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(OSCE/ODIHR)

BOSNIA AND HERZEGOVINA

JOINT OPINION

**ON THE DRAFT LAW OF REPUBLIKA SRPSKA ON
THE SPECIAL REGISTRY AND PUBLICITY OF THE WORK OF
NON-PROFIT ORGANISATIONS**

**Adopted by the Venice Commission
at its 135th Plenary Session
(Venice, 9-10 June 2023)**

on the basis of comments by

Ms Herdis KJERULF THORGEIRSDOTTIR (Member, Iceland)
**Ms Hanna SUCHOCKA (Honorary President of the Venice
Commission)**

Mr Kaarlo TUORI (Honorary President of the Venice Commission)
Ms Tatiana GLUSHKOVA (Expert, OSCE/ODIHR)
Mr Jeremy MCBRIDE (Expert, OSCE/ODIHR)

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I. Introduction

1. By letter of 29 March 2023, the Head of the OSCE Mission to Bosnia and Herzegovina requested the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) to provide a legal analysis of the Draft Law of Republika Srpska on the Special Registry and Publicity of the Work of Non-Profit Organisations (hereinafter the “Draft Law”, see CDL- REF(2023)024). Given its standard practice of collaborating with the Venice Commission when reviewing legislation pertaining to freedom of association, on 24 April 2023, ODIHR invited the Venice Commission to draft the Opinion jointly. On 6 May 2023, the Venice Commission agreed to prepare a Joint Opinion.

2. Ms Hanna Suchocka (Honorary President of the Venice Commission), Ms Herdis Kjerulf Thorgeirsdottir (Member, Iceland) and Mr Kaarlo Tuori (Honorary President of the Venice Commission) acted as rapporteurs on behalf of the Venice Commission. Ms Tatiana Glushkova and Mr Jeremy McBride from the ODIHR Panel of Experts on Freedom of Assembly and Association were appointed as experts for ODIHR. The Joint Opinion also benefited from the review made by the members of the ODIHR Panel of Experts on Freedom of Assembly and Association.

3. On 19 and 24 May 2023, the Venice Commission rapporteurs and ODIHR experts assisted by Ms Sopio Japaridze and Mr Schnutz Dürr from the Secretariat of the Venice Commission and Ms Anne-Lise Chatelain and Mr Jacob Bonnevie from ODIHR, held online meetings with the Ministry of Justice of Republika Srpska, and representatives of civil society. The Venice Commission and ODIHR regret that the rapporteurs and experts were not able to meet with other relevant authorities of the Republika Srpska and of Bosnia and Herzegovina to discuss more in-depth the *rationale* for developing the Draft Law and to clarify the aims of certain of its provisions. The Venice Commission and ODIHR are grateful to the OSCE Mission to Bosnia and Herzegovina for the support it provided for the organization of these online meetings.

4. This Joint Opinion was drafted on the basis of comments by the Venice Commission’s rapporteurs and ODIHR experts and the results of the online meetings on 19 May and 24 May 2023. It was adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023).

II. Scope of the Joint Opinion

5. The scope of this Joint Opinion covers only the Draft Law, as approved by the Government of the Republika Srpska on 23 March 2023. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating associations and foundations in Republika Srpska.

6. The Joint Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses on areas that require amendments or improvements. The absence of comments on certain provisions of the Draft Law should not be seen as tacit approval of these provisions. The ensuing recommendations are based on international human rights standards and obligations, OSCE human dimension commitments, and good national practices. Where appropriate, they also refer to the relevant recommendations made in previous legal opinions published by ODIHR and the Venice Commission.

7. This Joint Opinion is based on an unofficial English translation of the Draft Law. The translation may not accurately reflect the original version on all points and inaccuracies may occur in this Joint Opinion as a result of errors from translation.

8. In view of the above, ODIHR and the Venice Commission would like to note that this Joint Opinion does not prevent them from formulating additional written or oral recommendations or comments on the Draft Law or related legislation of Republika Srpska in the future.

III. Analysis and Recommendations

A. Background, national legal framework, and legislative process

9. The Constitution of the Republika Srpska guarantees the “*freedom of [...] public expression of opinion*” (Article 25) and the “*freedom of political organisation and activities in conformity with law*” (Article 31). Article 31(2) of the Constitution further provides that “*Any political organisation or activity threatening the democracy, jeopardising the integrity of the Republic, violating the freedoms and rights guaranteed by the Constitution and any incitement to ethnic, racial or religious hatred and intolerance shall be prohibited*”.

10. Currently, associations and foundations, as well as foreign and international non-governmental organisations, are governed by the 2001 Law on Associations and Foundations as amended.¹ Article 2 of the said Law defines an association as “*any form of voluntary association of several natural or legal persons for the purpose of improving or pursuing some common or general interest or goal, in accordance with the Constitution and law, and whose primary purpose is not to gain profit*”. Article 3(3) of the Law specifies that the objectives and activities of associations and foundations may not include engagement in the election campaign of political parties and candidates, raising funds for political parties and candidates and financing candidates. Article 9(3) provides for the principle of voluntary registration thereby not requiring registration of associations and implicitly acknowledging informal associations. The Registrar of associations and of foundations is maintained by the relevant district court of the territory where the association or foundation has its seat. The Unified Register of Associations and Foundations is maintained by the Ministry of Administration and Local Self-Government of the Republika Srpska (Article 33(1)) based on information communicated by the respective courts within eight days of registration. According to the existing Law, associations and foundations shall submit an annual report on work and financial report in accordance with the law, other regulations, and statute (Article 5) and are obliged to keep business books and prepare financial statements in accordance with law (Article 37). Financial controls are envisaged under Article 36 of the 2001 Law, which states that “*Supervision over the legality and purposeful use and disposal of the funds of the association and the foundation shall be exercised by the body of the association/foundation, determined by the statute and this Law, as well as the competent body of Republika Srpska*”. Supervision over associations/foundations is further elaborated in Chapter VIII (Articles 43-46).

11. On 23 March 2023, the Government approved the *Draft Law of Republika Srpska on the Special Registry and Publicity of the Work of Non-Profit Organisations*, which aims at specifically regulating associations, foundations as well as foreign and international non-governmental organisations receiving any form of foreign funding or other assistance of foreign origin that are designated as “Non-profit organisations” (hereinafter “NPOs”). In particular, the Draft Law regulates the scope of authorized activities of NPOs, prohibiting them to carry out political activities, requiring them to register in a special Registry and all their published materials to include the mark “NPO”, and to submit additional reports compared to those already required by the existing 2001 Law on Associations and Foundations. NPOs are also subject to an additional legal regime of oversight and inspections, and a range of sanctions for violations of the provisions of the Draft Law that may result in the ban of the NPOs’ activities and thereby of the NPO itself.

12. During the online meetings of the Venice Commission and ODIHR with civil society, it was confirmed that in 2015 and 2018, similar attempts to introduce new requirements and

¹ See <[Law on Associations and Foundations of Republika Srpska \(2001\)](#)>.

obligations for associations receiving foreign funding or assistance were initiated in the Republika Srpska with the stated purpose of preventing terrorism and money-laundering but were eventually withdrawn due to public criticism and pressure. A number of public statements made by the government, which were reaffirmed during an online meeting with representative of the Ministry of Justice of the Republika Srpska, justify the need for the Draft Law owing to the inadequacy of the existing legal framework, in particular the need to enhance transparency of the civil society sector and in that respect referring to examples from other countries. Associations of citizens sent an initiative to the Ministry of Justice to withdraw the Draft Law.²

13. The Draft Law and its Explanatory Note were published on the website of the Ministry of Justice, where it is indicated that since the proposed draft is considered to be of interest to the public, it is subject to public consultations and that suggestions may be sent within eight days of publication on the website.³ At the same time, there is no clarity as to the exact date of publication on the website nor as to whom comments and suggestions on the Draft Law should be sent. During the online meeting, the Ministry of Justice informed that comments may be sent until the finalization of the Draft Law, but the timeline remains unclear. In any case, eight days for submitting feedback on the Draft Law also appears extremely short and generally not in line with recommendations issued by international or regional bodies and good practices within the OSCE and Council of Europe area where public consultations generally last from a minimum of 15 days to two or three months.⁴ It is crucial that the authorities take measures to introduce the draft amendments to the public through the media and call for feed-back as it is not enough to simply publish the draft law on an official website.⁵ The Explanatory Note to the Draft Law specifies the reasons for developing the Draft Law including the lack of regulation regarding the publicity of the work of NPOs, their political activities, reporting/accounting obligations and supervision, which according to Section IV of the Explanatory Note “*creates the prerequisites for the collapse of the legal system and constitutional arrangement of the Republika Srpska and provokes harmful consequences on the work of organs and organizations of the Republika Srpska*”. The Explanatory Note also refers to the goal of increasing “*the transparency of the work of NPOs*”. In terms of contemplated impact of the Draft Law, apart from the mention of the introduction of a new formality of registration of NPOs, the related section of the Explanatory Note is very succinct and only indicates the absence of social, environmental, and budgetary impact of the Draft Law. This appears questionable since the introduction of a new Special Registry and its maintenance, along with the resources necessary to monitor compliance with the new reporting obligations and to carry inspections would *a priori* entail significant budgetary implications.

14. From the online meetings, it appears that the Draft Law is not based on any risk assessment or consultation with associations and others potentially affected by the adoption of this new Law. The absence of consultation is contrary to the requirements in the ODIHR and Venice Commission Joint Guidelines on Freedom of Association⁶ and Recommendation CM/Rec(2007)14⁷ for measures affecting NGOs and the right to freedom of association to be adopted through a democratic, participatory, and transparent process, including meaningful and inclusive consultations with associations and their members. It is understood that following the submission to the National Assembly of the Republika Srpska and adoption of the Draft Law in first reading, a period of 60 to 90 days of public consultations may follow. As underlined

² See e.g., <<https://ti-bih.org/reaction-to-the-draft-law-on-the-special-register-and-publicity-of-the-work-of-non-profit-organizations-an-attack-on-the-work-of-citizens-associations/?lang=en>>.

