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OPINION ON THE HUNGARIAN DRAFT ACT ON THE TRANSPARENCY OF ORGANISATIONS SUPPORTED FROM ABROAD

Opinion prepared by the Expert Council on NGO Law

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Foreword

When the Council of Europe's Conference of INGOs created the EXPERT COUNCIL ON NGO LAW in 2008, it affirmed that "the existence of many non-governmental organisations (NGOs) is a manifestation of the right of their members to freedom of association under Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and of their host country's adherence to principles of democratic pluralism". The Conference also designated the Expert Council "as one of its major organs contributing to all the core values of the Council of Europe".

The Expert Council was and is mandated to "monitor the legal and regulatory frameworks in European countries which affect the status and operation of NGOs" and to "take up issues on its own initiative". The present Opinion on a current Hungarian draft Act "on the transparency of organizations supported from abroad" responds to all the mandates cited above.

In the years following Hungary's 1990 admission to the Council of Europe, it was recognized - and cited by Council of Europe leaders - as a model for other countries also emerging from Soviet repression and progressing towards "adherence to principles of democratic pluralism". Successive governments ensured an enabling environment for a vibrant Hungarian civil society as it re-emerged and demonstrated the benefits of citizen involvement in public policy discussions and decision-making.

Sadly, recent years have seen today's Hungarian authorities become increasingly aggressive and regressive towards civil society organizations (CSOs). This has included making verbal assaults and heaping opprobrium on perfectly legitimate CSOs/NGOs solely because they have received funding from governments or philanthropies based in other countries - a practice which is of course itself entirely legitimate.

One step down this slippery path to repression is the Hungarian draft Act cited above that is the subject of the present Opinion. As the well-reasoned paragraphs of the Opinion demonstrate, the draft Act is largely incompatible with international and European standards and would open the door to further acts of discrimination and/or vilification of civil society. Let us not forget that CSOs/NGOs are nothing more - and nothing less - that freely-constituted associations of citizens, exercising citizens' rights to hold and express an opinion on any subject, including on the values and performance of the government those very citizens have elected and whose cardinal duty is to protect their rights.

In terms of democracy, human rights and the rule of law - the core values of the Council of Europe - this Hungarian draft Act is flawed from start to finish. I accordingly underline the final Conclusion of the Opinion, namely calling upon the Hungarian authorities not to adopt the draft Act.

I urge the authorities to revert to upholding the timeless principles of democracy and good governance, including fostering anew the active enlightened engagement of citizens and civil society.

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OPINION ON THE HUNGARIAN DRAFT ACT ON THE TRANSPARENCY OF ORGANISATIONS SUPPORTED FROM ABROAD

Introduction

1. This opinion examines the compatibility of the draft *Act on the Transparency of Organisations Supported from Abroad (Hungarian Parliament Bill T/14967)*[1] (hereinafter: draft Act) [2] with international standards and best practices, particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Council of Europe's Recommendation (2007)14 on the Legal status of non-governmental organisations in Europe. The opinion was prepared at the request of the Conference of INGOs of the Council of Europe.[3]

2. The overall environment in which Hungarian NGOs operate has been subject of scrutiny by the Council of Europe and other interested parties[4] over the past few years. From 21 to 22 November, the Conference of INGOs carried out a fact finding visit in Budapest with a view to assessing the participation of civil society in political decision making and to strengthening the connection with national NGOs in the Member States. At that point, the Hungarian public authorities informed the Conference of INGOs that that they "do not plan any measures aiming to categorize NGOs benefiting from foreign funding under a 'foreign agent' status, which would only promote suspicion and divisions within civil society".[5]

   In addition, in anticipation of the announced Act in March 2017, the Conference of INGOs and the Expert Council on NGO Law issued a statement highlighting key standards that should be respected in drafting of the Act.[6]

3. The opinion first outlines the main provisions of the draft Act. Thereafter, it presents international standards pertinent to non-governmental /civil society

[1] Submitted by 3 MPs on April 7, 2017: http://www.parlament.hu/irom40/14967/14967.pdf
[2] Unofficial translation made available to the Expert Council for review. All internet links in this Opinion last accessed on 21 April 2017.
[3] Expertise in aspects of the opinion was sought from the European Center for Not-for-Profit Law (ECNL).
[4] The UN Special Rapporteur on human rights defenders in the report to his visit to Hungary outlined that "authorities have effectively sought to restrict the work of civil society and increase supervision through such indirect means as investigations on funding, increased auditing, new internet laws and increased media campaigns stigmatising human rights defenders." End of mission statement by Special Rapporteur, concluding his visit to Hungary from 8 to 16 of February 2016. https://www.protecting-defenders.org/en/news/end-mission-visit-hungary
[5] Fact-finding visit to Budapest (November 2016) https://www.coe.int/en/web/ingo/newsroom/-/asset_publisher/BR9aikJBXnwX/content/fact-finding-visit-to-hungary?_101_INSTANCE_BR9aikJBXnwX_viewMode=view/
[6] Council of Europe Statement by the President of the Conference of INGOs and the President of the Expert Council on NGO Law http://www.coe.int/en/web/ingo/-/statement-by-the-president-of-the-conference-of-ingos-and-the-president-of-the-expert-council-on-ngo-law

organizations (NGOs/CSOs) and considers the compatibility of the draft Act with those standards.

4. For the purposes of the opinion the term NGOs is considered to be the same as the term CSOs and will refer to the associations and foundations subject to the draft Act.

