

Reference: Proposals for amending the draft law on non-commercial organizations
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This opinion presents comments on [the draft law on non-profit organizations](#), the version available on the official website of the Ministry of Justice on 15 July 2017. The comments hereinafter refer exclusively to the provisions of Chapter VI - "Special Provisions" (Articles 26-28) which provide for the limitation of foreign financing of non-profit organizations, set forth additional reporting obligations for them and stipulate harsh penalties for failure to comply with the limitations and reporting requirements.

The introduction of those three articles can not be supported. They are contrary to the international standards in the field of freedom of association and international treaties ratified by Moldova (including the Association Agreement between the Republic of Moldova and the European Union), for the following reasons:

- The proposals do not pursue a genuine legitimate goal in a democratic society;
- The proposals excessively limit the freedom of association and expression of the civil society organizations (hereinafter CSOs) and their leadership, as well as the possibility for CSOs to engage in issues of public interest;
- Being contrary to the governmental commitments, the proposals limit the possibility of both direct (co-participation) and indirect (CSO funding) involvement of Moldovan citizens from abroad to be involved in the national planning and decision-making process.
- The proposals jeopardize the financial sustainability of more than 80% of active non-profit organizations once financing from foreign sources is prohibited, which will practically eliminate the associative sector in the Republic of Moldova;
- The proposals introduce tightening up of financial reporting requirements, which is an excessive bureaucratic burden as such, and will consume a considerable part of resources of non-profit organizations and negatively affect their sustainability;
- The sanctions that are introduced are disproportionate and the procedure for their enforcement is done without guarantees to ensure protection against arbitrariness.

The signatories reiterate [the position expressed on 11 July 2017](#) by 78 signatories – organizations and networks of the CSOs and recommend the Ministry of Justice to waive these provisions, as well as any other initiatives aimed at limiting of the CSOs work. This does not mean that signatories encourage the direct involvement of the CSOs in supporting of candidates in elections. If the proposed limitations were introduced in order to limit the involvement of the CSOs in elections while providing support for candidates, we reiterate that appropriate limitations in this respect have been already included in Art. 6 of the Draft.¹ If necessary, it can be reworded more explicitly. We also

¹ The limitations added to Art. 6 of the draft law provide for the possibility of the non-profit organization to offer support to political parties, social and political organizations, electoral blocs and electoral candidates or to support issues being subjects to referendum only if they cumulatively comply with the following conditions:

- act in a transparent manner, i.e. publicly declare that they support a candidate/political party;
- respect the provisions of their statutes, which should provide for the support of a candidate/political party;
- comply with the Electoral Code (Article 36 prohibits direct or indirect financing of electoral campaigns from abroad, therefore, the NGOs will not be able to support a candidate/political party using funds received from foreign donors);

reiterate the urgent need to increase transparency in the funding of political parties, but this should be achieved by regulating the activity of political parties rather than by limiting the funding and activity of the CSOs.

The detailed arguments of the signatories are given in the annex to the present document. The signatories express their support and availability to further contribute to the improvement of the draft law on non-profit organizations in the spirit of the best available international recommendations and standards in the domain of freedom of association.

Signatory organizations (according to the list)