³ See <[Legal and administrative framework Laws and regulations \(vladars.net\)](#)>.

⁴ See e.g., ODIHR, *Opinion on the Draft Law of Ukraine “On Public Consultations”* (2016), paras. 40-41.

⁵ See in this respect similar comments made regarding the proposed amendments to the Criminal Code of Republika Srpska, in ODIHR, *Urgent Comments on the Draft Criminal Offences against Honour and Reputation in the Republika Srpska* (11 May 2023), para. 67.

⁶ See ODIHR and Venice Commission, CDL-AD(2014)046, *Joint Guidelines on Freedom of Association*, Principle 9 and para. 106, noting in particular the importance of ensuring access to information and “adequate and timely notice about consultation processes”, involving “stakeholders representing a variety of different and opposing views, including those that are critical of the proposals made”, and of “responding to proposals made by stakeholders, in particular where the views of the latter are rejected”.

⁷ ODIHR and Venice Commission, CDL-AD(2014)046, *Joint Guidelines on Freedom of Association*, para. 77.

in the ODIHR Assessment of the Legislative Process of Bosnia and Herzegovina, “*the rules that make the consultation at the parliamentary stage possible only after the first reading when the draft law has already been discussed and when the fundamental decisions have been already made and major changes difficult to obtain*” are problematic as they do not allow for meaningful and effective public consultations.⁸ There is also a risk that the legislator might use the urgent procedure, which would completely exclude public consultations.

15. Finally, the Draft Law should also be seen in the broader context and in light of other legislative initiatives that are currently under discussions or being developed, which will have grave consequences for civil society, freedom of expression, journalism and an open, robust public debate. In this respect, the recent proposed amendments to the Criminal Code of Republika Srpska that were adopted in first reading on 23 March 2023, aim to re-criminalize defamation and insult in the Republika Srpska. The present Joint Opinion should be read together with the recently published [ODIHR Urgent Comments on the Draft Criminal Offences against Honour and Reputation in the Republika Srpska](#) that analyse these proposed amendments and note the undue impact they may have on the exercise of freedom of expression, freedom of peaceful assembly and of association.⁹

B. International legal framework

16. The right to freedom of association is a cornerstone of a vibrant, pluralistic and participatory democracy and underpins the exercise of a broad range of other civil and political rights. Associations often play an important and positive role in achieving goals that are in the public interest, as recognized at the international and regional levels.¹⁰ Although the right to freedom of association is not an absolute right, it can be limited, or derogated from, only under the strict conditions stipulated in international human rights instruments.

17. This Joint Opinion assesses the Draft Law in light of the relevant international and regional instruments and standards. The rights to freedom of expression and freedom of association are enshrined in Articles 19 and 22 of the [International Covenant on Civil and Political Rights](#) (ICCPR), to which Bosnia and Herzegovina, of which Republika Srpska is a constituent part, is a State Party.¹¹ The right of associations to seek, secure and utilize resources is also protected by this right, as otherwise freedom of association would be deprived of all meaning.¹² Furthermore, the 1998 [UN Declaration on Human Rights Defenders](#)¹³ further provides specifically 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*” (Article 13). 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 (Article 3). Furthermore, the United Nations Human Rights Council’s Resolution 22/6 on

⁸ See ODIHR, [Assessment of the Legislative Process in Bosnia and Herzegovina](#) (2023), paras. 464-465.

⁹ See ODIHR, [Urgent Comments on the Draft Criminal Offences against Honour and Reputation in the Republika Srpska](#) (11 May 2023); see also [ODIHR Final Report on 2022 General Elections in Bosnia and Herzegovina](#), which refers to “Many IEOM interlocutors saw the numerous recent defamation cases against journalists as a tool to discourage them from reporting about issues of public importance.”

¹⁰ See ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 9.

¹¹ UN [International Covenant on Civil and Political Rights](#) (hereinafter: ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. Bosnia and Herzegovina became a State Party to the CEDAW by succession on 1 September 1993. Article 22(2) of the ICCPR stipulates that “[n]o restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others”.

¹² See e.g., ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 102. See also UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2013 Report, [A/HRC/23/39](#), para. 8; and Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2007\)14 on the legal status of non-governmental organisations in Europe](#), adopted on 10 October 2007, para. 50.

¹³ [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 \(Human Rights Defenders\)](#) of 9 December 1998, adopted unanimously by the United Nations General Assembly (A/RES/53/144).

protecting human rights defenders urged States “to acknowledge publicly the important and legitimate role of human rights defenders [...] by respecting the independence of their organizations and by avoiding the stigmatization of their work” and “to ensure that reporting requirements placed on [associations] do not inhibit functional autonomy”, that “restrictions are not discriminatorily imposed on potential sources of funding”, and that “no law should criminalize or delegitimize activities in defence of human rights on account of the geographic origin of funding thereto”.¹⁴ The UN Special Rapporteur on the rights to freedom of peaceful assembly and association has also emphasised that “associations should be free to seek, receive and use foreign funding without any special authorization being required”¹⁵ and that stigmatizing or delegitimizing the work of foreign-funded NGOs or subjecting them to special audit requirements and investigations, constitute undue restrictions to the right to freedom of association.¹⁶

18. At the Council of Europe level, Article 11 of the ECHR sets standards regarding the right to freedom of association. Furthermore, the right to freedom of opinion and expression under Article 10 of the ECHR and to be free from discrimination (Article 14 of the ECHR and Protocol 12 to the ECHR) are also of relevance. The case law of the European Court of Human Rights (ECtHR) provides additional guidance for Council of Europe Member States on how to ensure that their laws and policies comply with key aspects of Article 11. In this respect, the compatibility of legislation specifically targeting associations exercising “political activities” and receiving funding or other kind of assistance from abroad (so-called “foreign agents” legislation) has been the focus of the 2022 ECtHR judgment in the case *Ecodefence and Others v Russia*.¹⁷ Several recommendations of the Committee of Ministers of the Council of Europe also offer useful guidance regarding the issue of funding of non-governmental organisations and related matters, including *Recommendation Rec(2007)14 on the Legal Status of Non-Governmental Organisations in Europe* (hereinafter “Recommendation Rec(2007)14”),¹⁸ *Recommendation Rec(2003)4 of 8 April 2003 on common rules against corruption in the funding of political parties and electoral campaigns*, (hereinafter “Recommendation on funding”),¹⁹ and *Recommendation on the legal regulation of lobbying activities in the context of public decision making* (hereinafter “Recommendation on lobbying”).²⁰

19. In light of international human rights standards, restrictions on the right to freedom of association must be compatible with the strict test set out in Article 22(2) of the ICCPR and Article 11(2) of the ECHR, requiring any restriction to be prescribed by law, meaning clear and foreseeable, in the pursuit of one of the legitimate aims listed exhaustively²¹ in the treaty/convention, necessary in a democratic society, which presupposes the existence of a “pressing social need” and respect for the principle of proportionality. In addition, the restriction must be non-discriminatory (Article 26 of the ICCPR and Article 14 of the ECHR and Protocol 12 to the ECHR).

20. As a candidate country for accession to the European Union (EU),²² Bosnia and Herzegovina should approximate relevant state legislation to the EU *acquis communautaire*. Hence, when drafting new legislation, it is important to take into consideration EU primary legislation and the EU Charter on Fundamental Rights, especially Articles 11 and 12 on rights to freedom of expression and information and freedoms of peaceful assembly and of association, respectively.

¹⁴ A/HRC/RES/22/6, 21 March 2013, paras. 5 and 9.

¹⁵ [Access to resources](#), A/HRC/50/23, 10 May 2022, para. 22.

¹⁶ UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2013 Report, UN DOC [A/HRC/23/39](#), 24 April 2013.

¹⁷ ECtHR, *Ecodefence and others v. Russia*, nos. 9988/13 and 60 others, 14 June 2022, para. 96.

¹⁸ Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2007\)14 on the legal status of non-governmental organisations in Europe](#), adopted on 10 October 2007.

¹⁹ Council of Europe, [Recommendation Rec\(2003\)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns](#), adopted 8 April 2003.

²⁰ Council of Europe, [Recommendation of the Committee of Ministers to member States on the legal regulation of lobbying activities in the context of public decision making](#), adopted on 22 March 2017.

²¹ i.e., (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

²² See <[Bosnia and Herzegovina \(europa.eu\)](#)>.

In the 2019 European Commission Opinion on Bosnia and Herzegovina's Membership application to the EU, Key Priorities 11 and 12 stated that Bosnia and Herzegovina should "[e]nsure an enabling environment for civil society" and "[g]uarantee [of] freedom of expression and of the media and the protection of journalists".²³

21. At the OSCE level, the OSCE participating States 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 which seek the promotion and protection of human rights and fundamental freedoms" (1990 Copenhagen Document). In addition, in the 1990 Paris Document, they affirmed that "...without discrimination, every individual has the right to (...) freedom of association." The OSCE participating States have also committed themselves to the aim of "strengthening modalities for contact and exchanges of views between NGOs and relevant national authorities and governmental institutions" (1991 Moscow Document) 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" (1999 Istanbul Document).

