certain forms of foreign funding. The most relevant among them are the *Act XXXIII of 1989 on the Operation and Financial Management of Political Parties*²⁰ and the *Act LXXXVII of 2013 on the Transparency of Campaign Costs related to the Election of the Members of the National Assembly*.²¹ In addition, the *Act No. 76/2017 on the Transparency of Organisations receiving support from abroad*²² introduced a new category of organisations supported from abroad and imposed certain additional obligations on such organisations. However, on 22 April 2021 the Government repealed the law, making the State Audit Office responsible for reporting annually on associations and foundations whose balance sheets exceeded 20 million HUF (55,200 €) a year, apart from national, religious and sports organisations.

B. International standards

19. Hungary is a State party to all the major international human rights instruments, including the 1966 *International Covenant on Civil and Political Rights* (ICCPR),²³ and the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR).²⁴ By virtue of Article Q of the Constitution “*i/n order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law*” (para 2). Since the Hungarian legal order is predominantly dualist in nature, international treaties are not directly applicable but “*shall become part of the Hungarian legal system by promulgation in legal regulations*” (Article Q(3) of the *Fundamental Law*).

20. The ICCPR guarantees the right to freedom of expression in its Article 19, the right to freedom of association in its Article 22, the right to private life in its Article 17 and the right to vote and be elected in its Article 25. The ECHR guarantees these rights in its Articles 8 (right to private and

¹⁹ Venice Commission, Opinion on the constitutional amendments adopted by the Hungarian parliament in December 2020, [CDL-AD\(2021\)029](#), paras 45-46.

²⁰ An English translation of the *Act on the Operation and Financial Management of Political Parties* (as in force on 1 August 2022) is available at <https://njt.hu/jogszabaly/en/1989-33-00-00>.

²¹ An English translation of the *Act on the Transparency of Campaign Costs related to the Election of the Members of the National Assembly* is available at <https://www.valasztas.hu/web/national-election-office/act-lxxxvii-of-2013-on-the-transparency-of-campaign-costs-related-to-the-election-of-the-members-of-the-parliament>.

²² The Venice Commission assessed the draft of this Act and criticised both the procedural and substantive aspects of the Act, see Venice Commission, [CDL-AD\(2017\)015](#), Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad. In June 2020 the European Court of Justice (ECJ) held that the legislation on the transparency of foreign-funded civil society organisations was incompatible with EU law, since the obligations amounted to a restriction of the free movement of capital, while its measures created a climate of distrust with regard to these associations and foundations. On 18 February 2021 the European Commission gave Hungary two months to amend its law on foreign-funded civil organisations, failing which it would incur heavy fines.

²³ Online at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

²⁴ Online at <https://www.echr.coe.int/european-convention-on-human-rights>.

family life), 10 (right to freedom of expression), 11 (right to freedom of association) and Article 3 of Protocol No. 1 (right to free elections).

21. All the rights identified above can be restricted under the three-part test of legality (the restriction is prescribed by law), legitimacy (the restriction pursues a legitimate aim) and necessity (the restriction is necessary in a democratic society, i.e., it corresponds to a pressing social need, and proportionate to the aim).

22. Restrictions that may be imposed on political parties and/or other actors within the electoral process have been dealt with in *Recommendation Rec(2003)4* of 8 April 2003 of the Council of Europe Committee of Ministers to Member States *on common rules against corruption in the funding of political parties and electoral campaign*²⁵ and *Recommendation CM/Rec(2007)14* of the Committee of Ministers to Member States *on the legal status of non-governmental organisations in Europe*,²⁶ as well as in several documents of the Venice Commission, especially the 2006 *Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources*,²⁷ the 2006 *Report on the Participation of Political Parties in Elections*,²⁸ the 2009 *Code of Good Practice in the Field of Political Parties*,²⁹ the 2019 *Report on funding of associations*,³⁰ and the 2020 *Joint Guidelines on Political Party Regulation*.³¹

23. On 12 December 2023, the European Commission put forward the Defence of Democracy package. The package includes EC Recommendation 2023/2829 *on inclusive and resilient electoral processes in the Union and enhancing the European nature and efficient conduct of the elections to the European Parliament* as well as a legislative proposal to set up common transparency and accountability standards for interest representation activities seeking to influence the decision-making process in the Union that is carried out on behalf of third countries. The European Union adopted new rules on transparency and targeting of political advertising in order to limit information manipulation and foreign interference in elections and to provide rules for political advertising ensuring the respect of the right to privacy and the freedom of opinion and the freedom of speech.³²

IV. Analysis of the Act on the Protection of National Sovereignty

A. Preliminary remarks

1. Legislative process and consultation

24. In line with its constant practice the Venice Commission does not only comment on the substance of the legislative changes but also on the legislative process. In this respect, it notes that the Act was adopted in the final reading within three weeks from its submission to Parliament. There was thus only limited time reserved for parliamentary discussions over the Bill as well as for any public debate.

²⁵ Online at <https://rm.coe.int/16806cc1f1>.

²⁶ Online at <https://rm.coe.int/recommendation-of-the-committee-of-ministers-to-member-states-on-the-1680a1f502>.

²⁷ Venice Commission, [CDL-AD\(2006\)014](#), Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources (amicus curiae opinion for the ECtHR).

²⁸ Venice Commission, [CDL-AD\(2006\)025](#), Report on the Participation of Political Parties in Elections.

²⁹ Venice Commission, [CDL-AD\(2009\)021](#), Code of Good Practice in the Field of Political Parties.

³⁰ Venice Commission, [CDL-AD\(2019\)002](#), Report on funding of associations.

³¹ Venice Commission and OSCE/ODIHR, [CDL-AD\(2020\)032](#), Joint Guidelines on Political Party Regulation, Second Edition.

³² The Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising (COM(2021)0731) was adopted by the European Parliament and the Council on 27 February and 11 March, respectively. See <https://www.europarl.europa.eu/news/en/press-room/20240223IPR18071/parliament-adopts-new-transparency-rules-for-political-advertising>; EU introduces new rules on transparency and targeting of political advertising – Consilium (europa.eu).

