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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

AND

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE/ODIHR)

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)

on the basis of comments by

Ms Veronika BILKOVA (Member, Czech Republic)
Mr Peter PACZOLAY (Member, Hungary)
Mr Jorgen Steen SORENSEN (Member, Denmark)
Ms Herdis THORGEIRSDOTTIR (Member, Iceland)
Mr Jan VELAERS (Member, Belgium)

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I. INTRODUCTION

1. In September 2013, two members of the *Jogorku Kenesh* (the Parliament of the Kyrgyz Republic), Mr Tursunbay Bakir Uulu and Mr Nurkamil Madailev submitted to the Parliament a draft Law "On Introducing Amendments and Changes into some Legislative Acts of the Kyrgyz Republic (hereinafter "Draft Law") (CDL-REF(2013)044), which aims at amending three existing laws: law No. 111/1999 On Non-Commercial Organizations (CDL-REF(2013)047); law No. 57/2009 On state registration of legal entities (CDL-REF(2013)045) and Article 259 of the Criminal Code (CDL-REF(2013)046).

2. On 18 September 2013, the OSCE Centre in Bishkek transmitted to OSCE/ODIHR the request from the Chairman of the Human Rights, Constitutional Legislation and State Structure Committee of the Parliament of the Kyrgyz Republic for a joint ODIHR-Venice Commission legal opinion on the proposed draft Law.

3. As a parliamentary hearing was originally scheduled for 14 October 2013, the Human Rights, Constitutional Legislation and State Structure Committee requested the opinion before this date.

4. Ms Veronika Bilkova, Mr Peter Paczolay, Mr Jorgen Steen Sorensen, Ms Herdis Thorgeirsdottir and Mr Jan Velaers were appointed rapporteurs for the Venice Commission. The present Interim Joint Opinion was adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013).

II. SCOPE OF REVIEW

5. This Opinion analyses the draft Law of the Kyrgyz Republic on Amendments and Addenda to Some Legal Acts against the background of its compatibility with relevant international standards and OSCE commitments. It focuses mainly on this draft Law, and thus does not constitute a full and comprehensive review of all available framework legislation touching on freedom of association in the Kyrgyz Republic.

6. In light of the short notice given in the request for legal review (due to the initial date of the parliamentary hearing), it has not been possible to carry out a fact-finding mission to the Kyrgyz Republic and there thus have been no opportunities to discuss the Draft Law and its background with the authorities and civil society in the Kyrgyz Republic. For this reason, this opinion is an interim one, based on a preliminary, abstract assessment of the Draft Law. It might be revised, once exchanges of views have taken place with the authorities and civil society of the Kyrgyz Republic.

7. This Opinion is based on an unofficial English translation of the draft Law. Errors from translation may result.

8. OSCE/ODIHR and the Venice Commission would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments to the Law or related legislation that OSCE/ODIHR and the Venice Commission may make in the future.

III. EXECUTIVE SUMMARY

9. The Draft Law under consideration represents an interference into several fundamental rights, *in primis* the right to freedom of association and the right to freedom of expression of associations and individuals in the Kyrgyz Republic. As such, in order to comply with international standards, such interference must be prescribed by law, must pursue a legitimate aim and must not exceed what is necessary in a democratic society. Proportionality between the legitimate aim and the interference is also required by Article 20

of the Constitution of the Kyrgyz Republic. The interference in question may be considered to pursue the legitimate aim of ensuring openness and transparency of non-commercial organizations operating in the territory of the Kyrgyz Republic. In its current wording, however the Draft law suffers from serious deficiencies and is hardly compatible with international standards of the protection of human rights and fundamental freedoms.

10. The Draft Law fails to clearly define the term "political activities" which is crucial for determining the newly introduced status of non-commercial organizations exercising the function of a foreign agent. It is also rather vague in defining the new criminal offence of the creation of a non-commercial organization, infringing upon the liberties and rights of individuals. In these parts, the Draft Law appears not to fulfill the criterion of legality and therefore to be incompatible with relevant human rights standards.

11. The Draft Law establishes new legal statuses of and legal regimes for structural units of foreign non-commercial organizations and of non-commercial organizations exercising the function of a foreign agent. It is not clear whether the establishment of these statuses/ regimes is truly necessary in a democratic society and proportional to the legitimate aims pursued by the regulation. Should the special statuses/regimes be maintained, the extent and content of the additional obligations imposed on non-commercial organizations need to be carefully reconsidered to avoid that these obligations are disproportionately more cumbersome than those foreseen for non-commercial organizations in general. Advocacy work on issues of public concern, regardless of whether or not it is in accordance with governmental policy, should not be affected, or limited.

12. In the light of the analysis contained in greater detail hereinafter, the relevant stakeholders in the Kyrgyz Republic are recommended to reconsider this Draft Law in its entirety and to not pursue its adoption by the *Jogorku Kenesh*.

13. In the light of the short time available, the Venice Commission and the OSCE/ODIHR have not had the opportunity to discuss these interim findings with the Kyrgyz authorities, and therefore reserve their final position until they will have such opportunity. They remain at the disposal of the authorities of the Kyrgyz Republic for any further assistance that they may need.

IV. ANALYSIS AND RECOMMENDATIONS

A International Standards on Freedom of Association

14. Freedom of association is "an essential prerequisite for other fundamental freedoms".[1] It is closely intertwined with freedom of expression, and assembly, as well as with other human rights (freedom of religion, right to privacy, the prohibition of discrimination etc.). It is "an individual human right which entitles people to come together and collectively pursue, promote and defend their common interests".[2] 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".[3] Although freedom of association is not an absolute right, it can be limited, or derogated from, only

[1] 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, para 45; and CDL-AD(2012)016, Opinion on the Federal law on combating extremist activity of the Russian Federation, para 64

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

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

under the strict conditions stipulated in human rights instruments (see Articles 4 and 22(2) of the ICCPR).