22. The Joint Opinion will also make reference to the 2014 ODIHR-Venice Commission [Joint Guidelines on Freedom of Association](#),²⁴ the 2020 ODIHR-Venice Commission [Guidelines on Political Party Regulation](#)²⁵ and the Financial Action Task Force (FATF) Recommendations 8 and 24 on, respectively, non-profit organisations ("Recommendation 8") and transparency and beneficial ownership of legal persons ("Recommendation 24").²⁶ The present Joint Opinion will also refer as appropriate to other opinions and reports published by ODIHR and/or the Venice Commission in this field, especially those addressing legislation aimed at regulating associations receiving "foreign funding" or introducing new reporting requirements in the name of enhancing transparency of the civil society sector.²⁷

23. Based on the above, members of non-governmental organisations and other civil society organisations (CSOs) as well as CSOs themselves are the holders of human rights, including the rights to freedom of association, freedom of expression and to respect for private life. Moreover, as underlined in Principle 1 of the Guidelines on Freedom of Association, the state has the obligation to respect, protect and facilitate the exercise of the right to freedom of association.²⁸

²³ See European Commission, [Opinion](#) (Avis) on the EU membership application of Bosnia and Herzegovina (May 2019), Key Priorities 11 and 12.

²⁴ ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#).

²⁵ ODIHR and Venice Commissions, CDL-AD(2020)032, [Guidelines on Political Party Regulation](#) (2nd ed., 2020).

²⁶ [International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation The FATF Recommendations](#), as updated in 2023.

²⁷ See e.g., Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#); ODIHR and Venice Commission, [CDL-AD\(2018\)004](#), Romania - Joint Opinion on Draft Law No. 140/2017 on amending Governmental Ordinance No. 26/2000 on Associations and Foundations; [CDL-AD\(2018\)006-e](#), Joint Opinion 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; [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. See also ODIHR, [Urgent Interim Opinion on the Draft Law on Non-Profit Non-Governmental Organizations and Draft Amendments on "Foreign Representatives" of the Kyrgyz Republic](#) (12 December 2022); [CDL-AD\(2014\)025-e](#), Venice Commission, Opinion on Federal Law n. 121-fz on non-commercial organisations ("law on foreign agents"), on Federal Laws n. 18-fz and n. 147-fz and on Federal Law n. 190-fz on making amendments to the criminal code ("law on treason") of the Russian Federation; [CDL-AD\(2021\)027](#), Russian Federation - Opinion on the Compatibility with international human rights standards of a series of Bills introduced to the Russian State Duma between 10 and 23 November 2020, to amend laws affecting "foreign agents"; and [CDL-PI\(2017\)002](#), Hungary – Preliminary Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad.

²⁸ See Principle 2 of the ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#). Indeed, according to the ECtHR, "genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere" (ECtHR, *Ouranio Toxo and Others v. Greece*, no. 74989/01, 20 October 2005, para. 37 and "t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" (see *Airey v. Ireland*, Application no. 6289/73, judgment of 9 October 1979).

C. Purpose of the Draft Law

24. The title of the Draft Law refers to a “Special Registry” and to the “Publicity of the Work of Non-Profit Organisations”. Article 1 states the purpose of the Draft Law, those subject to its provisions and the designation to be given to them. According to Article 1, the purpose is specified as “ensuring the publicity” of the work of NPOs. This purpose must be read together with the way in which the entities concerned are additionally designated in this provision as “agents of foreign influence”, a term also used in Article 16 of the Draft Law. The Explanatory Note also specifically mentions the goal to be achieved by the Draft Law as “*increase[ing] the transparency of the work of non-profit organizations*”.

25. At the outset, it must be emphasized that publicity or transparency of the work of associations is not explicitly listed among the legitimate aims mentioned in Article 22 (2) the ICCPR and Article 11 (2) of the ECHR, which include national security, public safety, public order (*ordre public*) for Article 22(2) or the prevention of disorder or crime for Article 11 (2) of the ECHR, the protection of public health or morals, and the protection of the rights and freedoms of others. The Joint Guidelines on Freedom of Association also underline that “[t]he scope of these legitimate aims shall be narrowly interpreted”.²⁹ While the ECtHR has acknowledged in principle, that the objective of increasing transparency with regard to the funding of CSOs may correspond to the legitimate aim of the protection of public order,³⁰ it also specifically referred to the receipt of “substantial foreign funding” in connection with identified risks of foreign involvement in some “sensitive areas – such as elections or funding of political movements” and to the objective of preventing money laundering and terrorism financing.³¹ In this respect, as underlined in ODIHR and/or Venice Commission’s previous opinions and reports,³² enhancing transparency does not *by itself* constitute a legitimate aim as described in the above international instruments,³³ although there may be circumstances where this may constitute a means in the pursuit of one or more of the legitimate aims recognised as allowing restrictions on this right, such as public order or the prevention of crimes such as money-laundering and terrorism financing.³⁴ Moreover, the Joint Guidelines on Freedom of Association provide that, while openness and transparency are fundamental for enhancing accountability and public trust, “*[t]he state shall not require but shall encourage and facilitate associations to be accountable and transparent*”.

26. Generally speaking, enhancing transparency and accountability is an essential component of good *public* governance applicable to the public sector but not to private associations, unless they are funded from public sources or performing essential democratic functions, such as political parties, which may justify the imposition of specific reporting or disclosure requirements as underlined in the Joint Guidelines on Freedom of Association and in Recommendation CM/Rec(2007)14.³⁵ In the context of political party regulation specifically, the ECtHR has also acknowledged the imposition of certain requirements entailing transparency limited to political parties, providing that they did not entail significant disclosure or reporting obligations, not to be disproportionate.³⁶ Thus, the ECtHR has found that a

²⁹ ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 34.

³⁰ ECtHR, *Ecodefence and Others v. Russia*, no. [9988/13](#), 14 June 2022, para. 122.

³¹ ECtHR, *Ecodefence and Others v. Russia*, no. [9988/13](#), 14 June 2022, paras. 139 and 165

³² See e.g., [CDL-AD\(2018\)006-e](#), *Joint Opinion 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*, para. 35. See also ODIHR, [Urgent Interim Opinion on the Draft Law on Non-Profit Non-Governmental Organizations and Draft Amendments on “Foreign Representatives” of the Kyrgyz Republic](#) (12 December 2022), para. 107; and Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), paras. 61 and 80.

³³ See e.g., Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#).

³⁴ *Ibid.*

³⁵ ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), paras. 225-226. See also Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2007\)14 on the legal status of non-governmental organisations in Europe](#), adopted on 10 October 2007, paras. 62-65.

³⁶ As in *Parti nationaliste basque – Organisation régionale d’Iparralde v. France*, no. [71251/01](#), 7 June 2007 (as regards political parties).

prohibition on the funding of political parties by foreign States – which effectively gave rise to an obligation for political parties to publish donations through depositing them in a specified bank account – was necessary for the prevention of disorder.³⁷ It has also recognised that the possibility for some associations to participate in elections and accede to power might make it necessary to require some of them to register as political parties, so as to make them subject to, for instance, stricter rules concerning party financing, public control and transparency.³⁸ In addition, the ECtHR has acknowledged that, in view of the fundamental role played by political parties in the proper functioning of democracies, the general public may be deemed to have an interest in political parties being monitored and in sanctions being imposed for any irregular expenditure, particularly as regards those parties that receive public funding so that the inspection of their finances did not in itself raise an issue under Article 11 of the ECHR.³⁹ In any case, the reporting and transparency requirements that may be imposed on political parties may be justified in light of their specific role and status and should not be extended to apply to all associations. The Joint Guidelines on Political Party Regulation also acknowledge the legitimacy of certain regulations with respect to the third-party financing in relation to election campaigns, such as “[c]ampaign expenditures made independently of a candidate or party with the aim of promoting or opposing a candidate or party, either directly or indirectly”, which “may be subject to reasonable and proportionate limitations”.⁴⁰

27. At the time of adoption of the Draft Law, the Government of Republika Srpska also invoked similarities of the Draft Law with the US Foreign Agents Registration Act (FARA) as a justification.⁴¹ In this respect, it is important to underline the differences of purpose and scope of the FARA. The FARA was originally enacted in 1938 with a view to register individuals or entities acting *at the direction and control* of a foreign government and its scope was broadened in 2016 to focus on countering foreign interference in elections.⁴² Under the FARA, one does not have to register simply because one receives funds from a foreign source. Rather one must be *an agent* of a foreign principal, meaning that one acts at the specific direction and control, and on the behalf, of a foreign principal.⁴³ In addition, the FARA was not enacted to regulate specifically civil society organisations or media representatives but any entity, non-profit or commercial, or individual acting as a legal agent on behalf of a foreign principal, requiring a very high degree of control between the foreign entity/individual and the agent.⁴⁴ In contrast, the Draft Law provides that the criterion for being subject to the Draft Law is to be an association, foundation, or foreign or international non-governmental organisation registered in the Republika Srpska “*financially or in some other way assisted by foreign entities*” (Articles 1 and 2 of the Draft Law). The reference to “*agents of foreign influence*” in Articles 1 and 16 of the Draft Law seems to imply that the mere receipt of funding by non-profit organisations or other forms of assistance from abroad triggers a presumption of some forms of influence or control of the work of the recipient by the donor, which is not justified.

28. As noted above, the Explanatory Note to the Draft Law does not refer to any actual risk assessment or does not elaborate on the impact of the proposed regulation on the civil society sector. It also does not explain why the existing reporting obligations, including financial ones, would be insufficient for the purpose of getting information about financing from abroad. During the online meetings, interlocutors also informed the Venice Commission and ODIHR that such a risk assessment had not been carried out. Hence, no explanation has been offered justifying the necessity to adopt the said legislation specifically targeting associations receiving funding and other kinds of assistance from abroad. Even matters such as preventing money laundering or countering financing of terrorism do not justify imposing new reporting

³⁷ ECtHR, *Parti nationaliste basque – Organisation régionale d’Iparralde v. France*, no. [71251/01](#), 7 June 2007.

