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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

HUNGARY

PRELIMINARY OPINION

**ON THE DRAFT LAW
ON THE TRANSPARENCY OF ORGANISATIONS
RECEIVING SUPPORT FROM ABROAD**

on the basis of comments by

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I. Introduction

1. On 27 April 2017, the Parliamentary Assembly of the Council of Europe adopted Resolution 2162(2017)¹ requesting the opinion of the Venice Commission on the compatibility with Council of Europe standards of the Hungarian Draft Law on the Transparency of Organisations Receiving Support from Abroad (hereinafter, “the Draft Law”).
2. Ms Veronika Bílková, Mr Richard Clayton and Ms Herdís Kjerulf Thorgeirsdottir acted as rapporteurs for this opinion.
3. On 11-12 May 2017, a delegation of the Commission, composed of Ms Bílková and Mr Clayton accompanied by Simona Granata-Menghini (Deputy Secretary of the Venice Commission) and Mr Ziya Caga Tanyar (legal officer at the Secretariat), visited Budapest and met with the Deputy Prosecutor General, the President of the Constitutional Court, President, Vice-president and judges of the Curia, representatives of parliamentary groups, Deputy Speaker responsible for the Legislation, the Minister of Justice, the State Secretary of the Ministry of Justice and Chairman of the Human Rights Working group, Deputy Secretary for Churches, Minorities and Civil Affairs of the Ministry of Human Capacities and a number of NGO representatives. The Venice Commission delegation is grateful to the authorities for their excellent cooperation during the visit.
4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of official translations of the Draft Law on the Transparency of organisations Receiving Support from Abroad accompanied by an Explanatory Memorandum (General statement of reasons) concerning the Draft Law (CDL-REF(2017)025rev). Inaccuracies may occur in this opinion as a result of incorrect translations.
5. The present preliminary opinion was prepared on the basis of contributions by the rapporteurs and sent to the Hungarian authorities on 2 June 2017. *It was endorsed by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. Legal Framework and Standards

A. The Draft Law on the Transparency of Organisations Receiving Support from Abroad

6. On 7 April 2017, the Draft Law was introduced before the National Assembly by three members of Parliament, elected on behalf of the governing party, Fidesz (Bill T/14967).
7. According to the Draft Law, associations and foundations annually receiving money or other assets from abroad reaching twice the amount specified in Article 6(1) b) of Act CXXXVI of 2007 on the Prevention and Combatting of Money Laundering and Terrorist Financing (which amounts to 7.2 million forints – around 24 000 euros-) have the obligation to register with the Regional Court as “organisations receiving support from abroad” and label themselves as such on their websites as well as on any press products and other publications. The Draft Law also regulates the procedure of registration and provides sanctions for those organisations which do not fulfil the obligations under the Draft Law.

¹ Resolution 2162 (2017) of the Parliamentary Assembly of the Council of Europe, Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University,
<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>

8. The Draft Law applies to all associations and foundations with the exception of a) associations and foundations that do not qualify as non-governmental organisations; b) associations that fall within the scope of Act I of 2004 on Sports; and c) organisations that perform religious activities (Article 1(4) of the Draft law). In addition, according to Article 1(3), funds received from the European Union through a budgetary state organ according to a separate law are not covered by the Draft Law.

B. National regulation

9. Article VIII of the Fundamental Law of Hungary, adopted in 2011, recognizes “*the right to establish or join organisations*” (par. 2). The provision confirms that this right applies to the establishment and operation of political parties and trade unions. The Constitutional Court of Hungary indicated in its case law that the right to freedom of association “*is primarily about the selection of the objective, and furthermore the freedom of establishment of an organisation for a given purpose, voluntary accession thereto and the possibility of voluntary secession*”².

10. General rules applicable to the legal status of associations and foundations, and their financing, are enshrined in Act No. CLXXV/2011 on the *Right of Association, Non-profit Status, and the Operation and Funding of Civil Society Organisations* and Act No. 181/2011 on the *Court Registration of Civil Society Organisations and the Related Rules of Procedure*. There are also specific legal acts relating to certain types of civil society associations (Act No. 47/2003 on *foundations assisting the functioning of political parties, carrying out scientific, awareness raising, research and educational activities*, Act No. 1/2004 on *Sports*, Act No. 26/2011 on *Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities*, etc.).

11. Article 2(6) of Act CLXXV defines a civil society organisation as including a) a civil company, b) an association registered in Hungary, excluding political parties, trade unions and mutual associations, c) a foundation, excluding public foundations and party foundations. Act No. CLXXV does not impose any obligations in relation to transparency of funding which is comparable to the Draft Law.

12. The Draft Law is not a mere amendment to the Act on Freedom of Association. It is an independent piece of legislation, which is to operate as a self-standing legal act. The Draft Law focuses on a category of civil society organisations, namely those receiving foreign funding. At the moment, Act CLXXV does not provide for a specific category of organisations receiving support from abroad. As a rule, foreign funding, alongside domestic one, is allowed. The only exception is that of political parties, which are prohibited from accepting donations from foreign states and, since 2014, from any foreign organisations as well as foreign citizens. Articles 20(1) a)-d) and (2) of Act CLXXV require disclosure of the amount of funding but not the source or funders. The current reporting requirements under Article 29, similarly, require disclosure of amounts but not the source of funding. Moreover, the specific reporting obligations in relation to NGOs using double entry book keeping under this Act do not require disclosure of funders either.