15. Non-governmental organizations (NGOs) play a crucial role in modern democratic societies, allowing citizens to associate in order to promote certain principles and goals. Such public engagement, parallel to that of participation in the formal political process, is of paramount importance and represents a crucial element of a healthy civil society. Members of NGOs, as well as NGOs themselves, enjoy fundamental human rights, including freedom of association and freedom of expression.

16. These rights are enshrined in numerous international legal instruments, such as the 1948 Universal Declaration of Human Rights (Articles 19 and 20), and the 1966 International Covenant on Civil and Political Rights (Articles 19 and 22). They are also granted under the 2007 Constitution of the Kyrgyz Republic (Articles 31 and 35).

17. Non-governmental organizations engaged in human rights advocacy are traditionally considered as particularly vulnerable and, hence, in need of enhanced protection. Both at the universal and regional levels, special instruments have been adopted over the past decades codifying the standards applicable to human rights defenders. The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders)[4] confirms that "everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" (Article 1) and stipulates that States have to adopt measures to ensure this right.[5]

18. The UN Declaration on Human Rights Defenders provides specifically (Article 13) that "everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means in accordance with Article 3 of the present Declaration". The right of access to funding is to be exercised within the juridical framework of domestic legislation – provided that such legislation is consistent with international human rights standards

19. Specific standards which relate to the ability of associations to access financial resources can be found in the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (General Assembly resolution 36/55), which in Article 6 (f) explicitly refers to the freedom to access funding, stating that the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the freedom "to solicit and receive voluntary financial and other contributions from individuals and institutions".

20. Also of relevance in this context is the Human Rights Council resolution 22/6 (adopted on 21 March 2013), which calls upon States to ensure that reporting requirements "do not inhibit functional autonomy [of associations]" and "do not discriminatorily impose restrictions on potential sources of funding."

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[4] 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; the full text of the Declaration is available at http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.res.53.144.en?opendocument .

[5] UN Declaration on Human Rights Defenders), adopted by the General Assembly resolution 53/144 (A/RES/53/144) on 8 March 1999.

21. In communication No. 1274/2004, the Human Rights Committee observed that "the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association […]."[6] Accordingly, fundraising activities are protected under Article 22 of the ICCPR, and funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with this Article.[7]

22. A series of recent reports by UN Special Rapporteurs (on the right to freedom of peaceful assembly and of association, and on human rights defenders respectively) have expressly stated that the right to freedom of association also includes the ability of NGOs to seek, receive and use resources from domestic, foreign and international sources;[8] that "Governments must allow access by NGOs to foreign funding as a part of international co-operation, to which civil society is entitled to the same extent as Governments";[9] and that "legislation limiting foreign funding to registered associations only, […] violates international human rights norms and standards pertaining to freedom of association".[10]

23. In Europe, the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the ECHR") constitutes a binding human rights instrument for those States which are members of the Council of Europe. While not binding on the Kyrgyz Republic, the guarantee of freedom of association found in Article 11 is similar in scope to that found in the ICCPR. This opinion thus also refers to the ECHR throughout, including relevant case law of the European Court of Human Rights (hereinafter "the ECtHR"), as a persuasive authority.

24. The Council of Europe has also issued Fundamental Principles on the Legal Status of Non-governmental Organisations in Europe[11] ("the Fundamental Principles") which, though not binding by nature, are valuable tools for the interpretation of international treaty norms touching on freedom of association. Recommendation CM/Rec(2007)14 of the Committee of Ministers to Member States on the Legal Status of Non-governmental Organisations in Europe[12] (hereinafter "Recommendation CM/Rec(2007)14") stresses "the essential contribution made by non-governmental organizations (NGOs) to the development and realisation 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".

25. In OSCE commitments on the "human dimension", OSCE participating States further pledged 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

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[6] Human Rights Committee, communication No. 1274/2004, *Korneenko et al.* v. *Belarus*, Views adopted on 31 October 2006, para 7.2.

[7] See A/HRC/23/39, second report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para 16.

[8] A/HRC/23/39, para 8.

[9] A/59/401, para 82. The Report adds that "The only legitimate requirements of such [foreign-funded] NGOs should be those in the interest of transparency".

[10] A/HRC/23/39, para 17.

[11] CoE Fundamental Principles on the Status of Non-governmental Organisations in Europe and explanatory memorandum. The Fundamental Principles in English or Russian are available at http://www.coe.int/T/E/NGO/public/Fundamental_Principles/Fundamental_principles_intro.asp

[12] Adopted on 10 October 2007; the full text is available at https://wcd.coe.int/ViewDoc.jsp?id=1194609&Site=CM&BackColorInternet=9999CC&BackColorIntranet

contribution to the further development of civil society and respect for human rights and fundamental freedoms" (Istanbul Document, 1999).

B The Existing Legal Framework

26. The Constitution of the Kyrgyz Republic guarantees freedom of thought and opinion[13], freedom of assembly[14] and freedom of association[15]. It prohibits discrimination[16]. Pursuant to Article 20 of the Constitution, "1. The laws that deny or derogate human and civil rights and freedoms shall not be adopted in the Kyrgyz Republic. 2. Human and civil rights and freedoms may be limited by the Constitution and laws for the purposes of protecting national security, public order, health and morale of the population as well as rights and freedoms of other persons. The introduced limitations should be commensurate to the declared objectives."

