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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)
OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(ODIHR)

HUNGARY

DRAFT JOINT OPINION ON SECTION 253 ON THE SPECIAL IMMIGRATION TAX OF ACT XLI OF 20 JULY 2018 AMENDING CERTAIN TAX LAWS AND OTHER RELATED LAWS AND ON THE IMMIGRATION TAX

on the basis of comments by

Mr Richard BARRETT (Member, Ireland)
Ms Veronika BÍLKOVÁ (Member, Czech Republic)
Mr Martin KUIJER (Substitute Member, the Netherlands)
Mr Dan MERIDOR (Member, Israel)
Mr David GOLDBERGER, Ms Muatar KHAYDAROVA and
Mr Alexander VASHKEVICH (Members of the ODIHR Panel of Experts on Freedom of Assembly and Association)

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I. Introduction

1. By a letter of 10 October 2018, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the Venice Commission to prepare an opinion on the compatibility with international human rights standards of the law of 20 July 2018 amending certain tax laws and other related laws, and on the immigration tax (hereinafter "the law") of Hungary. The Commission decided to prepare the Opinion jointly with the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

2. Mr Richard Barrett, Ms Veronika Bílková, Mr Martin Kuijer and Mr Dan Meridor acted as rapporteurs on behalf of the Venice Commission. Mr David Goldberger, Ms Muatar Khaydarova and Mr Alexander Vashkevich were appointed as legal experts for ODIHR.

3. On 15-16 November 2018, a joint delegation of the Venice Commission and OSCE/ODIHR composed of Ms Veronika Bílková and Ms Marta Achler, Deputy Head of the Democratisation department of the ODIHR, accompanied by Mr Ziya Caga Tanyar, legal officer at the Secretariat of the Venice Commission and Ms Tamara Otiashvili, Senior Legislative Support Officer at ODIHR visited Budapest and met with the representatives of the Foreign Affairs Committee and Committee of Justice of the Hungarian Parliament, including deputies from the ruling and opposition parties, Mr Balász Orbán, State Secretary for Parliamentary and Strategic Affairs of the Prime Minister's Office, Mr Ákos Mernyei, head of cabinet, principle adviser to the State Secretary, Mr Szabolcs Takacs, Minister of State for EU Affairs in the Prime Minister's Office, Mr János Bóka, State Secretary for Cooperation in European and International Justice Affairs of the Ministry of Justice, representatives of the Constitutional Court and a number of civil society organisations. The Venice Commission and ODIHR are grateful to the Hungarian authorities for the excellent organisation of the visit.

4. The present joint opinion was prepared on the basis of contributions by the rapporteurs and on the basis of an official translation of Section 253 on the Special Immigration Tax of Act XLI of 20 July 2018 (CDL-REF(2018)059). Inaccuracies may occur in this opinion as a result of inaccuracies in the translation.

5. *This opinion was examined by the Sub-Commission on Fundamental Rights on (…), and subsequently adopted by the Venice Commission at its (…) Plenary Session (Venice, …).*

II. Executive Summary and Conclusions

6. The aim of the introduction of the special immigration tax according to the reasoning of Section 253, is to oblige non-governmental organisations conducting activities in the field of migration, to bear the costs that have arisen as a result of their associative activities, which contribute to the growth of immigration and the growth of public tasks and expenditure. The authorities present the special immigration tax as a requirement of the principle of "burden sharing": those organisations which contribute to the growth of immigration in Hungary should also contribute to cover the resulting cost.

7. When examining the interference incurred by the imposition of the special immigration tax, the situation of the donor/funder and that of the civil society organisation conducting the immigration supporting activities and which receives funds in order to finance such activities should be separated. The imposition of the special tax on the financial support to an immigration supporting activity represents in the first place an interference with the right to property of the donor as the primary taxable entity.

8. Concerning specifically NGOs performing the immigration supporting activities, the provision constitutes an interference with their right to property as the secondary taxable entity. In addition, legislation pertaining to associations should not dictate or disproportionately restrict the objectives and activities that associations wish to pursue and undertake, including by providing a restrictive list of permissible objectives or activities or through a narrow interpretation of the legislation relating to the objectives and activities of associations.[1] Section 253 therefore constitutes a restriction of the freedom of founders and members of NGOs to determine the objectives and activities of their associations, including the scope of their operations, therefore, an interference with their right to freedom of association.

9. The freedom of association is intertwined with, and serves as a conduit for, the exercise of freedom of expression and opinion. Associations should have the right to exercise their freedom of expression and opinion with respect to their objectives and activities.[2] The special tax represents moreover an interference into the right to freedom of expression of the NGOs, since the special tax limits their ability to undertake research, education and advocacy on issues of public debate. According to Principle 6 of the Joint guidelines on Freedom of Association, associations shall have the right to freedom of expression and opinion through their objectives and activities. This is in addition to the individual right of the members of associations to freedom of expression and opinion. Associations shall have the right to participate in matters of political and public debate, regardless of whether the position taken is in accord with government policy or advocates a change in law.

10. Further, the tax is levied on the act of donating to NGOs expressing a particular opinion which appears to be a significant political controversy. Section 253 treats those NGOs performing immigration supporting activities differently than others without a reasonable justification, which creates the risk of stigmatisation of such organisations, adversely affecting their legitimate activities.

11. The Venice Commission and ODIHR observe that the European Court of Human Rights (hereinafter, "ECtHR"), in cases concerning the right to property guaranteed under Article 1 of Protocol 1 to the Convention, recognises the wide discretion of state authorities in determining the types of taxes or contributions to be levied, since they alone are competent to assess the political, economic and social issues to be taken into account in this regard.[3] Moreover, it must be recognised that it is necessary for States to raise revenue through taxation and that this involves taxation of lawful activities that may be arguably an exercise of a fundamental right.

12. In the present opinion, the Venice Commission and ODIHR do not pursue more elaborately the issue concerning the right to property. The present opinion focuses on Section 253 on the special immigration tax to the extent that it affects the activities and interferes with the rights to freedom of expression and association of NGOs.

13. Concerning first the legality of Section 253, the reference to a number of terms in Section 253, such as "activities that indirectly aim at promoting migration", "carrying out media campaigns", "building and operating networks" makes the provision overly vague and does not offer appropriate guidance as to when an organisation becomes liable under the special immigration tax. Moreover, despite the explanations provided by the authorities, the wording of Section 253 is not entirely clear as to whether the tax base of the special immigration tax is limited to the financial contribution used to perform the immigration supporting activities or whether it is the entirety of the financial contribution made to an organisation conducting

[1] CDL-AD(2014)046, *ibid.*, paras. 86, 87.
[2] CDL-AD(2014)046, *Joint Guidelines on Freedom of Association,* Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, 17 December 2014.
[3] ECtHR, *National & Provincial Building Society, The Leeds Permanent Building Society And The Yorkshire Building Society v. The United Kingdom*, 23 October 1997, par. 80.

immigration supporting activities regardless of whether or not the full amount of the contribution is used for such activities.