25. In its checklist related to the *Relationship between the Parliamentary Majority and the Opposition in a Democracy*, the Venice Commission stressed that “*complex and controversial bills would normally require particularly long advance notice, and should be preceded by pre-drafts, on which some kind of (internet-) consultation takes place. The public should have a meaningful opportunity to provide input [...]. Allocation of additional time for public consultations increases the ability of the opposition to influence the content of the legislative proposals by the Government or the majority. The majority should not manipulate the procedure in order to avoid such public consultations*”.³³

26. The Venice Commission is not persuaded that the procedure of the adoption of the Act, which undoubtedly qualifies as a complex, comprehensive and controversial bill, corresponded to these standards. While the rapporteurs were informed that the ordinary – not accelerated – legislative procedure was followed, they took note of criticism voiced by some representatives of opposition parties and of civil society as to the rapid and non-inclusive process. Likewise, the European Parliament in its resolution of 18 January 2024 noted that “*the Hungarian National Assembly adopted a ‘national sovereignty protection’ package without proper parliamentary scrutiny or public consultation*”.³⁴ The Venice Commission is concerned that this human-rights sensitive Act was adopted in a rushed way. As it was introduced by an individual member of Parliament, the scrutiny foreseen for governmental proposals did not take place. Furthermore, no adequate consultation of the opposition and civil society was allowed for.³⁵ This is all the more unfortunate as the plan for this Act was announced by the leader of Fidesz’ parliamentary group already in September 2023 and there was thus certainly time which could have been used for meaningful consultations before the adoption of the Act.

2. Rationale

27. The preamble at the beginning of the Act and the justification accompanying the Bill³⁶ present a concern that the nation’s sovereignty is under attack by foreign organisations and individuals through funding activities. This concern about foreign funding or other influence is a valid issue for national constitutional authorities, to be addressed through political debate and, when necessary, by law. In a recent Opinion relating to Poland, the Venice Commission has recognised in principle the legitimacy of the country’s efforts aimed at countering undue foreign influence – but it warned that flawed legislation might open the door for political misuse, have an influence on the electoral process and lead to the violation of human rights.³⁷

28. The preamble of the Act recalls that existing provisions in Hungary prohibit political parties from accepting foreign funding. It further claims that according to the national security investigation, the opposition circumvented this rule in spring 2022 in the context of the parliamentary elections by using funds from abroad through their civil society organisations and companies engaged in political activities (during the discussions in Budapest, however, the rapporteurs were informed that the investigation of these cases was still ongoing). The preamble

³³ Venice Commission, [CDL-AD\(2019\)015](#), Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, para 74.

³⁴ European Parliament resolution of 18 January 2024 on the situation in Hungary and frozen EU funds (2024/2512(RSP)), para E of the preamble, online at <https://www.europarl.europa.eu/news/en/press-room/20240112IPR16780/the-hungarian-government-threatens-eu-values-institutions-and-funds-meps-say>.

³⁵ This recurrent practice has already been criticised in the past, see Venice Commission, [CDL-AD\(2013\)012](#), Opinion on the Fourth Amendment to the Fundamental Law of Hungary, paragraph 131.

³⁶ On the legal relevance of the preamble and the justification, see Article 28 of the Fundamental Law: “In the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for, or for amending, the law.”

³⁷ Venice Commission, [CDL-AD\(2023\)037](#), Urgent Opinion on the Law on the State Commission to Investigate Russian Influence on Internal Security in the Republic of Poland between 2007 and 2022 and on the draft law amending that Law.

makes it clear that the Act is aimed at preventing similar cases, by tightening the applicable rules and increasing transparency.

29. The Act introduces two main changes to the legal order of Hungary. First, it establishes a new Sovereignty Protection Office. Second, it amends electoral, criminal and further relevant legislation in order to prohibit foreign funding of electoral campaigns. While foreign influence on electoral processes is cited in the preamble and justification, the scope of the Act is much wider than the electoral context as it covers “state and social decision-making processes” where justification based on electoral integrity will not apply. Thus, the powers of the new body extend beyond electoral campaigns to cover political activity in a broader sense and campaigns for social change. The reason and need for such a broad approach are not explained in the preamble and justification and have not been made clear to the rapporteurs during the meetings in Budapest.

B. The Sovereignty Protection Office

30. The new Sovereignty Protection Office has been established by the Act on the basis of amended Article R(4) of the *Fundamental Law*, which prescribes the establishment of an independent organ to protect “constitutional identity”. The Office started operating at the beginning of 2024 and its first President was appointed by the President of Hungary on 10 January 2024. The Office has its seat in Budapest.

1. The mandate of the Office

31. Section 1(1) of the Act states that the Office “*is established by Article R(4) of the Fundamental Law in the interest of protecting constitutional identity*”. However, the Venice Commission notes that “*constitutional identity*” is invoked in the Act in only one place, the title of section 1(1). National sovereignty, on the contrary, is referred to in almost 40 instances. Neither national sovereignty nor constitutional identity are defined in the Act.

32. In a decision of 2016³⁸ relating to the relationship between Hungarian and EU law, the Constitutional Court of Hungary distinguished between, on the one hand, *sovereignty control*, and, on the other hand, *identity control*. It noted that whereas the former concept relates to “*the principle of independent and sovereign statehood and indicates the people as the source of public power*”, the latter relates to “*Hungary's self-identity*”. While this judgment establishes a link between the two concepts,³⁹ it also indicates that they are seen as distinct within Hungary, and this view is fully shared by the Venice Commission.

33. National sovereignty is enshrined in Article B of the *Fundamental Law*: “(3) *The source of public power shall be the people. (4) The people shall exercise their power through their elected representatives or, in exceptional cases, directly.*” In its 2016 decision, the Constitutional Court suggested that Hungarian sovereignty may be jeopardised both by undue foreign interferences (external dimension of sovereignty) and by the exercise of unlimited power by state authorities (internal dimension of sovereignty). The Act focuses predominantly on the external dimension of sovereignty, suggesting that “*political power falling into the hands of persons and organisations who are dependent on a foreign power, organisation or person damages Hungary's sovereignty*” (para 3 of the preamble).

³⁸ Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law.

³⁹ See para 67 of the Constitutional Court Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law: “*Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. /.../ Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.*”

34. The concept of constitutional identity is a rather malleable concept linked to core cultural values. In its 2016 decision, the Constitutional Court of Hungary stressed that the “*constitutional identity of Hungary is not a list of static and closed values*” and that its content has to be unfolded “*from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution*”.⁴⁰ This suggests that the determination of constitutional identity is a delicate task involving systematic and teleological interpretation of the Constitution. It follows from the preceding paragraphs that the protection of constitutional identity is highly questionable as a basis for this Act.

35. The question which arises is whether Article R(4) as amended may serve as a legal basis for the establishment of a body which is mandated to protect the “*national sovereignty*” instead of the “*constitutional identity*”. Moreover, in a democratic State, the threats identified by the Constitutional Court and by the explanatory report of the Act – such as undue foreign funding of political parties and electoral campaigns and processes – are countered through the ordinary institutions of the State: courts, law enforcement authorities, security services, parliamentary committees, electoral management bodies. This new Office may not encroach on the constitutional competences of these bodies.