27. Under the existing Law on Non-Commercial Organizations (hereinafter "the NCO Law"), it is possible to establish non-commercial organizations in the form of public associations, foundations or institutions. According to Article 6 of the NCO Law, registration as a legal entity is not obligatory for non-commercial organizations.[17]

28. It is also possible to establish branches and representative offices of foreign non-commercial organizations within the Kyrgyz Republic. However, Article 1 par 3 of the Law on Registration of Legal Entities (hereinafter "the Registration Law") requires the registration of branches and representative offices of foreign non-commercial organizations, which would appear to be a somewhat restrictive and over-regulatory approach.[18]

29. Non-commercial organizations can be established by legal entities or individuals (Article 2 of the NCO Law). The registration of a non-commercial organization as a legal entity is governed by the Registration Law, which also applies to commercial legal entities.

30. Registration is carried out by or under the auspices of the Ministry of Justice. The registration of NCOs requires the submission of foundation documents, namely the charter and founders' agreement (Articles 6 and 7 of the Registration Law) to the Ministry. Appropriately, no other documents are required, although in the case of legal entities with

[13] Article 31: "1. Everyone shall have the right to freedom of thought and opinion. 2. Everyone shall have the right to free expression of opinion, freedom of speech and press. 3. No one may be forced to express his/her opinion or deny it. 4. The propagation of national, ethnic, racial and religious hatred, gender as well as other social supremacy which calls to discrimination, hostility and violence shall be prohibited".

[14] Article 34: Everyone shall have the right to freedom of peaceful assembly. No one may be forced to participate in the assembly. 2. In order to ensure the conduct of a peaceful assembly everyone shall have the right to submit notice to state authorities. Prohibition and limitation on conduct of a peaceful assembly shall not be allowed; the same applies to refusal to duly ensure it failing to submit notice on conduct of free assembly, non-compliance with the form of notice, its contents and submission deadlines. 3. The organizers and participants in peaceful assemblies shall not be liable for the absence of notice on the conduct of a peaceful assembly, non-compliance with the form of notice, its contents and submission deadline.

[15] Article 35 provides that "Everyone shall have the right of freedom of association."

[16] Article 16 § 2: The Kyrgyz Republic shall respect and ensure human rights and freedoms to all persons on its territory and under its jurisdiction. No one may be subject to discrimination on the basis of sex, race, language, disability, ethnicity, belief, age, political and other convictions, education, background, proprietary and other status as well as other circumstances.

[17] However, according to the Registration Law (Article 13) only registered entities can open a bank account. Furthermore, any activity as a legal entity without being registered is prohibited and income resulting from this is forfeited to the state budget (Article 20).

[18] See Principle 40 of the Fundamental Principles and paragraph 42 of Recommendation CM/Rec (2007).

foreign participation, certain documents specified in the Law "On Foreign Investments in the Kyrgyz Republic" must also be supplied.

31. The refusal of registration is only possible in cases where the foundation documents do not comply with the requirements of Kyrgyz legislation. Apart from specific situations whereby registration may be terminated by court order pursuant to the Article 17 of the Law on Bankruptcy, the termination of registration of a non-commercial organization is - subject to verification by the registration body - only possible by decision of its founders or members. All disputes on the refusal or termination of registration shall be resolved in court upon the application of an interested party. However, there is a special provision for the liquidation of public and religious associations and other organisations whose goals and acts are aimed at the exercise of extremist activity in the Law on Counteracting Extremist Activities (Article 9).

32. The NCO Law provides for government support to the activities of non-commercial organizations but also explicitly prohibits any unjustified interference by state bodies or officials in such activities.

C Comparative material

33. The Draft Law is not the first legislative proposal to introduce the concept of "foreign agent" to the regulation of non-commercial civil organisations' activities. A very similar piece of legislation was adopted in Russia (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 ('the Law'), dated 20 July 2012, №. 121-Ф3. The present Draft Law seemingly follows closely the Russian amendment.

34. The "Foreign Agent" law in Russia was modeled on the 1938 US Foreign Agent Registration Act (FARA law). The FARA law has undergone several changes since its adoption when it was mainly targeted at pre-WWII Nazi activity in the US. Further, the FARA law as it is now regulates a very narrow group of entities acting at the order, request or direction of a foreign state or entity. Its main target is lobbying, an activity that aims to directly influence political decision-making and politicians themselves. The Law does not prevent US NGOs from receiving financial support from foreign organisations and countries and these NGOs are not required to be registered under the FARA Law[19].

D Analysis of the Draft Law

1. The Criteria

35. The Draft Law aims at establishing additional obligations of non-commercial organizations and at creating a special legal regime for structural units of foreign non-commercial organizations and for non-commercial organizations exercising the function of a foreign agent. It also increases the powers of public authorities to monitor such non-commercial organizations and it foresees various sanctions (administrative or criminal) for non-commercial organizations which fail to comply with legal obligations, as well as for their representatives and members.

[19] The Foreign Agents Registration Act (FARA), 22 U.S.C. § 611 et seq., as amended, requires that an "agent" which acts under the direction or control of a foreign government, entity, or person, and engages in political activities in the United States "for or in the interests of" such foreign entity, must register to disclose the relationship with the foreign entity and provide information about related activities and finances. The law primarily focuses on the activities of lobbyists and publicity agents acting on behalf of foreign governments. The law has been significantly narrowed by amendments over time, in part in response to decisions of the U.S. courts, and requires a very high relationship of agency and control between the foreign entity and the agent. It also exempts news or press organizations not owned by the foreign entity.

36. These measures constitute an interference into several human rights, especially freedom of association and freedom of expression. For such interference to be lawful, it needs to meet the criteria of legality, legitimacy and necessity in a democratic society.