C. Comparative law

13. In 2013, the Venice Commission collected information on the legislation on NGOs, including specifically on foreign funding, in a number of countries.³ In 2016, the Secretary General of the Council of Europe requested the Venice Commission to carry out a review of

² Constitutional Court of Hungary, *Decision No. 22/1994*, para. 128.

³ CDL(2013)018.

the standards applying to foreign funding of NGOs in Council of Europe member states. This review is under way.

14. The preliminary, non exhaustive analysis of the information received (relating to 38 countries) reveals that the majority of Venice Commission member states does not have specific provisions regulating or restricting⁴ the ability of associations to receive funding from abroad, nor specific provisions imposing specific reporting or disclosure duties in respect of foreign funding.⁵

⁴ There are a few exceptions. In Azerbaijan, legislative amendments introduced in 2014 limited the circle of potential donors to “a citizen of the Republic of Azerbaijan or legal person, as well as branches or representations of foreign legal persons (...) registered in Azerbaijan and not being aimed at profit to a non-governmental organisation”, thus excluding donations from foreign sources. The Venice Commission has strongly criticized this provision (Venice Commission, Opinion on the Law on non-governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan, CDL-AD(2014)043). In Ireland, while there is no NGO law and no explicit limitation on NGOs being funded internationally, the Electoral Act 1997 prohibits international funding of “third parties” and this might affect NGOs when involved in political activity or political campaigns or election campaigns.

⁵ In the Russian Federation associations which receive cash funds or other property from foreign governments, their government bodies, international and foreign organisations, foreign citizens, stateless persons or other entities authorized by them, and/or from Russian legal entities receiving cash funds and other property from the indicated sources and which take part in the political activity performed in the territory of the Russian Federation are considered as “non-profit organisations performing the functions of a foreign agent”. Non Commercial Organisations (“NCOs”) exercising the function of a “foreign agent” are subject to an enhanced monitoring system, implying the duty to submit more frequent reports and to undertake an annual mandatory auditing. The materials issued or distributed by NCOs exercising the function of a “foreign agent” must have indications of their being issued by a foreign agent (Article 24(1)). In case of a failure to fulfill any of the obligations imposed by the Law, the organisation as well as its representatives may be sanctioned by a fine. The Venice Commission has expressed strong criticism of this law (See 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(2014)025-e). In Israel, where, while there is no prohibition on or restriction to receiving funding from abroad as such, in respect of donations (contributions, financial support) to associations (so-called “supported bodies”) by Foreign States Entities (as defined) there are duties of reporting and duties of disclosure. The supported body must in its annual financial report submitted to the Registrar of Associations file the following information: a) The identity of the donor; b) The sum donated; c) The goal of the donation; d) The terms of the donation, including commitments the association has given in relation with the donation orally or in writing, directly or indirectly, if there are such terms. Such information must be disclosed by the supported body in its internet site, and if it has none, to the Registrar and he will disclose it in the internet site of the Ministry of Justice. On 11 July 2016 the Knesset amended the Law on Disclosure Duty of Bodies Supported by a Foreign State Entity (2011). This amendment demands a higher standard of Disclosure and Reporting Duties regarding an association or a company for public benefit whose main source of financial support comes from a Foreign State Entity: the Supported Body should submit an annual report to the Registrar, stating that its main financial support comes from a Foreign State Entity and it should state that its main financial support comes from a Foreign State Entity in the following its publications “enhancing its goals, meant to reach the public and accessible to the public, published on public boards or in an internet campaign”. Private foreign support by people, associations, companies etc. is not under a duty to disclose or report. In the United States, there are no restrictions on the ability of US NGOs to receive financial support from foreign organisations and countries. The Foreign Agents Registration Act (FARA) requires that an “agent” which acts under the direction or control of a foreign government, entity, or person, and engages in political activities in the United States “for or in the interests of” such foreign entity, must register to disclose the relationship with the foreign entity and provide information about related activities and finances. This applies primarily to the activities of lobbyists and publicity agents acting on behalf of foreign governments.

D. International standards

15. Civil society organisations (hereinafter, “CSOs”) play an important role in modern democratic societies. They enable citizens to associate in order to promote certain goals and/or pursue certain agendas. As a form of public engagement parallel to that of participation in the formal political process, CSOs have to cooperate with public authorities while at the same time keeping their independence. Members of CSOs, as well as CSOs themselves, enjoy human rights, including freedom of association and freedom of expression. These rights are enshrined in numerous international legal instruments, such as the 1948 Universal Declaration of Human Rights (Articles 19 and 20), the 1966 International Covenant on Civil and Political Rights (Articles 19 and 21), and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 10 and 11).