Background

5. The draft Act was introduced to Parliament after few months of consecutive campaigns against foreign funded groups. The Hungarian government took particular attention against specific groups of NGOs, depicting them as foreign agents and stating they needed to be "fought back and cleared away." The government has claimed that NGOs are not legitimate representatives of the society, but are financed by international organizations in an attempt to exert influence on domestic politics[7] and discredit the government, questioned their transparency[8], and even labelled them as one of five major "attacks" on Hungary[9] that the government needs to defend itself against in 2017. In parallel to legislative proposals, at the end of March the government also initiated a national consultation entitled "*Let's Stop Brussels*", polling citizens on issues labelled as possible threats[10] to the national independence of the state. This campaign also entails NGOs receiving foreign funding and suggests they operate in Hungary with the aim to interfere in domestic affairs in a non-transparent manner.[11]

6. As the Expert Council has stated before "As with individual citizens, NGOs and associations have the fundamental right to peacefully disagree with governmental policies, and to peacefully express their opinions, without being muzzled by the authorities - the very authorities who should be accountable to their citizens for protecting and promoting citizens' liberties. Indeed, the question arises: what might be next?"[12]

7. This context is, therefore, important when analysing the draft Act and understanding its motivations and justifications. The Council wants to highlight here excerpts from the findings and recommendations by the Council of Europe

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[7] http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-address-in-parliament-before-the-start-of-daily-business20170223

[8] http://www.kormany.hu/en/government-spokesperson/news/ngos-too-must-meet-criteria-of-transparency

[9] http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-state-of-the-nation-address-20170214

[10] http://www.kormany.hu/en/the-prime-minister/news/national-consultation-to-be-launched-on-threats-faced-by-hungary

[11] http://www.kormany.hu/en/cabinet-office-of-the-prime-minister/news/the-national-consultation-has-begun

[12] Expert Council on NGO Law, Opinion on Federal Law of 23 May 2015 #129-Fz "On Introduction of Amendments to Certain Legislative Acts of the Russian Federation" (Law On "Undesirable" Organisations), November 2015.

Secretary General's Report "General State of democracy, human rights and the rule of law (2017)"[13]:

> "NGOs are subject to financial reporting obligations, limits on foreign funding and/or other requirements that impede the operation of NGOs (Hungary, Russian Federation, Turkey)."
>
> "They are labelled in a negative manner merely on account of receiving foreign funds and subsequently face adverse consequences. NGOs encounter various impediments to their creation, activities and funding. Emphasis is placed on a control-and-command approach reflected in cumbersome and lengthy registration procedures, additional administrative requirements and obstacles to accessing financial resources, particularly foreign funding. More and more frequently this goes along with a deterioration of the environment in which NGOs operate, through stigmatisation, smear campaigns and judicial, administrative or fiscal harassment. The NGOs targeted are mostly those active in the field of human rights protection, promoting accountable governance or fighting corruption."
>
> "A restrictive approach to NGOs, particularly those pursuing a public watchdog function, is incompatible with a pluralist democracy, which should guarantee the work of all NGOs, without undue interference in their internal functioning."

8. Finally, the draft Act was not developed in broad consultation with the NGOs, particularly those that will be affected by the draft Act. The lack of such debate is not in line with the right to participation guaranteed in Article 25 of the International Covenant on Civil and Political Rights (ICCPR) nor standards regarding participation, as outlined in the Code of Good Practice for Civil Participation in the Decision-Making Process, elaborated by the Conference of INGOs and supported by the Committee of Ministers, Parliamentary Assembly and the Congress and Local and Regional Authorities of the Council of Europe. Moreover, para. 77 of the Recommendation CM/Rec(2007)14 provides that:

> "NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation."

About the Draft Act

The analysis of the draft Act suggests that the following issues bear particular relevance for the assessment of its overall compatibility with international standards:

[13] State of democracy, human rights and the rule of law: Populism - How strong are Europe's checks and balances?, Report by the Secretary General of the Council of Europe, 2017 https://edoc.coe.int/en/an-overview/7345-pdf-state-of-democracy-human-rights-and-the-rule-of-law.html

Purpose of the draft Act

9. The general reasoning of the Draft Act uses the pretext of (1) national security, (2) sovereignty and (3) anti-money laundering and counter-terrorism financing as justifications to impose additional requirements on the NGOs supported from abroad.

Scope

10. The Act applies exclusively to associations and foundations which in a tax year receive funding from foreign sources in double of the sum specified in the Hungarian Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing (7.2 million Hungarian Forints). It does not apply to associations under the scope of Act no. I of 2004 on Sports nor associations pursuing religious activities. In addition, similar rules do not apply to other legal entities nor businesses that receive funding from abroad, thus discriminating NGOs which receive foreign funding from other entities.

Scope of support from abroad / foreign funding

11. The draft Act applies to all funds from abroad, presumable including funding from individuals, legal entities, governments, aid agencies, inter-governmental organisations, and the European Union (unless the EU funding is distributed through a Hungarian budgetary institution). Funding includes financial and pecuniary support, obtained directly and indirectly.

Labelling requirements and register

12. The draft Act creates a category of "organization supported from abroad". The organization receiving funding from the abroad need to declare and notify the court, within 15 days of reaching the threshold, that it has become 'organization supported from abroad'. The court will register the organization as 'organization supported from abroad'.

13. Such organisations will be registered in a register hosted under the Minister responsible for the management of the Civil Information Portal. The data will be publicly available through a separate electronic platform developed for this purpose and will be available free of charge.

14. Under the draft Act, the "organization supported from abroad" title should be marked on the organization's website, all press materials and on its publications.

Reporting requirements

15. The draft Act requires NGOs to annually declare the support received in the previous year. The organization must include the amount and donor of each foreign transaction (in case of individuals their name, country and city, in case of

organizations their name and registered address) and the sum of the foreign donation.

Penalties and criminal sanctions

16. Failing to register will ultimately result in the entity's legal status being revoked through a simplified liquidation procedure. If the organization fails to register after repeated requests by the public prosecutor, fines can be imposed (between 10.000 – 900.000 HUF). The public prosecutor shall initiate with the Registering Court the imposition of a fine. If the organization still fails to register, the public prosecutor shall initiate a proceeding for the dissolution of the association or the foundation by the court through a simplified procedure.