14. The Venice Commission and ODIHR have serious doubts about the legitimacy of the aim behind the provision. Certain characteristics of the special tax show that the tax is imposed not just to finance a government activity but to discourage a number of legitimate associative activities in the field of migration and to limit the potential of associations to seek and secure funds to conduct those activities. The use of an apparently neutral measure, such as a new tax, to penalise individuals/entities on account of the views that they promote does not fall within one of the legitimate permissible aims under 10(2) and 11(2) ECHR. Such measures should therefore not be used to hinder the freedom of expression and association of groups disliked by the authorities or advocating ideas that the authorities would like to supress.

15. As to the necessity and proportionality of the restriction imposed by the introduction of the special immigration tax, the new obligations (tax and additional reporting obligations) are analysed by taking due account of the cumulative effect created by the obligations imposed by the Law on the Transparency of Organizations receiving Support from Abroad introduced in 2017 and Article 353A of the Criminal Code on Facilitating Illegal Migration.

16. The new reporting obligations, including the disclosure of the identity of the donor who financially contributed to the associations' activities, under paragraphs 8 and 9 of Section 253, taken together with the reporting obligations imposed by the law on transparency of organisations receiving support from abroad and the potential restrictions imposed by the implementation of Article 353A of the Criminal Code on Facilitating Illegal Migration on legitimate associative activities in the field of migration, could create an environment of excessive state monitoring, which is not conducive to the effective enjoyment of freedom of association. The selective targeting and burdening by the special tax of NGOs performing immigration supporting activities with onerous requirements raise moreover the issue of discrimination on the grounds of particular ideas and expressions within the meaning of Article 14 ECHR. The principle of equal treatment does not preclude differential treatment only on the basis of objective criteria unrelated to viewpoints and beliefs.

17. Lastly, concerning the availability of effective legal remedies, in view of the wording of Article 37(4) of the Basic Law and of the conflicting information received by the Venice Commission and ODIHR as to whether Section 253 could be challenged in the Constitutional Court, it remains uncertain whether the Constitutional Court could assess the compatibility of this provision with the Basic Law and international treaties granting the right to property, the right to freedom of association, the right to freedom of expression and the principle of non-discrimination. The Venice Commission and ODIHR have doubts on whether the recourse by means of an administrative complaint indicated by the authorities allow an administrative section of a court to review the compatibility of Section 253 with human rights standards granted by the Basic Law and the ECHR.

18. Consequently, the special tax on immigration constitutes an unjustified interference with the right to freedom of expression and of association of the NGO affected. The imposition of this special tax will have a chilling effect on the exercise of basic human rights and on individuals and organisations who defend them. It will deter potential donors from supporting these NGOs and put more hardship on civil society engaged in legitimate human rights' activities. For all these reasons, the provision as examined in the present opinion should be repealed.

III. Previous Opinions of the Venice Commission and ODIHR concerning the freedom of association in Hungary

19. The Venice Commission and ODIHR have dealt with the legal status of civil society organisations in general, and with the issue of funding of associations in particular in a number of previous opinions.[4] In June 2017, the Commission adopted an Opinion on the Hungarian Draft Law on the transparency of organisations receiving support from abroad. This Draft Law, provided that associations and foundations annually receiving money or other assets from abroad in the amount of 7.2 million forints (around 24 000 euros) have the obligation to register with the Regional Court as "organisation receiving support from abroad" and label themselves as such on their websites as well as on any press products and other publications. The Draft Law also regulated the procedure of registration and provided sanctions for those organisations which do not fulfil the obligations under the Draft Law.

20. On 13 June 2017, following exchanges with the Venice Commission, the Hungarian Parliament adopted the Law with certain amendments. In its Opinion, the Venice Commission concluded that although it recognised that some of these amendments represented an important improvement, some other concerns were not addressed and the amendments did not suffice to alleviate the Venice Commission's concerns that the Law would cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination. It considered, in particular, that the broad and even increased exceptions to the application of the Law, coupled with the negative rhetoric that continues to surround this matter, cast doubt on the genuine aim of ensuring transparency. Moreover, the obligation to publish the information that the association is foreign funded on all press products was clearly disproportionate and unnecessary in a democratic society.

21. In March 2018, the Venice Commission was requested by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly to prepare an opinion on the compatibility with international human rights standards of the Hungarian government's "Stop Soros" draft legislative package, which included Bill t/1976 on the licencing of organisations supporting migration, Bill t/19774 on the immigration restraint order and Bill t/19775 on the immigration financing duty. The latter Bill aimed at rendering obligatory for organisations supporting migration receiving funding directly or indirectly from abroad, to pay an "immigration financing duty", due by June 30 of the subsequent year. The rate of the duty was 25% of the received benefit. Exempt from the duty was the part of the benefit that was used for other than migration-

[4] CDL-AD(2013)023 Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013); CDL-AD(2013)030 Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013); CDL-AD(2014)025 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, adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014); CDL-AD(2014)043 Opinion on the Law on non-governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan, adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014); CDL-AD(2017)015, Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad of Hungary, adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017); CDL-AD(2018)004, Joint Opinion on Draft Law No. 26/200 on associations and foundations of Romania, adopted by the Venice Commission at its 114th Plenary Session (Venice, 16-17 March 2018); CDL-AD(2018)013, Joint Opinion on the provisions of the so-called "Stop Soros" draft legislative package which directly affect NGOs (In particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).

related purposes or that is used for humanitarian purposes. The failure to pay the duty could result in a fine amounting to the double of the amount of the unpaid duty.

22. In May 2018, the Venice Commission and ODIHR were informed that the three draft laws of the "Stop Soros" draft legislative package, thus including Bill t/19775 on the immigration financing duty, had not been maintained on the agenda of the newly elected Parliament (legislative elections had taken place on 8 April 2018). On 25 May 2018, the Hungarian government announced that those draft laws would not be re-submitted to Parliament and that a new legislative package was being prepared.