³⁸ ECtHR, *Zhechev v. Bulgaria*, no. [57045/00](#), 21 June 2007.

³⁹ ECtHR, *Cumhuriyet Halk Partisi v. Turkey*, no. [19920/13](#), 26 April 2016.

⁴⁰ See ODIHR and Venice Commissions, CDL-AD(2020)032, [Guidelines on Political Party Regulation](#) (2nd ed., 2020), para. 218. See also ECtHR, *Bowman v. United Kingdom*, no. [24839/94](#), 19 February 1998

⁴¹ <https://crsreports.congress.gov/product/pdf/IF/IF11439>.

⁴² See [22 U.S. Code § 611 - Definitions](#).

⁴³ See further elaboration in Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), footnote 134.

⁴⁴ *Ibid.* Venice Commission’s [Report on Funding of Associations](#), footnote 134.

requirements for all associations without a concrete threat or any concrete indication of individual illegal activity.⁴⁵ Restrictions to the freedom of association can only be justified if they are necessary to avert a real, and not only hypothetical danger.⁴⁶ As ODIHR and the Venice Commission have observed, “[a]bstract ‘public concern’ and ‘suspicions’ about the legality and honesty of financing of NGO sector, without pointing to a substantiated concrete risk analysis concerning any specific involvement of the NGO sector in the commission of crimes, such as corruption or money-laundering cannot constitute a legitimate aim justifying restrictions to this right”.⁴⁷ The European Court of Human Rights held that “[a]ny interference must correspond to a ‘pressing social need’” and the reasons adduced by the national authorities to justify it should be “relevant and sufficient”, with “evidence of a sufficiently imminent risk to democracy”.⁴⁸ Apart from a vague mention of the risk of “collapse of the legal system and constitutional arrangement of the Republika Srpska” and alleged “harmful consequences” due to the absence of regulation of NPOs, the Explanatory Note to the Draft Law does not justify its development by reference to any concrete threats. As also stated by the ECtHR in the *Ecodefence* case, an approach considering as “suspect and a potential threat to national interests” any external state scrutiny of the work of CSOs in any matters, including human rights or rule of law, “is not compatible with the drafting history and underlying values of the Convention as an instrument of European public order and collective security: that the rights of all persons within the legal space of the Convention are a matter of concern to all member States of the Council of Europe.”⁴⁹

29. It is also worth referring to the Financial Action Task Force (FATF)’s Recommendation 8 the objective of which is to ensure that non-profit organisations are not misused by terrorist organisations, and which specifically requires to adopt a risk-based approach.⁵⁰ Recommendation 8 only applies to those non-profit organisations whose activities and characteristics put them at risk of terrorist financing abuse, rather than on the mere fact that they are operating on a non-profit basis or that they may receive funding or other assistance from abroad. In using the term non-profit organisation, the FATF Recommendation 8 is referring only to “a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes”, or for the carrying out of other types of “good works” and so its definition does not cover the entire universe of NPOs⁵¹ and certainly not all associations, NGOs and CSOs.⁵² FATF recently released a *Report on the Unintended Consequences of the FATF Recommendations*, including on the civil society sector, noting the misuse of FATF Recommendation 8 as a justification for introducing undue restrictions on freedom of association, essentially due to a poor or negligent implementation of the FATF’s risks-based approach.⁵³ Even if there were indications of terrorism financing, money laundering activities or other criminal activities on the side of certain individual NPOs, the correct response to this

⁴⁵ See Financial Action Task Force (FATF)’s Recommendations, Recommendation 8 – as amended, which states: “Countries should apply focused and proportionate measures, in line with the risk-based approach”. See also e.g., ECtHR, *Sindicatul ‘Păstorul cel Bun’ v. Romania* [GC], no. 2330/09, 31 January 2012, para. 69.

⁴⁶ See e.g., UN Human Rights Committee, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002(2005), para. 7.2.

⁴⁷ Venice Commission, CDL-AD(2019)002, *Report on Funding of Associations*, para. 81.

⁴⁸ See e.g. ECtHR, *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, no. 46626/99, 3 February 2005, para. 48; and *Gorzelik and Others v. Poland*, no. 44158/98, 17 February 2004, paras. 95-96.

⁴⁹ ECtHR, *Ecodefence and others v. Russia*, nos. 9988/13 and 60 others, 14 June 2022, para. 139.

⁵⁰ According to the *Interpretative Note to FATF Recommendation 8*, the objective of FATF Recommendation 8 is to ensure that non-profit organisations (NPOs) are not misused by terrorist organisations: (i) to pose as legitimate entities; (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; or (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes, but diverted for terrorist purposes. For this purpose, it is suggested that States adopt requirements on: making publicly available information as to the identity of those who own, control or direct their activities; issuing annual financial statements; measures being taken by NPOs to confirm the identity, credentials and good standing of their beneficiaries and associate NPOs; and making available to the public records of their charitable activities and financial operations (see paragraph 6(b) of the Interpretative Note to FATF Recommendation 8).

⁵¹ *Ibid.*, Paragraph 1 of the Interpretative Note to FATF Recommendation 8.

⁵² See *Non-governmental Organisations and the Implementation of Measures against Money Laundering and Terrorist Financing* for problems with the way the Recommendation is actually being implemented by States.

⁵³ FATF, “*High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards*” (2021).

would be proportionate targeted risk-based approaches, as required by FATF, and not new blanket registration and reporting requirements – adding to the already existing ones – and that affect numerous other organisations engaging in entirely legitimate activities, targeted due to the foreign origin of their sources of funding. Of note, regarding similar legislation requiring organisations “receiving support from abroad” to register, with possible dissolution as a penalty for non-compliance, the Council of Europe’s Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) expressed concern that the said legislation was not the result of the application of a risk-based approach.⁵⁴

30. The Explanatory Note also does not elaborate about why the existing reporting requirements are deemed insufficient for the purpose of pursuing one of the legitimate aims provided by international human rights standards.

31. Similarly, the succinct impact assessment included in the Explanatory Note neither provides a real assessment of the impact of the Draft Law on the exercise of the right to freedom of association by a variety of associations nor demonstrates that the drafters considered other legal alternatives and selected the least intrusive with regard to the protection of fundamental rights. The availability of such alternatives are important factors in the assessment of the proportionality of the proposed legislative choice.⁵⁵ In the absence of a proper regulatory impact assessment or consultations with civil society during the process of developing the Draft Law, it appears that there has been no genuine attempt to assess the potential impact of its adoption. For instance, there is no information as to whether any of the entities potentially affected would be able to secure reasonable level of domestic funding on a transparent and non-discriminatory basis⁵⁶ in the event of them not wishing to continue to receive funding from abroad because of concerns about being stigmatised as “NPOs”. Together with questions relating to necessity and the availability of alternative measures, this factor is relevant to assess the proportionality of the contemplated measures.

D. New category of organisations receiving funding or assistance from abroad

32. The Draft Law creates a new category of non-government organisations, so-called “non-profit organisations” (NPOs), which are associations, foundations and foreign and international non-governmental organisations as registered under the 2001 Law “*that are entirely or partially financed by their countries, their bodies, their authorized representatives, international and foreign organisations, foreign citizens or registered non-governmental institutions financed from abroad*” (Article 2 (1) of the Draft Law). At the same time, Article 1 of the Draft Law refers to NPOs that are “*financially or in some other way assisted by foreign entities as agents of foreign influence*”. During the online meetings, interlocutors noted that the Draft Law would also apply to online media that generally register as associations in Republika Srpska in the absence of any other legal basis for them to be established. This underlines the relevance of considering the adverse impact of the Draft Law not only on the right to freedom of association but also freedom of expression and freedom of the media.

33. Hence, the main criteria for differentiating NPOs from other associations or foundations is the foreign origin of their funding or other type of (undefined) assistance from abroad. Neither the Explanatory Note nor the information obtained during the online meetings provide any objective and rational justification for such a differential treatment between NPOs and other

⁵⁴ See Council of Europe [Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism](#) (MONEYVAL), Hungary - *1st Follow-up report (Enhanced)* (7 December 2017), para. 109.

⁵⁵ See e.g., ODIHR, [Assessment of the Legislative Process in Bosnia and Herzegovina](#) (2023), para. 245

⁵⁶ See e.g., ECtHR, [Ecodefence and others v. Russia](#), nos. 9988/13 and 60 others, 14 June 2022, paras. 165 and 169.

organisations.⁵⁷ From the information available to ODIHR and the Venice Commission, the reasons adduced by the national authorities to justify the introduction of this new legal framework and related restrictions applicable only to NPOs do not appear “*relevant and sufficient*”.⁵⁸ As underlined in previous opinions, the mere foreign origin of the funding of an association does not by itself constitute a legitimate reason for a differentiated treatment.⁵⁹ Without further justification for introducing such a difference in treatment, this is contrary to the prohibition on discrimination enshrined in Article 26 of the ICCPR and Article 14 of the ECHR and Protocol No. 12 to the ECHR.⁶⁰ As further underlined below, the categorisation of an “NPO” triggers a series of prohibitions, registration and reporting obligations and the potential imposition of severe sanctions in case of non-compliance, in addition to the application of the general legal framework applicable to all associations and foundations. Consequently, the Draft Law introduces restrictions directly linked to the receipt of funding and other resources from foreign and international sources, which is protected by the right to freedom of association.