The applicable international standards

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

17. Provisions of the ECHR governing the rights to *freedom of expression* (Article 10) and *freedom of* assembly and *association* (Article 11)—as well as the ensuing case law of the European Court of Human Rights ('Court')—bear particular relevance for assessing the compliance of the draft Act with the international standards. In addition, the opinion takes into due consideration other articles of the Convention as appropriate, namely, the rights to privacy (Article 8) and prohibition of discrimination (Article 14).[14]

18. As the Expert Council in its Opinion on the Russian Foreign Agent Law stated[15]:

> "The rights protected by the Convention are guaranteed to "everyone". This includes natural but also legal persons—depending on the nature of the rights concerned—"within the jurisdiction" of a Signatory State (Article 1, Convention). The Court interprets the notion "within jurisdiction" to at least include all persons residing—or for that matter having a place of business—on a territory of a State.[16]"

[14] See also Article 1 of the Protocol No. 12 to the Convention (general prohibition of discrimination).

[15] This section and opinion in general, draws references from previous opinions prepared by the Expert Council on NGO Law, most notably its Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents (August 2013)

[16] See e.g. *Brankovic and others v. Belgium and others*, Application No. 52207/99, judgement of 12 December 2001, par. 67.: "In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention". See also *Soering v. the United Kingdom*, Application No. 14038/88, judgment of 7 July 1989. On the application of the notion 'everyone'' with respect to Article 11 of the Convention see Expert Council on NGO Law, 'Conditions of Establishment of Non-Governmental Organizations', OING Conf/Exp (2009) 1, First Annual Report, Strasbourg, January 2009, par. 20-24.

"The primary obligation of a State with respect to the rights guaranteed by Article 10, and 11 is negative one: duty not to interfere in the enjoyment of those rights.[17] This is in keeping with the overriding objective of those articles: to afford protection to legal and natural persons in exercising those rights from undue interference by public authorities.[18] The Court shall primarily interpret pertinent national legislation and domestic case law, as well as decisions and actions of government, against the background of the negative obligation of a State.[19] Legitimate interference of a State ('positive obligation') is limited to instances in which it is necessary to protect the exercise of those rights.[20] This also includes an obligation of a State to afford necessary legal protection during NGOs life-cycle.[21]"

"In deliberating if the alleged interference of rights under the Convention, including Article 10 and 11, is compatible with the Convention, the Court has developed an analytical framework which sets out a high threshold for a State's legitimate interference with the rights protected by those articles. Accordingly, any interference with freedoms of expression and association must be "prescribed by law", "serve legitimate aim", and be "necessary in a democratic society.[22]"

"Necessary in a democratic society. The Court has repeatedly noted that democracy is a fundamental feature of the European public order and the only regime compatible with the Convention[23]. Therefore, it is incumbent on a State to prove that interference with the rights enshrined in Article 10 and 11 is not only prescribed by law and serve legitimate aim, but is also in response to 'pressing social needs'[24]".

"Proportionality: It is incumbent on a State to prove that the interference in question is not only necessary in a democratic society i.e. serves pressing social needs, but is also proportional to the needs it purports to serve: a State must prove that the interference in question is the minimum

[17] The negative obligation of a State pertains to the right of privacy (Article 8) and freedom of thought, conscience and religion (Article 9) as well, which also belong to the group of the so called qualified rights. Article 9 is not addressed in the opinion, however, given that the Act does not apply to religious organizations.

[18] See e.g. *Brega and Others v. Moldova*, Application no. 61485/08, judgment of 24 January 2012

[19] See e.g. *Ramazanova and Others v. Azerbaijan*, Application no. 44363/02, judgment of 1 February 2007.

[20] See e.g. *Demir and Baykara v Turkey*, Application no. 34503/97, judgment of 12 November, 2008.

[21] See e.g. *Sidiropulos and Others v. Greece*, Application no. 57/1997/841/1047, judgment of 10 July 1998.

[22] See e.g. *Handyside v. United Kingdom*, Application no. 5493/72, judgment of 7 December 1976.

[23] See e.g. *United Communist Party of Turkey and Others v. Turkey*, Application no. 19392/92, judgment of 30 January 1998.

[24] *Handyside v. United Kingdom*, par. 48. In Refah Partisi (the Welfare Party) and Others v. Turkey the Court stated: "Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it"

level of interference necessary to attain legitimate goals. Proportionality therefore requires striking a fair balance between the general interest and the requirements of the protection of fundamental rights, which is inherent in the whole of the Convention. In a significant number of cases involving violation of Article 8, 10 and 11 of the Convention—which are pertinent to the analyses of the Act —the Court found that the interference served a legitimate aim, however, the respondent failed to meet the proportionality test. [25]"

Recommendation CM/Rec (2007)14

19. The Recommendation CM/Rec (2007)14 cites the "essential contribution made by NGOs to the development and realization of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies". It also underscores the role of NGOs in "the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe".[26]

20. The Recommendation CM/Rec (2007)14 sets out a number of principles governing the legal status of NGOs which bear particular relevance for assessing the compliance of the draft Act with international standards. Significantly, many of the principles have been specifically invoked by the Court. Thus in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan* the Court made specific references to the principles set out in the Recommendation.[27] This underscores the point about the role of the Recommendation in the Council of Europe's overall structure designed to protect democracy and human rights, given the political nature of this document.

21. The draft Act also could be reviewed from the perspective of compliance with rights and safeguards guaranteed in the following non-exclusive list of international and European instruments:

International Covenant on Civic and Political Rights (ICCPR) freedom of expression (article 19), freedom of association (article 22) and right to take part in the conduct of public affairs (article 25); non-discrimination (article 26);

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[25] See e. g. *Campbell v. the United Kingdom*, application no. 1359/88, judgment of 25 March 1994 (violation of Article 8). *Handyside v. the United Kingdom*, *supra*, note 16. *Sunday Times v. the United Kingdom* (No. 1), Application no. 6538/74, judgment of 26 April 1979 (violation of Article 10). *Yeşilgöz v. Turkey***,** Application no. 45454/99, judgment of 20 December 2005. *Kjeldsen, Busk, Madsen and Pederson v. Denmark*, Application no. 5095/71, 5920/72, 5926/72, judgment of 7 December 1976. *Loizidou v. Turkey*, Application no. 15318/89, judgment of 23 March 1995. *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, *supra*, note 24. (violation of Article 11). See also Compilation of Venice Commission opinions concerning freedom of association, Strasbourg, 16 July, 2013, CDL(2013)035.