23. On 29 May 2018, the new "Stop Soros" draft legislative package was submitted to Parliament by the Minister Interior. The new package contained amendments to the Police Act, Acts on Travelling Abroad, on the entry and stay of persons with the right of free movement and residence, on the entry and stay of third-country nationals, on Asylum, on the State border, on the criminal record system, on the registration of judgments adopted against Hungarian nationals by courts of the Members States of the European Union and the registration of criminal and law enforcement biometric data and finally, Act of 2012 on the Criminal Code. The amendment proposed to be made to the Criminal Code introduced a criminal offence of "facilitating illegal migration" (Section 353/A) which criminalised anyone "*who engages in organising activities in order to facilitate the initiation of an asylum request in respect of a person, who in their native country or in the country of their habitual residence or in another country through which they have arrived, is not subject to persecution or whose allegations of direct persecution are not well-founded.*" The criminal provision also criminalised organisational activities in order to assist a person entering Hungary illegally or residing in Hungary illegally, in obtaining a title of residence. The draft legislative package was adopted by the Parliament of Hungary on 20 June 2018.

24. In their Joint Opinion adopted in June 2018,[5] the Venice Commission and ODIHR concentrated especially on the draft amendment to the Criminal Code of Hungary, which introduced Section 353A. They concluded that as such, the criminal provision could result in further arbitrary restrictions to and prohibition through heavy sanctions of the indispensable work of human rights NGOs and leave migrants without essential services provided by such NGOs. They considered that under this provision, persons and/or organisations that carry out informational activities, support individual cases, provide aid on the border of Hungary may be under risk of prosecution even if they acted in good faith in line with the international law for supporting the asylum seekers or other forms of legal migrants. After having emphasised that the provision criminalises activities that are fully legitimate including activities which support the State in the fulfilment of its obligations under international law and that the criminal provision is not accompanied by a humanitarian exception clause, the Venice Commission and ODIHR recommended that new Section 353A of the Criminal Code be repealed.[6]

[5] CDL-AD(2018)013, Joint Opinion on the provisions of the so-Called « Stop Soros » draft legislative package which directly affect NGOs (In particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).

[6] *Ibid.,* paras. 103 et seq.

IV. Legal standards

National Regulation

25. The Constitution of Hungary, adopted in 2011, contains a comprehensive catalogue of fundamental human rights, including the right to freedom of association, the right to freedom of expression the right to property and the prohibition of discrimination.

26. Article VIII of the Basic Law recognizes "the right to establish or join organizations" (par. 2). Article IX stipulates that "every person shall have the right to express his or her opinion" (par. 1). Article XIII declares that "every person shall have the right to property and inheritance" (par. 1). By virtue of Article XV, "Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, colour, gender, disability, language, religion, political or other views, national or social origin, financial, birth or other circumstances whatsoever" (par. 2).

27. Article VIII of the Basic Law has been implemented by means of several legal acts. General rules applicable to the legal status of associations and foundations, and their financing, are enshrined in the Act No. 175/2011 on the Right of Association, Non-profit Status, and the Operation and Funding of Civil Society Organisations and the Act No. 181/2011 on the Court Registration of Civil Society Organisations and the Related Rules of Procedure. The Parliament has also enacted specific legal acts relating to certain types of associations (Act No. 47/2003 on foundations assisting the functioning of political parties, carrying out scientific, awareness raising, research and educational activities, Act No. 1/2004 on Sports, Act No. 26/2011 on Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, etc.). On 13 June 2017, the Parliament adopted the Act No. 76/2017 on the Transparency of Organisations receiving support from abroad (see above).

International Standards

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

29. The right to **freedom of association** is enshrined in Article 21 of the ICCPR and Article 11 of the ECHR. Soft law instruments dealing with freedom of association encompass: the Guidelines The Legal Status of Non-Governmental Organisations and their Role in a Pluralistic Democracy, adopted on a Multilateral meeting organised by the Council of Europe on 23 - 25 March 1998; UN Declaration on Human Rights Defenders of 8 March 1999;[7] the Fundamental Principles on the Status of Non-governmental Organisations in Europe, adopted by multilateral meetings organised by the Council of Europe in 2001-2002 and the Recommendation of the Committee of Ministers of the Council of Europe CM/REC(2017)14 on the Legal Status of Non-Governmental Organizations in Europe of 10 October 2007.[8]

[7] UN Doc. A/RES/53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 8 March 1999.

[8] *Recommendation CM/REC(2007)14 on the Legal Status of Non-Governmental Organizations in Europe, 10 October 2007.*

30. The Venice Commission, together with ODIHR, produced in 2014 Joint Guidelines on Freedom of Association[9] which give an overview of international standards applicable in this area. The Venice Commission has also dealt with the freedom of association in a number of opinions.[10]

31. The right to freedom of association is "an essential prerequisite for other fundamental freedoms".[11] It is closely intertwined with the right to freedom of expression, the right to freedom of religion, the right to privacy or the prohibition of discrimination. It is "an individual human right which entitles people to come together and collectively pursue, promote and defend their common interests".[12]

32. The right to freedom of association is at the core of a modern democratic and pluralistic society. It serves "as a barometer of the general standard of the protection of human rights and the level of democracy in the country".[13] Although freedom of association is not an absolute right, it can be limited, or derogated from, only under the strict conditions stipulated in human rights instruments.

33. The right to **freedom of expression** is enshrined in Article 19 of the ICCPR and Article 10 of the ECHR. The ECtHR has described the right as "one of the basic conditions for the progress of democratic societies and for the development of each individual".[14] The UN Human Rights Committee, in its General Comment No. 34, noted that "freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. (…) Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights" (par. 2-3).

34. The right to **property** is granted by Article 1 of Protocol I to the ECHR, by virtue of which "every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". In the in 2014 Joint

[9] CDL-AD(2014)046, *Joint Guidelines on Freedom of Association,* Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, 17 December 2014.

[10] See CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan,* Opinion No. 636/2011, 19 October 2011; CDL-AD(2013)023, *Interim Opinion on the Draft Law on Civic Work Organisations of Egypt*, Opinion No. 732/2013, 18 June 2013; CDL-AD(2013)030, *Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic,* Opinion No. 738 /2013, 16 October 2013; CDL-AD(2014)025, *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,* Opinions No. 716-717/2013, 27 June 2014; CDL-AD(2014)043, *Opinion on the Law on Non-Governmental Organisations (Public Associations and Funds) as Amended of the Republic of Azerbaijan*, Opinion No. 787/2014, 15 December 2014; CDL-AD(2016)020, *Opinion on Federal Law No. 129-FZ on Amending Certain Legislative Acts (Federal Law on Undesirable Activities of Foreign And International Non-Governmental Organisations),* Opinion No. 814/2015, 13 June 2016.