1. Human Rights Embassy
2. Amnesty International
3. Eco-TIRAS International Environmental Association of River Keepers
4. Public Association "Colaborare" (Collaboration)
5. Association for Efficient and Responsible Governance (AGER)
6. Foreign Policy Association
7. Association of Independent Press (API)
8. Promo-LEX Association
9. Public Association Synergetica Eur/Est
10. Public Association (ARD) HABITAT
11. GENDERDOC-M Information Centre
12. Independent Journalism Centre
13. Centre for Rehabilitation of Victims of Torture "Memoria" (Memory)
14. Legal Resources Centre from Moldova (LRCM)
15. International Centre for Protection and Promotion of Women's Rights "La Strada"
16. National Law Centre AD LEGEM
17. Center "Partnership for Development"
18. Centre For Health Policies and Studies (Centre PAS)
19. National Coalition "Viața fără Violență în Familie" (Life without Violence in the Family)
 - Public Association International Centre for Protection and Promotion of Women's Rights "La Strada" , Chisinau
 - Public Association "Women`s Law Centre" (CDF), Chisinau
 - Association against violence "Casa Mărioarei" (Marioara's Home), Chisinau
 - Public Association "Promo-Lex", Chisinau
 - Public Association "National Center for Child Abuse Prevention", Chisinau
 - Centre for Rehabilitation of Victims of Torture "Memoria" (Memory), Chisinau
 - Public Association "Gender – Centre", Chisinau
 - Centre for Aggressors, Drochia
 - Public Association "Stimul", Ocnita
 - Public Association Youth Resource Centre "Dacia", Soroca
 - Public Association "Honour and Rights of Contemporary Woman"
20. CPR Moldova
21. Foundation for Development
22. Institute for Public Policy (IPP)
23. Institute for European Policies and Reforms (IPRE)
24. Institute for Development and Social Initiatives (IDIS)

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Relevant international standards in the domain of freedom of association. p. 9

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- respect the rules and regulations on political party support (Article 26 (6) of the Law on Political Parties prohibits any kind of support to political parties, for compensation or free of charge);
 - do not use the funds and material values received from the state.

Special comments on Art. 26 – 28 of the draft law

A. Conceptual issues

The Ministry of Justice proposes limitation of foreign financing of non-profit organizations and imposing of additional reporting rules and sanctions for the latter. However, the considerations why these provisions are necessary remain unclear. The reasons for introducing these limitations were not described in the informative note to the draft law. Limitation of any freedom without convincing reasoning is unacceptable in a state of the rule of law. Artificially imposed restrictions and barriers to access foreign funds seriously undermine the freedom of association. Their enforcement will have a deterrent effect on the exercise of the right to the freedom of association and will endanger the existence of the associative sector in the Republic of Moldova as such.

The prohibition to access funds will affect the most active civil society organizations and political foundations that are funded from abroad. The main source of funding for 83% of the CSOs in the Republic of Moldova are foreign foundations and organizations.² At the same time, currently 415 non-profit organizations benefit from the right to indirect financial support from the state through the percentage designation (the 2% Law).³ However, given that the 2% mechanism is a new one, but also based on the practice of other states, we cannot say that it is able to cover all the financial needs of the not-for-profit sector in the Republic of Moldova.

Civil society organizations have existed in the Republic of Moldova for more than 25 years. During this time, there were no limitations on their foreign financing. Over 80% of active non-profit organizations have foreign funds as their main source of funding, and during this period there have been no situations that justify the limitation of foreign financing for these organizations. Moreover, introduction of such limitation, as they did not exist for 25 years, seems to be unconstitutional, as Art. 54 para. 1 of the Constitution does not allow the adoption of laws that would diminish human rights and fundamental freedoms.

The initiative to limit the foreign financing of CSOs exists only in three Member States of the Council of Europe (Hungary, Azerbaijan and the Russian Federation). All three systems have been criticized by the European Union and the Council of Europe, as being contrary to democratic principles and international standards in the field of freedom of association. In June 2017, the Venice Commission issued a negative opinion⁴ on the Hungarian law limiting the foreign funding of CSOs whilst the European Commission launched a procedure for establishing the infringement of the EU law against Hungary. The European Commission concluded that Hungary is failing to fulfil its obligations under the Treaties with the EU.⁵ Similar initiative in Azerbaijan was severely criticized by the Venice Commission back in 2014,⁶ whilst in the Russian Federation, the provisions of a similar law are currently being examined by the European Court of Human Rights,⁷ and were repeatedly criticized by

² Centre Contact „Colectarea de fonduri din surse autohtone: oportunități și perspective“ (Fundraising from local sources: opportunities and prospects) (2016), p. 4, available at: http://ecnl.org/wp-content/uploads/2016/02/colectare-de-fonduri-final_2016.pdf.