[26] Preamble, Recommendation CM/Rec(2007)14.

[27] Par. 39. of the judgment.

European Union Directive 2015/849 on the use of the financial system for the purposes of money laundering or terrorist financing of 20 May 2015 (OJ L 5.6.2015 73) (hereinafter: Directive (EU) 2015/849);[28]

The European Union Charter on Fundamental Rights: freedom of association (Article 12); freedom of expression (Article 11), data protection (Article 8), non-discrimination (Article 21);

UN Declarations, and Human Rights Council Resolutions on civil society space and participation.[29]

Compatibility of the draft Act with international standards

Purpose of the draft Act

22. The general reasoning stipulates that the aim of the draft "is to see and make visible which organisations can be considered as organisations receiving foreign funds…" and to "… create the opportunity for making it clear to the public which organisations and what interests want to influence the opinion and the behaviour of the Hungarian state and its individual citizens." The draft Act in the Preamble and the General Reasoning also assume that foreign interest groups may misuse NGOs and because of the social influence NGOs have, "endanger the national security and sovereignty of Hungary".

23. The draft Act without providing concrete evidence assumes that groups funded from abroad that engage in public policy do not have own legitimate opinions or follow their statutory aims, but serve other interests and justifies requirements for their increased transparency, in the name of national security, sovereignty, anti-money laundering and counter-terrorism financing. Therefore, the Council finds it important to elaborate on these justifications and their compatibility with international standards.

NGO engagement in public policy

24. NGOs should be free to engage in any kind of activities otherwise allowed to individuals or other legal entities, without additional restrictions imposed on them.[30] The rights to freedom of association and expression encompass the right of

[28] Directive (Eu) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (EU AML Directive)

[29] E.g., A/HRC/24/L.24 on civil society space: creating and maintaining, in law and in practice, a safe and enabling environment, 23 September 2013, A/HRC/27/L.24 on civil society space, 23 September 2014, A/HRC/32/L.29 on civil society space, 27 June 2016, A/HRC/30/L.27/Rev.1 on equal participation in political and public affairs, 30 September 2015

[30] See Expert Council on NGO Law, 'Conditions of Establishment of Non-Governmental Organizations'

NGOs to be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law.[31] This includes participation in public life and policy, which is in keeping with one of the principal features of democracy—that is, to create the possibility for members of a society to resolve social and political problems through dialogue, without recourse to violence, "even when they are irksome".[32]

25. The right to freedom of association encompasses not only the right to form an association but also the right of its members to carry out the statutory activities of the association freely. In the view of the UN Human Rights Committee the protection afforded by Article 22 of the ICCPR extends to all such activities. Furthermore, the Committee considered that the reference to the notion of 'democratic society' in the necessity test for admissible restrictions on this freedom indicated that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society.[33]

26. Therefore, the mere fact that NGOs put forward different options or actions than what the current government would want to hear does not justify interference in the name of transparency into their rights to association, expression, privacy, ability to seek, access and use resources among others.

Transparency

27. The draft Act does not offer publicly available evidence of imminent threat by foreign funded NGOs that would merit further scrutiny over their funding, especially funding from abroad. Further the reasoning does not actually indicate any problems that have arisen in practice that could not be dealt with by existing legal provisions or less intrusive measures. Therefore, it is not likely to pass the 'necessary in democratic society' nor 'proportionality' test.

28. The Venice Commission on this matter stated that:

> "legitimate aim of ensuring transparency … cannot justify measures which hamper the activities of non-commercial organisations operating in the field of human rights, democracy and the rule of law." [34]

[31] Para.12 Recommendation CM/Rec(2007)14
[32] *United Communist Part of Turkey and Others v. Turkey*.
[33] Case Korneenko v. Belarus, Communication No. 1226/2003, 20 July 2012, as explained in Review of Developments in Standards, Mechanisms and Case Law, Review prepared by Mr Jeremy McBride on behalf of the Expert Council at the request of the Standing Committee of the Conference of INGOs, 2013
[34] Venice Commission Opinion on federal law no. 129-fz on amending certain legislative acts (Federal law on undesirable activities of foreign and international non-governmental organisations) (2016) and Opinion on federal Law N. 121-FZ on Non-Commercial Organisations ("Law on Foreign Agents"), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation.

29. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association similarly warned against misuse of transparency as a pretext for "extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment."[35]

National security and state sovereignty

30. The government has not put forward any concrete evidence as to the real danger by Hungarian NGOs receiving funding from abroad, to the national security or sovereignty and hence the draft Act will likely fail the necessity and proportionality requirements.

31. The ECHR allows restrictions to freedom of association and expression in the interests of national security. However, there is a lack of evidence that any such restrictions are doing what the draft Act claims. In addition, there are undoubtedly sufficient criminal provisions already in place dealing with terrorism and money-laundering in the Hungarian legal system. This would make the approach of the draft Act a restriction on the right to freedom of association that the European Court would consider unjustified.

32. Furthermore, the potential restriction on links by Hungarian nationals with those in other countries in the name of national security– which is the inevitable consequence of them receiving funds for projects that each side considers desirable – runs counter to the freedom of expression under Article 10 which guarantees the right to impart information and ideas regardless of frontiers. Since it will affect all NGOs, regardless of the activities involved, it would not be regarded by the European Court as pressing social need, proportionate nor necessary in democratic society. [36]

33. According to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996). "(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government."

[35] UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 2013

[36] See for example: Judgment by the European Court of Human Rights, Case of Ekin Association v. France, Application no. 39288/98 of 17 July 2001. In the case which concerned a ban on the importation of foreign publications, the Court, considered that the content of the book did not justify, in particular as regards the issues of public safety and public order, so serious an interference with the applicant association's freedom of expression as that constituted by the ban imposed by the Minister of the Interior. Ultimately, the Court considered that the ban did not meet a pressing social need and was not proportionate to the legitimate aim pursued.