[11] See CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan,* §45; and CDL-AD(2012)016, *Opinion on the Federal law on combating extremist activity of the Russian Federation,* §64

[12] CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan,* §40.

[13] CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan,* §41.

[14] ECtHR, *Handyside v. the United Kingdom*, 7 December 1976, para 49.

Guidelines on Freedom of Association, the Venice Commission and ODIHR note that "associations may also receive funding for their activities from private and other non-state sources, including foreign and international funding. States should recognize that allowing for a diversity of sources will better secure the independence of associations" (par. 218).

35. The **prohibition of discrimination** is enshrined in Article 26 of the ICCPR and Article 14 of and Protocol 12 to the ECHR. The UN Human Rights Committee in its General Comment No. 18 confirms that "(n)on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights". [15]

V. Analysis

A. Section 253 on the Special Immigration Tax

36. On 20 July 2018, the Parliament of Hungary adopted Act XLI on amending certain tax laws and other related laws and on the immigration tax. The draft act had been submitted to parliament by the Minister of Finance on 19 June 2018. Act XLI entered into force on 25 August 2018.

37. Section 253 of the Act (labelled as "On the special immigration tax") imposes a 25% tax (1) on financial support to an immigration supporting activity carried out in Hungary or (2) on the financial support to the operations of an organisation with a seat in Hungary that carries out immigration supporting activity. Therefore, in contradiction to the Bill t/19775 on the immigration financing duty which imposed a tax on foreign funding only, Section 253 encompasses all funding regardless of whether the origin is foreign or domestic.

38. Immigration is defined, under the second paragraph of Section 253, as "resettlement, intended to be permanent, by persons from their country of domicile to another country, not including the cases under section 1(1) of Act I of 2007 on the entry and residence of persons having the right of free movement and residence[16] which guarantee the right of free movement and residence afforded in the treaty establishing the European Community".

[15] UN HRC, *General Comment No. 18: Non-Discrimination,* 10 November 1989, par. 1.

[16] Unofficial translation:
Section 1.
(1) The Republic of Hungary shall ensure the right of free movement and residence in accordance with the provisions of this Act:
a) with the exception of Hungarian citizens, to nationals of any Member State of the European Union and States who are parties to the Agreement on the European Economic Area, and to persons enjoying the same treatment as nationals of States who are parties to the Agreement on the European Economic Area by virtue of an agreement between the European Community and its Member States and a State that is not a party to the Agreement on the European Economic Area with respect to the right of free movement and residence (hereinafter referred to as "EEA nationals");
b) to the family member of an EEA national who does not have Hungarian citizenship, accompanying or joining the EEA national (hereinafter referred to as "family members of EEA nationals");
c) to the family member of a Hungarian citizen who does not have Hungarian citizenship, accompanying or joining the Hungarian citizen (hereinafter referred to as "family members of Hungarian citizens"); and
d) to any persons accompanying or joining an EEA national or a Hungarian citizen, who:

39. Under paragraph 2 of Section 253, an immigration-supporting activity is defined as "any programme, action or activity that, either directly or indirectly, aims at promoting immigration." According to the same paragraph, the immigration-supporting activity is realised through a) carrying out of media campaigns and media seminars, and participating in such activities; b) organising education; c) building and operating networks, or d) propaganda activities that portray immigration in a positive light.

40. The primary taxable entity is the donor (or the funder).[17] The donor is obliged to declare to the grantee by the 15th day of the month following its granting of funds that it has paid the tax (paragraph 5 combined with paragraph 8 of Section 253). If the donor fails to pay the tax or to make this declaration, the grantee (i.e. the organisation conducting the immigration supporting activity) becomes obliged to pay the tax by the 15th day of the month following the use of the financial support for performing the immigration supporting activities listed under the second paragraph of Section 253. The statement by the grantee should indicate the name, postal address and other known identification data of the donor providing the financial support and the amount of the support.

41. Section 253(3) establishes two different tax bases: in case the tax payer is the donor, the tax base of the special tax on immigration is the amount of financial support; in case the tax payer is the grantee, the tax base is the costs incurred while carrying out the relevant Immigration-supporting activity.

42. If the state tax authority considers that the statement by the donor is untrue, it shall order the taxable entity (i.e. the donor) to pay the tax not declared plus a tax fine amounting to 50% of it (paragraph 10 of Section 253). Moreover, Article 215 (4) of Act CL of 2017 on the Rules of Taxation provides for a tax penalty up to 200 % of the tax deficiency, if it relates to the concealment of revenues, production and the use of falsified documents, ledgers or records, or the falsification or destruction of documents, ledgers or records. In addition, Section 396 of the Criminal Code (Budget fraud) provides for prison terms, up to 10 years in case the fraud results in particularly substantial loss or the fraud results in particularly considerable financial loss and is committed in criminal association with accomplices or on a commercial scale.

43. Finally, under paragraph 12 of Section 253, the revenue from the special immigration tax shall be part of the central budget, and shall be exclusively used for the purposes of performing border protection tasks.

44. The rationale behind the provision, as described in the reasoning of the Act, is that "*the activities of organizations assisting immigration by various means involve the increase of social spending, as the financing of public tasks related to immigration will result in an increase in public finance expenditure. It is not compatible with the principle of common burden that the society as a whole should bear the costs that have arisen because the activities of some organizations involve the growth of immigration and thus the growth of public tasks and*

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da) are dependants or members of the household of a Hungarian citizen for a period of at least one year, or who require the personal care of a Hungarian citizen due to serious health grounds;
db) had been dependants or members of the household of an EEA national in the country from which they are arriving, for a period of at least one year, or who require the personal care of an EEA national due to serious health grounds, and whose entry and residence has been authorized by the authority on grounds of family reunification.

[17] According to paragraph 5 of Section 253, political parties, foundations of political parties, and organisations whose exemption is guaranteed by an international treaty or reciprocity are not taxable under the special immigration tax.

expenditures. Therefore, the law introduces a new payment obligation, an immigration special tax."

B. The legislative process

45. During the meetings in Budapest, representatives of civil society organisations informed the joint delegation that no public consultation with civil society organisations had taken place prior to the adoption of Act XLI on 20 July 2018, including Section 253 on special immigration tax. The authorities referred to the national consultation, entitled "Let's Stop Brussels", which took place in the spring of 2017 and which presented citizens with six questions relating to the alleged interference in the Hungarian domestic affairs by the European Union or other foreign actors. However, this national consultation took place prior to the submission of the initial "Stop Soros" draft legislative package to Parliament on 13 February 2018, which included Bill t/19775 imposing the payment of an immigration financing duty on associations which receive funding from abroad, if they conduct activities in the field of migration (25% of the received benefit). No separate public consultation took place prior to the submission of draft Act XLI to parliament on 19 June 2018 or between the submission and the adoption of the Act by parliament on 20 July 2018.