37. The criterion of legality requires that any restrictions imposed upon human rights be prescribed by law. This means that there must be a law foreseeing the restriction (presence of the legal basis) and that this law has to be accessible and formulated with sufficient precision to enable citizens to regulate their conduct (quality of the legal basis). The requirement of a clear legal basis has been repeatedly emphasised for example by the European Court of Human Rights.[20] For domestic law to meet these requirements, it may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[21] Instead, it must afford a measure of legal protection against arbitrary interferences by public authorities with the guaranteed rights. In matters affecting fundamental rights it would be contrary to the rule of law for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.[22]

38. According to the Explanatory Note, the Draft Law has been introduced with the aim of "ensuring oppenness, publicity and transparency of the activities of non-commercial organisations, including structural units of foreign non-commercial organizations and non-commercial organizations exercising the function of a foreign agent". In the opinion of the Venice Commission and OSCE/ODIHR, this aim may be regarded, in principle, as a legitimate one, falling within the meaning of "the interests of public safety, public order and/or rights and freedoms of others".

39. Restrictions imposed upon both freedom of association and freedom of expression must not exceed what is "necessary in a democratic society"; this means that the interference must correspond to a pressing social need and be proportionate to this need.[23] The Venice Commission and the OSCE/ODIHR recall that under international standards, freedom of expression extends also to information or ideas which may be found offending, shocking, and disturbing.[24]

2. Legal Status of Foreign Non-commercial Organisations

40. The Draft Law introduces six additional paragraphs (paragraphs 4-9) to Article 2 of the NCO Law on definitions. Paragraph 4 provides for a definition of the term "foreign non-commercial organization", which appears to be in congruity with international standards.

41. Paragraphs 5 and 6 pertain to the branches and representative offices of foreign non-commercial organizations, operating on the territory of the Kyrgyz Republic, the so-called "structural units". Under these provisions, structural units of foreign non-commercial organizations are defined as "branches and local offices of foreign non-commercial organizations that are subject to state registration and acquiring legal capacity on the territory of the Kyrgyz Republic".

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[20] E.g. ECtHR, Maestri v. Italy [GC], No. 39748/98, § 30.

[21] Human Rights Committee, General Comment no. 34 (25)

[22] E.g. ECtHR, Hasan and Chaush v. Bulgaria [GC], No. 30985/96, § 84, ECHR 2000 XI.

[23] ECtHR, Chauvy and Others v. France, Application No. 64915/01, 2004, para 70.

[24] ECtHR, Handyside v. United Kingdom, Application No. 5493/72, 7 December 1976, para 49.

42. The Venice Commission and OSCE/ODIHR stress that NGOs should not be required to seek authorisation in order to establish branches, whether within the country or abroad.[25]

43. It is true that foreign non-governmental organizations may be required to obtain authorization to operate in a country other than the one in which they have been established. However, they should not be required to establish a new and separate entity for this purpose.[26] Foreign non-governmental organizations may be subjected to the same accountability requirements as other non-governmental organizations with legal personality in their host country, but these requirements should only be applicable to their activities in that country.[27]

3. Labeling as "Non-commercial organisations which serve as foreign agents"

44. Under Article 1 (Article 2, 7-9 law 111/99) of the draft law, a non-commercial organisation is considered to exercise the functions of a "foreign agent", if three conditions are met:

a) the organisation is established in the Kyrgyz Republic;
b) the organisation receives money or other property from foreign governments and their public authorities, international and foreign organizations, foreign citizens, persons without citizenship or their authorized representatives receiving cash and other property from the specified sources (except for the open joint-stock companies with state participation and their affiliates); and
c) the organisation is involved in political activities carried out on the territory of the Kyrgyz Republic as well for the benefit of foreign sources.

45. A "non-commercial organization is considered as participant in political activities" if "regardless of its goals and objectives stated in its articles of association, it is involved (including through financing) in organizing and conducting political activities aimed at influencing the decisions of public authorities in order to change their policy, as well as influencing the public opinion for the above mentioned purposes".

46. Activities in a number of specifically listed areas, such as science, culture, art, health, public health, social support and protection, and social support to the disabled, protection of motherhood and childhood, and the promotion of healthy lifestyles, physical culture and sport, protection of flora and fauna and charitable activities do not qualify as "political activities" (Article 2 par 9 of the NCO Law).

47. In light of the negative connotation of the term "foreign agent" (иностранный агент), a non-commercial organization labeled as a "foreign agent" would most probably encounter an atmosphere of mistrust, fear and hostility, which would make it difficult for it to operate. Other people and - in particular - representatives of the state institutions will likely be reluctant to co-operate with them, in particular in discussions on possible changes to legislation or public policy. The labeling 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 by such a NCO (amendment to Article 12 of the Registration Law) therefore, together with the additional reporting obligations which ensue from this labeling (see below) undoubtedly

[25] The registration requirement runs contrary to Principle 40 of the Fundamental Principles and paragraph 42 of Recommendation CM/Rec (2007)014. In its 2009 OSCE/ODIHR Opinion on the draft Law of the Kyrgyz Republic on Amendments and Addenda to Some Legal Acts, the OSCE/ODIHR recommended to reconsider the requirement to register branches and representative offices.

[26] Paragraph 45 of Recommendation CM/Rec (2007)014.

[27] Paragraph 66 of Recommendation CM/Rec (2007)014.

represent an interference with the exercise of the right to freedom of association and of freedom of expression without discrimination. In order to be compatible with international standards, such interference must be in accordance with the law, must pursue a legitimate aim and must be "necessary in a democratic society".

48. The Venice Commission and OSCE/ODIHR wish to express their strong reservations in respect to the use of the term "foreign agent".