34. According to Principle 7 of the Joint Guidelines on Freedom of Association, associations must have the means to pursue their objectives, meaning that they should have the ability to access resources of different types, including financial, in-kind, material and human resources, and from different sources, including public or private, domestic, foreign or international.⁶¹ Undue restrictions on funding sources or linked to the receipt of funding from certain sources may impair the implementation of activities by NGOs and endangers their very existence, especially when associations have to make a choice between either refusing all foreign funding or being subject to new restrictions or obligations linked to the receipt of foreign funding and the status of NPO. As noted by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, “*associations – registered and unregistered – can seek, receive and use funding and other resources from natural and legal persons, whether domestic, foreign or international, without prior authorization or other undue impediments, including from individuals; associations, foundations or other civil society organizations; foreign Governments and aid agencies; the private sector; the United Nations and other entities.*”⁶² The Recommendation CM/Rec(2007)14 also underlines that “*NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties*”. The ECtHR has also underlined the fundamental importance of ensuring that NGOs are “*free to solicit and receive funding from a variety of sources*” in order for them to perform their role as the “*watchdogs of society*”, further underlining that “[t]he diversity of these

⁵⁷ See ODIHR and Venice Commission, [CDL-AD\(2018\)006-e](#), *Joint Opinion 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*, at para. 44; and the Expert Council on NGO Law’s [Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad](#), para. 46. See also Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), paras. 122-127.

⁵⁸ See e.g. ECtHR, *Partidul Comunistilor (Nepeckeristi) and Ungureanu v. Romania*, no. [46626/99](#), 3 February 2005, para. 48; and *Gorzeltk and Others v. Poland*, no. [44158/98](#), 17 February 2004, paras. 95-96.

⁵⁹ See e.g., ODIHR and Venice Commission, [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*, para. 54, referring as a comparison to ECtHR, *Moscow Branch of the Salvation Army v. Russia*, no. [72881/01](#), 5 October 2006, paras. 81-86, where the Court was reluctant to accept the foreign origin of a non-commercial organisation as a legitimate reason for a differentiated treatment. See also Venice Commission, [CDL-AD\(2021\)027](#), *Russian Federation - Opinion on the Compatibility with international human rights standards of a series of Bills introduced to the Russian State Duma between 10 and 23 November 2020, to amend laws affecting “foreign agents”*, para. 34.

⁶⁰ See ODIHR and Venice Commission, [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*, Section 3. In this respect, as the Joint Guidelines note, “*while the foreign funding of non-governmental organisations may give rise to some legitimate concerns, regulations should seek to address these concerns through means other than a blanket ban or other overly restrictive measures*”; see ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 219.

⁶¹ ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 102.

⁶² *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, [A/HRC/23/39](#), 24 April 2013, para. 81 (d).

sources may enhance the independence of the recipients of such funding in a democratic society”.⁶³

35. While Article 2 of the Draft Law appears to circumscribe the definition to financial resources or funding, Article 1 also mentions more broadly organisations that are “*in some other way assisted*” by foreign entities. This terminology is overly vague and hence potentially subject to arbitrary interpretation. For the purpose of assessing the legality of a restriction, the law being relied on must not only formally exist and be accessible but also must be formulated with sufficient precision to enable an individual – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁶⁴ The wording used in Article 1 goes beyond the provision of financial resources/funding but refers to any other form of assistance, which could range from mere provision of equipment or services, or more informal forms of support such as provision of speakers for a conference or potentially even the mere provision of information. Based on this vague and ambiguous wording, it is impossible to envisage with a sufficient degree of foreseeability what funding and other assistance would trigger the qualification of an “NPO” and the related obligations and prohibitions.⁶⁵ This may in turn lead to potential arbitrary interpretation and discretion on the side of the public authorities in charge of implementing the legislation. In this respect, regarding the issue of “foreign funding” of associations, the ECtHR found that the “*absence of clear and foreseeable criteria has given the authorities unfettered discretion to assert that the applicant organisations were in receipt of ‘foreign funding’, no matter how remote or tenuous their association with a purported ‘foreign source’ was*”.⁶⁶

36. Regarding the funding provided by international organisations in particular, the Venice Commission has emphasised that “[b]y joining an international organisation, a State proclaims to share its values and objectives and participates in the definition of the strategies and actions, including possibly through financing of eligible NGOs. Allocations of funds by an international organisation to a domestic NGO cannot therefore be seen, in this context, as pursuing ‘alien’ interests.”⁶⁷ As to the funding by “registered non-governmental institutions financed from abroad”, it may be challenging for an association or foundation to assert whether the said institutions/organisations are in fact funded from abroad.

37. Finally, the Draft Law fails to precisely define what features, including minimum amounts or thresholds and nature of the sources, such funding or other types of assistance should have for an association or foundation to fall within the scope of application of the Draft Law. The Venice Commission and ODIHR note that the status of NPOs does not appear to be made conditional on any minimal amount of funds or assistance received from foreign sources. This lack of differentiation weighs negatively on the assessment of the proportionality of the interference.⁶⁸ The Draft Law does not specify the time that must pass for an NPO to be removed from the Special Registry if it stops receiving foreign funding or assistance. The Draft Law is completely silent on the de-registration procedure. Thus, it remains unclear whether, and how, an organization registered in the Special Registry as an NPO may ever divest itself of the status of NPO and related additional reporting and other obligations and restrictions, once it ceases to

⁶³ See e.g., ECtHR, [Ecodefence and others v. Russia](#), nos. 9988/13 and 60 others, 14 June 2022, para. 169.

⁶⁴ See, e.g., ECtHR, *Parti nationaliste basque – Organisation régionale d’Iparralde v. France*, no. [71251/01](#), 7 June 2007, paras. 40-42.

⁶⁵ See e.g., in relation to the qualification of “foreign funding”, ECtHR, [Ecodefence and others v. Russia](#), nos. 9988/13 and 60 others, 14 June 2022, para. 112.

⁶⁶ *Ibid*, paras. 107-112.

⁶⁷ Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), para. 98.

⁶⁸ See similar findings in ODIHR and Venice Commission, [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*, para. 55. See also Venice Commission, [CDL-AD\(2014\)025-e](#), *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*, paras. 70 and 88, which notes that the Draft Law it “does not make the legal status of ‘foreign agent’ conditional on any minimal amount of funding received from abroad or on any minimal period of time during which a NCO would have to receive foreign funding. [...] The current draft lacks minimum requirements in the amount of the used money and the length of operation.”

receive foreign funding/assistance. As noted in other joint opinions, this is a significant gap which calls into question the proportionality of the measure.⁶⁹

E. Restrictions and obligations imposed on NPOs

1. Prohibition to carry out political action and political activities

38. Article 3(3) of the Draft Law provides that NPOs are not allowed to engage in “political action” (“политичко дјеловање”) and “political activities” (“политичке активности”), as defined in Article 3(1) and (2) respectively, which exclude operations/activities in the area of “science, culture, social and healthcare protection, sports, consumers’ protection, protection of national minorities and persons with disabilities, environmental protection, fight against corruption, philanthropy, volunteerism and information” (Article 4 of the Draft Law).

39. It is noted that Article 3 of the 2001 Law on Associations and Foundations already provides that associations and foundations may not “engage [...] in the election campaign of political parties and candidates, rais[e] funds for political parties and candidates and finance[e] candidates, i.e., political parties”. It is unclear why such a limitation must be reiterated for NPOs since they are already subject to the 2001 Law. At the same time, the definition of political activities in the Draft Law goes beyond what is stated in the 2001 Law as it refers in addition to the “implementation of political activities with an aim to frame public opinion for the purpose of accomplishing political goals”. Such a wording appears overly vague and ambiguous. It could potentially cover any type of advocacy work through activities such as participation in peaceful assemblies, making statements to the press, participating in radio or television programmes, publications, etc.⁷⁰ The notion “political goals” may also be opened to very diverse interpretations.⁷¹ As a consequence, Article 3 may lead to undue limitations to the right to freedom of expression of associations and in light of the potential sanctions, may also have a chilling effect on associations’ exercise of their freedom of expression. In this respect, the Joint Guidelines on Freedom of Association emphasise the fundamental role of the freedom of expression of associations and that associations should be free to undertake advocacy on any issues of public debate, regardless of whether the position taken is in accordance with government policy or advocates a change to the law.⁷² In addition, as underlined above, a provision cannot be regarded as a “law” unless it is formulated in such a manner as to enable an individual to foresee, to a degree that is reasonable in the circumstances, that certain conduct would lead to specific legal consequences or sanctions.⁷³ The ECtHR, in the case *Zhechev v. Bulgaria*, also concluded that the term “political” is inherently vague and could be subject to largely diverse interpretations.⁷⁴ In its *Report on Funding of Associations*, the Venice Commission noted the inherent difficulty of defining the term “political activities” noting the risk that “the authorities could label any activities which were in some way related to the normal functioning of a democratic society as ‘political’.”⁷⁵ As noted in previous joint opinions, this is also inconsistent with “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”⁷⁶

40. Moreover, Article 3(2) of the Draft Law further elaborates what is encompassed by the term “political activity” i.e., “any activity towards bodies, institutions or elected representatives of the Republika Srpska or Republika Srpska representatives in the institutions of Bosnia and

⁶⁹ See e.g., ODIHR and Venice Commission, [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*, para. 65.

⁷⁰ See e.g., Council of Europe, Expert Council on NGO Law, [Study on Regulating Political Activities of Non-Governmental Organizations](#) (2015).

⁷¹ See e.g., ECtHR, [Ecodefence and others v. Russia](#), nos. 9988/13 and 60 others, 14 June 2022, para. 95.

⁷² ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), Principle 6 and paras. 97-101.

⁷³ See ECtHR, *Öztürk v. Turkey* [GC], no. [22479/93](#), 28 September 1999, para. 54.

⁷⁴ ECtHR, *Zhechev v. Bulgaria*, no. [57045/00](#), 21 June 2007, para. 55.