2. Nature and organisation of the Office

36. The Office is characterised as “*a State administration organ established /.../ in the interest of protecting constitutional identity which shall operate in accordance with the provisions of this Act and carry out analytical, assessment, proposal-making and investigative activities*” (section 1(1)). It shall be “*independent and subordinated only to law, shall not be instructed by another person or organ in the exercise of its functions*” (section 1(2)). The Office is a central budgetary organ with its own heading within the State budget. Apart from the question whether it is a body intended at the aims defined in Article R(4) of the *Fundamental Law*, as “*a State administration organ*” it cannot be considered as an “*independent organ*” in the sense of the addition to Article R(4) made by the 12th Amendment to the *Fundamental Law*.

37. The organisation of the Office is regulated by sections 14-20 of the Act. The Office is led by a President and two Vice-Presidents, and it has its own staff; the current President informed the rapporteurs in Budapest that the target was some 50-100 staff. The President is appointed by the President of Hungary upon the proposal of the Prime Minister, for a period of 6 years, renewable. The Vice-Presidents are appointed by the President of the Office for the same period. The Act prescribes requirements that candidates for the positions have to meet (section 14(2) and section 17(2)). The President and the Vice-Presidents have to submit a declaration of assets and their position is incompatible with any other public positions as well as with membership in any political party. The President enjoys immunities like members of Parliament.

38. The mandate of the President may be terminated on various grounds, including his/her resignation, the finding of a conflict of interest, of the failure to meet the conditions for appointment and the failure to comply with the rules on the declaration of assets. Such findings are carried out by the President of Hungary, upon a motion from the Prime Minister. The mandate of Vice-Presidents may be terminated on similar grounds with three differences. First, the Vice-Presidents may be dismissed if they are unable to carry out their duties for a period of more than 90 days. Second, they may be removed, if they fail to carry out duties or intentionally misrepresent substantial data or facts in their declaration of assets. Third, the decision on dismissal/removal is adopted by the President of the Office.

39. These procedures provide for a highly politicised system of appointment and dismissal without any outside technical input. The Venice Commission emphasises that the Office is tasked

⁴⁰ *Ibid.*

with protecting national sovereignty, including in the area of political financing, which is a politically sensitive matter. In addition to its general concerns about the establishment of this new body, on a questionable constitutional basis, the Commission stresses that strong guarantees of independence would be necessary to enable the Office to resist any possible political pressure.

40. In the view of the Venice Commission, the appointment of the President of the Office by the President of Hungary – who is not part of the executive but still elected by the majority of MPs and thus typically by the governing party/ies – upon the proposal of the Prime Minister, with no involvement of other branches of government, opposition parties or other State organs, risks undermining the President's and, by extension, the Office's capacity to carry out their activities in a truly independent way. The risk is exacerbated by the large discretion granted to the President of Hungary and the Prime Minister in the termination of the mandate of the President of the Office. The Vice-Presidents on their turn are fully dependent on the President who appoints as well as dismisses/removes them, again enjoying quite extensive discretion. The Commission also notes that the President of the Office can be re-appointed which potentially compromises his or her independence.

41. Finally, it is worrying that the Office is not subject to any State oversight. It is not directly responsible to Parliament or any other State organ. Pursuant to section 6(4) of the Act, the Office shall send the "annual national sovereignty report" to the parliamentary Committee on National Security and to the Government, but only "for information", not for external review of its activities. This obligation aims at transmitting the Office's findings to the political decision-makers in view of possible measures; under section 6(5) the Government shall present in its reply to the Office how it will address the findings made in the annual national sovereignty report.

3. Activities carried out by the Office

42. The Office carries out four main types of activities – analytical, assessment, proposal-making and investigative ones (section 1(1)). Sections 2-3 specify the nature of these activities.

43. The first three types of activities are covered by a single provision, section 2. According to this provision, these activities include developing and applying risk assessment methodology, analysing the exercise of national sovereignty, developing proposals and making recommendations for measures to protect Hungary's sovereignty, producing an annual national sovereignty report and conducting and financing research to improve conditions for the exercise of national sovereignty.

44. The last activity shall be largely carried out through the Research Institute of the Office, set up under section 13 as an "*separate organisational division*" of the Office "*which shall perform independent scientific activity*". The work of the Research Institute is supervised by the President of the Office, and both the head and the members of the Research Institute shall be civil servants and employees of the Office. In the view of the Venice Commission, the inclusion of the Research Institute within the Office and its internal organisation do not provide sufficient guarantees of its capacity to conduct independent research.

45. The investigative activities of the Office are regulated by section 3 which provides the Office with the competences to:

- a) explore and investigate certain activities – interest representation activities, information manipulation and disinformation activities, activities aimed at influencing democratic discourse as well as State and social decision-making processes – carried out in the interest of another State and, irrespective of its legal status, of a foreign organ or organisation and natural person if they can harm or jeopardise the sovereignty of Hungary;
- b) explore and investigate the organisations whose activity funded with supports from abroad may exert influence on the outcome of elections;

- c) explore and investigate the organisations which, using supports from abroad, perform or support activities aimed at influencing the will of voters.

46. In carrying out these activities, the Office shall investigate individual cases and publish the results of such investigation on its website (section 6(1)). The investigation procedure is regulated in more detail by Chapter 2 (sections 7-13) of the Act. It is interesting to note that the provisions on the Research Institute are included in this Chapter. That might suggest that in addition to research activities, the Institute is expected to support the Office's investigative activities as well, which would cast further doubts on its independence.

47. The Venice Commission notes that the activities of the Office are described in a very general and vague manner. This is particularly problematic in case of investigative activities, which may interfere with several human rights, especially the right to freedom of privacy, the right to freedom of expression and the right to freedom of association. It must be stressed again that investigative activities belong to the ordinary institutions of the State such as courts and law enforcement authorities, which provide for guarantees in respect of interferences in the exercise of fundamental rights. In any case, to be lawful, such interferences would need to meet the three-part test of lawful restrictions.

