

**AMNESTY
INTERNATIONAL**



**HUNGARIAN
HELSINKI
COMMITTEE**

HUNGARY'S ACT ON THE PROTECTION OF NATIONAL SOVEREIGNTY IN BREACH OF EU LAW

8 February 2024

Act LXXXVIII of 2023 on the Protection of National Sovereignty (the Act) entered into force on 23 December 2023.¹ The Act consists of two distinct elements: the setting up of the new Sovereignty Protection Office (SPO) as of 1 February 2024, and an amendment to the Hungarian Criminal Code prescribing prison sentence for using funding from abroad (overtly or “in disguise to circumvent the prohibition”) for political campaign purposes. The Act raises conflicts with EU law.

This paper provides

- an overview of the contents of the Act and the related 12th Amendment to the Fundamental Law;
- a summary of how Hungary's Constitutional Court interprets the concept of national sovereignty and constitutional identity, the underlying ideas of the Act; and
- a non-exhaustive list of potential breaches of EU law.

The SPO will have (i) wide ranging tools at its disposal to investigate private individuals, informal groups and legal entities both inside and outside of Hungary, and (ii) the concepts it is envisaged to defend are eluding definition in the Hungarian legal system. Consequently, the potential effects of its activities as regards EU law are not justified and not foreseeable in their entirety. Considering the vast elusiveness of the Act, this analysis focuses on the activities of the Sovereignty Protection Office and only provides examples and does not aim to list all potential breaches of EU law.

As the first step of an infringement procedure, the European Commission has decided to send a formal notice to Hungary on 7 February. While the Commission provided two months for Hungary to respond, taking into consideration the irreversible harm the Act may cause, the Commission shall expedite the procedure once it receives a response. In case it decides to turn to the Court of Justice of the European Union (CJEU), the Commission shall request the suspension of the application of the Act as an interim measure.

¹ Official English translation of the adopted law: <https://njt.hu/jogszabaly/en/2023-88-00-00>

1. Adoption and content of the Act on the Protection of National Sovereignty

On 12 December 2023, the Hungarian Parliament adopted the proposal that sets up the new SPO and amends the Criminal Code to punish candidates and representatives of nominating organisations using prohibited foreign funds for campaigning purposes with up to three years of imprisonment.

Over a hundred civil society organisations,² thousands of citizens,³ and ten independent media outlets⁴ heavily criticised the new law. The Council of Europe Commissioner for Human Rights called for the abandonment of the proposal;⁵ the UN Special Rapporteur on Freedom of Expression and the Special Rapporteur on Human Rights Defenders noted the imminent negative implications of the adoption of the proposal in their joint communication to the Hungarian Government.⁶ The Monitoring Committee of the Parliamentary Assembly of the Council of Europe seized the Venice Commission to provide an opinion on the proposal.⁷

The key points of the adopted Act are the following:

- The SPO was set up as of 1 February 2024. Its president is nominated by the Prime Minister and appointed by the President of the Republic for a renewable term of six years. The first holder of the office is Mr. Tamás Láncki.
- The main task of the SPO, while the act widely refers to the notion of sovereignty, is “to protect constitutional identity” through various activities listed in Section 2 of the Act, including by carrying out investigations against individuals or legal entities. Investigations are followed by a public report on the findings of the SPO.
- No legal remedy is available against the actions of the SPO, including against its investigation or the publication of its findings.
- The intelligence agencies, through the National Information Centre, shall provide information to the SPO in order to facilitate its work according to Section 24 of the Act.
- According to Section 8 of the Act, the SPO has access to all data in the possession of the investigated entity as well as the state or local government body concerned in the case that may be relevant to the investigation. It may request oral or written information from investigated entities, from any member of staff of the investigated entity, as well as from any entity or individual that may be related to the case under investigation.
- If the SPO establishes any fact or detects any circumstance that can serve as a ground for a petty offence or criminal proceeding, the proceeding of an administrative authority or any other proceeding, it shall, under Section 11 of the Act, notify the respective state organ.