⁷⁵ Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), paras. 96-100.

⁷⁶ ODIHR and Venice Commission, [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*, para. 62.

Herzegovina in terms of formulating, adopting or amending regulations and policies of the Republika Srpska or in regard to political and public interests". Such a definition includes very broad terms and is capable of covering simply the provision of information to the public about existing or future possible legislative provisions and policies or even as to matters "of public interest". This provision would *de facto* exclude NPOs not only from policy or law-making processes and from public consultations but even from any public discussion. The ECtHR specifically emphasized that "*civil society makes an important contribution to the discussion of public affairs*", noting its vital role as "public watchdog", and that "*democratic process is an ongoing one which needs to be continuously supported by free and pluralistic public debate and carried forward by many actors of civil society, including individual activists and NGOs*".⁷⁷ The prohibition to take part in policy- and law-making implied by Article 3(2) of the Draft Law would unduly restrict the right of such organisations to take part in public affairs, also unduly impacting their right to freedom of expression and to impart information protected under Article 19 of the ICCPR and Article 10 of the ECHR.

41. The specification that this activity should be directed "towards" bodies, institutions and representatives of Republika Srpska is imprecise as any public dissemination of information would be capable of having some impact on those bodies. In practice, this may also curtail general access to matters of legitimate interest for civil society, thereby restricting the public's right to receive information.

42. Article 4 of the Draft Law further specifies what is meant by "political activities" for the purpose of the Draft Law by reference as to what this does not cover, excluding from the definition any "action/activity" in the fields of "*science, culture, social and healthcare protection, sports, consumers' protection, protection of national minorities and disabled people, environmental protection, fight against corruption, philanthropy, volunteerism and information*". This list does not however refer to human rights or the rule of law. This would mean that any statement or activities related to promotion and protection of human rights in general, the rule of law, criminal justice, or judicial reform, including public consultations related to these during the policy or law-making process may fall under the scope of "political activities" and hence violate the fundamental right to freedom of expression and an open discussion on matters vital to the public interest. In practice, it may become very difficult for an entity considered as an NPO to determine the types of activities or advocacy that it may or may not undertake according to Articles 3 and 4 of the Draft Law.

43. The application of the limitations contemplated by the Draft Law, especially as they relate to the prohibition of broadly framed "political action" and "political activities" to online media outlets which register as associations is particularly worrisome. In effect, this runs the risk of effectively censoring journalists/media outlets and interfering with their mission of informing the public, and of public watchdogs.

44. Finally, the breadth of the definition also raises the issue of whether what is not covered by Article 4 is based on any clear *rationale* that could provide some basis for justifying the difference in treatment of certain activities undertaken by associations and foundations that are subject to the provisions of the Draft Law. As a result, such difference in treatment would appear contrary to the prohibition of discrimination.

2. NPO marking

45. Article 5 of the Draft Law requires that any materials published by NPOs as defined by the Draft Law "*contain the NPO mark*". Although more neutral and descriptive than the term "foreign agent" used in other legislation, the NPO marking may still, depending on the context, create the risk of stigmatising certain associations, NGOs and CSOs and affecting their legitimate

⁷⁷ See e.g., ECtHR, [Ecodefence and others v. Russia](#), nos. 9988/13 and 60 others, 14 June 2022, paras. 124 and 139.

activities,⁷⁸ especially if other associations and foundations, or foreign and international NGOs, are not required to indicate their status. In addition, the terms NPO, NGO and CSO are so interchangeably used in practice that it will create additional confusion and possibly implications for wider civil society.

46. As a comparison, regarding the labelling as “foreign agent”, the ECtHR has expressly recognized the “*strong deterrent and stigmatising effect on the operations [of NGOs]*”.⁷⁹ The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has also underlined that “*the sweeping imposition of the label of ‘foreign agent’ on all civil society organizations [...] cannot be deemed necessary in a democratic society in order to ensure a legitimate aim, including ensuring transparency of the civil society sector*”.⁸⁰ As further underlined by the Venice Commission, an association labelled “foreign agent” “*will probably encounter an atmosphere of mistrust, fear and hostility making it difficult to operate*”. Moreover, it should be borne in mind that such labelling can have an entirely improper objective. As the Venice Commission has observed, “*public disclosure obligations of receipt of foreign funding were often designed to subject associations receiving such funding to public opprobrium and to increase the difficulties for the organizations in achieving their intended work. On occasion, they have even been accompanied by smearing campaigns against associations which receive foreign funding*”.⁸¹ Regarding the imposition of a more neutral label of “*organisation receiving support from abroad*”, the Venice Commission concluded that “*in the context prevailing in [the country], marked by strong political statements against associations receiving support from abroad, this label risks stigmatising such organisations, adversely affecting their legitimate activities and having a chilling effect on freedom of expression and association*”.⁸²

47. In light of the foregoing, noting that other associations are not required to label themselves to indicate their legal structure, obliging NPOs to use even a seemingly neutral label as their self-identification may in practice, depending on the context, impact their actual operation and exercise of their legitimate activities, as it may discredit their activities in the eyes of others, including their beneficiaries and the public.⁸³

48. Apart from that defect, the requirement is also imprecise as it does not specify what exactly is entailed by the “NPO mark” or where exactly this should be positioned. As a result, there is considerable scope for dispute as to whether there is compliance with this requirement. This is especially important in view of the fines that can be imposed for non-compliance under Article 18(1)(a) of the Draft Law (see also Sub-Section 7 *infra*).

3. Registration

49. The Draft Law requires NPOs to get registered, which will be in addition to the voluntary registration of all associations and foundations, as well as foreign and international non-governmental organisations, pursuant to the 2001 Law on Associations and Foundations. The process of registration of NPOs, which involves an application being made by the entity concerned, is dealt with in Articles 8 and 9 of the Draft Law.

50. Article 6 of the Draft Law lists the information to be included in the Registry to be established pursuant to the Draft Law.⁸⁴ This data does not seem to be any different from the

⁷⁸ As a comparison, see e.g., Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), para. 59. See also e.g., Venice Commission, [CDL-AD\(2017\)015](#), *Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad*, para. 65.

⁷⁹ See e.g., ECtHR, [Ecodefence and others v. Russia](#), nos. 9988/13 and 60 others, 14 June 2022, para. 136, which refers to “a strong deterrent and stigmatising effect on their operations”.

⁸⁰ [Access to resources](#), A/HRC/50/53, 10 May 2022, para. 28.

⁸¹ See Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), para. 85.

⁸² See Venice Commission, [CDL-AD\(2017\)015](#), *Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad*, para. 65.

⁸³ See Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), para. 59. See also e.g., Venice Commission, [CDL-AD\(2017\)015](#), *Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad*, para. 65.

⁸⁴ i.e., (a) name surname and address, seat and name of the founder; (b) act of foundation and decision on registration issued by the competent body; (c) statute; and (d) NPO bodies.

data required to establish an association or foundation or to register a foreign or international non-governmental organisation as underlined in the 2011 Law. This, of course, raises the question of what added value the establishment of the Registry would have. Moreover, the requirement to provide data concerning the founder of the NPO concerned is potentially irrelevant since such a person may no longer have any involvement in the activities of the organisation.

51. At the same time, there seems to be an implied requirement to submit additional information other than the data specified in Article 6 of the Draft Law. For instance, there is a reference in Article 8(3) to notifying changes to the entity's "activities" through an addendum in the course of an application's consideration – notwithstanding the absence of any reference to NPO activities in Article 6. Article 8(1) also includes an open-ended specification as to the registration application being "defined by the Ministry of Justice". An NPO should also make available for inspection "documentation on grounds of which registration is performed", without further specification (Article 10(1) of the Draft Law).

52. As a result, there is considerable uncertainty as to what can be legitimately required from NPOs. This is especially problematic as Article 18(1)(b) allows for the possibility of a fine being imposed where inaccurate information/data and addendum are not provided.

53. The actual consequences of an application being refused are not spelt out in the Draft Law. However, given the possibility in Article 15 of banning the work of an NPO which acts contrary to the provisions of the Draft Law, it seems inevitable that the continued operation of an entity would be precluded if its application were unsuccessful, and it did not cease to accept funding from the foreign or international entities specified in Articles 1 and 2.

4. New reporting obligations

54. Pursuant to Article 11(1) of the Draft Law, the entities registered as NPOs would be required to submit twice-yearly financial reports "*with a clear indication of who paid [the foreign contributions], the amount of allocated funds, type and amount of fee and revenue expressed in currency or other value, as well as the report on expenditure of funds*". As underlined above, the 2001 Law already requires the submission by associations and foundations of annual reports on work and financial report, as well as the obligation to keep business books in accordance with the law.

55. At the outset, it must be underlined that new reporting and disclosure obligations cannot be justified on the basis of mere "suspicions" about the honesty of the financing of the NGO sector without any concrete risk analysis having been made concerning the involvement of associations in the commission of crimes such as corruption and money laundering.⁸⁵ As mentioned above, from the information available to ODIHR and the Venice Commission at the time of drafting the Joint Opinion, it does not appear that a risk assessment of the NGO sector was carried out by the public authorities that would justify the adoption of the new and more frequent reporting obligations, in addition to the existing ones.

56. Regarding the necessity and proportionality of reporting obligations, the Joint Guidelines on Freedom of Association provide that reporting requirements, where these exist, should be appropriate to the size of the association and the scope of its operations.⁸⁶ As underlined in previous joint opinions, "*[e]xcessively 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.*"⁸⁷ While NGOs that receive some form of public support

⁸⁵ See e.g., ODIHR and Venice Commission, [CDL-AD\(2018\)004](#), *Romania - Joint Opinion on Draft Law No. 140/2017 on amending Governmental Ordinance No. 26/2000 on Associations and Foundations*, paras. 12 and 66.