46. The Commission and ODIHR recall in the first place that in their joint Opinion on the provisions of the so-called "Stop Soros" draft legislative package,[18] they pointed to the rather biased formulation of the questions presented to the citizens in the spring of 2017, during the national consultation process labelled "Let's Stop Brussels".[19]

47. OSCE participating States have specifically committed to ensure that "[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives"[20] and to "secure environments and institutions for peaceful debate and expression of interests by all individuals and groups of society".[21] The OSCE has also recognized the vital role that civil society has to play in this regard. The Commission and ODIHR note that the "public consultation" the authorities refer to was conducted almost 9 months before the submission of the draft Act to the Parliament. Moreover, the fact that, as the authorities indicated, everyone in Hungary was able to send their comments on the Bill via email to the Parliament, in the absence of a formalised and transparent system of feedback by the authorities to the comments posted, does not exempt national authorities from acting in accordance with Recommendation CM/Rec(2007)14. The Commission has repeatedly stressed this – procedural - element of the quality of the legislative process: conducting a public consultation with civil society organisations prior to the adoption of legislation directly concerning such organisations therefore constitutes part of the best practices that the European countries should strive to adhere to in their domestic legislative processes.[22]

[18] CDL-AD(2018)013 Joint Opinion on the provisions of the so-called « Stop Soros » draft legislative package which directly affect NGOs (In particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).
[19] *Ibid.,* paragraphs 62-67.
[20] OSCE Moscow Document 1991.
[21] OSCE Maastricht Document 2003.
[22] CDL-AD(2017)015 Opinion on the Draft Law on the Transparency of Organisations receiving Support from Abroad, para. 27. See also, CDL-AD(2016)007 Rule of Law Checklist, p. 13.

C. Identification of the issues raised by Section 253

48. It must be recognised that it is necessary for States to raise revenue through taxation and that this involves taxation of lawful activities that may be arguably an exercise of a fundamental right. Taxation is used by all countries to dissuade and penalise activities that, while lawful, are not considered in the public interest, such as taxation of environmental or health hazards.

49. During the meetings in Budapest, the authorities explained that Section 253 on the special immigration tax does not impose any prohibition on the legitimate activities of associations in the field of migration, such as carrying out media campaigns and media seminars, organising education or propaganda activities that portray immigration in a positive light (paragraph 2 of Section 253). According to the authorities, however, although those activities are legitimate, they involve an increase in the public expenditure and the purpose of the special immigration tax is to oblige the associations to bear the costs that have arisen as a consequence of their activities in the field of immigration. The authorities stress that the imposition of the special immigration tax should not be considered as an interference with the right to freedom of association of non-governmental organisations active in the field of migration, but rather as a dissuasive measure against undesirable activities that increase the public expenditure, based on the sovereign competence of the state to frame and adopt policy in the tax sector.

50. The reasoning of the provision, in line with the explanations provided by the authorities, presents immigration supporting activities of civil society organisations as an important reason of the growth of immigration in Hungary and of the resultant increase of public tasks and expenditures. Therefore, the special tax is imposed on the financial contributions to organisations performing immigration supporting activities and not on the financial contributions to other NGOs which do not perform such activities. Moreover, a number immigration supporting activities indicated in the provision, such as "propaganda activities that portray immigration in a positive light" gives the impression that there is a strict causal link between mass migration and NGO activities in the field of migration. Further, the explanations provided by the authorities that the provision on the special immigration tax does not apply to financial contributions to NGO activities concerning refugees who are under the protection of the Geneva Convention relating to the Status of Refugees, is not clearly reflected in the wording, or in the reasoning of the provision. By making no distinction between various forms of migration, the provision may contribute to a hostile public perception towards *all* immigrants / foreigners and towards therefore NGO activities in the field of immigration. It should be stressed that placed in the context prevailing in Hungary, marked by strong statements against associations performing activities in the field of migration, the provision on the special immigration tax risks discriminatorily stigmatising such organisations and adversely affecting their legitimate activities. It should be recalled that the risk of stigmatisation is a relevant factor in the jurisprudence of the ECtHR.[23]

51. Section 253 on special immigration tax imposes a 25% tax on the financial support to an immigration supporting activity carried out in Hungary. The tax is not levied on the activities carried out, but on the funding these NGOs receive. The introduction of a special tax on immigration interferes with the right to property as protected by Article 1 of the First Protocol to the Convention, respectively of the donor as the primary taxable entity and of the association conducting immigration supporting activities, as the secondary taxable entity. The ECtHR has found violations of this right in case the tax in question poses an "individual and excessive burden".[24]

[23] See for example ECtHR, 4 December 2008, *Marper v. UK*, nos. 30562/04 and 30566/04, par. 122
[24] ECtHR, 14 May 2013, *N.K.M. v. Hungary*, application no. 66529/11; ECtHR, 7 March 2017, *Baczúr v. Hungary,* application no. 8263/15.

52. The second paragraph of Article 1 of Protocol 1 to the ECHR specifically provides that the right to respect of one's property does not impair the State "*to enforce such laws as it deems necessary (…) to secure the payment of taxes or other contributions or penalties."* The ECtHR has stressed, in cases concerning the right to property under Article 1 of Protocol 1, that the national authorities enjoy a wide margin of appreciation "in framing and adopting policies in the tax sector". In the case of *National and Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. United Kingdom*, the Court underlined that it will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation.[25] Therefore, states have a wide discretion in determining the types of taxes or contributions to be levied. They alone are competent to assess the political, economic and social issues to be taken into account in this regard.[26]

53. As the ECtHR, the Venice Commission and ODIHR recognise the wide discretion of states in determining types of taxes or contributions to be levied and that the national authorities are best placed to assess the political, economic and social issues to be taken into account when framing the tax policy.

54. In the present opinion, the Venice Commission and ODIHR will not pursue more elaborately the issue concerning the right to property. They consider that in some instances, taxation may be considered not only as a restriction on the right to property, but also as an interference in particular with individuals' and entities' freedom of expression and freedom of association.