16. There is also a rich set of soft law instruments which deal with freedom of association, in the light of which the Venice Commission will examine the Draft Law. These instruments include:

- *Guidelines on the Legal Status of Non-Governmental Organisations and their Role in a Pluralistic Democracy*, adopted on a Multilateral meeting organised by the Council of Europe on 23 - 25 March 1998;
- *UN Declaration on Human Rights Defenders* of 8 March 1999⁶;
- the *Recommendation of the Committee of Ministers of the Council of Europe CM/REC(2017)14 on the Legal Status of Non-Governmental Organisations in Europe*⁷;

*2014 Joint Guidelines on Freedom of Association*⁸;

17. The Venice Commission has dealt with freedom of association more generally, and with the legal status of civil society organisations, in several opinions.⁹

18. There is no international legal instrument which deals exclusively with funding (or foreign funding) of civil society organisations. Yet, this issue is covered by the instruments mentioned above.

⁶ UN Doc. A/RES/53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 8 March 1999.

⁷ RECOMMENDATION CM/REC(2007)14 ON THE LEGAL STATUS OF NON-GOVERNMENTAL ORGANISATIONS IN EUROPE, 10 OCTOBER 2007.

⁸ CDL-AD(2014)046, *Joint Guidelines on Freedom of Association*, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, 17 December 2014.

⁹ See, for instance, CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan*, 19 October 2011; CDL-AD(2013)023, *Interim Opinion on the Draft Law on Civic Work Organisations of Egypt*, 18 June 2013; CDL-AD(2013)030, *Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic*, 16 October 2013; CDL-AD(2014)025, *Opinion on Federal Law N. 121-FZ on non-commercial organisations (“law on foreign agents”), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on making amendments to the criminal code (“law on treason”) of the Russian Federation*, 27 June 2014; CDL-AD(2014)043, *Opinion on the Law on Non-Governmental Organisations (Public Associations and Funds) as Amended of the Republic of Azerbaijan*, 15 December 2014; CDL-AD(2016)020, *Opinion on Federal Law No. 129-FZ on Amending Certain Legislative Acts (Federal Law on Undesirable Activities of Foreign And International Non-Governmental Organisations)*, 13 June 2016.

III. Preliminary remarks

A. Context

19. As it affects the way in which it is received, applied and interpreted, the *context* in which the Draft Law is submitted and discussed merits attention. The Venice Commission notes that over the past years, there have been reports of civil society organisations receiving foreign funding being described by leading Hungarian politicians as a threat to national security and independence.

20. The Council of Europe (hereinafter “CoE”) Commissioner for Human Rights Mr Nils Muižnieks noted that the Draft Law was “*introduced against the background of continued antagonistic rhetoric from certain members of the ruling coalition, who publicly labelled some NGOs as “foreign agents” based on the source of their funding and questioned their legitimacy*”.¹⁰ Earlier this year, the UN Special Rapporteur on the situation of human rights defenders Mr Michel Forst indicated, in the statement issued after his visit to Hungary, that “*human rights defenders who criticize the Government or raise human rights concerns are quickly intimidated and portrayed as “political” or “foreign agents”. They face enormous pressure through public criticism, stigmatization in the media, unwarranted inspections and reduction of state funding*”.¹¹

21. In April 2017, the Hungarian Government launched a national consultation, under the general title “Let’s Stop Brussels”. The consultation presents citizens with six questions relating to the alleged interference in the Hungarian domestic affairs by the European Union or by other foreign actors. One of the questions focuses on organisations receiving foreign funding and it reads as follows: “*More and more foreign-supported organisations operate in Hungary with the aim of interfering in the internal affairs of our country in an opaque manner. These organisations could jeopardize our independence. What do you think Hungary should do? (a) Require them to register, revealing the objectives of their activities and the sources of their finances. (b) Allow them to continue their risky activities without any supervision.*”

22. This rhetoric can hardly remain without effect on the reception of the Draft Law among civil society organisations and in the Hungarian society more broadly. Although the highly stigmatizing term “foreign agent”¹² is not, and wisely so, used by the Hungarian legislator,¹³ it is doubtful whether in the current situation, marked by strong statements directed against civil society organisations funded from abroad, the expression “organisations receiving support from abroad” could be perceived in a neutral, descriptive way. This rhetoric has contributed to the controversy surrounding the debate about the merits of the Draft Law. The discussions of the rapporteurs and those they met indicated that there is considerable disquiet in relation to the technical drafting of the Draft Law and widespread concern from

¹⁰ Ref. CommHR/NM/sf021-2017, *Letter to the Speaker of the National Assembly of Hungary by Mr Nils Muižnieks*, 26 April 2017.

¹¹ End of mission statement by Special Rapporteur on the situation of human rights defenders, Visit to Hungary 8 - 16 February 2016. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?ewsID=17048&LangID=E#sthash.ayjYEDjx.dpuf> (retrieved on 9 May 2017).

