



OPINION BY THE EUROPEAN CENTER FOR NOT-FOR-PROFIT LAW ON THE SPECIAL PROVISIONS OF THE DRAFT LAW ON NONCOMMERCIAL ORGANIZATIONS OF THE REPUBLIC OF MOLDOVA *As of August 8, 2017*

This opinion examines the compatibility of Chapter VI on Special Provisions (*Special Provisions*) to the draft Law on Noncommercial Organizations of the Republic of Moldova (*draft Law*¹) with international standards and best practices, particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms (*ECHR*), the Council of Europe's Recommendation (2007) 14 on the Legal status of non-governmental organisations in Europe (*CoE Recommendation on the Legal status of NGOs in Europe*) and OSCE/ODIHR-Venice Commission Joint Guidelines on Freedom of Association (*OSCE/ODIHR Joint Guidelines on Freedom of Association*).

For many years, the European Center for Not-for-Profit Law (ECNL) has been supporting local efforts in creating enabling framework legislation for the operation of civil society organizations (CSOs)². The draft Law on Noncommercial Organizations is a result of a thorough background research³ and policy solutions developed in a participatory manner by the cross-sectoral working group. We commend the Ministry of Justice for its best efforts to involve CSOs in the drafting of the Law to ensure an open, consultative process.

On the other hand, we were surprised to learn about the Special Provisions that the Ministry of Justice introduced to the draft Law on July 5, 2017 expediently, without prior consultation and disregarding the opinion of the working group that is responsible for drafting the Law.⁴ **The Special Provisions threaten CSOs' ability to take part in the conduct of public affairs and their right to access domestic and foreign resources. They also impose burdensome reporting requirements and penalties, including for managers of the CSOs.** This is contrary to international standards and good regulatory practices, and potentially violates domestic laws on transparency in decision-making and Moldova's international commitments, such as the Open Government Partnership agenda.

¹ Second version uploaded for public consultation on July 18, 2017.

² Starting from 2011, ECNL has submitted a number of written comments and opinions to the proposed drafts of the law by the Ministry of Justice and the working group established for drafting a new framework Law on Noncommercial Organizations.

³ http://crjm.org/wp-content/uploads/2016/07/CRJM_03.2016-DPP-ONG.pdf

⁴ See the public statement from the Moldovan CSOs, including members of the working group. Currently, it includes more than 70 signatories: <http://crjm.org/tentativa-de-a-limita-finantarea-din-exterior-a-ong-urilor-pune-in-pericol-functionarea-democratiei-in-republica-moldova/>

If adopted, the new provisions most certainly will have a negative impact on the Moldovan CSO sector. According to our knowledge, around 90% of CSO funding in Moldova comes from or through foreign sources. In addition, more than 400 CSOs benefited from the percentage designation mechanism in the first year alone. Hence, the majority of CSOs will be subject to the new mandatory annual and quarterly reporting requirements. As a result of the draft Law, CSOs can be also deprived of access to the 2% mechanism and foreign resources based on the vaguely and broadly defined scope of political activities. If adopted, the Special Provisions would, therefore, put the Republic of Moldova *on par* with countries such as Belarus, Azerbaijan, Russia and India that introduced similarly restrictive rules on CSOs' political activities, foreign funding and reporting requirements. It would follow the most recent example of Hungary that was widely condemned by international community, including the European Parliament, Council of Europe, UN special rapporteurs, and led to the launch of an infringement procedure against the country by the European Commission.⁵ In addition, the draft Law will put significant administrative burden on public administration which will need to ensure compliance with the new rules on political activities and reporting requirements.

Hereby, we present our major concerns related to the Special Provisions and recommend their full removal from the draft Law in order to ensure that it complies with international standards and best practices. The European Center for Not-for-Profit Law remains committed to assist the Moldovan government in its efforts to improve the environment for civil society organizations in the Republic of Moldova, and ensure that the new legislative initiatives are in line with the standards on freedom of association, and can further serve as an example of good practices.

1. The Special Provisions do not address an existing problem or necessity

States have a negative obligation not to interfere in the enjoyment of the rights to freedom of expression and association. Legitimate interference of a State ('positive obligation') is limited to instances in which it is necessary to protect the exercise of those rights.⁶ Any restrictions on the exercise of freedom of association must: 1) be prescribed by law; 2) serve a legitimate aim; and 3) be necessary in a democratic society.