³ List of organizations eligible to receive percentage designations in 2017: http://www.justice.gov.md/public/files/don/2017/1/2_Legea_2017_-_Lista_Asociatii.pdf.

⁴ The Venice Commission, Opinion 889/2017, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)015-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)015-e).

⁵ Press release of the European Commission regarding the launch of the infringement procedure as of 13 July, available at: http://europa.eu/rapid/press-release_IP-17-1982_en.htm.

⁶ The Venice Commission, Opinion 787/2014, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)043-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)043-e).

⁷ ECtHR, ECODEFENCE and Others v. Russia, communicated to Russia on 22 March 2017, <http://hudoc.echr.coe.int/eng?i=001-173049>.

the Commissioner for Human Rights of the Council of Europe.⁸ The limitations proposed by the draft law in Moldova are much tougher than those in Hungary and Russia.

If it is desired to prevent the involvement of non-profit organizations in elections, then these restrictions are not present in the draft law on non-profit organizations because:

- i. Such limitations are already stipulated by art. 6 of the draft law. If necessary, the wording of art. 6 could be redrafted more explicitly to remove any ambiguities and misunderstandings;
- ii. Such limitations can not be applied only to non-profit organizations while being not applied to commercial companies, trade unions, religious cults, etc. In fact, the latter are those who get involved in the elections, the fact found by the Constitutional Court in 2016;⁹
- iii. Under Art. 26-28 of the draft law, the participation in electoral campaigns of organizations funded from Moldova is allowed. This is unacceptable in the context when foreign political foundations are basically prohibited by the draft law, and other organizations are forbidden to do so;
- iv. Limitations concerning electoral campaigns must be similar for all, regardless of whether they refer to individuals, non-profit organizations or companies. International standards prescribe that Governments should refrain from adopting measures that disproportionately target CSOs, such as the imposition of some rules, procedures or other specific requirements not applicable to the commercial sector.¹⁰ This is why, clear limitations in this sense, equally applicable to all actors should exist in the Law on Parties and the Electoral Code.

Being analyzed as a whole, the proposed measures have an intimidating effect on the CSOs, whose domains of activity are intrinsically linked to public policies and monitoring of the authorities' activity. Such provisions also cannot be supported in any way.

B. Proposals of Art. 26 considerably limit the possibility of funding CSOs from abroad or by the state

Excerpt from Art. 26 para. (1) of the draft law

*The non-commercial organization [...] can participate, engage in or carry out **political activities, electoral campaigns, electoral programs, propaganda, actions to promote them [...] or any actions launched by [parties, political candidates, political leaders], conducted jointly or separately, both in elections and outside the elections, on issues subject to the referendum, can be affiliated with a political organization [...], under the following conditions:***

- a) does not benefit or does not have the right to benefit from the percentage designation mechanism provided under Art. 9;
 - b) the described activities are not funded, do not benefit from material values and/or do not have assistance (direct or indirect) originating from the outside of the Republic of Moldova;
- [...]

Art. 26 para. (1) provides for limiting the possibility for the CSOs to access funds from abroad or benefit from the percentage designation mechanism, if they are involved in so-called „political activities“. While the provisions of the draft law and of the informative note do not define the notion of „political activity“ or „political affiliation“, the authors of the disputed articles prescribe at least five situations that may lead to a ban on financing from foreign sources or by means of percentage

⁸<http://www.coe.int/en/web/commissioner/-/the-russian-federation-s-law-on-foreign-agents-contravenes-human-rights>

⁹ Constitutional Court, Decision no. 34 on the confirmation of the election results and validation of the mandate of the President of the Republic of Moldova, 13 December 2016, para. 157-167
<http://constcourt.md/ccdocview.php?tip=hotariri&docid=602&l=ro>.