49. As to the legality of the interference in respect of the definition of "political activity", the Venice Commission and the OSCE/ODIHR note at the outset that the European Court of Human Rights has found that the term "political" is of itself "*inherently vague and could be subject to largely diverse interpretations*."[28] The Court has considered however that a constitutional provision stating that associations "may not pursue political goals or carry out political activities" had a sufficient level of precision, due regard being had to the role of adjudication by courts in clarifying the meaning of the provisions. The Venice Commission and the OSCE/ODIHR therefore consider that the notion of "political activities" as such can comply with the principle of legality if it is interpreted in a coherent way by the executive and judicial authorities. However, they note that several aspects of the definition of "political activity" imposed by the new pars 7 and 8 to Article 2 of the Draft Law appear to prevent a clear application of the law, and call into question the level of precision of the definition of foreign agents in the Draft Law under consideration.

50. The Venice Commission and the OSCE/ODIHR indeed note that the definition – "non-commercial organizations involved in organizing and conducting political activities aimed at influencing the decisions of the public authorities in order to change their policy, as well as influencing the public opinion for the aforementioned purposes" - contains a tautology, as it employs circular reasoning, stating that a non-commercial organization is considered as a participant in "political activities if it is involved […] in organizing and conducting political actions […]".

51. In addition, it contains a subjective element, as the aim for which the activities are undertaken is a decisive element for their qualification as "political" activities. Such a subjective element would be difficult to assess: the administrative authorities would therefore have an overly broad discretion in labeling an activity as "political", so that it would be extremely difficult for a non-commercial organization to anticipate whether its activities would risk being labeled as such.

52. As regards the exceptions, it is further unclear whether, in order to be excluded, scientific activities may only be conducted by a university or by a recognized scientific institute or also by a non-commercial organization; similarly, it is uncertain whether an artistic expression of criticism of public authorities would also be excluded and whether political activities in the field of the environment would fall under the definition of "activities in the field of protection of flora and fauna".

53. Under these circumstances, it is doubtful that the definition of "political activities" in the Draft Law attains a sufficient level of precision as to be duly foreseeable; it is therefore doubtful that it meets the criterion of legality. It would indeed seem to allow unfettered discretion on the part of the implementing authorities.

54. It is not clear whether the legitimate interest of the Kyrgyz Republic in supervising non-commercial organizations and ensuring transparency of their financing truly requires special legal regimes for non-commercial organizations with foreign links. The benefits of such

[28] ECtHR, Zhechev v. Bulgaria, Application No. 57045/00, 21 June 2007, para 55.

regimes need to be carefully weighed against the impact that their creation can have upon NCOs and their operation. The principle of non-discrimination, enshrined in Article 26 of the ICCPR, Article 14 of the European Convention and Protocol 12 to this Convention, also has to be respected. In the *Moscow Branch of the Salvation Army v. Russia* case, the European Court for Human Rights was reluctant to accept the foreign origin of an NCO as a legitimate reason for a differentiated treatment,[29] the same reluctance would seem to be in order in case of mere foreign funding.

55. As regards the criterion of "necessity in a democratic society", the Venice Commission and the OSCE/ODIHR note that the status of non-commercial organizations exercising the function of a foreign agent does not appear to be made conditional on any minimal amount of funds received from foreign sources. The Draft Law also fails to distinguish between various forms of "funding and other property". Thus, a non-commercial organization regularly funded from abroad, a non-commercial organization which received an international prize for its activity, or a non-commercial organization buying a laptop from an international business company would – again, provided that the political activities element is met – be all considered as "foreign agents". This lack of differentiation weighs negatively on the assessment of the proportionality of the interference.

56. The amendments proposed in the Draft Law clearly disadvantage NGOs receiving foreign funding. Foreign support is essential to many non-commercial organizations without which they would not be able to survive. At the same time, foreign funding of NGOs is at times viewed as problematic by States. The Venice Commission and OSCE/ODIHR acknowledge that there may be various reasons for a State to restrict foreign funding, including the prevention of money-laundering and terrorist financing. Requiring the utmost transparency in matters pertaining to foreign funding may therefore be justified. 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.[30]

57. It bears recalling in this context that the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has stated that the right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.[31] In the Special Rapporteur's view, measures which compel recipients of foreign funding to adopt negative labels such as "foreign agents" constitute undue impediments on the right to seek, receive and use funding.[32]

58. It should further be stressed that the definition as political activities of any activity aimed at influencing public opinion or decision-making authorities would cover not only those organizations which are *de facto* involved in lobbying or partisan political activities, but virtually all NGOs carrying out any form of legitimate public advocacy.

59. In this context, it should be noted that international instruments pertaining to specific forms of association (notably human rights defenders and associations active in the field of environmental protection) have recognized that such associations should be able to undertake certain forms of activity, most notably, the observation of trials and other

[29] ECtHR, Moscow Branch of the Salvation Army v. Russia, Application No. 72881/01, 5 October 2006, para 81-86.

[30] Venice Commission, CDL-AD(2013)023 - Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, § 40

[31] See A/HRC/23/39, second report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para 8.

[32] A/HRC/23/39, section V. Conclusion and Recommendations, paras 20, and 82 letter (d).

proceedings,[33] participation in public affairs and criticism of governmental actions,[34] promotion of human rights ideas,[35] provision of advice,[36] provision of information to international organizations[37] and the act of seeking information.[38]

60. Moreover, the definition of "political activities" as stipulated in the draft Law seems to be premised on the erroneous assumption that activities in certain areas, including, e.g., science, culture, art, health, public health, social support and protection, sports, and environmental protection are separate from public policy advocacy and do not shape public opinion on the above issues (new par 9 to Article 2). This seemingly ignores the truistic fact that many if not all activities carried out by an association may, to a certain degree, and inadvertently or even inevitably, shape public opinion and potentially influence decision-making, regardless of the topical focus of the activity.