34. Similarly, the UN Human Right Committee has also found that when a State party invokes national security and protection of public order as a reason to restrict the right to association, the State party must prove the precise nature of the threat. The Committee further elaborated that "the mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose."[37]

35. Furthermore, having opinions that are different from the government policies does not represent a threat to national security and public order. The Human Rights Committee discussed this matter in light of protection offered by both Article 19 and Article 25 of the ICCPR, which respectively guarantee freedom to seek, receive and impart information and ideas and recognize and protect the right of every citizen to take part in the conduct of public affairs.[38]

36. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association found that justification on the grounds of state sovereignty violates international norms and standards related to freedom of association. He said that "it is not just an illegitimate excuse, but a fallacious pretext which does not meet the requirement of a "democratic society". The recent tendency of invoking the protection of State sovereignty to restrict foreign funding or to launch slander offensives against those receiving foreign funding and the defamation, stigmatization and acts of harassment against the recipients have a serious impact on the work of civil society actors, not to mention their ability to access funding as it deters them from seeking foreign funding."[39]

Anti-money laundering and counter-terrorism financing

37. The draft Act states that "In line with the efforts of the international community…, this Act expands the control mechanisms related to money laundering and the financing of terrorism, ensures the transparency of foreign financing for organisations in the civil society…." However, the draft Act seems to fall short in applying the standards that govern the way in which states should regulate the NGOs in the name of money laundering and the financing of terrorism.

38. The Recommendation 8 of the Financial Action Task Force (FATF)[40] and the Directive (EU) 2015/849 which are key international and European documents on

[37] Mr. Jeong- Eun Lee v. Republic of Korea, U.N. Human Rights Committee, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005).
[38] Case Korneenko v. Belarus, Communication No. 1226/2003, 20 July 2012, as explained in Review of Developments in Standards, Mechanisms and Case Law, Review prepared by Mr Jeremy McBride on behalf of the Expert Council at the request of the Standing Committee of the Conference of INGOs, 2013
[39] UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 2013
[40] The Financial Action Task Force (FATF) 'International standards on combating money laundering and the financing of terrorism and proliferation: The FATF Recommendations' (last updated 2016).

prevention of money laundering and terrorism financing, do not provide the basis for introducing reporting and transparency rules on NGOs receiving foreign funding as such.

39. The FATF Recommendation 8 and its Interpretive Note require states to first undertake a risk assessment of the NGO sector in order to identify which NGOs are at risk. Only if some NGOs are identified to be risk, then the states must apply focused and proportionate measures and only to those NGOs identified as being at risk. The FATF regime also asks states to respect international human rights law and avoid over-regulation.

40. According to the MONEYVAL Mutual Assessment Report of Hungary,[41] Hungary rated the terrorism financing risks related to the NGO sector as low. However, the report concluded that Hungary has not undertaken a formal domestic review nor risk assessment specific to the NGOs sector, as required by FATF Recommendation 8 which will allow the government to determine if (some) NGOs are at risk of being misused for terrorism financing.

41. The Directive does not target NGOs specifically. Even more, Article 22-27 of the Directive also require a risk-assessment, evidence-based decision-making, and proportionate approach that considers the specific needs and the nature of the business of the entities that will be affected. Furthermore, the Directive does not require special register for foreign funded NGOs as such. Moreover, the Directive asks countries to align their approach with FATF recommendations, as well as the Union data protection law and the protection of fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union.

42. The draft Act does not contain any elements allowing to determine whether the rules that would apply to certain NGOs are based on a proper assessment of risk. Lack of evidence and Hungary's own rating of the NGO's risk as low, would suggest that the draft Act is not justified by what is necessary to prevent money laundering and terrorist financing and that the objectives could be met by less restrictive means.

43. The Venice Commission pointed out that:

> "Foreign funding of NGOs is at times viewed as problematic by States. The Venice Commission acknowledges that there may be various reasons for a State to restrict foreign funding, including the prevention of money-laundering and terrorist financing. However, these legitimate aims should not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work, notably in defence of human rights".[42]

[41] Anti-money laundering and counter-terrorist financing measures Hungary, Fifth Round Mutual Evaluation Report, September 2016, MONEYVAL(2016)13

[42] Compilation of Venice Commission opinions concerning freedom of association (2013).

44. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, also stated that states have a responsibility to address money-laundering and terrorism, but this should never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work and that states should use alternative mechanisms to mitigate the risk.[43]

45. Similarly, the UN Special Rapporteur on the situation of human rights defenders found that:

> "Many countries have put in place legislation that significantly restricts the ability of human rights organizations to seek and receive funding, especially foreign funding. There may be various reasons for a Government to restrict foreign funding, including the prevention of money-laundering and terrorist financing, or increasing the effectiveness of foreign aid. The Special Rapporteur is concerned, however, that in many cases such justifications are merely rhetorical and the real intention of Governments is to restrict the ability of human rights organizations to carry out their legitimate work in defence of human rights."[44]

Discriminatory treatment

46. All NGOs should be treated equally regardless of the type of activities they engage in or source of funding they receive. However, the draft Act applies exclusively to associations and foundations. Furthermore, it specifically states that it does not apply to sport associations nor associations pursuing religious activities. Also, the draft Act discriminates NGOs that receive funding from foreign resources, from those that don't.

47. The Venice Commission recalled that in its case law the European Court was reluctant to accept the "foreign origin of an NCO as a legitimate reason for a differentiated treatment; the same reluctance would a fortiori be in place in case of mere foreign funding."[45]

48. The *Guidelines on Freedom of Association*, jointly elaborated by the OSCE-ODIHR and Venice Commission, also reject limitations based on the nationality or origin of the source of funding:

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[43] First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai A/HRC/20/27, 2012

[44] UN General Assembly, Report of the Special Rapporteur on the situation of human rights defenders, A/64/226, August 4, 2009

[45] Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents (August 2013)

"States shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source…."[46]

49. The draft Act is targeted also at links with countries within the European Union/Council of Europe and it is hard to see that activities that are legitimate within those grouping of States can be seen as objectionable.[47] Furthermore, the inclusion of funding from European Union countries in the measure amounts to differential treatment of European Union nationals in the absence of any evidence that European Union sources of funding have created the problems which are supposed to be addressed.