¹² CDL-AD(2014)025, *Opinion on Federal Law N. 121-FZ on non-commercial organisations (“law on foreign agents”), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on making amendments to the criminal code (“law on treason”) of the Russian Federation*, 27 June 2014

¹³ In its opinion CDL-AD(2014)025 concerning the Law on Foreign Agents of the Russian Federation, the Venice Commission recommended that the Russian authorities should urgently consider replacing the term “foreign agent” with another, more neutral term, and should remove the power of the authorities to proceed with the registration of an association as “foreign agent” without that association’s consent (para. 65).

non-governmental bodies in respect of transparency obligations on foreign funders for NGOs when there were no comparable obligations in relation to domestic funders of NGOs.

B. Lack of public consultation

23. The Parliamentary Assembly expressed concern over the lack of public consultation prior to the submission of the Draft Law to parliament.¹⁴ Likewise, the CoE Commissioner for Human Rights deplored “*the absence of any meaningful public consultation or debate preceding the introduction of the Draft Law to the National Assembly*”.¹⁵

24. The Venice Commission is aware that in Hungary the rules applicable to the legislative process differ depending on the author of the Draft Law and that drafts submitted by members of Parliament, unlike those submitted by the Government or the President of the Republic, do not require an obligatory public consultation.¹⁶ However, a public consultation for drafts submitted by members of Parliament is not explicitly ruled out either.

25. *Recommendation CM/REC(2007)14* stipulates that “*NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation*”.¹⁷ Conducting a public consultation with civil society organisations prior to the adoption of legislation directly concerning such organisations therefore constitutes part of the good practices that the European countries should strive to adhere to in their domestic legislative processes.

26. The Venice Commission is further aware that on 20 April 2017, the Ministry of Justice organized an enlarged meeting of the Human Rights Working Group, where the Draft Law was discussed. Whereas the efforts of the Hungarian authorities to consult some civil society organisations merit praise, according to the information on the event available to the Venice Commission, the meeting was only open to civil society organisations active in the area of human rights protection and did not involve organisations operating in other areas, though the Draft Law is to apply to them as well. It may be that a wider consultation on the Draft Law could have avoided some of the technical drafting difficulties which were drawn to the Commission’s attention.

IV. Analysis

27. The Draft Law aims at establishing a new category of civil society organisations receiving foreign funds beyond a certain threshold. Such organisations will have additional reporting obligations to be included into the already existing register of associations in that respect and also certain additional disclosure obligations. The Draft Law invokes the need to protect

¹⁴ Resolution 2162 (2017), para. 6.1.

¹⁵ CommHR/NM/sf021-2017, *op. cit.*

¹⁶ See Act 131/2010 on *Public Participation in the Legislative Process*. See also László Vértessy, The Public Participation in the Drafting of Legislation in Hungary, *International Public Administration Review*, Vol. 14, No. 4, 2016, pp. 115–135.

¹⁷ Para.77. The Explanatory Memorandum to the Recommendation clarifies that “*it is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the law which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of the important contribution that they are able to make to democratic societies but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed*” (par. 139).

the political and economic interests of the country and to counter money-laundering and financing of terrorism as the reasons for the new legislative initiative.

28. In its Resolution 2162 (2017), although the Parliamentary Assembly praised that the Draft Law does not use the controversial term “foreign agent” and that it provides for judicial, rather than administrative review, it expressed concerns over several issues that the Draft Law raises with respect to freedom of association, freedom of expression and the right to privacy:

- a) the obligation for NGOs receiving foreign funding to indicate this on all the materials published or distributed;
- b) the obligation for NGOs to submit detailed personal data of foreign donors, including private individuals;
- c) the gravity of the sanctions provided in the draft, including ultimately the dissolution of the association for non-compliance with administrative obligations;
- d) the scope of application of the draft law, which applies to certain associations and excludes others, such as sports and religious organisations.

29. These concerns have been largely shared by the CoE Commissioner for Human Rights, Mr Nils Muižnieks,¹⁸ the Expert Council on NGO Law¹⁹ and by the UN Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression, on the rights to freedom of peaceful assembly and of association and on the situation of human rights defenders.²⁰

30. The Venice Commission will analyse the Draft Law in three steps, discussing the concept of organisations receiving support from abroad, the additional reporting and disclosure obligations stemming from the Draft Law for organisations receiving support from abroad and the sanctions foreseen in case of non-fulfilment of these obligations.

A. The concept of “Organisations Receiving Support from Abroad”

31. The Draft Law requires all associations and foundations which receive foreign funding above the threshold of 7.2 million forints (around 24.000 Euro) annually to register as organisations receiving foreign funding and it introduces certain additional reporting and disclosure obligations for these organisations. It thus provides for a “differentiated treatment” for organisations relying exclusively on domestic funding and those relying on foreign funding.

32. It stems from international instruments that differentiated treatment is possible in this case only and in so far as the treatment pursues a number of legitimate aims, such as prevention of money laundering and terrorism and proportionate to the legitimate aims pursued. These criteria correspond to the conditions of limitations on the right to freedom of association foreseen by Article 11(2) of the European Convention on Human Rights and Article 22(2) of the ICCPR.