55. First, according to Principle 4 of the Joint Guidelines on Freedom of Association, founders and members shall be free in the determination of the objectives and activities of their associations, including scope of operations. Legislation pertaining to associations should not dictate or disproportionately restrict the objectives and activities that associations wish to pursue and undertake, including by providing a restrictive list of permissible objectives or activities or through a narrow interpretation of the legislation relating to the objectives and activities of associations.[27] Therefore, the imposition of the special tax on associations for a number of lawful objectives and activities indicated in the legislation qualifies as interference into the right to freedom of association of non-governmental organisations.[28]

56. Secondly, NGOs should 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.[29] The Joint Guidelines on Freedom of Association state that "*[a]ssociations shall have the right to freedom of expression and opinion through their objectives and activities. This is in addition to the individual right of the members of associations to freedom of expression and opinion. Associations shall have the right to participate in matters of political and public debate, regardless of whether the position taken is in accord with government policy or advocates a change in the law".*[30] Given the fact that some lawful

[25] ECtHR, 23 October 1997, *National and Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society,* application nos. 21319/93 21449/93 21675/93, para. 80.
[26] ECtHR, 16 March 2010, *Di Belmonte v. Italy*, application no. 72638/01.
[27] CDL-AD(2014)046, *ibid.*, paras. 86, 87.
[28] The OSCE participating States have committed to "ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in non-governmental organizations" (Copenhagen Document, 1990) and to "enhance the ability of NGOs to make their full contribution to the further development of civil society and respect for human rights and fundamental freedoms" (Istanbul Document, 1999).
[29] See, *Recommendation CM/REC(2007)14 on the Legal Status of Non-Governmental Organizations in Europe, 10 October 2007.*
[30] CDL-AD(2014)046, *Joint Guidelines on Freedom of Association,* Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, 17 December 2014, para. 31. The Joint Guidelines further state that

activities of NGOs indicated in Section 253(2) such as media campaigns, educative activities, building and operating networks and propaganda activities are relevant to determine whether an activity should be qualified an "immigration supporting activity" which will lead to the imposition of a significant tax, Section 253 on the special immigration tax has a chilling effect on and constitute an interference with the freedom of expression of those organisations when engaging in lawful activities.

57. In the case of *Ramazanova v. Azerbaijan,* the ECtHR accepted that receiving and using financial donations is part of the right to freedom of association. The right of the donor to give funds to associations is equally protected. Article 10 ECHR protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed[31] and this applies equally to persons who chose to express that opinion through the donation of funds. The right to freedom of expression also protects the right of the donors to provide financial support for expressive activities and the ECtHR has recognised that Article 10 protects financial contributions to produce "publications and other means of communication".[32] Therefore, the taxation of the donor/funder could be considered as an interference into the right to freedom of expression of the donor.

58. Lastly, Article 10 ECHR includes also the freedom of the public to receive and impart information and ideas without interference by public authorities. The right of the public to receive information has been recognised by the Court on a number of occasions in cases concerning restrictions on freedom of press, as a corollary of specific function of journalists, which is to impart information and ideas on matters of public interest.[33] It should be recalled that, according to the case-law of the ECtHR, when a non-governmental organisation is involved in matters of public interest, it is exercising a role of public watchdog of similar importance to that of the press.[34] Consequently, for the Venice Commission and ODIHR, the direct burden and interference created by the imposition of a special immigration tax on the freedom of expression and association of non-governmental organisations is analysed as an interference into the right of the public to receive information under Articles 10 and 11 ECHR and Articles 19 and 22 ICCPR.

59. The present opinion will focus on Section 253 on the special immigration tax to the extent that it affects the activities of and interferes with the rights to freedom of expression and association of NGOs, together with the principle of non-discrimination. The interferences into the rights to freedom of association and freedom of expression are permissible only under the strict conditions stipulated in human rights instruments: the condition of legality of the interference, the condition of legitimacy of the aim(s) pursued by the interference, and the condition of the necessity and proportionality of the interference.

D. Legality of the interference

60. For a restriction of fundamental rights to be permissible, it has to be prescribed by law in clear and precise terms and must be foreseeable.

61. Section 253 on the special immigration tax imposes the immigration tax if there has been financial support of an "immigration supporting activity". Paragraph 2 of Section 253 defines immigration supporting activity as including "*any programme, action or activity that either directly or indirectly, aims at promoting immigration* (…) *and is realised within the framework of*

"*[f]reedom of association is intertwined with, and serves as a conduit for, the exercise of freedom of expression and opinion with respect to their objectives and activities."* (para. 97).

[31] See, ECtHR, *Murat Vural v. Turkey.*

[32] See, ECtHR, *Bowman v. United Kingdom.*

[33] ECtHR, *Autronic AG v. Switzerland*, application no. 12726/87.

[34] ECtHR, 25 June 2013, *Youth Initiative for Human Rights v. Serbia,* no. 48135/06, para. 20.

a) carrying out media campaigns b) organising education c) building and operating networks d) propaganda activities that portray immigration in a positive light."

62. The terms used in this provision are somewhat vague and imprecise. The special tax is imposed on donations supporting activities which, not only "directly", but also "indirectly" aim at promoting migration. The reference to the term "indirectly" makes the provision overly vague and broad and offers too little guidance for the public, the donors and the civil society organisations to understand when the tax may be imposed.

63. During the meetings in Budapest, representatives of civil society organisations informed the joint delegation about the difficulties they encounter concerning the practical implementation of this legislation because of the vagueness of some terms used in Section 253. For instance, the term "network" (building and operating networks) is not defined in paragraph 2 of Section 253 and uncertainty remains as to what degree of organisation is necessary for a group of persons to be considered as "network" and as to whether or not the initial consultations on the possibility of forming a network falls under the scope of the provision on the special immigration tax.

64. The same holds true concerning "carrying out media campaigns". In Budapest, civil society representatives expressed concern about the vagueness of this term as it is extremely difficult to differentiate a "campaign" from regular communications of an organisation aiming at informing the public about the activities conducted by the organisation through its regular channels.

65. The vagueness of the terms used in Section 253 may also create a chilling effect on legitimate activities of civil society organisations because of the lack of foreseeability as to when an organisation becomes and ceases to be liable under the special immigration tax provision.

66. Under paragraph 1 of Section 253, the subject of the special immigration tax is (1) the financial support to an immigration supporting activity carried out in Hungary or (2) the financial support to the operations of an organisation with a seat in Hungary that carries out immigration supporting activity. The wording of point (2) suggests that the full amount of the financial support falls under the scope of the immigration tax, if the grantee organisation performs any of the activities indicated in paragraph 2 of Section 253 to promote migration, although the financial contribution, or a part of it, is not used for immigration supporting activities.