² <https://civilizacio.net/en/news-blog/over-100-ngos-protest-against-the-defense-of-sovereignty-law>

³ <https://szabad.ahang.hu/petitions/a-demokracia-nem-veszelyezteti-magyarorszag-szuverenitasat>

⁴ <https://insighthungary.444.hu/2023/12/13/the-sovereignty-protection-authority-is-harmful-and-against-the-rule-of-law-yet-it-cannot-intimidate-independent-media>

⁵ <https://www.coe.int/ca/web/commissioner/-/hungary-the-proposal-for-a-defence-of-national-sovereignty-package-should-be-abandoned>

⁶ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=28661>

⁷ <https://rm.coe.int/synopsis-of-the-meeting-held-in-rome-on-4-and-5-december-2023/1680adaf55>

- According to Section 12 of the Act, the president of the SPO may request, under certain conditions, that the Parliament's National Security Committee discusses the SPO's report and hears the head of the investigated organisation.
- For now, no sanctions are provided in case a person or entity under investigation refuses to cooperate with the SPO. At the same time, Section 12 a) of the Act prescribes that the head of the investigated organisation failing to provide information to the SPO could be heard by the Parliament's National Security Committee. Section 7 (4) of the Act prescribes that the SPO specifically indicate in its annual report an entity that refused to comply with requests of the SPO in the course of an investigation.
- In addition to regulating the activities of the SPO, the Act introduced a new Section 350/A into the Criminal Code entitled "Illegal influence of the will of voters". Candidates and certain representatives of nominating organisations found guilty of committing this crime can be punished with up to three years of imprisonment.
- Parallel to the Act, the Parliament also adopted the 12th Amendment to the Fundamental Law, establishing a constitutional-level foundation for the SPO. The amendment identifies the task of the SPO as the protection of constitutional identity. However, the title of the Act, its preamble, and its reasoning (which is binding for courts in potential legal disputes under the 7th Amendment to the Fundamental Law) refer to the protection of national sovereignty and not Hungary's constitutional identity.

Section 3 of the Act "establishes" the reasons which might trigger the investigation of the SPO as follows:

"In connection with its investigative activities, the [SPO]

a) shall explore and investigate

aa) interest representation activities, not including the activities of diplomatic or foreign missions and professional interest representation organisations,

ab) information manipulation and disinformation activities,

ac) activities aimed at influencing democratic discourse and state and social decision-making processes, including activities influencing decision-making by individuals who exercise public authority responsibilities of the state,

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) shall explore and investigate the organisations whose activity funded with supports from abroad may exert influence on the outcome of elections;

c) shall explore and investigate the organisations which, using supports from abroad, perform or support activities aimed at influencing the will of voters."⁸

⁸ While the official translation of the Act is used throughout the document, the unofficial translation better reflects the original terminology, wording and aim of the Act. The unofficial translation of the adopted text is available here: <https://helsinki.hu/wp-content/uploads/2023/12/Defence-of-Sovereignty-bill-To6222-EN-adopted.pdf>

Since the scope of activities of the SPO as provided for in Sections 2 and 3 of the Act are extremely vague and open to interpretation (the vague notions of not only “national sovereignty” and “constitutional identity”, but also of “manipulation”, “disinformation”, “influencing democratic discourse”, “interest of a foreign nation or organisation” may be interpreted extensively and arbitrarily), basically any lawful activity concerning an issue of public interest in Hungary may fall under the competences of the SPO, regardless of whether it is carried out for example by an individual, a civil society organisation, or a media outlet. With EU law relevance, these could include for example:

- any kind of action carried out “in the interest” of the EU,
- participation in EU funded public programmes,
- importing goods from other Member States, for example books on the primacy of EU law,
- employing other Member State nationals by employers residing in Hungary whose activities may fall under the Act, Hungarian nationals seeking employment at an employer residing in other Member State (or another Member State or any international organisation) whose activities may fall under the Act,
- using services by Hungarian nationals or other nationals of another Member State residing in Hungary offered by other Member States or providers residing in other Member States,
- offering services by providers residing in Hungary to other Member States or partners residing in other Member States,
- using funds originating from other Member States to support activities that may fall under the investigation of the SPO.

Besides the **abstract and vague nature of notions of constitutional self-identity and sovereignty**, other **provisions** further **grant the SPO a wide room for manoeuvre**. For example, the criteria that an activity is carried out “in the interest of another state and, irrespective of its legal status, of a foreign organ or organisation and natural person”, one of the legal grounds to trigger the investigation of the SPO is applicable basically to any situation when a foreign element concerning an otherwise lawful activity is involved in any form.