¹⁸ Ref. CommHR/NM/sf021-2017, *op. cit.*

¹⁹ Expert Council on NGO Law, *Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad*, prepared by the Expert Council at the request of the Conference of INGOs of the Council of Europe, April 2017.

²⁰ OL HUN 2/2017, *Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders*, 9 May 2017.

33. Recommendation CM/REC(2007)14 states 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” (par. 50). The Explanatory Memorandum (General statement of reasons) adds that “the only limitation on donations coming from outside the country should be the generally applicable law on customs, foreign exchange and money laundering, as well as those on the funding of elections and political parties. Such donations should not be subject to any other form of taxation or to any special reporting obligation” (par. 101).

34. Principle 7 of the Venice Commission-OSCE Joint Guidelines on Freedom of Association stipulates that “associations shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities. In particular, states shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source, nor stigmatize those who receive such resources. This freedom shall be subject only to the requirements in laws that are generally applicable to customs, foreign exchange, the prevention of money laundering and terrorism, as well as those concerning transparency and the funding of elections and political parties, to the extent that these requirements are themselves consistent with international human rights standards”.

35. In its Resolution 22/6 of 21 March 2013, the UN Human Rights Council called upon States to “ensure that they do not discriminatorily impose restrictions on potential sources of funding aimed at supporting the work of human rights /.../, other than those ordinarily laid down for any other activity unrelated to human rights within the country to ensure transparency and accountability, and that no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto” (par. 9(b)).

36. The Draft Law aims at ensuring greater transparency of civil society organisations engaging in public life. The Explanatory Memorandum further specifies that “Recent decades have seen the rise of a threat (...) that foreign interest groups try to make use of civil society organisations. (...) Such grants seek to ensure that –through the societal influence of the non-governmental organisations receiving the grants- interest groups that provide such support assert their own interests in Hungary’s political and social life. These processes may pose a high risk to Hungary’s national security and sovereignty.” The Explanatory Memorandum adds that: “Moreover, account must be taken of the challenges posed by financial flows of non-transparent origin associated with money laundering and the financing of terrorism”.²¹

37. Preventing financing of terrorism and money laundering are legitimate aims. In its 2013 *Interim Opinion on the Draft Law on Civic Work Organisations of Egypt*, the Venice Commission explicitly acknowledged that “there may be various reasons for a State to restrict foreign funding, including the prevention of money-laundering and terrorist financing”²² and that “it is justified to require the utmost transparency in matters pertaining to

²¹ On 31 May 2017, the Office of the Prosecutor General of Hungary provided statistical data and information on criminal proceedings conducted in cases related to acts of terrorism and money laundering in the past two years. The statistical data does not reveal, however, civil society organisations, in particular those receiving foreign funding, were involved in the commission of those crimes.

²² CDL-AD(2013)023, *Interim Opinion on the Draft Law on Civic Work Organisations of Egypt*, §40.

foreign funding.²³ Ensuring transparency is also a legitimate aim. The Commission considers that transparency may on the one hand reveal the possible illicit origin of the financing (whether it is a result of a criminal activity or not), but also keep the public informed of the (legitimate) sources of financing of NGOs. It is also an instrument to ensure the regularity of the procedures followed for the financing, thus enabling the authorities to react and other NCOs possibly to also apply for the funding. Transparency may therefore justify proportionate reporting and disclosure obligations imposed on the associations.

38. The Venice Commission however also notes that the comment provided in the Explanatory Memorandum might give rise to doubts as to whether the Draft Law is, as the CoE Commissioner for Human Rights suggested, *“based on the erroneous and harmful assumption that receiving foreign funding necessarily equals representing “foreign” interests that are inevitably ill-intentioned and at odds with Hungarian public interest”*.²⁴

39. In its 2014 Opinion on the Law on Foreign Agents of the Russian Federation²⁵, the Venice Commission also acknowledged that ensuring transparency of NGOs receiving funding from abroad in order to prevent them from being misused for foreign political goals pursues a prima facie legitimate aim and can be considered to be “necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”, as stated in paragraph 2 of Article 11 ECHR. However, this should not result in seeking to stigmatise and ostracise some of the civil society organisations solely on the basis of foreign funding. The label of “supported from abroad” should not give the appearance of branding NGOs with foreign funding as being deviant from proper standards. This could affect the way foreign-funded CSOs perceived in the society and may induce a chilling effect which inhibits cooperation with such organisations or deters foreign funders from making financial contributions.

40. The Draft Law applies to all associations and foundations with the exception of sport associations, religious associations and associations not considered as civil society organisations (political parties, their foundations, trade unions, etc.) (Article 1(4) of the Draft Law). During their visit to Budapest, the representatives of the Venice Commission were informed that further exceptions – especially one concerning national minorities associations sponsored by kin-States – may be introduced into the Draft Law.