67. During the meetings in Budapest, the authorities explained the tax base of the immigration tax is the amount used to perform the immigration supporting activities indicated under paragraph 2, and not the entire financial contribution granted to the organisation concerned. This explanation is in conformity with paragraph 3 b) of Section 253 which stipulates that the tax base of the special immigration tax shall be (in case the taxable entity is the organisation carrying out the immigration supporting activities) the costs incurring while carrying out the activity referred to in paragraph 2. However, despite this explanation and unless this is a translation issue, the vague, even misleading wording of Section 253(1) as to the subject of the special immigration tax may create contradictory practices in the implementation concerning the tax base of the special immigration tax.

68. Lastly, during the visit, the authorities insisted that the immigration tax does not apply to organisational activities concerning refugees, since the immigration is defined in Section 253(2) as "resettlement, intended to be *permanent*, by persons from their country of domicile to another country (…)" The authorities underlined that the aim of Section 253 was to discourage promoting activities concerning unlawful economic migrants and not refugees who are forced to leave their country in order to escape persecution and who are under the protection of Geneva Convention relating to the Status of Refugees. Lawful migrants who come to Hungary with the agreement of the national authorities, are not covered by the tax either. The Venice

Commission and ODIHR welcome this explanation. However, they consider that in such an important matter as the scope of the tax, the provision in question should use very clear and precise terms in order to prevent any risk of confusion in this respect.

69. In conclusion, the Venice Commission and ODIHR consider that Section 253, because of the vagueness of some terms used therein, does not meet the criteria of "legality" under Articles 10(2) and 11(2) ECHR and Articles 19 and 22 ICCPR.

E. Legitimacy of the interference

70. The interference into the right to freedom of expression/association must pursue legitimate aims. Concerning specifically the freedom of association, Article 11(2) ECHR states that the only restrictions permissible are those that are "prescribed by law and are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health and morals or for the protection of rights and freedoms of others". As noted in paragraph 34 of the Joint Guidelines on Freedom of Association, "the scope of these legitimate aims shall be narrowly interpreted". In a similar vein, Article 10(2) permits restrictions which are "prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

71. According to the reasoning of Section 253 and in light of the explanation provided by the Hungarian authorities, the activities supporting immigration result in the increase of public finance expenditure and the principle of "burden sharing" requires that the organisations which contribute to the growth of immigration in Hungary should also contribute to cover the resulting cost.

72. The Venice Commission and ODIHR recognise that levying taxes is absolutely necessary for the effective functioning of a government. Consequently, one cannot argue that levying taxes, although it infringes on various human rights is *per se* illegitimate. Taxes may be imposed in a general manner (e.g. on income or consumption) or on specific activity. Taxes may reflect political policies and preferences. Taxes may even be imposed to finance certain activities.

73. Nevertheless, taxes shall not be imposed mainly for the purposes of infringing upon a basic human right and States cannot use taxation provision as a cloak to violate the right to free expression and association of individuals and entities. In the case of *United Macedonian Organisation Ilinden-Pirin v. Bulgaria,* the ECtHR considered that: "[Measures] *should not be used to hinder the freedom of association of groups disliked by the authorities or advocating ideas that the authorities would like to supress. Therefore, in cases where the circumstances are such as to raise doubts in that regard, the Court must verify whether an apparently neutral measure interfering with a political party's activities in effect seeks to penalise it on account of the views or the policies that it promotes. (…) Indeed, Article 18 of the Convention provides that any restrictions permitted to the rights enshrined in it must not be applied for a purpose other than those for which they have been prescribed."*[35]

[35] ECtHR, 18 October 2011, *United Macedonian Organisation Ilinden – Pirin and others v. Bulgaria* (no. 2), application nos. 41561/07 and 20972/08, para.83.

74. Contrary to Article 353A of the Criminal Code on Facilitating Illegal Migration examined by the Venice Commission and ODIHR in a previous joint opinion,[36] the rationale of Article 253 does not refer to national security or public safety considerations. Neither would it make sense to refer to "prevention of disorder or crime", since the tax is imposed with respect to otherwise lawful activities. The Venice Commission and ODIHR are concerned that the reasons put forth by the Hungarian authorities to justify the imposition of the special immigration tax does not fall under one of the legitimate aims in the second paragraph of Articles 10 and 11 ECHR as well as Articles 19(3) and 22(2) ICCPR.

75. Certain characteristics of the special tax on immigration indicate that this tax is imposed not just to finance a government legitimate activity but to limit the potential of NGOs to seek and secure funds for carrying out legitimate activities in the field of immigration.

76. Consequently, despite the broad wording of the limitation grounds under the second paragraph of Articles 10 and 11 and the wide margin of appreciation that is granted to authorities when taxation issues are at stake, the Venice Commission and ODIHR have serious concerns about the legitimacy of the aims pursued by imposing special immigration tax for the sole purpose of discouraging activities protected under Articles 10 and 11 ECHR and to limit the possibility of NGOs to seek and secure sources for their legitimate activities on issues of public debate such as migration.

F. Necessity and proportionality of the interference

77. The restriction must be necessary in a democratic society and proportionate to the pursued aim. Public authorities need to be able to demonstrate that the disputed measure is truly effective means of pursuing the declared legitimate aim and why the disputed measure is necessary in addition to already existing possibilities to achieve this aim. Further, the cumulative effect of all legal rules combined on the freedom concerned needs to be assessed, and whether there is a proportionate relationship between the effects of the measure concerned and the affected freedom. The interference should be based upon an acceptable assessment of the relevant facts.

78. The immigration related activities indicated under Section 253(2) which according to the reasoning of the provision incur additional costs to the state, are legitimate activities and what is more, activities, which support the State in the fulfillment of their obligations under international law.[37] Freedom to perform activities in the field of migration by democratic means, for example, using the advocacy and public campaigning, production of informational materials, are the types of activities aimed at advancing democratically the issue of human rights and public interest.

79. The Commission and the ODIHR reiterate that in the assessment of the necessity and proportionality of the interference by the imposition of the special immigration tax, attention should be paid to the cumulative effect, especially in the light of the Law on the Transparency of Organizations receiving Support from Abroad introduced in 2017[38] and Article 353A of the

[36] CDL-AD(2018)013, Joint Opinion on the Provisions of the so-called "Stop Soros" draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).

[37] See the United Nations 1951 Refugee Convention, the Council of Europe Convention on Action against Trafficking in Human Beings, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, with the latter two conventions directly addressing co-operation with civil society in providing assistance to victims.

[38] Previously examined by the Commission in the Opinion CDL-AD(2017)015.

