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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

SECRETARIAT MEMORANDUM
ON PARLIAMENTARY ASSEMBLY RECOMMENDATION 2192 (2020)
ON “RIGHTS AND OBLIGATIONS OF NGOS ASSISTING REFUGEES
AND MIGRANTS IN EUROPE”

**In view of the preparation of the Committee of Ministers’ reply
to this recommendation**

**Endorsed by the Venice Commission at its 126th Plenary Session
(online, 19 - 20 March 2021)**

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1. The Venice Commission examined with interest the Parliamentary Assembly Recommendation 2192 (2020) "Rights and obligations of NGOs assisting refugees and migrants in Europe".

2. The Venice Commission welcomes the approach taken in Recommendation 2192 (2020) particularly to develop legally-binding standards for volunteers and common standards to address the issues of rights and obligations of NGOs in order to facilitate their international humanitarian mission in monitoring and advocating human rights in Europe.

3. The Venice Commission commends the Parliamentary Assembly's vision formulated in its Resolution 2356 (2020) and Recommendation 2192 (2020) on the need for enhanced protection of NGOs engaged in assisting migrants, refugees, and displaced persons in Europe which are considered as particularly vulnerable compared to other types of associations. The Commission wishes to underline the relevance of existing Council of Europe instruments to be properly and consistently enforced in this respect.

4. Together with the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (thereafter, "OSCE/ODIHR"), the Venice Commission produced the Joint Guidelines on Freedom of Association CDL-AD(2014)046 adopted at its 101st Plenary Session, 12-13 December, 2014 (thereafter, "Joint Guidelines on Freedom of Association"), which contain *inter alia* best practices for regulating NGOs in line with Article 11 European Convention on Human Rights (thereafter, "ECHR") and Article 22 International Covenant on Civil and Political Rights (thereafter, "ICCPR"). The guidelines underscore the facilitation in exercising the right to freedom of association by '*creating an enabling environment in which formal and informal associations can be established and operate*' (para. 74) which is a state's contractual obligation under Article 11 ECHR. Also, they recognize the significance of the state support in the establishment and operations of NGOs due to their not-for-profit nature and importance to democratic society. The guidelines emphasize that states should develop different mechanisms for supporting NGOs, especially those "*specializing in providing social services and involved in human rights protection, policy-making, monitoring and advocacy*" (para. 210).

5. Concerning the establishment of NGOs' local field offices, the Venice Commission further recalls that in accordance with the Joint Guidelines on Freedom of Association, states should neither compel NGOs to gain formal legal personality nor require them to seek authorization to establish branches, whether within the country or abroad. To enjoy various forms of public support, the states, however, may require the NGOs to first obtain legal personality. In no case, the formalities for registration should be burdensome, but "*simple and swift to facilitate the process*" (para. 49).

6. The Joint Interim Opinion CDL-AD(2013)030 on the Draft Law amending the Law on non-commercial Organisations and other legislative acts of the Kyrgyz Republic, prepared in collaboration with the OSCE/ODIHR and adopted by the Venice Commission at its 96th Plenary Session, 11-12 October, 2013 (paras. 42-43), the Opinion CDL-AD(2011)035 on the compatibility with human rights standards of the legislation on non-governmental organizations of the Republic of Azerbaijan adopted by the Venice Commission at its 88th Plenary Session, 14 - 15 October, 2011 (para. 58), and the Opinion CDL-AD(2011)036 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 adopted by the Venice Commission at its 88th Plenary Session, 14 - 15 October, 2011 (para. 120), also reflect this approach.

7. In particular, the Venice Commission favors the approach of 'notification procedure' in order to acquire the legal personality status when the associations *inter alia* NGOs automatically obtain the legal personality as soon as the authorities are notified by the founders that an association has been created. Likewise, the Venice Commission recalls that the Joint Guidelines on Freedom of Association foresee that seemingly neutral registration requirements, such as

nationality or residency requirements may impede the full exercising of the right to freedom of association by generating a disproportionate effect on certain persons or groups.

8. In relation to access to resources by NGOs assisting migrants and refugees, the Venice Commission reiterates the following principles of the Joint Guidelines on Freedom of Association, namely Principle 2: *the State's duty to respect, protect, and facilitate the exercise* and Principle 7: *Freedom to seek, receive and use resources*. They expressly define the state's duty to provide NGOs with access to resources and the possibility to seek, receive and use resources such as financial transfers, loan guarantees, and other forms of financial assistance from natural and legal persons, in-kind donations, material, and human resources, access to international assistance and solidarity, the ability to travel and communicate without undue interference and the right to benefit from the protection of the state. Furthermore, in its Report on Funding of Associations CDL-AD(2019)002 adopted by the Venice Commission at its 118th Plenary Session, 15 - 16 March, 2019 (thereafter, "Report on Funding of Associations"), the Venice Commission emphasizes the states' responsibility to "*establish a legal and administrative framework as well as a practice that facilitates access of associations to funding, including foreign funding, in order to achieve their aims*" (para. 9) as an integral part of the right to freedom of association as defined in Article 11 ECHR and Article 22 ICCPR.