⁸⁶ ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 225.

⁸⁷ See ODIHR and Venice Commission, [CDL-AD\(2018\)006-e](#), *Ukraine – Joint Opinion 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"*, para. 40.

may legitimately be subject to additional reporting or transparency requirements in light of the public origin of the funding, even reporting requirements relating to public support should not be too burdensome and, at the very least, should be proportionate to the level of public support received.⁸⁸

57. Regarding the information to be indicated in semi-annual and annual financial reports, this requires information about the donor and the amount of allocated funds, without any minimum threshold, which means that NPOs would be obliged to report all funding received, regardless of the amount, even minor sums, which would entail a significant burden for the NPOs concerned.⁸⁹

58. In addition, Article 11(1) implies that the names of all the donors, irrespective of the contributed amount, should be indicated in the said financial reports. This means that the financial reports submitted by NPOs may provide information about private individuals financially supporting various NPOs, thereby revealing their affiliation, opinions and beliefs which are protected by the right to respect for private life under Article 17 of the ICCPR and Article 8 of the ECHR. Of note, according to Article 6 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, data revealing political opinions, or religious or other beliefs are considered particularly sensitive and deserving additional data protection safeguards. As underlined in previous joint opinions, the right to privacy of donors must be protected⁹⁰ and may be interfered only if necessary in a democratic society, for instance in the case of investigation of criminal offences.⁹¹ In addition, adequate safeguards should be in place to ensure that the personal data that will be collected, processed and stored during that process are protected against misuse and abuse in line with international standards, particularly the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.⁹² In the past, the Venice Commission has recommended that the personal data included in the financial reports should be limited to the major sponsors in order to ensure that no excessive obligation is imposed on organisations receiving foreign funding.⁹³

59. Against this background, the introduction of additional reporting requirements as foreseen by the Draft Law cannot be considered necessary in a democratic society. On the one hand, they duplicate already existing requirements and add a further, redundant layer of reporting, which would in addition appear extremely burdensome, in particular for small associations. On the other hand, they go beyond the current obligations, without there being a concrete objective need for this. Not only may the reporting obligations contemplated by the Draft Law impose a significant and excessive financial and organisational burden on the NPOs and their staff and undermine their capacity to engage in their core activities, but it is also unclear how such new requirements contribute to more transparent and complete information to the public, which is the alleged aim of the Draft Law.

⁸⁸ See e.g., ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 214.

⁸⁹ See e.g., ODIHR and Venice Commission, [CDL-AD\(2018\)004](#), *Romania - Joint Opinion on Draft Law No. 140/2017 on amending Governmental Ordinance No. 26/2000 on Associations and Foundations*, paras. 68-73.

⁹⁰ See ODIHR and Venice Commission, [CDL-AD\(2018\)006-e](#), *Ukraine – Joint Opinion 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”*, para. 46. See also Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2007\)14 on the legal status of non-governmental organisations in Europe](#), adopted on 10 October 2007, para. 64, which stipulates that all reporting by CSOs “should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality”.

⁹¹ See e.g., paragraph 116 of the [Explanatory Memorandum to Recommendation CM/Rec\(2007\)14](#).

⁹² Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108), Strasbourg, 28 January 1981, which entered into force in Bosnia and Herzegovina on 1 July 2006.

⁹³ See e.g., Venice Commission, CDL-PI(2017)002, [Hungary – Preliminary Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad](#), para. 55.

5. Inspections

60. Articles 12 to 14 of the Draft Law regulate the “inspections” of NPOs to control the legality of their work (Article 12), specifying that regular inspection control in this respect is performed once a year (Article 13). In addition, Article 14 of the Draft Law provides that under extraordinary circumstances, such inspection control can be performed upon requests of citizens, Republika Srpska bodies, the competent Committee of the National Assembly of Republika Srpska or on the basis of publicly available information.

61. As underlined by ODIHR and the Venice Commission in previous joint opinions, “*states have a right to satisfy themselves that an association’s aim and activities are in conformity with the rules laid down in legislation*”, but they must do so “in a manner compatible with their obligations under the European Convention” and other international instruments, meaning that “*state bodies should be able to exercise some sort of limited control over non-commercial organisations’ activities with a view to ensuring compliance with relevant legislation within the civil society sector, but such control should not be unreasonable, overly intrusive or disruptive of lawful activities.*”⁹⁴

62. It is not clear whether the body envisaged as conducting inspection is different from a body that might have responsibility for inspection of associations and foundations in accordance with the 2001 Law. In the Explanatory Note, there is no clear justification as to the necessity to introduce such inspection – which will inevitably be burdensome for the entities categorised as NPOs – in addition to existing arrangements for supervising associations and foundations and other registered entities.

63. Moreover, the Draft Law does not detail or elaborate on the types of information or documents that may be required by the competent inspection body, which is also linked to the concerns raised above regarding the absence of any criteria in the Draft Law as to what documentation might be required for the determination of an application. As recommended in the Joint Guidelines on Freedom of Association, “*legislation should define the procedure for appointing supervisory bodies, as well as the grounds for inspecting associations, the duration of inspections and the documents that need to be produced during inspection*”.⁹⁵ This is essential in order to prevent possibility for arbitrary or discretionary application by public authorities and potential risk of abuse and a selective approach being taken, as well as to avoid the misuse of the regulations, potentially leading to harassment.⁹⁶

64. Regarding the additional inspections “under extraordinary circumstances”, there is no attempt to define what might constitute “extraordinary circumstances”. Also, the extent of those deemed competent to make requests for such extraordinary inspections has the potential to lead to vigilantism and extensive disruption of the activities of the entities treated as NPOs. This is also at odds with the presumption of lawfulness of activities of NGOs that should underpin the legal framework regulating associations in order to create an enabling environment for the exercise of the right to freedom of association, as emphasized in Principle 1 of the Joint Guidelines on Freedom of Association.⁹⁷ In addition, the Joint Guidelines underline a number of safeguards to prevent abuse or misuse of inspections to target certain associations:

“The legislation should specifically define in an exhaustive list the grounds for possible inspections. Inspections should not take place unless there is suspicion of a serious

⁹⁴ See ODIHR and Venice Commission, [CDL-AD\(2018\)006-e](#), *Ukraine – Joint Opinion 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”*, para. 40.

⁹⁵ See e.g., ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 229.

⁹⁶ *Ibid.* para. 230 ([Joint Guidelines on Freedom of Association](#)).

⁹⁷ *Ibid.* para. 26 ([Joint Guidelines on Freedom of Association](#)). See also Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2007\)14 on the legal status of non-governmental organisations in Europe](#), adopted on 10 October 2007, para. 67.

contravention of the legislation and should only serve the purpose of confirming or discarding the suspicion. Regulations on inspections must also contain clear definitions of the powers of inspecting officers, must ensure respect for the right to privacy of the clients, members, and founders of the associations, and must provide redress for any violation in this respect. Any justified need for an inspection should also provide associations with ample warning time before the inspections, as well as information on the maximum duration of an inspection. In addition, where associations are required to provide documents prior to or during inspection, the number of documents required should be defined and reasonable, and associations should be given sufficient time to prepare them. Legislation should also contain safeguards to ensure the respect of the right to privacy of clients, members, and founders of associations, as well as provide redress for any violation in this respect.”⁹⁸

65. In light of the foregoing, the provisions pertaining to inspections appear to be broadly framed and lacking the necessary safeguards to protect against abuse by the competent inspection body.

6. Ban of activities of NPOs

66. Article 15 of the Draft Law provides that “[i]n the event of an NPO acting contrary to the provisions of this law, the Minister of Justice submits a request to the competent court to ban work of the NPO in line with the provisions of the Law on Associations and Foundations of the Republika Srpska”.

67. Article 15 of the Draft Law provides for the possibility of banning the work of entities treated as NPOs for potentially any act contrary to the provisions of the Draft Law, which appears overly broad and vague. Article 16 of the Draft Law specifies that the Ministry of Justice initiates proceedings before the competent court for banning the work of the NPO when the NPO “acts contrary to the Constitution of the Republika Srpska and the regulations of the Republika Srpska, that is when it acts as an agent of foreign influence to the detriment of the individual and other rights of citizens or incites violence, uses speech of hatred or incites religious or any other intolerance with the aim to accomplish political goals or if the Tax Administration determines irregularities in the financial operation”. It is noted that Article 41 of the 2001 Law already provides that an association or foundation “will be banned from working: - if it acts contrary to the provisions of Article 3, paragraph 2 of this Law;⁹⁹ or - if after the imposed misdemeanour penalty in accordance with Article 47, paragraph 1, item. 1 and 4 of this Law¹⁰⁰ shall continue to perform the activity for which the misdemeanour penalty was imposed”. Hence, Article 16 of the Draft Law somewhat overlaps with the existing grounds for banning an association or foundation but also introduce new grounds for NPOs specifically i.e., “acting as agent of foreign influence at the detriment of the individual and other rights of citizens” and “if the Tax Administration determines irregularities in the financial operation”.

68. At the outset, it must be reiterated that the prohibition or dissolution of an association is a sanction of an exceptional nature and shall always be a measure of last resort, only applied in cases where the breach gives rise to a serious threat to the security of the state or of certain groups, or to fundamental democratic principles.¹⁰¹ In any case, in the name of the principle

⁹⁸ See ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 231. See also See also Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2007\)14 on the legal status of non-governmental organisations in Europe](#), adopted on 10 October 2007, para. 68, which envisages all NGOs being required to submit their books, records and activities to inspection by a supervising agency but only where there has been a failure to comply with reporting requirements or where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent.