Criminal Code on Facilitating Illegal Migration.[39] Those legal rules are relevant parts of the context to assess whether the special tax is necessary. Under the transparency law, associations annually receiving foreign financing which amounts to 7.2 million forints (around 22 000 euros) have the obligation to register with the Regional Court as "organisation receiving support from abroad" and label themselves as such on their websites as well as on any press products and other publications. The Commission also underlined the importance of the context surrounding the adoption of the transparency law and specifically the virulent campaign by some state authorities against civil society organisations receiving funding from abroad portraying them as acting against the interest of the society. In their joint Opinion concerning Article 353A of the Criminal Code on Facilitating Illegal Migration, the Commission and ODIHR warned against further arbitrary restriction to the indispensable work of human rights NGOs in the implementation of this criminal provision and drew the attention to the risk of prosecution against persons/organisations that carry out informational activities, support individual cases, provide humanitarian aid on the border of Hungary.

80. In the particular case of Section 253, there are various issues to raise in respect of the criteria of necessity and proportionality: first, the taxation of the donor/funder has no direct connection to the additional expenses incurred by the recipient's activity and the "burden sharing" aim. It is difficult to see how the act of making financial donations, in and of itself, to an NGO creates financial responsibility or burden on the Hungarian state and how this burden is measured.

81. Secondly, paragraphs 8 and 9 of Section 253 impose a new reporting obligation on associations when they become taxable under paragraph 7, requiring them to submit a tax statement including the name, postal address and other known identification data of the donor providing the financial support and the amount of the support to the tax authority by the 15th day of the month following the receipt of the statement. The transparency law imposes on associations to report the identity of the concrete donors only in case of funding received from abroad and Articles 20(1) a)-d) and (2) of Act CLXXV on Associations require disclosure of the amount of funding but not the source or the identity funders. The additional reporting obligation imposed by Section 253(8)(9) could create an environment of excessive state monitoring, which is not conducive to the effective enjoyment of freedom of association, in particular in the current context where one of the declared legitimate aims of the special tax is to discourage some associative activities in the field of migration.[40] The burdensome reporting requirements, coupled with the very heavy tax imposed on these organisations, while not outright prohibiting the existence of these organisations and not outright prohibiting the content of their work, has the cumulative effect of not only being dissuasive as the authorities claim, but also having a punitive effect. That is, effectively amounting to a sanction on these associations.

82. Thirdly, Section 253 treats NGOs differently than other entities based on the nature and the purpose of their activities. The wide margin of appreciation relates to the types of taxes the state introduces as well as their height. States may also introduce differentiated taxes, as long as the difference in treatment is based on objective criteria, is not unreasonable and meets the proportionality criterion.[41] The special tax on immigration under Section 253 is levied on the act of donating to NGOs expressing a particular opinion which appears to be a political controversy. This content based approach to the lawful activities of NGOs in the determination of the taxable entities under Section 253 may amount to discrimination under Article 14 ECHR,

[39] Previously examined by the Commission and the OSCE/ODIHR in the Opinion CDL-AD(2018)013.
[40] Paragraph 104 of the Guidelines provides that "the resources received by associations may legitimately be subjected to reporting and transparency requirements. However, such requirements shall not be unnecessarily burdensome, and shall be proportionate to the size of the association and the scope of its activities, taking into consideration the value of its assets and income."
[41] See, ECtHR, 30 April 2009, *Glor v. Switzerland,* application no. 13444/04.

considering in addition that NGOs engaged in human rights advocacy are traditionally considered as particularly vulnerable and, hence, in need of enhanced protection.

83. In conclusion, the effect of the legislation introducing the special immigration tax represents an unnecessary and disproportionate restriction of the associations' freedom to determine their objectives and activities and therefore disproportionate interference with their right to freedom of association. The special tax represents moreover an unjustified interference into the right to freedom of expression of NGOs, since the special tax limits their ability to undertake research, education and advocacy on issues of public debate. Lastly, because the tax is levied on the act of donating to NGOs expressing a particular opinion which appears to be a significant political controversy, it may also amount to discrimination within the meaning of Article 14 ECHR.

G. Right to Effective Remedies

84. The right to effective remedies is granted by Article 13 of the ECHR, by virtue of which "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". In the Joint Guidelines on the Freedom of Association[42], the Venice Commission and ODIHR noted that "associations, their founders and members and all persons seeking to exercise their right to freedom of association shall have access to effective remedies in order to challenge or seek review of decisions affecting the exercise of their rights" (principle 11).

85. Section 253 does not foresee any legal remedies that those subject to this provision could use. During the visit to Budapest, the delegation of the Venice Commission was informed that the decisions by tax authorities, as any other administrative decisions, may be challenged before the administrative sections of courts. In future, the newly established administrative courts will probably take over this agenda.

86. At the same time, the Venice Commission received conflicting information as to whether Section 253 could be challenged in the Constitutional Court. On the one hand, Article 24(2) of the Constitution of Hungary grants the Constitutional Court the competence to "review any piece of legislation applied in a particular case for conformity with the Fundamental Law further to a constitutional complaint" (al. c)). On the other hand, Article 37(4) of the Basic Law limits the right to review taxes to the cases, when the alleged violation pertains to "the violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship". Section 253 of the Taxation Law does not interfere with any of these rights. It therefore remains uncertain, whether the Constitutional Court could assess the compatibility of Section 253 with the provisions of the Basic Law and of international treaties granting the right to property, the right to freedom of association, the right to freedom of expression or the principle of non-discrimination.

87. Article 24(2) of the Basic Law also grants the Constitutional Court the competence to "examine any piece of legislation for conflict with any international agreement" (al. f)). Yet, by virtue of Article 32(2) of the Constitutional Court Act, individuals or associations are not among the entities entitled to request such an assessment.

88. The Venice Commission has doubts on whether the recourse by means of an administrative complaint would of itself meet the criteria of Article 13 ECHR. Administrative sections of courts are not entitled to review the compatibility of Section 253 with human rights granted by the Constitution and the ECHR. Yet, as the ECtHR indicated in Leander v. Sweden, "where an individual has an arguable claim to be the victim of a violation of the rights set forth in

[42] CDL-AD(2014)046, *Joint Guidelines on Freedom of Association,* Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, 17 December 2014.

the Convention, /he-she/ should have a remedy before a national authority in order both to have his/her claim decided and, if appropriate, to obtain redress".[43] It is questionable whether the review foreseen by Article 24(2)(c)-(f) of the Basic Law meets this criterion.

[43] ECtHR, *Leander v. Sweden,* Application no. 9248/81, 26 March 1987, para. 77.