The existing legislation already regulates political activities and reporting requirements of CSOs. If adopted, the new Special Provisions will go much beyond the **existing rules on political activities under the current Moldovan law**. Currently, CSOs are prohibited to use state funding for political activities *during* electoral campaigns and *in support of* the political parties.⁷ The draft Law would extend the scope of the already existing limitations by:

- Expanding the scope of activities, which are considered political. Thus, limiting CSOs' possibilities to engage in, for example, legitimate public activities, such as referenda, or

⁵ See the opinion of the Council of Europe's Expert Council on NGO Law Opinion on the Hungarian Draft Act on the Transparency of Organizations Supported from Abroad, April 2017.

⁶ See e.g. *Demir and Baykara v Turkey*, Application no. 34503/97, judgment of 12 November, 2008.

⁷ Article 8 of the Law on Public Associations and Article 1 of the Law on Foundations

participation in public affairs and their right to expression by citizens outside of the electoral processes;

- Expanding the prohibition for use of funds for certain CSO activities, such as funding received from abroad.

Moreover, the draft Law itself already contains strict limitations on the engagement of CSOs in political activities. Art. 6.3 prohibits the use of any *"funds and material values received from the state"* for engaging in political activities. Art. 9.1.c. states that any organization can benefit from the percentage mechanism only if it *"in the past four years has not supported and, in the period of use of the sources received from the percentage designation, will not support a political party, a social-political organization or a candidate in the elections, in the sense of the Election Code"*.

The draft Law and its Informative Note **fail to provide any justification as to the legitimate aim and necessity to impose additional requirements on CSOs' political activities and reporting**. It does not indicate any problems that have arisen in practice that could not be dealt with by the existing legal regime or by less intrusive measures. Also, it does not offer publicly available evidence of imminent threat that would merit further scrutiny.

We need to ask ourselves - would similar limitations apply to for-profit entities or religious entities in conducting political activities? Are for-profit entities subject to quarterly reporting requirement in case they receive funding from abroad (i.e the European Union)? **If not, what is the legitimate reason for singling out the civil society and apply such discriminatory provisions? The legislator has not provided any legitimate reasons for this.**

2. The scope of "political activities" is too broad and would negatively affect participation in public affairs

Article 26 of the Special Provisions regulates the political activities of CSOs and special conditions for those organizations engaged in such activities. However, the **scope of political activities⁸ is broadly and vaguely formulated** (e.g., "actions for promoting them or any other actions launched by them") **and the draft Law uses undefined terms** (e.g., "propaganda", "social-political organizations") that can lead to arbitrary interpretation. This will result in blanket prohibitions for CSOs to access their main sources of funding and serve as a disincentive to take part in the conduct of public affairs as such.

Second, the **draft Law blends the concepts of public policy and party political activities**. The rights to freedom of association and expression encompass the right of CSOs to be free to undertake research, education and advocacy on issues of public debate, regardless of whether

⁸ The full list in the draft Law includes possibility for CSOs to carry out "political activities, election campaigns, election programs, propaganda, in support or against political parties, political party blocs, alliances of political parties, social-political organizations, election blocs, their leaders or candidates or the independent candidates, actions for promoting them or any other actions launched by them, carried out jointly or separately, both during and outside the elections, in matters subjected to a referendum".

the position taken is in accord with government policy or requires a change in the law.⁹ Activities of CSOs around public policy, public debate and decision-making should not be mistaken as party political activities.¹⁰ CSOs that engage in advocacy, watchdog or monitoring exercise a right to participation in public affairs, not party political activities.¹¹ When CSOs draw attention to matters of public interest, they are exercising a public watchdog role of similar importance to that of the press and make an important contribution to the discussion of public affairs.¹² Certain activities listed in Article 26 (1) **fall clearly within the domain of public policy and decision-making**, including participation in matters subject to a referendum and expressed opinion in support or against political views, leaders or candidates.