⁹⁹ i.e., if its statute and activities are contrary to the constitutional order or directed at its violent undermining, incitement of national, racial and religious hatred and intolerance or discrimination prohibited by the Constitution and law.

¹⁰⁰ i.e., item 1: “perform[ing] activities that are not in accordance with the objectives of the association or foundation (Article 3, paragraph 3, Article 4, paragraph 1, Art. 11 and 21)” and item 4: “If it does not use the excess income over expenditures realized by performing economic activity in the manner provided by law and statute (Article 4, paragraph 2)”.

¹⁰¹ See e.g., ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), paras. 114 and 239. See also e.g., ECtHR, *Vona v. Hungary*, no. [35943/10](#), 9 July 2013.

of proportionality, such a measure of last resort should be preceded, if circumstances so allow, by the imposition of milder sanctions (see Section 7 below).

69. Regarding the “*irregularities in the financial operation*”, this would not appear to reach the level of seriousness to justify prohibition or dissolution of any association, including an NPO. As emphasized in the Joint Guidelines on Freedom of Association, the principle of proportionality dictates that prohibition or dissolution should never be used to address minor infractions.¹⁰² In case of the non-compliance with requirements on reporting, the legislation, policy and practice of the state should provide associations with a reasonable amount of time to rectify any oversight or error.¹⁰³

70. The new ground of acting “*as an agent of foreign influence at the detriment of the individual and other rights of citizens*” appears broadly framed and lacking specificity, also due to the lack of definition of “agent of foreign influence” in the Draft Law. In this connection, there is also no indication that a lesser measure than a ban could be imposed or that any account is to be taken in approving such a measure of the actual significance of the breach of a legal provision relied upon for this purpose. As a result, there is a strong likelihood that of these provisions being applied without regard to the principle of proportionality.

7. Fines and sanctions

71. Pursuant to Article 18 of the Draft Law, fines ranging from BAM 1,000 (approximately €511) to 5,000 (approximately €2,556) could be imposed for failing to use the NPO mark, to submit a registration application or an addendum within the prescribed deadline or the required financial reports; and providing inaccurate information in the application or the addenda.

72. The nature and severity of the sanctions imposed are important factors to be taken into account when assessing the proportionality of the interference.¹⁰⁴ The sanctions provided for in the law must be proportionate to the gravity of the wrongdoing and be the least intrusive means to achieve the desired objective.¹⁰⁵ Compared to the average gross monthly salary in Republika Srpska,¹⁰⁶ the range of fines that could be imposed could well be especially problematic for some entities treated as NPOs, especially if they have a small funding base. When assessed against the range of fines and sanctions applied in accordance with Article 47 of the existing 2001 Law, from BAM 300 to BAM 3,000, it is not clear why such a differential treatment is applied on the sole basis of the foreign origin of the funding or other assistance.

73. Moreover, the imposition of even the minimum fine could be disproportionate if the breach concerned is not a particularly significant one such as the unintentional submission of inaccurate information in the application. In this respect, the Joint Guidelines on Freedom of Association emphasized that when there is a breach of a legal requirement, the first response should be to request rectification of the omission and a fine or other small penalty should only be issued at a later date, if appropriate.¹⁰⁷

74. In light of the foregoing, the possibility of imposing the fines contemplated in the Draft Law raises concerns given the lack of foreseeability that taints many of the provisions and requirements included in the Draft Law. The potential impact of such unforeseeability will in itself curb the enjoyment of the right to freedom of association and freedom of expression and cannot be regarded as necessary in a democratic society.

¹⁰² See e.g., ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 114.

¹⁰³ See ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 234.

¹⁰⁴ See e.g., ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, no. [37083/03](#), 8 October 2009, para. 82. See also Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), paras. 114-115.

¹⁰⁵ See e.g., ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), para. 237. See also Venice Commission, CDL-AD(2019)002, [Report on Funding of Associations](#), para. 115.

¹⁰⁶ For March 2023, the average gross monthly wage amounts to BAM 1910, see [Institute of Statistics - Republika Srpska \(rzs.rs.ba\)](#).

¹⁰⁷ See e.g., ODIHR and Venice Commission, CDL-AD(2014)046, [Joint Guidelines on Freedom of Association](#), paras. 237-238.

8. Entry into force of the Law

75. Although Article 20 provides for the Draft Law to take effect on the 8th day following its publication in the Official Gazette of the Republika Srpska, the Ministry of Justice has up to six months to create the Registry and up to sixty days to develop the application form for registry inclusion. However, the Draft Law fails to indicate the impact of this timing regarding the applicability of provisions such as the prohibition to carry out political action and political activities, the inclusion of the NPO mark in all published materials and new reporting obligations, and related sanctions/fines, including the possibility to ban the work of the NPO. It may be that none of the provisions are operative until the Registry is in existence but that does not entail that NPOs can circumvent the requirements there-to-fore, not least in light of the possibility that their work may be banned.

76. As a result, entities that might be treated as NPOs for the purpose of the Draft Law will be left in a state of great uncertainty as to what is required of them and indeed may suffer detrimental consequences because of this uncertainty.

9. Effective remedies

77. Overall, the Draft Law is silent regarding the effective remedies for potential violations of the fundamental rights of freedom of association pertaining to the classification of existing associations, foundations, or foreign/international non-governmental organisations as NPOs, their registration and related obligations and restrictions. As emphasized in the Joint Guidelines on Freedom of Association, associations, their founders and members shall have access to effective remedies in order to challenge or seek review of decisions affecting the exercise of their rights, meaning providing them with the right to bring suit or to appeal against and obtain judicial review of any actions or inactions of the authorities that affect their rights; remedied shall be timely and include adequate reparation.¹⁰⁸

IV. Conclusion

78. On 23 March 2023, the Government of the Republika Srpska adopted the *Draft Law of Republika Srpska on the Special Registry and Publicity of the Work of Non-Profit Organisations*, which aims at specifically regulating organisations receiving foreign funding that are to be designated as “Non-profit organisations” (hereinafter “NPOs”). In particular, the Draft Law regulates the scope of authorized activities of NPOs, prohibiting them to carry out “political activities”, requires them to register in a special Registry and all their materials to include the mark “NPO”, as well as to submit additional reports compared to those already required by the existing 2001 Law on Associations and Foundations. Pursuant to the Draft Law, NPOs would also be subject to an additional legal regime of oversight and inspections, and a range of sanctions for violations of the provisions of the Draft Law that may result in the ban of the NPOs’ activities and thereby of the NPO itself.

79. The *rationale* for developing the Draft Law is unclear and apparently it is not based on any risk assessment or consultation with associations and others potentially affected. The Explanatory Note to the Draft Law merely refers to the inadequacy of the existing legal framework and the need to enhance the transparency of associations or non-governmental organisations receiving funding from abroad. In this respect, ODIHR and the Venice Commission reiterate that enhancing transparency does not *by itself* constitute a legitimate aim as provided in international instruments although it may constitute a means in the pursuit of one or more of the legitimate aims recognised as allowing restrictions on the right to freedom

¹⁰⁸ *Ibid.* Principle 11 and para. 36 ([Joint Guidelines on Freedom of Association](#)).

of association, such as public order or the prevention of crimes such as money-laundering and terrorism financing.

80. From the information available to ODIHR and the Venice Commission, there do not seem to be relevant and sufficient reasons for submitting NPOs to additional registration and reporting requirements. The Draft Law is crafted in overly vague and ambiguous terms, where breaches are unforeseeable and sanctions disproportionately severe, including banning the work of the said NPOs.

81. The many broadly framed terms of the Draft Law, including the definition of NPO, are likely to fall afoul of the requirement that any restriction on the right to freedom of association must be prescribed by law, which entails being foreseeable. In particular, the scope of the political activities that an NPO must abstain from is inconsistent with the foreseeability requirement since it will be very difficult for such an entity to assess which types of activities or advocacy are illegal according to Articles 3 and 4 of the Draft Law, thereby also excessively restricting the right to freedom of expression with a chilling effect on open discussions on matters vital to the public interest.

82. The new reporting obligations imposed on NPOs would require information about the donor and the amount of allocated funds, without any minimum threshold, which means that NPOs would be obliged to report all funding received, regardless of the amount, even minor sums, which would entail a significant burden for the NPOs concerned. The Draft Law does not clearly define the kind of information or documents that may be required by the competent inspection body. It does not include safeguards to prevent the potential risk of abuse of the regulations or against discriminatory measures that may lead to harassment. There is furthermore a strong risk that the provisions of the Draft Law regarding the ban of the work of NPOs due to acts contrary to its provisions, irrespective of their seriousness, could be applied without regard to the principle of proportionality. The range of fines that could be imposed for violations of the provisions of the Draft Law are also much higher than the ones envisaged by the 2001 Law and seem disproportionate. The Draft Law also lacks provisions guaranteeing access to effective remedies in order to challenge or seek review of decisions taken in the context of its implementation that may infringe the right to freedom of association and expression.

83. Given the inherent serious deficiencies of the Draft Law, ODIHR and the Venice Commission call upon the authorities of the Republika Srpska to reconsider its adoption entirely and to engage in further consultation with all stakeholders with a view to guarantee the enjoyment of the rights to freedom of association and freedom of expression in the Republika Srpska albeit broadening the scope of regulation. If the public authorities nevertheless pursue the adoption of this Draft Law, it is essential to clearly substantiate the need for it. This entails carrying out a risk assessment of the civil society sector and to significantly revise and improve the existing draft provisions so as to ensure compliance with the principles of legal certainty, legitimacy, necessity and proportionality in accordance with international human rights standards.

84. The Venice Commission and ODIHR remain at the disposal of the authorities of Republika Srpska for further assistance in this matter.