61. In this respect, the Venice Commission and the OSCE/ODIHR also recall that the UN Human Rights Committee in its General Comment on Article 25 of the ICCPR explains this right of citizens to participate directly in public affairs "by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to respect citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed".[39] International law explicitly permits citizens organising and undertaking political actions aimed to influence decision-making of state organs, at changing current state policy on certain issues or creating a public opinion on those issues. The UN Human Rights Committee further states: "Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association".[40]

62. Although the non-commercial organizations acting as foreign agents are not directly prohibited from participating in political activities, under the Draft Law the fundamental political right of any citizen to directly attempt to influence and change politics or state policy ends up being adversely affected, seemingly without sufficient grounds of necessity in a democratic society.

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[33] See Article 9(3)(b) of the Declaration on Human Rights Defenders and para 43 of the Document of the OSCE Moscow, 1991 Meeting.

[34] See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), Articles 6-8; full text is available at:http://www.unece.org/env/pp/documents/cep43e.pdf ; the European Charter on the Statute for Judges, Article 1.8; full text is available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf; the UN Declaration on Human Rights Defenders, Article 8; the Document of the OSCE Moscow Meeting, 1991, para. 43 full text is available at http://www.osce.org/documents/odihr/1991/10/13995_en.pdf

[35] The Declaration on Human Rights Defenders, Article 7.

[36] Ibid., Article 9(3)(c).

[37] Ibid., Article 9(4).

[38] The Aarhus Convention, Article 4.

[39] Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

[40] General Comment 25 (57), supra. See also UN Human Rights Committee, Korneenko v Belarus, cited at footnote 6, §§ 2.5, 10.5 and 10.6.

63. Finally, it should be noted that those who disagree with the decision-makers are more likely to be willing to try to influence their decisions. As a consequence, the Draft Law is more likely to impose a "foreign agent label" on those associations whose members do not share the political views of the ruling authorities. This would result in associations being penalized on account of their political convictions, which amounts to discrimination prohibited under international standards as well as under Article 16 of the Constitution of the Kyrgyz Republic.

64. Should the Draft Law be passed, then the scope of "political activities" would need to be narrowed down, so that the ensuing interference does not go so far as to potentially affect any activity that falls under the legitimate interest of civil society, particularly non-commercial organizations which follow and address issues of public interest. It is essential for the Draft Law, if indeed retained, to draw a line between advocacy, on the one hand, and partisan political activity on the other. Individuals and non-commercial organizations should not be precluded from advocacy work on issues of public concern, regardless of whether or not their position is in accord with governmental policy.[41]

65. The Venice Commission and the OSCE/ODIHR finally note that the Draft Law is silent on the de-registration procedure. It therefore remains uncertain whether, and how, a non-commercial organization may divest itself of the status of a "foreign agent" once it ceases to participate in political activities and/or to receive foreign funding, and whether it can do so without having to first liquidate and then re-establish itself as a non-commercial organization. This is an important gap which weighs negatively on the assessment of the proportionality of the interference.

4. Additional Reporting Obligations for Foreign Non-Commercial Organizations and Non-Commercial Organizations which Serve as Foreign Agents

66. The Draft Law also introduces a wide range of new reporting obligations for non-commercial organizations. Under the new provisions, the annual financial statements of the structural units of foreign non-commercial organizations and "non-commercial organizations acting as a foreign agent", would be subject to statutory audit, and need to submit the auditor's report to the competent authorities, in addition to the usual requirement for non-commercial organizations to report on their activities, on the composition of their government bodies, and on the financial books and use of other property.

67. Moreover, non-commercial organizations acting as "foreign agents" would be required to submit documents containing an activity report and information on the composition of their governing bodies to the authorized body once every six months, and documents related to the expenditure of funds and the use of property on a quarterly basis; the abovementioned audit reports need to be submitted annually.

68. These organizations would also be required to publish, once every six months, in the media or on the Internet, reports on their activities, including their founders, the composition of their property, sources of formation and information on spending. The structural units of foreign non-commercial organizations operating in the territory of the Kyrgyz Republic would be required to publish the same, annually.

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[41] See, also, e.g., the ruling of the European Court of Human Rights in the case of *Zhechev v. Bulgaria*, application No. 57045/00, judgment of 21 June 2007, par 47, in which the Court stated that "an organisation may campaign for a change in the legal and constitutional structures of the State if the means used to that end are in every respect legal and democratic and if the change proposed is itself compatible with fundamental democratic principles". Both the Fundamental Principles (Principles 10 and 11) and Recommendation CM/Rec (2007)14 (paras 11 and 12) specifically encourage the participation of non-commercial organisations in mechanisms for dialogue, consultation and exchange with government on public policy objectives and decisions.

69. The Venice Commission and the OSCE/ODIHR recall that, under current human rights standards, "states have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation", provided they do so "in a manner compatible with their obligations under the /European/ Convention"[42] and other international instruments. While it is understood that state bodies should be able to exercise some sort of [limited] control over non-commercial organizations' activities with a view to ensuring transparency and accountability within the civil society sector, such control should not be unreasonable, overly intrusive or disruptive of lawful activities. Excessively burdensome or costly reporting obligations could create an environment of excessive State monitoring over the activities of non-commercial organizations. Such an environment would hardly be conducive to the effective enjoyment of freedom of association. Reporting requirements must not place an excessive burden on the organization.