41. The Explanatory Memorandum states that the Draft Law *“shall not apply to the organisations listed, considering the fact that either they do not qualify as non-governmental organisations in the first place, or their operation is linked to the exercise of other fundamental rights”*. This explanation does not seem fully convincing. An act which aims at ensuring greater transparency in the public space and at preventing financing of terrorism and money-laundering could be expected to apply to any organisations which operate in public space and/or which could engage in the relevant criminal activities, as long as the transparency of their funding is not regulated by special legal acts. Such is the case for political parties, which are – under Act No. 33/1989 on the *Operation and Financial Management of Political Parties*, as amended, prohibited from receiving foreign funding. While specific legislation exists with respect to the exempted organisations, such legislation

²³ CDL-AD(2013)023, *Interim Opinion on the Draft Law on Civic Work Organisations of Egypt*, §43.

²⁴ Ref. CommHR/NM/sf021-2017, *op. cit.*

²⁵ CDL-AD(2014)025, Opinion on Federal Law N. 121-FZ on non-commercial organisations (“law on foreign agents”), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on making amendments to the criminal code (“law on treason”) of the Russian Federation, 27 June 2014, para. 58.

does not provide for specific duties of transparency and it is therefore not clear why they should be excluded from the scope of application of the Draft Law. Such an exclusion, unless better accounted for, could, therefore, appear unjustified, discriminatory and in breach of Article 14 of the European Convention on Human Rights. In addition, the phrase “associations and foundations that do not qualify as non-governmental organisations” is rather vague and open-ended. Similar concerns hold true concerning “organisations that perform religious activities”. Organisations that perform religious activities appear to be defined in Article 9/A of the Church Act as being “an association comprising natural persons confessing the same principles of faith and shall, according to its statute, operate for the purpose of exercising religious activities.” This exemption is, however, expressed in very broad terms and there is a concern that might be open-ended and not reasonably foreseeable.

42. Moreover, Article 3(2) of the Draft law exempts European Union funding paid through a Hungarian budgetary institution. No justification has been offered for differentiating the funding paid through a budgetary institution and other EU funding.

43. Lastly, the expression, in Article 1(2) of the Draft Law, “directly or indirectly” is not completely clear. In its previous opinions, the Venice Commission recalled that “(a)ny restrictions on free association (...) must be clear, easy to understand, and uniformly applicable to ensure that all individuals and parties are able to understand the consequences of breaching them. (...) legislation must be carefully constructed to be neither too detailed nor too vague.”²⁶ It is not certain whether a financial contribution provided to a civil society organisation by a legal person (another civil society organisation, law firm, commercial enterprise) which has a seat in Hungary but is partly financed and/or owned by non-Hungarian natural or legal persons, would qualify as indirect financing or not. This should be clarified.

B. Obligations stemming from the Draft Law for organisations receiving support from abroad

1. Registration and Deregistration

44. Civil society organisations which receive financial support from abroad above the threshold of 7.2 million forints annually have to declare this fact, using the form contained in Annex I to the Draft Law, within 15 days from the date on which they meet the condition, to the Regional Court with jurisdiction over the association’s registered seat (so called Registering Court). The Registering Court registers the relevant organisation as an organisation receiving support from abroad (Article 1(1) and (2) of the Draft Law). The Court also informs, by the 15th day of each month, the ministry responsible for managing the Civil Information Portal (which is the Ministry of Human Resources according to the information provided during the visit in Budapest). The Ministry should include the information, without delay, in the Portal which is publicly available, free of charge, on the website of the Ministry (Article 1(4) of the Draft Law).

45. During the visit to Budapest, the Venice Commission was informed that no new, separate register was to be established for organisations receiving foreign funding. Rather, the information is to be added to the already existing register of civil society organisations which is regulated by Act No. 181/2011 on the *Court Registration of Civil Society Organisations and the Related Rules of Procedure*. This solution is to be welcomed, as creating a separate register might strengthen the perception that the Draft Acts aims at stigmatizing certain civil society organisations, based solely on their source of financing.

²⁶ CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan*, §45.

46. The Draft Law also regulates a “deregistration” procedure. According to Article 4, if the money or other assets allocated from abroad to an organisation which has been registered as an organisation receiving support from abroad, do not reach the relevant threshold in any of three consecutive fiscal years, the organisation may, within 30 days from the adoption of its annual report for the year when this circumstance occurs, inform the Registering Court and apply for a deregistration which shall be carried out without delay.

47. The period of three years is relatively long and there seems to be a certain imbalance between the registration, which is to take place immediately after the financial threshold is reached, and the deregistration, which may not occur earlier than three years after the registration. The Hungarian authorities explained that the three-year period should reflect the fact that financial support from abroad received in one year can be used in several subsequent years. While this might be true, the period appears excessive and also rather arbitrary. Since the deregistration takes place on the basis of an annual report, a one-year period should be sufficient to cover situations, in which funding is in the second part of the year and then necessarily spent in the next year only.