48. First, they would need to be prescribed by law, i.e., have a legal basis which is accessible and foreseeable. Second, the interferences need to pursue one of the legitimate aims indicated in the relevant provisions of the *Fundamental Law* and of international instruments. Third, the interferences have to be necessary in a democratic society, i.e., they must correspond to a pressing social need, and, in particular, must be proportionate to the legitimate aim pursued.⁴¹

49. In the view of the Venice Commission, the Act is hardly compatible with these requirements.

50. First, it fails to meet the requirement of legality due to its general and vague wording. It contains a number of terms which do not have a clear definition, such as “*carrying out activities in the interests of another state and, irrespective of its legal status, of a foreign organ or organisation and natural person*”, “*information manipulation and disinformation activities*”, “*social decision-making processes*”, activities that “*can harm or jeopardise the sovereignty of Hungary*” or “*supports from abroad*”. As rightly noted in the aforementioned statement by the two UN special rapporteurs, the Act “*uses overly broad and ambiguous terms which could open the doors to abuse of power to unduly investigate and subsequently label any organisation or entity on the basis of engaging in ‘foreign-linked’ advocacy, alleged information manipulation and activities aimed at influencing democratic debate and decision-making processes*”.⁴²

51. Second, the Venice Commission recalls that the protection of national sovereignty might fall within the ambit of Article I(3) of the *Fundamental Law* but it is not explicitly mentioned as a legitimate aim in the relevant provisions of the ICCPR and the ECHR. National security, which is additionally invoked in the preamble of the Act, is one of such legitimate aims. However, it is not absolutely clear whether the protection of national security is indeed meant to be the aim of the broad range of activities entrusted to the Office. Moreover, as stated in the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, “*national security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse*”.⁴³ The Act imposes vague and arbitrary limitations and there are no safeguards and effective remedies against abuse available.

⁴¹ See, for instance, ECtHR, *Dudgeon v. the United Kingdom* (Application no. 7525/76), Judgment, 22 October 1981, paras 42-61.

⁴² Ref.: OL HUN 1/2023, *Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders*, 8 December 2023, p. 3.

⁴³ U.N. Doc. E/CN.4/1985/4, Annex (1985), *United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, para 31.

52. Third, the Act fails to meet the requirement of necessity in a democratic society. The Venice Commission recalls that under this requirement, “a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation”⁴⁴ and “the burden of justifying a limitation upon a right /.../ lies with the State”.⁴⁵

53. The Act endows the Office with extremely vague and broad competences. The Office has the power, first, to autonomously and without consultation with any other public or civil society actor, define national sovereignty and develop a methodology for sovereignty risk assessment;⁴⁶ and second, to carry out investigations with respect to any entity or person whom the Office deems to constitute a risk to national sovereignty.

54. The grounds for investigation described in section 3 are broadly framed and do not correspond to the conditions of legal certainty and foreseeability. By linking the risk for national sovereignty with any form of foreign funding as well as any form of acting in the interests of another State or another foreign body, organisation or natural person, while moreover leaving the interpretation of these terms to the Office, the provision endows the Office with absolute – and unchecked – discretion.

55. It is noteworthy that the Office is empowered to, *inter alia*, investigate activities of organisations which *may* influence the outcome of elections or the will of voters. This is far too broad and effectively permits the kind of interference that was previously allowed under the law on “*Transparency of Organisations which receive Support from Abroad*”.⁴⁷ Since this provision is unrestricted in its wording, nothing prevents its application against the legitimate activities of NGOs, journalists and other groups which are entitled to contribute to the political debates of a democratic society. This goes clearly beyond acceptable transparency obligations on NGOs in relation to foreign funding.⁴⁸

56. Moreover, it is also unclear under what conditions information should be collected and investigations started. If the far-reaching and human-rights sensitive procedure can be started in an arbitrary manner, there is a risk that the Office comes under pressure by politicians or by the public. In the view of the Venice Commission, it would be necessary to include some basic principles in the law making it clear how the Office shall proceed, on what grounds it shall start investigations, and to require a “reasonable suspicion” or a “strong reasonable suspicion” that a person or organisation has acted unlawfully.

57. While conducting investigation, the Office is entitled to have access to all data relevant for the investigation; to request written and oral information from an investigated organisation, its staff or relevant State or local government bodies; and to request written or oral information from any organisation or person related to the case under investigation, and request a copy of any data or documents related to the case under investigation (section 8). All the State organs, as well as any other entities including even private organisations and natural persons, have the obligation to cooperate with the office. The Office also has access to classified sensitive data and tax secrets and is provided intelligence support by the National Information Centre;⁴⁹ this appears to be a portal into significant investigative powers and security material collected through diverse

⁴⁴ *Ibid.*, para 11.

⁴⁵ *Ibid.*, para 12.

⁴⁶ During the meetings in Budapest, the President of the Office indicated to the rapporteurs that other bodies would be consulted during the preparation of the methodology. However, the Venice Commission is concerned that this process is completely left to the discretion of the Office.

⁴⁷ As mentioned above in Chapter III.A., on 22 April 2021 the Government repealed the law, which had been subject to a ECJ Judgment and a Venice Commission Opinion.

⁴⁸ The Venice Commission has elaborated on such transparency regulations in its Report on funding of associations, [CDL-AD\(2019\)002](#), para 150.

⁴⁹ Section 8/A of the Act CXXV of 1995 on national security services is amended by section 24 of the Act to allow the Office to request information from the National Information Centre.

means.⁵⁰ The aforementioned powers of the Office are far too broad and appear to disregard any right to privacy or legally privileged data a person may have.⁵¹

58. Further to this, section 6(1) which requires the Office to publish information on its website on its specific investigations reflects some of the problems identified with the “*Act on Transparency of Organisations which receive Support from Abroad*” which publicly labelled organisations for receiving foreign funding although this would be legitimately received. This can only be conceived as an attempt to shame such organisations rather than as defending national sovereignty: If there was a proven case or at least enough evidence to reasonably suspect that a political party was using foreign funding or other assistance to interfere with an election, then this would be subject to legal proceedings which would be publicly visible. Outside of such cases the public disclosure of cases and the details thereof is a disproportionate breach of the rights to privacy and association of groups and individuals potentially affected.

59. Section 6(6) aggravates these conclusions by serving as a way to reveal private or secret information that is deemed made “*accessible on public interest grounds*”. This provision is so broad and without bounds so that it could be arbitrarily decided what the “*public interest*” is. The right to privacy, association and to legal privilege which serve as the guarantee and mechanism of other rights as well as being crucial in themselves could all be trumped if such information gathered by the Office is deemed in the “*public interest*”. By the same token if a legal or natural person refuses to cooperate with the Office on these grounds they can be labelled as a person which refused to cooperate – which is still an interference with the enjoyment of rights.

60. In addition to the publication of information on individual investigations and of the annual sovereignty report, the Office shall inform relevant State bodies of facts or circumstances “*that can serve as a ground for initiating or conducting an infraction or criminal proceeding, an administrative authority proceeding or other proceeding*” (section 11). Again, this provision is extremely broad and vague, and it is unclear what kind of offences and situations are envisaged – apart from the newly introduced offences and related provisions concerning prohibited use of foreign funds in relation to elections (see Chapter IV.C. below).