70. On the point of financial reporting and accountability, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has stated that "associations should be accountable to their donors, and at most, subject by the authorities to a mere notification procedure of the reception of funds and the submission of reports on their accounts and activities",[43] and has called upon States to "adopt measures to protect individuals and associations against defamation, disparagement, undue audits and other attacks in relation to funding they allegedly received".[44]

71. The reporting obligations set forth in the draft Law appear extremely burdensome and costly, to an extent that they might render the operation of a non-commercial organization extremely difficult. There already exist reporting obligations for non-commercial organizations in the Kyrgyz Republic, and the Venice Commission and the OSCE/ODIHR have not had the opportunity to discuss with the Kyrgyz authorities what specific needs would prompt the imposition of additional obligations specifically on foreign non-commercial organizations and on non-commercial organizations acting as foreign agents. At any rate, these additional obligations do not appear to be dependent on a specific threat or indication of a violation of the law or of human rights of others. Accordingly, they appear to exceed what can be considered "necessary in a democratic society", and would thus not be in line with international standards such as those laid out in the ICCPR.

5. Supervision and Oversight

72. The Draft Law vests the State authorities with extensive control and oversight powers over activities of non-commercial organizations. According to the new Article 17 proposed by the draft Law, the authorities may, *inter alia*, request documents relating to the operation of such organizations and review the compliance of their activities with their own statutes, including with respect to the use of funds.

73. Such wide oversight powers are of particular concern, given that securing compliance with an organization's goals and objectives should be a matter for its founders, members and participants. It should be noted that such an approach is guided by the general principle of self-governance of associations, as well as by Article 4 par 1 of the NCO Law.

74. It should also be stressed that Article 5 of the NCO Law explicitly prohibits any interference of state bodies or officials in the activities of non-commercial organizations. The

[42] ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, 10 July 1998, para 40.

[43] See A/HRC/23/39, second report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para 37.

[44] *Ibidem,* para 82 letter (e).

amendments proposed by the draft Law would, therefore, effectively create an inherent contradiction within the NCO law itself.

75. Overall, the State has the duty not to interfere with the crucial activities of any established association. Once the association is set up, the essential relationships are between this body and its members and between this body and non-members. State supervision and intervention should only be limited to cases in which this is necessary to protect the members, the public, or the rights of others. Non-commercial organizations should, therefore, not be subject to direction by public authorities. The corollary to the principle of the independence of associations from the government is that they should be entitled to decide their own internal structure, to choose and manage their own staff and to have their own assets. The State may not issue instructions on the management and activities of the associations.[45]

76. State supervision should be limited to cases where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent. In the absence of evidence to the contrary, the activities of associations should be presumed to be lawful.

77. The Draft Law also allows the authorities to conduct unscheduled inspections of non-commercial organizations which perform the function of "foreign agents" e.g. on the basis of unspecified information indicating that such organizations have acted in violation of the law. As the European Court of Human Rights held in *Ernst and others v. Belgium*, searches in premises of a private actor also amount to the violation of the right to privacy, unless they have a clear legal basis and are proportionate to the legitimate aims pursued by the action. Unscheduled inspections should not take place unless there is suspicion of a serious violation of law. Inspections should only serve the purpose of confirming or discarding the suspicion and should never be aimed at preventing non-commercial organizations from exercising its activities. Importantly, such inspections should only be permitted upon court order, where there is clear evidence of a possible violation of existing legislation. The current formulation of the amendments proposed to Article 17 by the Draft Law do not set this out with sufficient clarity, and seem to provide State authorities with wide interfering competences. There is an additional risk that such unscheduled inspections, if not based on clear legal grounds and a legitimizing court order, could constitute a tool of potential intimidation and harassment in the hands of authorities, which could be used against organizations which voice criticism or dissent. Any means of control over associations need to be fair, objective and non-discriminatory, and should not be used as a pretext to silence critics.[46]

78. The Draft Law further provides the registration authorities with the right to request official documents from the non-commercial organizations, to request information from different state departments about the financial activities of these organizations and, what is particularly worrisome, to send their representatives to participate in the ongoing activities of the organizations. The latter may amount to undue interference in the internal affairs of public associations, and encroach upon the right to freedom of association and the right to private life of the members of the association. It may also potentially impede legitimate activities which require restricted access or should be conducted in a confidential manner for lawful reasons (e.g. shelter for domestic violence victims, peer support groups etc.).

[45] See "Some Preliminary Reflections on Standards and Legislation Relating to Freedom of Association and Non-Governmental Organizations", issued by the Venice Commission on 28 March 2013, CDL(2013)017, para 20.

[46] See A/HRC/23/39, second report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para 38.

79. In many cases, the issue of access to certain types of activities (e.g. meetings on private property) may have direct implications for the right to privacy, as enshrined in Article 17 of the ICCPR. The amendments proposed by the draft Law do not provide safeguards against arbitrary and abusive state interferences with the right to privacy, as required under pertinent international standards.[47]

80. Overall, the oversight functions over certain non-commercial organizations granted to State authorities by the draft Law's proposed amendments to Article 17 of the NCO Law are extensive. They provide public authorities with a wide, literally unchecked discretion in controlling, monitoring and interfering with the activities of non-commercial organizations receiving state funding. In particular with regard to those interfering measures which do not require a prior violation of the law (requesting documents, attending activities of the organizations), such provisions would not appear to be justified under international law standards, and should be removed.