¹⁰ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/23/39), 2013, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-39-Add1_en.pdf.

designation.¹¹ These situations are insufficiently described and are not foreseeable for a non-profit organization. In order to comply with the provisions of Art. 26 para. (1), the non-profit organization should refrain from any activity that might fall within the initiatives launched by representatives of political parties. Dissociation from „any action launched“ by a party, political and social organization or candidate is virtually impossible and unreasonable, especially when it is in line with the objectives declared by the statute of the organization (e.g. free and fair elections, abolition of the death penalty, justice reform, fight against corruption or promotion of equality and non-discrimination).

These prohibitions unduly limit the possibility of non-profit organizations to carry out activities or engage in public policy analysis, in particular concerning a program launched by authorities that are very often the representatives of political parties. Limitation of the CSOs involvement in elections is already stipulated by the draft law on non-profit organizations under Art. 6, with restrictions being set forth in line with international standards. The suggested additional proposals do not make any distinction between the activities carried out by the CSOs during the electoral campaign or outside of it. Such a distinction would at least facilitate a more clear identification of situations in which a CSO would be cautious not to intervene in „politics“. Finally, these actions discourage the CSOs involvement in conducting public policy activities, expressing their position on initiatives and projects launched by politicians or public policies promoted by public authorities.

Freedom of association can not be guaranteed only by ensuring the right to create an organization, the right to freely carry out the proposed statutory activities should also be guaranteed to the organization. The states have an obligation to facilitate the exercise of this freedom, and this also includes the right of the organization to benefit from state or foreign funding in order to fulfil its statutory objectives. Thus, freedom of association implies a negative obligation on the state not to restrict the CSOs' access to financing.¹²

One of the main roles of the civil society is monitoring of public authorities and promoting issues of public interest. Promoting involves a number of activities, including cooperation with public authorities, including locally elected representatives and Members of the Parliament. The latter are, to a large extent, the representatives of political parties. Due to restrictions imposed under Art. 26, the CSOs will no longer be able to exercise this role. Such prohibitions discourage any collaboration between the CSOs and representatives of public authorities.

In a democratic society, it is natural for the CSOs to collaborate with various actors to promote issues of public interest in the field of their expertise. Quite often the greatest reforms are promoted only after the involvement of public authorities and ruling political parties. For example, the package of laws banning smoking in public places, the inclusion of women participation quota in party lists, new law on the prosecution were promoted through effective collaboration between the CSOs, political parties and public authorities. It is not clear why it is intended to limit the involvement of the CSOs in such activities in the future.

C. The proposals introduce the liability of the CSO for the actions of the members of their governing bodies, if they engage in activities that can be considered “political”

Excerpt from Art. 26 para. (1) of the draft law

„Non-profit organization, *member of its governing bodies can participate, intervene or carry out...*“

¹¹ Art. 26 para. (2) stipulates: „Research, training and education activities, defence of human rights, expertise, support, development, promotion, implementation and monitoring of public policies or other activities that are the main purpose of the activity, other than those mentioned in paragraph (1), do not constitute political activity of non-profit organizations.“

¹² Conclusions of the OSCE-ODIHR meeting on regulation of operations of internationally affiliated non-governmental organizations and NGO access to foreign funding, 2013, p.5, available at:

<http://www.osce.org/odihr/118024?download=true>.

The right to engage in any activities, including political activities, as well as public policy, either individually or as a civil society organization, is closely linked to exercising ones freedom of expression, association and assembly. The possibility to engage in activities qualified by the draft law as "political" is also an example of expressing these freedoms. There are a number of international and European standards regarding the possibility for the non-governmental sector to engage in public and political affairs (see ANNEX).¹³

The organization can not be held liable for the activities or affiliation of members of its governing body that do not refer to their direct activity in the organization. The presence of such a prohibition is contrary to the freedom of association and freedom of individual expression. Freedom of association and expression cannot be limited for a certain category of citizens without a reasonable justification. The reasons for this prohibition were not provided or explained in the draft law or informative note. Their enforcement will have a chilling effect on the exercise of freedom of association and is contrary to the international standards on freedom of association. Such limitations, for example, are not provided for the governing bodies of for-profit organisations (Companies).