Finally, the **combined effect** of the SPO’s excessive investigative rights, the public reports, the lack of remedy throughout the process, and the steps of other stakeholders that can be triggered by the SPO have the potential to disrupt the enjoyment of various fundamental rights of anyone whose lawful activities may fall under the Act. This can impose a chilling effect on the exercising of a wide range of fundamental rights in Hungary (such as freedom of expression, of peaceful assembly and of association, right to access to information) within an uncertain range, leading to a serious distortion of public discourse and democratic life.

2. National sovereignty and constitutional identity as interpreted by the Constitutional Court

The 12th Amendment to the Fundamental Law, adopted on the same day as the Act on the Protection of National Sovereignty in order provide a constitutional basis for the SPO, adds to Article R) (4) of the Fundamental Law the following [addition underlined]:

“The protection of the constitutional self-identity and Christian culture of Hungary shall be an obligation of every organ of the State. For the protection of constitutional identity, an independent body established by a Cardinal Act shall operate.”

However, both the title of the Act, its preamble, its provisions as well as its reasoning refer to the protection of national sovereignty, not constitutional self-identity. These concepts were at the core of several Constitutional Court decisions over the past years. The Constitutional Court (whose interpretation is binding on all⁹) “interprets the concept of constitutional identity as Hungary’s self-identity and it unfolds the content of this concept from case to case. [...] The constitutional self-identity of Hungary is not a list of static and closed values.”¹⁰ The Constitutional Court also stated that “[s]overeignty has been laid down in the Fundamental Law as the ultimate source of competences and not as a competence”,¹¹ and, moreover, “[c]onstitutional identity and sovereignty are not complementary concepts, but are interrelated in several respects”.

It is unclear whether the SPO carries out its activities for the protection of constitutional self-identity or national sovereignty. The two concepts are not identical according to the Hungarian Constitutional Court, which has not provided a clear definition for either of these terms and noted in the case of constitutional self-identity that its content shall be determined on a case-by-case basis.

This means that the purpose of the SPO cannot be determined precisely, and, consequently, neither can the scope of its activities. In practice, this means that it is at the discretion of the SPO to establish its own limits. That there is no clear definition of the SPO’s aims is of relevance as **although EU law and the Court of Justice of the European Union (CJEU) acknowledge the protection of national identity of Member States, this concept cannot provide a *carte blanche* authorisation for a state body to infringe fundamental rights and EU law.**

3. A non-exhaustive list of potential breaches of EU law

Article 2 TEU

In light of the case-law of the CJEU, Article 2 TEU is to be considered as a legal provision that is applicable to all national measures,¹² and the European Commission has already initiated two infringement procedures claiming the violation of Article 2 TEU as a self-standing provision.¹³

As Section 3 of the Act cited above encompasses an ill-defined, but already wide range of activities to be investigated in relation to either the constitutional self-identity or the national sovereignty of Hungary (depending on how the SPO will interpret the Act) that again lack clear definitions, the Act breaches Article 2 TEU. The CJEU underlined in this regard that the “requirements of foreseeability, precision and non-retroactivity of criminal law constitute a specific expression of the principle of legal certainty. That fundamental principle of EU law requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular where they may have adverse consequences. That principle constitutes an essential

⁹ Decision 2/2019. (III. 5.) AB, [2].

¹⁰ Decision 22/2016. (XII. 5.) AB, [64-65].

¹¹ *Ibid.*, [23].

¹² Concerning its scope, see the characteristics of Article 7 TEU procedures and the arguments *mutatis mutandis* provided by Hungary supported by the Republic of Poland in C-156/21, *Hungary v Parliament and Council*, paras 156. and 164.

¹³ C-769/22, *Commission v Hungary*, and the infringement procedure against Poland concerning the so-called *Lex Tusk*, INFR(2023)2088.

element of the rule of law, which is identified in Article 2 TEU both as a founding value of the European Union and as a value common to the Member States.”¹⁴

In that regard, it has to be recalled as well that the combined effects of the Act’s various provisions may lead to a serious disruption of public discourse and democratic life in Hungary. Accordingly, the gravity of the situation may lead to the breach of Hungary’s obligation to respect the principle of democracy, the rule of law and the respect of fundamental rights as enshrined in Article 2 TEU.

Article 36 TFEU; Article 45 TFEU and Articles 49, 52 and 54 TFEU; Articles 56, 52 and 54 TFEU; Articles 63 and 65 TFEU

The SPO’s powers impact all four fundamental freedoms of the internal market, i.e. the free movement of goods, persons, services and capital.