61. Another possible course of action is provided by section 12 of the Act, according to which the President of the Office may request the parliamentary Committee on National Security (which supervises the security services) to discuss a report under section 6(1) (case-specific investigation report) and to interview the head of the investigated organisation if the latter fails to provide information within the fixed time limit or if this is “*justified by the nature or gravity of the case at issue in any other way.*” Again, these terms are very vague and give the President of the Office wide discretion to take such a serious measure as to seize a parliamentary committee on the case of an individual organisation.

62. The Act remains quite silent on procedural rights during the investigations by the Office. It only stipulates that prior to the publication of the case-specific and annual reports, the Office shall send its investigation findings to the organisations concerned (individual persons are not mentioned in this context), which may make comments and receive a reply to the comments by the Office. In contrast, the Act does not specify that the start of investigations is to be communicated to the person or organisation concerned, although it leads to co-operation duties; it does not mention the possibility of legal representation, does not provide for the right to refuse

⁵⁰ After the parliamentary elections of April 2022, the Government overhauled the security services: The security services of the Ministry of Interior and the Ministry of Foreign Affairs and Trade (the counterintelligence and the foreign intelligence) were annexed to the Office of the Prime Minister; the National Information Centre was created as a new, centralised structure to collect comprehensive information from all the different intelligence and law enforcement agencies.

⁵¹ In their comments on the draft opinion, the authorities stressed that “the Act complies with the applicable data protection rules, and specifically with the data protection regime of the European Union, as well as with Convention 108 of the Council of Europe on the protection of personal data.”

to testify or provide evidence, etc. Moreover, there are no time limits for the investigative activities at all.

63. The Act stipulates that “*no legal remedy shall lie against the report of the Office made public*”, relating both to the final report of the investigation and the annual sovereignty report (section 6(7)). The Venice Commission stresses that it is highly unusual for law to exclude legal remedy against a formal report especially when the report is itself the formal public product of a State investigation. Similarly, under section 8(2) it is stated that “*the investigation procedure of the Office /.../ shall not constitute an administrative authority procedure and no administrative court action shall be brought in relation to the activities of the Office under this subtitle*”. This limits the ability of affected persons to protect their legal rights. If these provisions make it excessively difficult for individuals or organisations to enforce their rights through the courts, the measures must be considered a disproportionate interference with fundamental rights. During the meetings in Budapest, the rapporteurs were presented conflicting views on the matter. Several interlocutors stated that no legal remedies were available against the Office’s activities at all, whereas some others – including the President of the Office – hinted at possibilities to challenge the findings in court under civil law. The latter view was confirmed by the authorities in their comments on the draft opinion. However, in the view of the Venice Commission, in the absence of clear legal regulation it is necessary that the law ensures effective legal remedy.

64. During the meetings in Budapest, several officials stressed that the Sovereignty Protection Office was not an *authority*, had no sanctioning powers and had the rather limited function to increase transparency and to support other State bodies. The Venice Commission is, however, highly concerned about the challenge to the rule of law, democracy and the enjoyment of human rights which results from the existence of an office with such broad discretion, on such vague legal bases and not subject to any State oversight. In particular, the regular monitoring of political parties, NGOs and others in the name of “*protection of national sovereignty*” raises significant concerns that the Office enjoys disproportionate power unjustifiable in a democratic society. Moreover, whether or not the Office is an “*authority*” under Hungarian law, its very public power threatens to chill expression and association in ways that raise serious doubts about its consistency with international standards. Finally, the Venice Commission fails to see the need for the establishment of a new body, in addition to the existing system of security services (which have indeed revealed the instances that occurred during the 2022 elections and led to this legislative initiative), parliamentary committees, law enforcement authorities and courts. There is clearly an overlap with the ordinary institutions of the State without providing for the corresponding guarantees in respect of interferences in the exercise of fundamental rights.

65. In conclusion, the Act has established a new body with extremely broad competences which can interfere with the privacy of any legal or natural entity and engage in naming and shaming of this entity without being subject to any control or review mechanism. Thus, rather than making “*the various electoral and social decision-making processes transparent*”,⁵² the Act risks having a chilling effect on the free and democratic discussion in the Hungarian society. The Venice Commission concludes that the regulation related to the establishment of the Sovereignty Protection Office and its mandate and competencies is at odds with international standards and should be repealed.

C. Prohibition of foreign funding in relation to elections

66. In addition to setting up the Sovereignty Protection Office, the Act also amends electoral, criminal and other relevant legislation with the aim of prohibiting and criminalising foreign funding in the context of elections.

⁵² Justification of the Act, as attached to the Bill, see *Hungarian Helsinki Committee*, online at <https://helsinki.hu/en/wp-content/uploads/sites/2/2023/11/Defence-of-Sovereignty-bill-T06222-EN.pdf>.

1. Legal framework and amendments introduced by the Act

67. Prior to the current amendments, the legal framework already contained the following restrictions. The *Act XXXIII of 1989 on the Operation and Financial Management of Political Parties*, as amended in 2014, stipulates that “a political party shall be prohibited from accepting asset contributions from another State. A political party shall be prohibited from accepting asset contributions from a foreign organisation regardless of its legal status and from a natural person other than a Hungarian citizen. A political party shall be prohibited from accepting anonymous donations” (section 4(3)).⁵³ If a political party accepted asset contributions in violation of those rules, it “shall, once called upon by the State Audit Office, pay its value to the central budget within fifteen days”, and “funding provided from the central budget to the political party shall be reduced by an amount equal to the value of the asset contribution accepted” (section 4(4)).

68. It follows from the aforementioned regulation that political parties were already prohibited from using foreign funds, including in the electoral context. On the other hand, until now the different election laws did not contain any provisions on foreign funding. For instance, the *Act LXXXVII of 2013 on the Transparency of Campaign Costs related to the Election of the Members of the National Assembly* fixes campaign spending limits for electoral contestants, but it does not address the question of foreign funding. Electoral contestants other than political parties were therefore not prohibited from using such funds. Under the Hungarian election law, elections can be contested by individual candidates and candidates/lists of candidates presented by nominating organisations. The latter include political parties and also, in local elections, associations (except trade unions) recorded in the court register of NGOs, and, depending on the type of elections, national minority representatives⁵⁴ (section 3(1) of the *Act on Election Procedure*).

69. The *Act on the Protection of National Sovereignty* has amended the *Act on Election Procedure* by establishing 1) the prohibition for candidates and (in local elections) nominating organisations to “use, regarding the elections concerned, foreign support or any asset element originating therefrom for the purpose of performing any activity aimed at influencing or attempting to influence the will of voters”; and 2) the obligation for candidates and (in local elections) nominating organisations to declare, upon giving notification of candidacy or as an association, that they comply with these requirements.⁵⁵ Registration as a candidate or nominating organisation is made conditional on such a declaration. On the other hand, the Act does not foresee deregistration of a candidate or nominating organisation in case of prohibited use of foreign funds. Officials met by the rapporteurs in Budapest stated that such deregistration would only be the consequence of criminal conviction based on such a violation of the law.