50. Further, the general reasoning of the draft Act stipulates that "it cannot be disregarded that the resulting danger does not threaten the for-profit sector only, but may also appear in the civil sector". Yet similar rules about registering, labelling and sanctions do not apply to for-profit sector nor other legal entities that receive funding from foreign sources.

51. States must refrain from adopting measures that disproportionately target or burden NGOs such as imposing onerous vetting rules, procedures or other NGO-specific requirements not applied to the corporate sector.[48] The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association calls upon States to ensure that equal treatment between NGOs and businesses in laws and practices regulating, inter alia, reporting, access to resources, including foreign resources. He emphasized that there is no basis in international human rights law for imposing more burdensome reporting requirements upon NGOs than upon businesses or other entities and that justifications such as protecting State sovereignty are not legitimate bases under the international human rights instruments.[49]

52. The registration, labelling of products, reporting requirements and the use of term "organisations supported from abroad" also give rise to the issue of compatibility with Article 14 of the Convention. As already noted, in light of the campaign by the government against such organisation there is concern that the labelling requirement will only provide additional grounds for undue discrimination of NGO for political reasons.

Labelling requirements

[46] OSCE-ODIHR and Venice Commission, *Guidelines on Freedom of Association*, December 2014, Principle 7.

[47] See for example, Open Door and Dublin Well Woman v. Ireland, no. 14234/88, 29 October 1992

[48] Protecting civic space and the right to access resources - General Principle 3: Civil society and the corporate sectors should be governed by an equitable set of rules and regulations (sectoral equity). UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and A Community of Democracies project funded by Sweden.

[49] UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Factsheet: Comparing treatment of business & associations (General Assembly Report – Oct. 2015).

53. As the Expert Council in its Opinion on the Russian Foreign Agent Law stated[50]:

> "the labelling requirement does not observe the guiding principles enshrined in Recommendation CM/Rec(2007)14 with respect to NGOs freedom of expression and gives rise to the issue of compatibility with Article 10 and 11 of the Convention. Significantly, Article 10 affords protection not only to the substance of the ideas and information expressed, but also to the *form* in which they are conveyed.[51]"

> "Furthermore, the labelling requirement does not seem to serve any legitimate goal either, given the exhaustive list of permissible derogations set out in Article 10 and 11, and the Court's narrow interpretation thereof, which reflects its commitment towards "pluralism, tolerance and broadmindedness.[52]"

54. The practice of stigmatizing NGOs on account of their source of funding has been condemned by several international institutions. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has stated that "[u]nder international law, problematic constraints include … stigmatizing or delegitimizing the work of foreign-funded NGOs by requiring them to be labelled as "foreign agents" or other pejorative terms." [53]

55. The *Guidelines on Freedom of Association* similarly provide, with respect to foreign sources, that: "states shall not … stigmatize those who receive such resources."[54]

56. The Venice Commission criticized the Russian authorities for stirring distrust and suspicion of certain foreign-funded organisations, imposing a label on them under the guise of ensuring transparency:

> "60. The Venice Commission considers that the imposition of the very negative qualification of "foreign agent" and the obligation for the non-commercial organisations to use it on all its materials cannot be deemed to be "necessary in a democratic society" to assure the financial transparency of the non-commercial organisation receiving foreign funding. The mere fact that a non-commercial organisation receives foreign funding cannot justify it to be qualified a "foreign agent".

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[50] Expert Council on NGO Law Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents (August 2013)
[51] *Oberschlick v. Austria* (no 1), judgment of 23 May 1991, Series A no. 204.
[52] *Handyside v. United Kingdom*, Application no. 5493/72, judgment of 7 December 1976
[53] UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 2013.
[54] OSCE-ODIHR and Venice Commission, *Guidelines on Freedom of Association*, December 2014, Principle 7.

> 61. In the light of the undisputable, very negative connotation of the label "foreign agent", the Venice Commission finds that the immediate effect of the law is that of stirring the suspicion and distrust of the public in certain non-commercial organisations and of stigmatizing them, thus having a chilling effect on their activities. This effect goes beyond the aim of transparency which is alleged to be the only aim of the law under consideration."[55]

57. The Venice Commission reinforced this in its Joint Opinion on the draft law of the Kyrgyz Republic:

> "the labelling of a non-commercial organization as foreign agent and the obligation for it to include a reference to the "foreign agent origin" in any materials published or distributed…., together with the additional reporting obligations …undoubtedly represent an interference with the exercise of the right to freedom of association and of freedom of expression without discrimination".[56]

Ability to seek, receive and use resources

58. The ability to seek, receive and use resources is inherent to the right to freedom of association and essential to the existence and effective operations of any organisation.

59. Recommendation CM/Rec(2007)14 sets out an important guiding principle with respect to legitimate sources of NGOs income:

> "NGOs should be free to solicit and receive funding– cash or in-kind donations–not only from public bodies in their own state but also from institutional or individual donors…"[57]

60. The foregoing principle is also echoed in a number of the United Nations (UN) instruments, including article 13 of the Declaration on Human Rights Defenders of UN General Assembly[58] which makes *no distinction* between the sources of funding, be it from domestic, foreign or international sources and provides that:

> "Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting

[55] Venice Commission Opinion on Federal Law N. 121-Fz on Non-Commercial Organisations ("Law on Foreign Agents"), on Federal Laws N. 18-Fz and N. 147-Fz and on Federal Law N. 190-Fz on Making Amendments to the Criminal Code ("Law On Treason") of the Russian Federation (2014)

[56] OSCE/ODIHR and Venice Commission, "Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organisations and Other Legislative Acts of Acts of the Kyrgyz Republic", CDL-AD(2013)030, 16 October 2013

[57] See also paras 100-101 of the Explanatory Memorandum to the Recommendation ('Explanatory Memorandum').

[58] UN General Assembly resolution 53/144, annex.

and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration".

61. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association highlights:

> "The ability of NGOs to access funding and other resources from domestic, foreign and international sources is an integral part of the right to freedom of association, and these constraints violate article 22 of ICCPR and other human rights instruments, including the International Covenant on Economic, Social and Cultural Rights".[59]

62. The UN Human Rights Council Resolution A/HRC/32/L.29 on Civil Society Space[60] also strengthens the link between the right to seek, secure and use resources and the ability to enjoy the right to freedom of association:

> "Recognizing that the ability to seek, secure and use resources is essential to the existence and sustainable operation of civil society actors, and that restrictions on funding to civil society actors may constitute a violation of the right to freedom of association"
>
> „8. Calls upon States to ensure that domestic provisions on funding to civil society actors are in compliance with their international human rights obligations and commitments and are not misused to hinder the work or endanger the safety of civil society actors, and underlines the importance of the ability to solicit, receive and utilize resources for their work;… "

63. "Negative rhetoric and restrictive laws also have impact on investments. Philanthropic individuals or organizations are investing their resources both to state institutions and NGO to support development in countries across borders. The consequence of the negative rhetoric or burdensome regulation has shown reduction of such investments in human, social, cultural, education and economic development."

64. The draft Act targets not only foreign funding obtained directly but also indirectly. This means that if one NGO in Hungary receives support from abroad, and then disburses some of the funds to another one the latter will also become subject to the law. This may potentially affect many organisations, including small NGOs, have chilling effect on them, including their willingness to collaborate and to jointly meet people's needs.

65. Based on the above, the Council considers that the draft Act will likely negatively impact the NGO sector, interfere in the NGO ability to raise resources not only

[59] UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 2013
[60] 27 June 2016

from abroad but also within the country, and hence their ability to exercise their right to freedom of association.

Additional categorisation and publishing information in register

66. The Expert Council is concerned that requiring NGOs to undergo notification process which will result in creating a category of 'organisations supported from abroad' and publishing their status in a separate register will undermine their ability to enjoy their rights and be under a threat of future restrictions.

67. Prescribing separate public registration of NGOs that receive funding from abroad, coupled with the labelling requirements, will likely single out and stigmatize NGOs that receive such funding. The Venice Commission took particular note of this negative effect when it found in the case of Russia that an NGO labelled as a "foreign agent" would most probably encounter an atmosphere of mistrust, fear and hostility making it difficult for it to operate and function properly.[61]

68. Hungarian NGOs will likely be seen as a threat to the national security and sovereignty, the political and economic interest of the country and connected to money laundering and terrorism financing. This will hamper the legitimate activities of NGOs, including their ability to seek, access and raise resources not only from sources from abroad but also domestically. For example donors will fear that their personal information will be subject to greater scrutiny or that they will be seen as linked to organisations working against the national interest. The draft Act will also affect delivery of important services, not only because some groups may not want to receive services from 'organisations funded from abroad'[62]; but also due to its likely negative effect on private philanthropy; which will reduce available resources to address people's needs. Ultimately, this will also negatively affect the reputation and trust towards Hungarian NGOs.

69. As shown from the experiences from other countries where such laws have been adopted, such labelling will likely reduce NGO ability to connect with the community, voice opinions and exercise fully their right to freedom of association, expression and right to participation in the conduct of public affairs.

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[61] Venice Commission Opinion on Federal Law N. 121-Fz on Non-Commercial Organisations ("Law on Foreign Agents"), on Federal Laws N. 18-Fz and N. 147-Fz and on Federal Law N. 190-Fz on Making Amendments to the Criminal Code ("Law On Treason") of the Russian Federation (2014) and Statement by the President of the Conference of INGOs and the President of the Expert Council on NGO Law http://www.coe.int/en/web/ingo/-/statement-by-the-president-of-the-conference-of-ingos-and-the-president-of-the-expert-council-on-ngo-law

[62] "As an illustration of the above-mentioned pattern, the Commissioner was informed of a case during the winter months of 2013 when homeless people were refusing to accept an offer of shelter from representatives of a non-commercial organisation engaged in providing support to people in need, indicating that they were unwilling to accept help from "foreign agents". See Opinion of the Commissioner for Hunan Rights on the legislation of the Russian Federation on non-commercial organisations in light of Council of Europe standards, CommDH(2013)15

70. In addition, a separate category of 'organisations supported from abroad' makes NGOs vulnerable to further restrictions on their work. Indeed, the Russian legislation was amended few times to further limit the rights of the organisations labelled as 'foreign agents'. Considering the government rhetoric around the development of the draft Act, and past attacks on NGOs funded from foreign sources, including foreign government sources (specifically, EEA/Norway grants), such possibility is not hypothetical.

Reporting requirements and privacy

71. The draft Act requires NGOs to annually declare the support received in the previous year. The organization must include the amount and donor of each foreign transaction (in case of individuals their name, country and city, in case of organizations their name and registered address) and the sum of the foreign donation. There is a special form provided by the draft Act for this purpose, but it is not clear how this information will be used and whether it will be made public. This raises several concerns regarding right to privacy and 'reporting requirements'.

72. The right to privacy is guaranteed to NGOs and their members. This means that oversight and supervision must be proportionate to the legitimate aims NGOs pursue, should not be invasive, nor should they be more exacting than those applicable to private businesses. It should always be carried out based on the presumption of lawfulness of the NGO and of their activities.[63]

73. Para. 64 of Recommendation CM/Rec(2007)14 provides that all reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality.

74. The European Court considered that NGOs should not be under a general obligation to disclose the names and addresses of their members since this would be incompatible with their right to freedom of association and the right to respect for private life.[64] Similar reasoning could apply to donors as the Court would likely question the legitimacy and necessity of asking for private information of donors. The list of individuals providing financial support to certain NGOs will likely expose their affiliation, opinion and belief; and with that the Act may be interfering with their personal privacy and violating data protection regulations depending on how the information may be used.

75. Further, to the extent NGOs are required to report the receipt of funds to a public authority, the procedure should be straightforward and not unnecessarily burdensome. Any control imposed by the state on an association receiving foreign resources should not be unreasonable, overly intrusive or disruptive of lawful

[63] Article 228 of OSCE/ODIHR-Venice Commission Joint Guidelines on Freedom of Association, January 1, 2015 http://www.osce.org/odihr/132371?download=true

[64] National Association of Teachers in Further and Higher Education v. United Kingdom (dec.), no. 28910/95, 16 April 1998

activities.[65] Similarly, any reporting requirements must not place an excessive or costly burden on the organization.