This flows from the regulatory concept that the SPO can investigate any activity concerning an issue of public interest in Hungary that (in the SPO’s interpretation) has a connection to another Member State or is conducted by a national of or company established in another Member State. These may include, *inter alia*: the importing and disseminating of materials or products (as they could be e.g. considered “disinformation” or having the potential to influence democratic discourse); the employment of nationals of another Member State by organisations that could be investigated by the SPO; the carrying out of economic activities or the provision of services by nationals of another Member State or companies established in another Member State that operate (or wish to operate) in Hungary and carry out any activity concerning an issue of public interest; the receiving of financial contributions from nationals of another Member State, from a legal entity residing in another Member State or from another Member State in case the financial support is used for an activity that may be investigated by the SPO; etc. In some of these potential cases, the restricting effect on the exercise of the four fundamental freedoms may be indirect, however, the chilling effect may prevent EU citizens from exercising these freedoms for fear of being subject to an SPO investigation.

While it is true that fundamental freedoms of the internal market might be restricted (subject to conditions), it shall be taken into account that the scope and the subject matter of the Act is vague, open to excessive discretion, and provides the SPO with a wide range of investigative powers.

In light of Section 3 a) of the Act, the SPO may investigate activities without discrimination. However, non-discriminatory measures may still hinder the exercise of the four freedoms of the internal market.¹⁵ Moreover, Section 3 b) and c) of the Act constitute direct discrimination. It follows that no acceptable ground was provided by the Hungarian legislator for the possible restrictions of the fundamental freedoms. The Act may hinder the exercise of the fundamental freedoms and constitute a discriminatory interference with the internal market without any justifiable ground.¹⁶

Even if one considers the goals of the Act as acceptable grounds for restrictions, according to the CJEU’s well established jurisprudence these must still comply with the Charter of Fundamental Rights of the European Union (the Charter).¹⁷ Thus, if the Act is to be considered as a derogation from EU law, in the light of the cited case-law of the CJEU it may violate Article 7, 8, 11, 12 and 47 of the Charter.

¹⁴ C-107/23, Lin, para. 114.

¹⁵ See for example: C-419/16, Simma Federspiel, para 38.

¹⁶ More concretely, concerning the free movement of capital in a similar context, see the CJEU’s judgement in C-78/18, Commission v Hungary (Transparency of associations).

¹⁷ C-78/18, Commission v Hungary (Transparency of associations), para. 101.

Article 11(1) and (2) TEU

Article 11(1) TEU provides for the opportunity to carry out public debates on all areas of EU action, while Article 11(2) TEU provides for regular dialogue between EU institutions and civil society. Section 3 of the Act provides for the possibility to investigate individuals and entities that participate in actions provided for by Article 11 TEU, including, amongst others, in providing contributions to the European Commission's annual Rule of Law Reports.

An example of how the Act interferes with Article 11 TEU and secondary EU law related to it is the participation of civil society organisations in monitoring committees overseeing the implementation of the operative programmes under the **Common Provisions Regulation (CPR)**.¹⁸ One of the specific tasks of the monitoring committees is to overview the fulfilment of enabling conditions as set out in the CPR, one such condition being the compliance of the programmes and their implementation with the Charter.¹⁹ This activity may well fall under the scope of Section 3 of the Act.

Article 11(4) TEU, Articles 24 and 227 TFEU

The provisions regulate the citizens' initiative, the right to contact EU institutions (for example submitting a complaint to the European Commission concerning a possible infringement of EU law) or the right to address a petition to the European Parliament. For the reasons above, any of these activities, in case it concerns a topic of public interest in Hungary, may be investigated by the SPO under Section 3 of the Act.

Article 19 TEU and Article 267 TFEU

The Act and the anticipated activities of the SPO can interfere with Hungarian judges' right to request a preliminary ruling from the CJEU. First, the Act can be interpreted in a way that it allows the SPO to investigate judges who submit preliminary references, as preliminary rulings serve the EU's common interest for a uniform interpretation of the EU law. Thus, the SPO may investigate the adjudicating activity of individual judges and the content of their preliminary reference to assess whether it harms the sovereignty of Hungary. Second, the annual reports prepared by the SPO, which identify legislation affecting national sovereignty, allow the SPO to create a pool of national legal provisions the applicability of which cannot be questioned without endangering national sovereignty. This way, the SPO may forecast that questioning the compatibility of these laws with the *acquis* via a preliminary reference will necessarily trigger the SPO's proceeding. Third, the SPO can prevent judges from requesting a preliminary ruling from the CJEU by formulating recommendations to judges on protecting national sovereignty and assessing compliance with its recommendations. Recommendations may entail that judges refrain from questioning the compatibility of certain national laws with the *acquis*.