70. In case of a suspected violation of the prohibition to use foreign support, the State Audit Office shall check compliance with the rules. If a violation of the rules is established, the candidate or nominating organisation shall pay twice the amount of support to the central budget within fifteen days; and in the case of local elections, the nominating organisation additionally loses tax

⁵³ In addition, the *Act No. 76/2017 on the Transparency of Organisations receiving support from abroad* introduced special obligations for associations and organisations receiving funding from abroad (not specifically in the electoral context), but this Act was repealed on 22 April 2021.

⁵⁴ I.e. national minority organisations recorded in the court register of NGOs, in the case of elections of national minority self-government representatives; and national self-governments of national minorities, in the case of parliamentary elections.

⁵⁵ See section 33(4) and (6) of the Act, adding new paragraphs (1a) to (1d) to section 124 of the *Act on Election Procedure* and replacing subtitle 138/C of the *Act on Election Procedure* (new provisions of section 307/D). In the case of local elections, those prohibitions and declaration requirements on nominating organisations extend to Hungarian legal persons and organisations without legal personality, as well as to anonymous donations.

benefits⁵⁶ and – by court decision upon a motion of the State Audit Office – the public benefit status.⁵⁷

71. Moreover, the Act has amended the *Criminal Code* by establishing a new criminal offence, “*Illegal influence of the will of voters*” (new article 350/A of the *Criminal Code*, introduced by section 32 of the Act). This offence criminalises when “*a member, responsible person or executive officer of a nominating organisation within the meaning of the Act on Election Procedure and a candidate within the meaning of the Act on Election Procedure /.../ uses prohibited foreign support or material advantage originating from an agreement disguising, to circumvent this prohibition, the origin of prohibited foreign support*”. The offence is punishable by imprisonment for up to three years.

72. Prohibited foreign support is defined in article 459(1) of the *Criminal Code* as “*any support from abroad, the acceptance or use of which is prohibited by the Act on the Operation and Financial Management of Political Parties or the Act on Election Procedure*” (as described above). Article 52 of the *Criminal Code* on the penalty of the “*Disqualification from the Profession*” was also amended to establish a new form of the penalty, consisting in the prohibition for the perpetrator of the offence under article 350/A to be a responsible person in a non-governmental organisation or to hold an office in a political party.

2. Analysis

73. The prohibition to use foreign funds in relation to elections, the corresponding declaration requirement which conditions the registration as a candidate or nominating organisation, as well as the different administrative and criminal sanctions in case of violation of the prohibition may interfere with several human rights, especially the right to free elections (namely the right to stand for election) and the rights to freedom of association and of expression. To be lawful, such interferences would need to meet the three-part test of legality, legitimacy and necessity/proportionality.

74. As concerns, firstly, the requirement of legality, it is doubtful whether the new provisions are accessible and foreseeable. The new regulation includes numerous cross-references between the *Criminal Code*, the *Act on Election Procedure*, the *Act on the Operation and Financial Management of Political Parties*, tax legislation etc., which are difficult to navigate and understand. Moreover, it contains several terms which do not have a clear definition, such as “*activity aimed at influencing or attempting to influence the will of voters*” (sections 124 and 307/D of the *Act on Election Procedure*, which regulate registration requirements and administrative sanctions and are also referred to in the new criminal law provisions) or “*cases deserving special consideration*” (article 52 of the *Criminal Code*).

75. Regarding, secondly, the second criterion of legitimacy, as recalled above with respect to the first part of the Act establishing the Sovereignty Protection Office, although the protection of national sovereignty is not one of the legitimate aims explicitly identified in the ICCPR and the ECHR, national security, which is also referred in the preamble of the Act, is one of such legitimate aims, and it is more plausible than for the first, very broadly and vaguely phrased part of the Act that the second part focussing on the use of foreign support in elections could pursue that aim.

⁵⁶ See section 25 of the Act, which adds paragraph (7b) to section 4 of the *Act CXXVI of 1996 on using a specific part of personal income tax in accordance with the instructions of the taxpayer*.

⁵⁷ See section 29 of the Act, which adds paragraph (5) to section 49 of the *Act CLXXV of 2011 on the right of association, the public-benefit status and the operation of and support to non-governmental organisations*.

76. Third, when assessing the necessity and proportionality of the new provisions, it must be noted that restrictions on foreign funding of political parties and election campaigns are usual⁵⁸ and in principle in line with international best practices and standards.

77. The ECtHR held that the regulation of foreign funding of political parties “falls within the residual margin of appreciation afforded to the Contracting States, which remain free to determine which sources of foreign funding may be received by political parties”.⁵⁹ However, the Court made a distinction between funding received from foreign States, which it was not difficult to accept as necessary for the preservation of national sovereignty, and funding from foreign political parties. In a more recent case, moreover, the ECtHR stressed that the disqualification of a political party from participation in elections based on the unlawful use of foreign funds could only be acceptable if it was based on sufficient and relevant evidence, the procedure before the relevant bodies provided sufficient guarantees against arbitrariness and there was sufficient reasoning provided.⁶⁰

78. The 2020 *Joint Guidelines on Political Party Regulation* of the Venice Commission and OSCE/ODIHR state that “donations from foreign sources to political parties may be prohibited by domestic legislation”.⁶¹ In fact, in its *Recommendation (2003)4*, the Committee of Ministers of the Council of Europe expressly recommended to States to “specifically limit, prohibit or otherwise regulate donations from foreign donors”;⁶² this rule does not only apply to political party funding but also to the funding of electoral campaigns of candidates for elections.⁶³ The *Joint Guidelines* explain that “this restriction aims to avoid undue influence by foreign interests, including foreign governments, in domestic political affairs, and strengthens the independence of political parties”.⁶⁴ They however also note that the regulation of political party funding needs to ensure that parties have “the opportunity to compete in accordance with the principle of equal opportunity.”⁶⁵ In the view of the Venice Commission, the prohibition of foreign funding is therefore premised on the fair and equal access of all political parties/forces to domestic sources of financing. The *Joint Guidelines* also make it clear that “foreign funding of political parties is an area that should be regulated carefully to avoid the infringement of free association in the case of political parties active at an international level”.⁶⁶ Drawing specific attention to parties operating within the EU, they call for a nuanced approach. Previously, the Venice Commission had stated that the increasing “co-operation of political parties within the many supranational organisations and institutions of Europe today” needed to be taken into account, that co-operation of this kind was “necessary in a democratic society” and that “international obligations of a State and among these the obligations emanating from membership of the European Union” needed to be considered.⁶⁷

⁵⁸ A 2023 study has shown that the prohibition for political parties to receive financial contributions from foreign states or foreign enterprises is in force in 23 out of 29 OECD countries. See OECD, *Government at a Glance 2023*, OECD, Paris, 2023, p. 90.