Restriction for party members to be a part of the governing bodies of the CSOs raises issues of unconstitutionality, and is incompatible with the European Convention of Human Rights (ECHR) provisions. Moreover, access to a number of public positions is not limited to party members; therefore, it should not be limited for functions in the governing bodies of the CSOs even more.

D. The proposals introduce tightening up of financial reporting requirements without reasonable justification

Excerpt from Art. 27 of the draft law

(1) Non-profit organizations that are benefiting or entitled to benefit from the percentage designation mechanism, are funded, or benefit from material values and/or assistance from outside of the Republic of Moldova, **shall submit to the Ministry of Justice and publish on the web site, annually and quarterly, not later than the 30th day of the month immediately following the reporting period:**

a) Financial report of non-profit organization;

b) Reports on the origin and use of funds;

c) Report on income and other benefits provided to the members of their governing bodies, employees and other contracted natural persons;

d) Report on income and expenditure regarding political activities.

The provisions of Art. 27 stipulate additional rules for the financial transparency of all organizations benefiting from funds from the outside of the Republic of Moldova. Under para. (1), the CSOs should submit to the Ministry of Justice financial reports on quarterly and annual basis. Furthermore, the CSOs should also publish other reports confirming the origin of financial means and income of the organization, as well as of the members of their governing bodies. Additionally, organizations will have to submit a written declaration on income and expenditure for „political activities“ to the Ministry of Justice and the Central Electoral Commission and publish it on their website.

Currently, any not-for-profit organisations, regardless of whether registered at the local level or at the Ministry of Justice, submit monthly, quarterly and annual reports to the tax and evidence-keeping bodies of the Republic of Moldova. Transparency in the non-governmental sector is also ensured by the own rules of the non-profit sector through self-regulation, while the use of foreign funds is rigorously verified by the donor. Moreover, the activity of the CSOs is subject to check-ups by the tax authorities or the State Labour Inspectorate, as in the case of any legal entity.

¹³ Hadzi-Miceva Evans., Katerina, „Regulating political activities of non-governmental organizations“, Conference of INGO (Council of Europe), p. 5, available at: <http://www.icnl.org/research/library/files/Transnational/oingconf.pdf>.

New additional financial reporting mechanisms should be introduced only if there are clear and specific reasons for doing so. These reasons are not clear and not mentioned in the draft law. Their enforcement will have a chilling effect on the exercise of freedom of association, being at the same time discriminatory for the CSOs, if compared to the for-profit companies, religious cults, state-owned enterprises or even to foreign-owned companies where there are no such additional requirements. As long as such requirements are not introduced for all public and private actors, introduction of these requirements only for the CSOs is discriminatory and raises issues of unconstitutionality and incompatibility with the ECHR.

E. The proposals provide sanctions that are disproportionate with the aim pursued in case of infringement of art. 26 – 27

Excerpt from Art. 28 para. (1) of the draft law

(1) For violation of the provisions of art. 26 and 27, the non-profit organization, the member of the governing body of the non-profit organization shall be subject to sanctions, according to the following order:

a) written notice on the removal of the admitted violation;

b) application of the higher financial penalty for the non-profit organization either in the amount of the monthly salary fund or the amount of funds, material values from which the non-profit organization benefited while committing the respective infringement and application for the responsible member of the governing body of financial sanction in the amount of the monthly salary;

c) the loss of the right to financial support and other preferences offered by the state as well as of the right to benefit from the percentage designation mechanism, alongside with the return to the state of the value of the obtained support and sources received from the state, obtained and/or used while committing the respective infringement and withdrawal of the public utility certificate;

d) liquidation of non-profit organization, based on a court decision.

(2) Sanctions are applied by the Ministry of Justice.

The provisions of art. 28 provide sanctions for the violation of art. 26-27, which apply both to the non-profit organization and to the member of the governing body. The sanctions involve the warning of the non-profit organization, fines in the amount of a salary fund/fine in the amount of allegedly misused sources, loss of state financial support or public utility certificate and liquidation of the organization.