76. Hungarian NGOs are already subject to detailed financial and narrative reporting requirements under the existing legislation, including the breakdown of income from various resources (inter alia grants from the EU, other states and international organizations) and detailed description on the utilization of grants and donations from the central and local governments, international sources and other funders. The reports are publicly accessible at the court registry. Besides, those NGOs that have a website must also disclose these documents on their website. This ensures the transparent operation of NGOs and insight to their activity and sources of funding.

77. The itemized reporting of every single transaction prescribed by the draft Act will be excessive, intrusive and disruptive to the work of the NGOs, as it will add additional administrative burden and costs (as NGOs will need to draw additional human and financial resources to comply). Considering this and the fact that Hungarian NGOs are already subject to strict reporting and transparency requirements, the draft Act will likely not satisfy the 'necessary in a democratic society' and 'proportionality' requirement.

Sanctions

78. According to the draft Act, failing to register will ultimately result in the entity's legal status being revoked through a simplified liquidation procedure.

79. Dissolution is, according to the European Court, "the most drastic sanction possible in respect of an association and, as such, should be applied only in exceptional circumstances of very serious misconduct."[66]

80. The Recommendation CM/Rec (2007)14 echoes the European Court findings and provides that in most instances the appropriate sanction against NGOs for breach of the legal requirements should merely be the requirement to rectify their affairs. Insofar as administrative, civil or criminal penalties are imposed on NGOs and/or any individuals directly responsible, they should be based on the law in force which is otherwise applicable to legal entities, and observe the principle of *proportionality*.[67]

81. In accordance with the principle of proportionality, enforced dissolution of an NGO by the State must be seen as an extreme, last-resort measure which may only be justified when the State may prove that it was needed in order to avoid a *real*

[65] OSCE/ODIHR and Venice Commission, "Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organisations and Other Legislative Acts of Acts of the Kyrgyz Republic", CDL-AD(2013)030, 16 October 2013

[66] See *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, European Court, Judgment of 8 October 2009

[67] Par. 72, Recommendation CM/Rec(2007)14.

danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.[68]

82. The Expert Council on NGO Law Report on Sanctions Against NGOs notes the following:

> "36. Consideration should always first be given to whether a legitimate matter of concern to the authorities can be adequately handled through the issue of some form of directions, whether to desist from certain activity or to take specific action. Generally it should only be the subsequent non-compliance with such directions that should lead to the imposition of sanctions and there should be no immediate resort to the institution of administrative or criminal proceedings against the NGO concerned.
>
> 37. As all sanctions must observe the principle of proportionality, those of a financial nature ought to take account both of the seriousness of the particular infraction giving rise to it and the impact that the penalty would have on the NGO concerned. In particular a financial penalty that would entail the bankruptcy of the NGO concerned is unlikely to be justifiable", except in the case of grave and repeated violations of the law."[69]
>
> Likewise other provisions in the Law, those governing sanctions also need to meet the safeguards provided by the Convention, including the principle of non-discrimination which is set forth in Article 14 of the Convention, and the requirement that interference in question is "prescribed by law", "serves legitimate aim" and is "necessary in a democratic society"."

83. Any penalties should never be higher or harsher than penalties for similar offences committed by other entities, such as businesses.[70] In the case of the Hungarian Act, such sanctions are not prescribed to other entities.

84. The draft Act falls short of observing the foregoing principles and standards and meeting the proportionality test. There could hardly be any justification for a dissolution of a NGO just because it has not entered into the registry of 'organisations supported from abroad". In addition, as already noted, the draft Act does not deem 'support from abroad' as illegitimate *per se*, and therefore the failure to be entered into the registry can hardly be considered a real danger which would justify such a measure.

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[68] Venice Commission, Some preliminary reflections on standards and legislation relating to freedom of association and non-governmental organisations (NGOs), by Mr Peter Paczolay (Member, Hungary), CDL(2013)017

[69] Expert Council on NGO Law, "Sanctions and Liability with Respect to NGOs", OING Conf/Exp (2011) 1, Strasbourg, January, 2011.

[70] Article 237 of OSCE/ODIHR-Venice Commission Joint Guidelines on Freedom of Association, January 1, 2015

Conclusions

85. As the opinion suggests, the draft Act gives rise to concerns with respect to its compatibility with the ECHR and other recognized international standards and principles especially regarding the compatibility of the draft Act with the rights to freedom of association, expression, participation in the conduct of public affairs, privacy and ability of NGOs to seek, receive and use resources.

86. Chief concerns include: signalling out NGOs based on their income from abroad and creating special category that will result in further regulation and labelling; discriminatory treatment of such NGOs; additional burdensome reporting requirement and sanctions for those NGOs. They draft Act undoubtedly imposes additional administrative and financial burden on those organizations and will likely stigmatize them, which will hamper their ability to carry out their statutory mission.

87. The draft Act is developed based on reasoning that increased transparency of the NGOs receiving funding from abroad is necessary to protect the national security, sovereignty and is in line with the efforts to combat money-laundering and terrorism financing.

88. However, the draft Act fails to provide evidence why and how such NGOs provide concrete danger to the society. The mere fact that NGOs influence the public opinion is not a justifiable ground to impose additional measures that will undermine the operations of the sector.

89. Condemning one type of organisations will lead to condemnation and weakening trust of the whole NGO sector.

90. In addition, the Hungarian legal system already has strict reporting and transparency requirements on these organisations which satisfy the need for transparency.

91. The overall harmful rhetoric by public officials which preceded and follows the development of this draft Act, also raises doubt as to the actual motivations of the Hungarian authorities in developing the draft and suggests that they aim to target NGOs because of their opinions.

92. The Expert Council therefore calls the authorities not to adopt the draft Act and to find strength to embrace the diversity of opinions that form the fabric of a democratic society.