2. Additional obligations

48. The Draft Law seeks to introduce additional reporting and disclosure obligations for those organisations receiving support from abroad.

a. Reporting obligations

49. The declaration form contained in Annex I to the Draft law (see para. 44 of this Opinion), requires the organisations to indicate the total sum of foreign financial support they received in the relevant year and to give a list of concrete donors (with the name, country and city for natural persons and name and registered address for legal persons, together with the sum provided by the donor in both cases). The list, as the Hungarian authorities confirmed, is to be made public. The regulation entails that if the total amount of foreign funds reaches the threshold of 7.2 million forints, all foreign donors, however small the donation they make, must, nevertheless, be included in the public list.

50. The Venice Commission considers that it is legitimate for States to monitor, in the general interest, who the main sponsors of civil society organisations are. It could also be legitimate, in order to secure transparency, to publicly disclose the identity of the main sponsors.

51. Disclosing the identity of all sponsors, including minor ones, is, however excessive and also unnecessary, in particular with regard to the requirements of the right to privacy as enshrined under Article 8 ECHR. These sponsors can hardly have any major influence on the relevant organisation and there is thus no legitimate reason and necessity for their inclusion in the list available to the public. The Venice Commission therefore calls upon the Hungarian authorities to limit the data included in the public register to that relating only to major sponsors (who could be defined, for instance, as those having provided a sum not lower than that specified in Article 6(1) of Act CXXXVI of 2007).

b. Disclosure obligations

52. Under Article 2(5) of the Draft Law, after filing the above mentioned notification, “the organisation receiving support from abroad shall, without delay, publish on its webpage, in press products it publishes as referred to in Act on the freedom of the press and the fundamental rules of media content, and in its other publications the fact that it qualifies as

an organisation receiving support from abroad pursuant to this Act". It is to be recalled that under the Draft Law, the organisations would need to use the indication not only in the period when it receives foreign funding but also for three more years after it ceases to do so (see paras. 46 and 47 above).

53. The use of the label "organisation receiving support from abroad" on all press products and publications produced by the relevant civil society organisation does not seem to be proportionate to, and necessary with respect to, the legitimate aim pursued by the draft law, that of ensuing transparency. The labelling obligation on press products and all other communications is extremely broad in scope and appears to cover every communication the civil society organisation publishes to any person in any circumstances. The information that an organisation has received foreign funding above the threshold of 7.2 million forints is already included in the register, which is publicly available. The same register contains the list of the sponsors of the organisation. This mechanism seems to guarantee transparency in a sufficient way and it is not clear why the information about the financial support from abroad should be constantly repeated and why it should be indicated even on publications fully sponsored from domestic sources. Such a requirement might further strengthen the impression that receiving foreign funding is considered as an *a priori* suspicious activity that has to be not closely monitored all the time.

54. The Venice Commission is, therefore, of the opinion that the obligation to use the formula "organisation receiving support from abroad" in all press products and publications produced by the relevant organisation should be removed from the Draft Law. It would however appear reasonable, as is generally required by the donors themselves, to require that when an activity is specifically funded by a foreign donor, this should be indicated on the press material for the said activity.

C. Sanctions imposed in case of breach of the obligations

55. Under its Article 3, the Draft Law provides for sanctions to be applied in cases when the relevant association or foundation does not fulfil its obligations under the Draft Law. Once the public prosecutor becomes aware of this fact, s/he first must request the organisation to fulfil the obligations within 30 days following the communication of the request. If the organisation does not fulfil its obligations within this time limit, the public prosecutor has to issue another request setting an additional 15-day deadline. If, again, the organisation does not fulfil its obligations, the public prosecutor has to initiate with the Registering Court the imposition of a fine in accordance with Article 37(2) of Act CLXXXI of 2011 on the Court Registration of Non-Governmental Organisations and Related Procedural Rules.

56. Finally, if the organisation after the imposition of a fine still does not fulfil the obligations, the public prosecutor shall institute a legal action in a court for the dissolution of the organisation in accordance with the Act CLXXV of 2011 on the Right of Association, Non-profit. If the court decides to dissolve an organisation, it shall initiate "simplified cancellation proceedings" and delete the organisation from the Register.

57. The Venice Commission welcomes the gradual process of sanctioning that the provision introduces and the fact that all the important decisions (on the fine, dissolution and cancellation) are taken by a judicial organ. However, Draft article 3 gives rise to several concerns.

58. First, the Draft Law seems to suggest that the sanction procedure should apply to all instances of non-fulfilment of an obligation foreseen under the Draft Law, regardless of the nature of this obligation (Article 3(1) speaks of the failure to comply with "obligations", thus in

plural). During the discussion in Budapest, some interlocutors embraced this view, whereas others opined that the provision of Article 3 should only apply to instances of non-fulfilment of the most important obligation (typically the obligation to register as an organisation receiving support from abroad) and/or to instances of serious non-fulfilment of obligations such as refusal to disclose the identity of any donors. The Venice Commission calls upon the Hungarian authorities to clarify this point, ideally along the lines of the latter interpretation in line with the proportionality principle.