First of all, according to the OSCE and ODIHR Guidelines on freedom of association, „*any sanctions introduced must always be consistent with the principle of proportionality, that is, they must be the least intrusive means to achieve the desired objective. Sanctions must at all times be enforceable and effective to ensure the specific objectives for which they were enacted. When deciding whether to apply sanctions, authorities must take care to apply the measure that is the least disruptive and destructive to the right to freedom of association*”.¹⁴

The draft law provides for the liability of both the organization and the member of the governing body. According to the OSCE, provisions that concern sanctions must not be abused as a means of exerting pressure on individual human rights defenders for their legitimate work.¹⁵ Alongside with it, this is contrary to the principle stipulated by the Recommendation of the CM on the legal status of non-governmental organisations in Europe, according to which „*The officers, directors and staff of an NGO with legal personality should not be personally liable for its debts, liabilities and obligations.*

¹⁴ OSCE/ODIHR, Guidelines on freedom of association, para. 237, <http://www.osce.org/odihr/132371?download=true>.

¹⁵ OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders, 2014, para. 209, <http://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders>

However, they can be made liable to the NGO, third parties or all of them for professional misconduct or neglect of duties”(p. 75).

Additionally, the provisions provide discretion to the Ministry of Justice to impose sanctions in the absence of an established procedure. As a result, the mechanism of sanctions enforcement is not clear enough to exclude arbitrariness and possible abuse.

UN International Covenant on Civil and Political Rights

- Stipulates the possibility for citizens to take part in conducting of public affairs, including exercising of influence through public debates and dialogue with the representatives of authorities. The freedom of association, including the freedom to establish and join organizations and associations involved in political activities, is an essential element for the exercising of rights protected by this Covenant. This participation is supported by ensuring freedom of expression, assembly and association.¹⁶

United Nations Human Rights Council, Resolution on equal participation in political and public affairs

- “Emphasizes the critical importance of equal political participation for democracy, the rule of law, social inclusion and economic development, and advancing gender equality, as well as for the realization of all human rights and fundamental freedoms irrespective of age.”¹⁷

European Convention on Human Rights and Fundamental Freedoms (ECHR)

- Guarantees the right of the CSOs to be engaged in any kind of activities that are otherwise allowed to natural persons. The case-law of the ECtHR states that NGOs should be allowed to get engaged in any kind of activities otherwise allowed to natural persons without additional restrictions imposed on them.¹⁸

The joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association

- 31. (...) “Not-for-profit organizations shall have the right to participate in matters of political and public debate, regardless of whether the position taken is in accord with government policy or advocates a change in the law”;
- 183. (...) “In a participatory democracy with an open and transparent lawmaking process, associations should be able to participate in the development of laws and policy at all levels, whether local, national, regional or international”.¹⁹

Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe²⁰

- CSOs should be free to pursue their objectives, provided that both the objectives and the means employed are consistent with the requirements of a democratic society. (§11).
- CSOs should be free to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation. Any such support should also be subject to legislation on the funding of elections and political parties. (§13).

¹⁶ UN International Covenant on Civil and Political Rights (ICCPR), explanatory paragraph 26 of article 25.

¹⁷https://www.unwatch.org/wp-content/uploads/2016/09/A_HRC_33_L.28.docx.

¹⁸ Case of United Communist Party and others v. Turkey, application no. 19392/92 as of 30 January 1998, para. 57-58.

¹⁹ The joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association (2015), principle 30 and D (183), available at: <http://www.osce.org/odihr/132371>.

²⁰ Recommendation CM/Rec(2007)14 of the Committee of Ministers to Member States on the legal status of non-governmental organisations in Europe, p. 11 and 13, available at:

[https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2007\)14E_Legal%20status%20of%20NGOs.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2007)14E_Legal%20status%20of%20NGOs.pdf).