¹⁸ Articles 38-40 of Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

¹⁹ Article 15(1) of the CPR.

The above not only creates an obstacle for national judges to request a preliminary ruling under Article 267 TFEU but also breach Article 19 TEU as the adjudicating activities of the national judge might be exposed to the investigation of an administrative authority.

Moreover, the Act can even be interpreted to allow the SPO to investigate a judge who decides in favour of an entity residing in another Member State to the detriment of the Hungarian state in a court procedure, which would violate Article 19 TEU as well.

All the above may infringe judicial independence in Hungary, which is essential to upholding EU law and the rights of EU citizens.

Article 7, 8, 11, 12 of the Charter of Fundamental Rights

Sections 7 and 8 of the Act lay down the rules of the investigation of the SPO. These do not establish any restriction or limitation on the type of data the SPO might request or have access to regarding individuals and organisations either *under* investigation or merely *related* to the case under investigation.²⁰ Where activities that fall under EU law (such as the above provided example of monitoring committees regulated by the CPR) are investigated by the SPO, the right to respect for private and family life, the right to the protection of personal data, the right to freedom of expression and information and the right to freedom of assembly and of association, protected under Articles 7, 8, 11, and 12 of the Charter may be breached.

Article 7 of the Charter also protects legal professional privilege, which, according to the CJEU, is also “justified by the fact that lawyers are assigned a fundamental role in a democratic society”.²¹ The unrestricted access to documents and data of the SPO during an investigation breaches this, which can be exacerbated if the SPO shares information falling under legal professional privilege with other state authorities.

Article 12(2) of the Charter provides that political parties at Union level contribute to expressing the political will of the citizens of the Union, an activity that itself may trigger the investigation of the SPO under Section 3 of the Act. *Therefore, the activities of European political parties as well as that of European political foundations may fall under the scope of the SPO’s investigation, in breach of EU law.*²² In relation to that, the activities of Members of the European Parliament can be swept under the Act as well, which may violate Article 6(2) of the **Act concerning the election of the members of the European Parliament by direct universal suffrage**, setting out that MEPs shall enjoy the privileges and immunities applicable to them by virtue of the Protocol of 8 April 1965 on the privileges and immunities of the European Communities, which in turn sets out in Article 8 that MEPs “shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties”.

Articles 18 and 19 of the Charter

Individuals and legal entities providing legal assistance to foreigners to exercise their right to asylum and/or to protect them from collective expulsions or from *refoulement*, as well as individuals and

²⁰ See Section 8(1)(c) of the Act, providing for the possibility of the SPO to request information and copies of any data or document not only from those under investigation but from any “organisation or person related to the case under investigation”.

²¹ Case C 694/20, *Orde van Vlaamse Balies*, EU:C:2022:963, para. 27.

²² Regulation 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations

legal entities that take a position on these matters or merely provide media coverage on them may fall under the scope of Section 3 of the Act, as by definition, this activity is at least partially carried out in the interest of a foreign individual. This may as well be in breach of certain provisions of the recast **Asylum Procedures Directive**,²³ the **Return Directive**,²⁴ and the **EBCG Regulation**.²⁵

Article 47 of the Charter and Article 19(1) TEU

Section 8(2) of the Act precludes any legal remedy against the activities of the SPO carried out in relation to its investigations. As the Act may breach individuals' right - explained in this paper - conferred to them by EU law, this would breach their right to effective remedy by independent courts as enshrined in Article 19(1) TEU and Article 47 of the Charter.

Article 48 of the Charter

Article 48 of the Charter (presumption of innocence and right of defence), read in conjunction with the Presumption of Innocence Directive²⁶ may be violated in cases where information provided by an individual in the course of the SPO's investigation is used by the SPO to trigger another authority's proceeding (e.g. criminal investigation or tax investigation). This is especially problematic taking into consideration that there are no procedural guarantees attached to the investigation of the SPO, and the information obtained thereby can be used in other official proceedings according to the Act.