9. Regarding tax privileges for international and national donations and their humanitarian use, international bank transfers of funds for humanitarian actions, the Venice Commission is aware that migration-assisting activities can be considered as a matter of public interest in some countries. The Commission recalls its view expressed in the Joint Opinion CDL-AD(2018)035 on Hungary 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, prepared in collaboration with the OSCE/ODIHR and adopted by the Venice Commission at its 117th Plenary Session, 14-15 December, 2018. States may support NGOs "*through financial contributions or through tax exemptions on private donations in favour of the associations that carry out such activities*" (para. 11). Taking into account the added value that NGOs bring to human rights protection in the international and European context, states may grant certain privileges to foster humanitarian activities such as reducing the cost of bank transfers, making donations from international organizations tax-free, or exemptions from certain state services, such as postal or communication services.

10. Referring to Resolution 2356 (2020) on rights and obligations of NGOs assisting refugees and migrants in Europe, the Venice Commission strongly agrees that NGOs should stay independent from governmental influence and stresses that any undue interference into the administration of NGOs' activities by state or third parties infringes the right to freedom of association. 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.

11. The Venice Commission shares concerns stated in Resolution 2356 (2020), notably on undue limitations of the work of NGOs assisting refugees and migrants and underlines that the states' restrictions on the right to freedom of association shall be in strict compliance with international human rights standards. The only legitimate aims recognized by Article 11(2) of the ECHR and Article 22(2) of the ICCPR for derogations are national security or public safety, public order (*ordre public*), the protection of public health or morals, and the protection of the rights and freedoms of others.

12. Furthermore, any discrimination of non-nationals, including stateless persons and migrants with regard to exercising the right to freedom of association based on their status, should be strictly prohibited. Limitations to the right of freedom of association should be narrowly interpreted and must meet the three cumulative conditions – legality, legitimacy, and necessity in a democratic society – in order to be justified.

13. The states' obligation to presume the lawfulness and adequacy of NGOs' establishment and activities is an integral part of Article 11 ECHR. Mere assumptions, abstract "public concern" and "suspicion of carrying out illegal activities" cannot be considered a valid ground for limitations imposed by states. Furthermore, the Venice Commission notes that a new joint case is pending before the Court of Justice of the EU concerning administrative hurdles faced by NGOs assisting refugees and migrants in Europe that may go beyond matters of freedom of association (see the Order of 25 February 2021 of the President of the Court of Justice, Joined Cases C-14 and 15/21, *Sea Watch*, ECLI:EU:C:2021:149 regarding port state authorities' measures to immobilise Search and Rescue vessels operated by NGOs).

14. With regard to foreign support of NGOs, the Venice Commission specifically recalls its Report on Funding of Associations where it acknowledges that the foreign funding of NGOs might constitute a ground for state's restrictions to ensure openness and transparency, contribute to the prevention of terrorism and money laundering and the need to protect the state and its citizens from disguised interference by foreign countries or other foreign entities. However, as the Commission points out in its Opinion CDL-AD(2014)025 on Federal Law No. 121-FZ on non-commercial organisations ("Law on foreign agents") and on federal laws No. 18-FZ and No. 147-FZ on Federal Law No. 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, 13-14 June, 2014 "*these legitimate aims should not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work, notably in defense of human rights*" (para. 67).

15. The Venice Commission recalls its view expressed in the Joint Guidelines on Freedom of Association that only courts should have decision-making power on the legality of foreign funding while the competencies of administrative authorities should be limited to reviewing the information on foreign funding using a simple system of notification (para. 221). As stipulated in Article 3 of the UN Declaration on Human Rights Defenders, NGOs, like every individual and legal person, should conduct their activities for the promotion, protection and effective realization of fundamental rights and freedoms within the juridical framework of domestic legislation – provided that such legislation is consistent with international human rights standards. Additionally, as the Joint Guidelines on Freedom of Association indicate, the reporting obligations should be crafted in a clear and straightforward form, applied in a non-discriminatory manner, should respect the rights to property, private life and confidentially, be necessary and proportionate to the needs of a democratic society and should be facilitated "*to the extent possible through information technology tools*" (para. 225).

16. Furthermore, the Venice Commission recalls the Joint Opinion CDL-AD(2018)006 on Ukraine on Draft Law No. 6674 "On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance" and on Draft Law No. 6675 "On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance, prepared in collaboration with the OSCE/ODIHR and adopted by the Venice Commission at its 114th Plenary Session, 16-17 March, 2018, stating that "*excessively burdensome or costly reporting obligations could create an environment of excessive state monitoring which would hardly be conducive to the effective enjoyment of freedom of association*" (para. 40). Moreover, any disclosure obligations imposed on NGOs relating to the processing, collection, and storing of personal data must be in line with international standards, particularly the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108).

17. Last, the Commission suggests that the Joint Guidelines on Freedom of Peaceful Assembly CDL-AD(2019)017 be considered cumulatively with other relevant international soft-law instruments when PACE is preparing common standards for facilitating the international work of NGOs and volunteers providing humanitarian assistance to migrants, refugees, and displaced persons.