⁵⁹ ECtHR, *Parti nationaliste basque – Organisation Régionale d’Iparralde v. France*, Application no. 71251/01, Judgment, 7 June 2007, para 47.

⁶⁰ ECtHR, *Political party “Patria” and others v. The Republic of Moldova*, Applications nos. 5113/15 and 14 others, Judgment, 4 August 2020, para 38.

⁶¹ [CDL-AD\(2020\)032](#), Guidelines on Political Party Regulation, Second Edition, para 229.

⁶² Recommendation Rec(2003)4 of the Committee of Ministers to member states *on common rules against corruption in the funding of political parties and electoral campaigns*, 8 April 2003, Article 7.

⁶³ *Ibid.*, Article 8.

⁶⁴ Venice Commission and OSCE/ODIHR, [CDL-AD\(2020\)032](#), Guidelines on Political Party Regulation, Second Edition, para 229.

⁶⁵ *Ibid.*, para 204.

⁶⁶ *Ibid.*, para 231.

⁶⁷ Venice Commission, [CDL-AD\(2006\)014](#), Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources (amicus curiae opinion for the European Court of Human Rights), paras 32ff. See also paras 27f., where the Commission noted that in the EU the financing of political parties had to respect the principle of free movement of capital (Article 56 of the EC Treaty) and that the prohibition on financing from sources in other member States was acceptable only under exceptional circumstances (grounds of public policy or public security, or overriding requirements of the general interest developed by the ECJ), establishing the European Community (EC).

79. Regarding associations and individuals that are not political parties or politicians, such as NGOs, journalists, companies, etc., the Venice Commission has previously expressed the view that States must facilitate access to funding, including foreign funding, but that these groups can be subjected to legitimate reporting obligations.⁶⁸ Moreover, it held that “*by joining an international organisation, a State proclaims to share its values and objectives and participates in the definition of the strategies and actions /.../. Allocations of funds by an international organisation to a domestic NGO cannot therefore be seen, in this context, as pursuing “alien” interests*”.⁶⁹

80. Turning to the situation in Hungary, the aim of the legislator to close a loophole in the law, by extending the prohibition of political party funding from foreign sources to all election competitors including individual candidates and local NGOs registered as nominating organisations, appears legitimate. At the same time, the Venice Commission finds the new definition of foreign support in the *Act on Election Procedure* too broad as it does not make any distinction based on the types of funding sources (States, private entities, political parties in particular) and does not make any exceptions for funding by international organisations, as was confirmed by officials during the meetings in Budapest; the definition broadly refers to a “*financial contribution from another State, a foreign natural or legal person or organisation without legal personality*”.⁷⁰ The same concerns also apply to the regulation in the *Act on the Operation and Financial Management of Political Parties*, which refers to asset contributions “*from another State*”, “*from a foreign organisation regardless of its legal status*” and “*from a natural person other than a Hungarian citizen*”. The Venice Commission recommends providing a more nuanced definition of “foreign support”, taking into account different types of funding sources and co-operation of political parties at international level, and excluding funding by international organisations, in line with international obligations and among these the obligations emanating from membership of the European Union.

81. Moreover, in the view of the Venice Commission, the new provisions of sections 124 and 307/D of the *Act on Election Procedure*, which regulate the prohibited use of foreign funds with regard to elections, as well as corresponding declaration requirements and administrative sanctions, are too broad and not precise enough. It is difficult to foresee what kind of situations are covered by the terms “*use, regarding the elections concerned, foreign support /.../ for the purpose of performing any activity aimed at influencing or attempting to influence the will of voters*”. It remains unclear, even after the rapporteurs’ discussions with officials met in Budapest, how and on what basis it will be established that certain activities 1) were *aimed at influencing or attempting to influence the will of voters*, and 2) were financed from foreign funds and not from other sources of candidates’ and nominating organisations’ income and assets. The law is formulated in such a way that it potentially covers any foreign funds received at any time, even completely outside the electoral processes.

82. Such wide regulations may have a chilling effect on the free and democratic debate in Hungary and on citizens’ engagement in elections. These concerns were also expressed by some representatives of civil society who reported that certain NGOs had already refused to accept foreign funding (outside the electoral cycle) and others would no longer nominate candidates for election. As concerns the administrative sanctions available under these provisions of the *Act on Election Procedure* (twice the amount of support received in violation of the rules), they are in line with what already applied to political parties under the *Act on the Operation and Financial Management of Political Parties* and do not appear to be disproportionate. The Venice Commission recommends defining more precisely in the new provisions of the *Act on Election Procedure* (sections 124(1a and b) and 307/D(3) and (4)) the prohibited activities as well as their link with foreign funding, e.g. by stipulating that the prohibition only applies to funds received within a specified period of time before elections.

⁶⁸ Venice Commission, [CDL-AD\(2019\)002](#), Report on funding of associations, para 150.

⁶⁹ *Ibid.*, para 98.

⁷⁰ New point 16 under section 3(1) of the *Act on Election Procedure*.

83. The new criminal offence of “*Illegal influence of the will of voters*” (article 350/A of the *Criminal Code*) suffers from the same flaws as the above-mentioned provisions of the *Act on Election Procedure* – and of the *Act on the Operation and Financial Management of Political Parties* – since it uses the terms “*prohibited foreign support*” which is defined by reference to those provisions. The vagueness of terms and definitions is even more problematic when it comes to criminal law provisions. It is also noteworthy that the title of the provision does not correspond to its content: whereas the title generally refers to “*influencing the will of voters*”, the provision itself requires the use of prohibited foreign funding.

84. Furthermore, the question arises why the Act went further than extending the existing prohibition under the *Act on the Operation and Financial Management of Political Parties* to all election competitors (coupled with administrative sanctions) and made the use of foreign funds in the electoral context a criminal offence. Interestingly, other forms of illicit political financing do not constitute criminal offences under Hungarian law, the new offence thus makes an exception. On the other hand, article 350 of the *Criminal Code* already criminalises other forms of illicit behaviour in the electoral context and provides for the same penalties, i.e. up to three years’ imprisonment. Bearing in mind that the amended *Act on Election Procedure* requires from candidates and nominating organisations a declaration not to use foreign funding, it is plausible that breaching the declaration can be a criminal offence.