6. Sanctions

81. The Venice Commission and OSCE/ODIHR recall that the principles and protection laid down in the ICCPR apply also to non-registered NGOs.[48] While it is legitimate for states to sanction violations of their legal order, the sanction always needs to comply with the principle of proportionality. As the Committee of Ministers stated in the Recommendation CM/Rec(2007)14, "the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of legal personality) should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality" (para 72). The European Court of Human Rights has indicated that a mere failure to respect certain legal requirements or internal management of non-governmental organisations might justify sanctions such as a fine or withdrawal of tax benefits.[49] The dissolution of an NGO is an extreme measure, which needs to be based on a well-founded rationale and it is well established under the international case-law that it can only be resorted to in exceptional situations".[50]

82. With respect to sanctions, the new Article 17 introduced by the draft Law grants the authorities the power to issue written notices to non-commercial organizations, found to act in violation of their statutes or domestic law, indicating the violation and the period for its removal in the period of not less than one month. Furthermore, the draft Law provides that the authorities may suspend the activities of non-commercial organizations that have failed to register as "foreign agents" for up to six months without a court decision. In the case of such suspension, the organizations are prohibited from carrying out mass actions or public

[47] With respect to state monitoring and surveillance, the UN Human Rights Committee has stated that laws must be adopted to clearly set out conditions for legitimate interferences with privacy and to provide for safeguards against unlawful interferences (Concluding Comments on the Russian Federation (1995) UN doc. CCPR/C/79/Add. 54), and that wire-tapping and surveillance, whether electronic or otherwise, must be prohibited if there is no independent monitoring (judicial supervision) of such practices (Concluding Comments on Poland (1999) UN doc. CCPR/C/79/Add. 110). The ECtHR has held that the mere existence of legislation allowing surreptitious state activity (i.e. various forms of state control or surveillance) may involve "for all those to whom the legislation could be applied, a menace of surveillance" which may amount to an interference with the right to privacy. See *Klass v. FRG*, ECtHR Judgment of 6 September 1978, paragraph 41.

[48] CDL-AD(2011)036 - Opinion on the compatibility with universal human rights standards on the Article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, § 93.

[49] ECtHR, Tebieti Mühafize Cemiyyeti and Isravilov v. Azerbaijan, no. 37083/03, Judgment of 8 October 2009

[50] CDL-AD(2011)036, Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, para 107.

events or from using bank deposits, with the exception of settlements on economic activity and employment contracts, compensation for losses caused by its actions, payment of taxes, fees and fines.

83. The legal consequence of non-compliance with registration obligations are not indicated explicitly; arguably, this would result in the de-registration of the non-commercial organization.

84. Moreover, the amendments proposed by the Draft Law to Article 17 of the NCO Law stipulate that the structural units of foreign non-commercial organizations in the country may be de-registered by the authorities, if they do not provide the required information in time or act contrary to their stated objectives.

85. The Venice Commission and the OSCE/ODIHR underline that the Draft Law fails to indicate explicitly that sanctions must be applied with due respect for the principle of proportionality. It should be stressed that undertaking actions which are perfectly lawful but go beyond the charter of an organization, for example, should in no way be a basis for the de-registration of the activities of an organisation, or part of an organisation.

86. Under the Draft Law, even far-reaching measures, such as suspension of the activities and de-registration, are not taken by the judicial authorities, but are left to the discretion of executive authorities. This decrease in the level of protection afforded to NCOs does not appear to be justified. In addition, while the suspension of activities may at least be appealed in court, the provisions of the Draft Law do not allow for an appeal in the case of de-registration of the structural units. Such decisions should likewise be appealable before a competent authority (ideally before a court of law), as required by the right to an effective remedy under Article 2 par 3 of the ICCPR. In any case, for judicial review to be meaningful, it is essential that the Draft Law set out a range of sanctions of different nature and severity and provide that such sanctions will be applied with due respect for the principle of proportionality, so as to limit and guide the discretion afforded to the executive authorities.

87. The Draft Law further stipulates that "in order to protect the constitutional order, national defence and state security, morality, health, rights and freedoms of others, the authority may issue a structural unit of the foreign non-commercial organization a motivated decision to ban the transfer of funds and other assets to specific recipients of these funds and other assets".

88. Interfering with financial transactions of a structural unit of a foreign non-commercial organization is a serious interference with the work of such organizations, and should be limited only to the most serious offences affecting national security, the public order, health and morals, or the rights and freedoms of others. References to "the constitutional order" should be removed from the new wording of Article 17, as proposed by the Draft Law.[51]

7. Criminal Sanctions

89. The Draft Law introduces amendments to Article 259 of the Criminal Code on the organisation of an association infringing upon the liberties and rights of individuals. Paragraph 1 stipulates that the establishment of a religious or public association whose activities involve "violence against citizens or otherwise causing harm to their health or leadership in such association" shall be punished by up to four years' imprisonment.

[51] As the UN Special Rapporteur has pointed out "States cannot refer to additional grounds, even those provided by domestic legislation, and cannot loosely interpret international obligations to restrict the right to freedom of association." In his view, such justification cannot reasonably be included under "the interests of national security or public safety" or even "public order".

Paragraph 2 envisages criminal liability and imprisonment of up to three years for establishing a non-commercial organization “whose work incites citizens to refuse to fulfill their civic duties or commit other unlawful acts” as well as leadership in such an organization or a structural unit”. Paragraph 3 adds that the participation in “the activities of non-commercial organizations listed in paragraphs one and two of this article, as well as propaganda of acts provided by the first and second paragraph of this article” shall be punished by imprisonment for a term not exceeding two years.

90. It appears unclear when a non-commercial organization would be “inciting” as well as what is meant by “propaganda acts” for the purposes of section (3).The proposed Article 259 par 2 is construed in such a way that, for example, a group advocating for the abolishment of mandatory military service could be seen as “inciting to refuse to fulfill civic duties” and thereby be subject to criminal liability. The formulation is vague and potentially open-ended, as the scope of civic duties (it is unclear whether “civic duties” are only duties prescribed by law, or also other “duties”) and, especially, of “other unlawful acts” is very broad. It could result in criminalizing all forms of civil disobedience, even the most moderate ones. Moreover, the formulation “whose work incites citizens” leaves it uncertain, whether the element of intent on the part of the non-commercial organization, and its individual representatives, is required or not.

91. In the light of the above, it appears very doubtful whether the revised Article 259 would meet the “prescribed by law” test. This provision therefore appears, on this count alone, not to be in line with international standards.