59. Secondly, the text also seems to suggest that the sanction procedure is rather rigid, with no discretion granted either to the prosecutor or to the judge to decide whether to initiate the procedure (prosecutor) and which sanctions to impose (judge). Again, the Venice Commission was confronted with contradictory interpretations of the provisions, with some interlocutors claiming that the procedure had to be strictly followed as prescribed in the text, whereas others suggesting that the prosecutor/judge had discretion. This point needs to be made clear in the draft. In principle, the judge involved in the procedure in particular has to have sufficient discretion in order to be able to make an appropriate proportionality assessment of the sanction to be imposed on the association or foundation to the seriousness of the breach of obligation stemming from the Draft Law.

60. Last but not least, the Draft Law provides for a simplified procedure without adequate safeguards, designed by the 2011 Act CLXXV for basic breaches, i.e. where an NGO is dissolved without successor (Section 2B(2) a) of the Act CLXXV) or it has no assets (Section 2B(2) b)). The Venice Commission recalls that dissolution of an organisation should only be used as a measure of last resort in cases when the organisation engages in serious misconduct or lends itself to bankruptcy or long-term inactivity.²⁷ In the *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* Case, the ECtHR recalled that “a mere failure to respect certain legal requirements or internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution”.²⁸ The Commission is not convinced that any failure to fulfil the reporting or disclosure obligations stemming from the Draft Law could be qualified as serious misconduct which justifies the imposition of such a drastic measure as dissolution. For the Commission, two different situations should be distinguished from each other: either a given civil society organisation is engaged in criminal activity, for instance money laundering or terrorism financing, in which case its dissolution can be proportionally pronounced by courts on the basis of general provisions of the Act on the Freedom of Association or other applicable legislation, or the only misconduct which can be reproached to this organisation is its failure to fulfil the obligations under the Draft Law on Transparency. For the Commission, in this last case, the dissolution appears to be a disproportionate measure. For these reasons, the Venice Commission is of the view that reference to the dissolution of the association should be removed from the Draft Law.

V. Conclusion

61. The Venice Commission has analysed the compatibility of the Draft Law on the Transparency of Organisations Receiving Support from Abroad of Hungary with the applicable Council of Europe standards. The Commission wishes to stress, in this respect, that while on paper certain provisions requiring transparency of foreign funding may appear to be in line with the standards, the context surrounding the adoption of the relevant law and

²⁷ See ECtHR, *Refah Partisi (the Welfare Party) and others v. Turkey*, Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003; *Vona v. Hungary*, Application no. 35943/10, 9 July 2013.

²⁸ ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application no. 37083/03, 8 October 2009.

specifically a virulent campaign by some state authorities against civil society organisations receiving foreign funding, portraying them as acting against the interests of society, may render such provisions problematic, raising a concern as to whether they breach the prohibition of discrimination, contrary to Article 14 ECHR.

62. The Venice Commission acknowledges that the Draft Law on the Transparency of Organisations Receiving Support from Abroad pursues the legitimate aim of ensuring transparency of civil society organisations. The Draft Law may also contribute to the fight against money laundering and the financing of terrorism. This being said, although the label “organisation receiving support from abroad” objectively appears to be neutral and descriptive compared, in particular, to the label of “foreign agent”, it should be emphasised that placed in the context prevailing in Hungary, marked by strong political statements against associations receiving support from abroad, this label risks to adversely affect their legitimate activities.

63. The Venice Commission has identified certain problematic aspects of the Draft Law and calls upon the Hungarian authorities to consider the following main recommendations:

As concerns the procedure:

- A public consultation concerning the Draft Law should be conducted before the final adoption of the Draft Law. The public consultation should involve, as far as possible, all civil society organisations the status, financing or spheres of operation of which will be affected as a result of the entry into force of this legislation.

As concerns the substance:

- The rationale behind the exclusion of a number of associations and organisations from the scope of application of the Draft Law is not entirely clear, as the requirement of transparency should certainly apply to all civil society organisations. The relevant provision (Art. 1(4) of the Draft Law) should therefore either be justified in clearer terms, or deleted;
- The period of three years during which a civil society organisation may not receive any foreign funding in order to be entitled to initiate a deregistration procedure (Article 4 of the Draft Law) is quite long and appears to be arbitrary. It is recommended to replace it with a one-year period. This would not, in any way, hamper the objective of the Draft Law and would also make the registration and deregistration procedures more coherent;
- The data included in the register and made public should be limited to the major sponsors in order to ensure that no excessive obligation is imposed on organisations receiving foreign funding. Article 1(2) of and Annex 1 to the Draft Law should be amended accordingly;
- The obligation imposed under Article 2(5) of the Draft Law, that the relevant organisation should mention that it qualifies as an organisation receiving support from abroad on all its press products and publications, appears to be excessive and should be removed;

- The Draft Law should expressly provide for the proportionality principle under Article 3 relating to sanctions, which should only apply to instances of non-fulfilment of the most important obligations and/or to instances of serious non-fulfilment of obligations. Reference to the sanction of dissolution for failure to fulfil the obligations under the Draft Law (Articles 3(3) and 6) should be deleted.

64. The Venice Commission remains at the disposal of the Hungarian authorities for any further assistance in this matter.