85. That said, the Venice Commission is concerned about the amendments to article 52 of the *Criminal Code*, consisting in the prohibition for the perpetrator of the offence under article 350/A to be *a responsible person in a non-governmental organisation or to hold an office in a political party*. This residual penalty is disproportionate in preventing individuals from engaging in a leadership role in NGOs and political parties, under certain circumstances even for the rest of their lives.⁷¹ While it would be usual for positions of authority in the State to be restricted for those with previous criminal convictions, it appears disproportionate with regard to the freedom of association in the case of private organisations, particularly as there is not necessarily a temporal limit. Another problem with this provision is that *in cases deserving special consideration* the ‘disqualification’ can be waived. The authorities in their comments on the draft opinion indicated that this is standard terminology frequently used in the Hungarian criminal law. However, in the view of the Venice Commission this terminology is too broad and too vague to be used in this politically sensitive area; it appears to be entirely discretionary as to what counts as “*deserving special consideration*”. The Venice Commission recommends changing the title of the new article 350/A of the *Criminal Code* to better reflect the content of the provision, providing a more specific definition of the prohibited actions, and defining the corresponding “*Disqualification from the Profession*” (article 52(5) of the *Criminal Code*) in a more precise and limited manner.

V. Conclusion

86. By letter of 11 December 2023, the Chair of the Monitoring Committee of the Council of Europe’s Parliamentary Assembly, Mr Piero Fassino, requested an Opinion of the Venice Commission on the *Act LXXXVIII of 2023 on the Protection of National Sovereignty*.

87. The Act was adopted by the Parliament of Hungary on 12 December 2023 and entered into force on 22 December 2023. It established the new Sovereignty Protection Office and strengthened the prohibition of foreign support to political activities through amendments to the electoral, criminal and other relevant legislation.

⁷¹ See the provisions of article 53 of the *Criminal Code* which regulate disqualification from a profession which may imposed for a definite period or permanently, with the possibility of an exemption granted by court decision after then years.

88. The preamble of the Act and the justification accompanying the Bill present a concern that the nation's sovereignty is under attack by foreign organisations and individuals through funding activities. They claim that according to the national security investigation, the opposition circumvented the existing prohibition for political parties to accept foreign funding in spring 2022 in the context of the parliamentary elections by using funds from abroad through their civil society organisations and companies engaged in political activities. The Act is aimed at preventing similar cases, by tightening the applicable rules and increasing transparency.

89. In the view of the Venice Commission, the concern about foreign funding or other influence is a valid issue for national constitutional authorities, to be addressed through political debate and when necessary, by law. While foreign influence on electoral processes is cited in the preamble and justification of the Act, its scope is much wider than the electoral context as it covers "State and social decision-making processes" where justification based on electoral integrity will not apply. Thus, the powers of the Sovereignty Protection Office extend beyond electoral campaigns to cover political activity in a broader sense and campaigns for social change. The reason and need for such a broad approach have not been substantiated by the Hungarian authorities.

90. In parallel with the Act, Parliament also adopted the 12th Amendment to the *Fundamental Law* (Constitution of Hungary), adding in Article R(4), which prescribes the obligation for every organ of the State to protect the constitutional identity and Christian culture of Hungary, that "*in order to protect constitutional identity, an independent organ established by a cardinal Act shall operate*". The addition to Article R(4) is considered by the authorities to be the constitutional-level foundation of the Sovereignty Protection Office. In the view of the Venice Commission, however, the protection of constitutional identity is highly questionable as a basis for this Act and for this Office, which is mandated to protect the "*national sovereignty*" instead of the "*constitutional identity*". In a democratic State, the threats identified by the justification of the Act are countered through the ordinary institutions of the State which provide for guarantees in respect of interferences in the exercise of fundamental rights, such as courts and law enforcement authorities. The new Office may not encroach on the constitutional competences of these bodies, and the Venice Commission fails to see the need for the establishment of a new body, which has not been sufficiently justified by the Hungarian authorities.

91. Moreover, the Venice Commission notes that the Act does not provide sufficient guarantees of the Office's independence. As a "State administration organ" whose Presidents and Vice-Presidents are appointed and dismissed by the executive branch of government, the Office cannot be considered as an "independent organ" in the sense of the addition to Article R(4) made by the 12th Amendment to the *Fundamental Law*. Furthermore, the Sovereignty Protection Office is provided extremely broad – and vaguely defined – competences. It can interfere with the privacy of any legal or natural entity and engage in naming and shaming of this entity without being subject to any control and without any review mechanism. Moreover, the Act does not provide sufficient guarantees of the Office's independence, which risks leading to arbitrary and politically motivated application of the law. There is thus a high risk that the establishment and activities of the Office will have a chilling effect on the free and democratic debate in Hungary.

92. The amendments to the *Act XXXVI of 2013 on Election Procedure* introduce a new prohibition for candidates and (in local elections) nominating organisations to use foreign support in relation to elections, the obligation to declare their compliance with those rules, as well as administrative penalties. The amendments to the *Criminal Code* introduce a new offence, "*Illegal influence of the will of voters*", which criminalises the use of prohibited foreign support in relation to elections.

93. The Venice Commission notes that restrictions on foreign funding of political parties and election campaigns are usual and in principle in line with international best practices and standards. In principle, an effort to close existing loopholes in the existing legal framework could meet standards of legitimacy. However, the legal amendments fail to clearly define what kind of

campaign activities are prohibited and how to establish that they have been financed by foreign funds. They neither take into account co-operation of political parties at international level, nor do they exclude funding by international organisations and provide for the respect of international obligations and among these the obligations emanating from membership of the European Union.

94. The Venice Commission recommends:

- A) Repealing the Act in the sections relating to the Sovereignty Protection Office; [paragraph 65]
- B) Providing a more nuanced definition of “foreign support”, taking into account different types of funding sources and co-operation of political parties at international level, excluding funding by international organisations, and providing for the respect of international obligations and among these the obligations emanating from membership of the European Union; [paragraph 80]
- C) Defining more precisely in the new provisions of the *Act on Election Procedure* (sections 124(1a and b) and 307/D(3) and (4)) the prohibited activities as well as their link with foreign funding, e.g. by stipulating that the prohibition only applies to funds received within a specified period of time before elections; [paragraph 82]
- D) Changing the title of the new article 350/A of the *Criminal Code* to better reflect the content of the provision, providing a more specific definition of the prohibited actions, and defining the corresponding “*Disqualification from the Profession*” (article 52(5) of the *Criminal Code*) in a more precise and limited manner. [paragraph 85]

95. The Venice Commission remains at the disposal of the Hungarian authorities and the Parliamentary Assembly for further assistance in this matter.