Audiovisual Media Services Directive²⁷

The SPO may consider that the reception of certain audiovisual services fall under its competences. As such, the investigation and report - i.e. the interference - of the SPO prescribed by the Act may breach Article 3(1) of the Audiovisual Media Services Directive and, consequently, Article 11 of the Charter.

General Data Protection Regulation²⁸

The Act and the SPO's activities are fundamentally incompatible with general data protection requirements as governed by the General Data Protection Regulation (GDPR).

Article 2(2) of the GDPR makes two relevant exceptions from the general rule which puts the data processing of the public bodies of Member States under GDPR: "This Regulation does not apply to the processing of personal data: (a) in the course of an activity which falls outside the scope of Union

²³ Articles 19, 20, 21, 22 and 23 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

²⁴ Articles 13 and 14 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

²⁵ Articles 46, 108, 109 and 110 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

²⁶ Article 7 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

²⁷ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)

²⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

law; [...] (d) by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.”²⁹ However, the SPO has no connection to criminal procedures and the duties of law enforcement authorities related to public security.³⁰ Moreover, the SPO may not even be considered an “authority” and its investigations are primarily directed at lawful activities. Based on the above, the data processing of the SPO falls under GDPR.

Sections 7-9 of the Act give the SPO an unusually broad, technically unrestricted mandate to collect and process any personal data in relation to the “investigative activity” of the SPO described under Section 3 of the Act. This means that the SPO is free to request personal data from the persons or organisations under investigation, any other private individual or organisation, as well as from any administrative or other public body, and the addressee of the requests is obliged to comply. The SPO is also free to set up direct data links with other organisations under Section 5 of the Act, without the respective agreements providing protection of personal data in practice.

The purpose of data processing is not explicitly stated. Section 7(1) of the Act only sets out that the data request has to be “in connection with the investigation under Section 3”. However, as Section 3 has a broad and uncertain wording, a clear purpose is not determined by this reference. Even if one might conclude to a regulatory aim of the investigation (and therefore, the data processing) from the wording of Section 3 and the preamble of the Act, there is still no legally established data processing purpose.

The only restriction on the use of the personal data collected by the SPO is in Section 6(6) of the Act, which states that the published reports of the SPO shall not contain personal data, apart from personal data which is public in the public interest. However, this rule only relates to publication as only one type of data processing, and it hardly qualifies as a safeguard against undue interference with privacy, as the SPO is free to use personal data for any other purposes, and there are no restrictions to incorporate findings based on the analysis of such data in the published reports.

The collected personal data can be used in any procedure of any other authority according to Section 11 of the Act. In practice, the SPO can transfer all the data it collected from different sources by initiating the proceeding of an administrative authority (such as a tax supervision) or “any other” proceeding (such as a disciplinary proceeding of a public or even a private employer, including a disciplinary proceeding against a judge or a public prosecutor). This contradicts the essence of the data protection requirements on public bodies, as it makes possible the merging of personal data collected for different purposes without even providing a purpose for it.

From among the lawful instances of processing included in the GDPR, Article 6(1)(c) (“processing is necessary for compliance with a legal obligation to which the controller is subject”) and Article 6(1)(e) (“processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller”) are relevant for the evaluation of the data processing rules of the Act. In addition, it has to be taken into account that Article 6(3) of the GDPR sets out, among others, that a Member State law has to lay down the legal basis for processing, that

²⁹ According to the case-law of the CJEU, Article 2(2) of GDPR must be interpreted strictly. See: C-101/01, Lundqvist, paras 40 and 42; C-272/19, VQ vs Land Hessen, para. 66.

³⁰ Regarding Article 2(2)(d) of the GDPR, the CJEU found that “it is clearly apparent from the wording of that provision that two conditions need to be met for data processing to fall within the scope of the exception it lays down. While the first one of those conditions related to the purposes of the processing operation, namely, the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, the second condition relates to the person carrying out that operation, namely a ‘competent authority’ within the meaning of that provision.” (C-817/19, Ligue des droits humains, para. 67.)

“the purpose of the processing shall be determined in that legal basis”, and that “Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued”. These requirements are not fulfilled in the case of the data processing of the SPO, as the purpose of the processing is not established by law with sufficient clarity, the data processing is unnecessary, and it does not meet an objective of public interest. Moreover, the fundamental data protection principle of purpose limitation acknowledged in Article 5(1)(b) of GDPR is also violated by the rules that allow the transfer of personal data collected by the SPO to other authorities and bodies without limitation.