According to Article 6 of the International Covenant for Civil and Political Rights (ICCPR) General Comment no. 25 of The right to participate in public affairs, voting rights and the right of equal access to public service, "*Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b).*" **CSOs should be free to undertake any kind of activities allowed to individuals and other legal entities.** The European Court of Human Rights addressed the capacity of citizens and CSOs to engage in public policy and political activities in several cases. The Court stated that allowing participation in public life and policy is in keeping with one of the principal features of democracy — that is, to create the possibility for members of a society to resolve social and political problems through dialogue, without recourse to violence, "even when they are irksome".¹³

3. The regulation on political activities is discriminatory and will negatively affect CSOs' right to access resources

The **draft Law allows CSOs to intervene in or carry out political activities, however, under detrimental conditions, by setting limitations to access and utilize funding (i.e. 2% mechanism and foreign funding)**. This will likely discourage organizations to conduct not only those activities which fall under the scope of political activities listed in the draft Law (e.g., to initiative a referendum) but also other, public policy activities, since there is a broad scope of interpretation possible for such activities.

Blanket measures rarely meet the proportionality test under ECHR. CSOs' ability to seek, receive and use resources is an integral part of the right to freedom of association, as emphasized on numerous occasions by the former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Setting limitations on access to both foreign and public

⁹ Para.12 Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organizations in Europe

¹⁰ Statement by the President of the Conference of INGOs and the President of the Expert Council on NGO Law on Hungary, 7 March 2017.

¹¹ Magyar Helsinki Bizottság v. Hungary, European Court of Human Rights, Judgment of 8 November 2016.

¹² Venice Commission Opinion on Russian Law on Undesirable Activities of NGOs. Adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016)

¹³ United Communist Part of Turkey and Others v. Turkey, no 19392/92, 30 January 1998, paras 57-58

funding for CSOs pursuing a wide range of activities would be in violation of the basics of this right and cannot be considered as *necessary in a democratic society*, nor *proportionate* to the purpose of ensuring transparency or enforcing the legislation already in place. If adopted, environmental CSOs will not be able to benefit from the 2% designation in case the organization or a member of its managing body initiate or support (i.e. sign) a referendum that aims to prevent a construction in a nature reserve area. Based on the vague language the limitation may also apply in case the organization engages in any activities whatsoever in relation to the subject of the referendum (i.e. raise awareness among constituencies around the detrimental effect of the construction or challenge it front of the court). This is contrary to the right to participation guaranteed under international¹⁴ and European¹⁵ law, but also Moldovan domestic law, such as Constitution (Art.32, 34, 41), Law on Transparency of the Decision-Making Process (Art.4), and international commitments, such as Open Government Partnership agenda.

The limitation to organizations engaged in political activities **discriminate CSOs against other entities and violate the principle of non-discrimination and equal treatment** guaranteed under Article 14 of ECHR. All CSOs should be treated equally regardless of the type of activities they engage in or source of funding they receive. In addition, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association called upon States to ensure equal treatment between CSOs and businesses in laws and practices regulating, inter alia, political activity and contributions, reporting and access to resources.¹⁶ Any penalties should never be higher or harsher than penalties for similar offences committed by other entities, such as businesses.¹⁷

4. The Special Provisions introduce excessive and burdensome reporting requirements

The draft Law introduces mandatory reporting requirements and other additional supervision measures, which are excessive in their nature and burdensome. Specifically, Article 27 establishes mandatory and detailed financial reports for CSO receiving 2% designations and foreign funding, regardless of the actual income of CSOs. It includes information such as report on incomes and other benefits granted to members of the management bodies, employees and other natural persons contracted. The draft Law also requires the disclosure of the income and

¹⁴ See the International Covenant on Civic and Political Rights (ICCPR) under articles on freedom of expression (art.19), freedom of association (art. 22), and the right to take part in the conduct of public affairs (art.25).

¹⁵ Council of Europe's Recommendation (2007)14 on the Legal status of non-governmental organisations in Europe explicitly states in para.76 that "*Governmental and quasi-governmental mechanisms at all levels should ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives and decisions.*" The right to local referenda is also enshrined through the Council of Europe documents: Committee of Ministers, Recommendation CM/Rec (2001)19 to member states on the participation of citizens in local public life; Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority.

¹⁶ Article 109 of the Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association on Comparing States' Treatment Of Businesses And Associations Worldwide. A/70/266, 2015.

¹⁷ Article 237 of OSCE/ODIHR Joint Guidelines on Freedom of Association

expenditures specifically on political activities. CSOs will need to comply with these new reporting requirements both on an annual and quarterly basis.

The new reporting requirement raises several concerns. Firstly, it **applies to all CSOs benefiting from 2% and foreign funding, irrespective of the size of the organization and its income from these resources.** According to Article 104 of the OSCE/ODIHR Joint Guidelines on Freedom of Association, the reporting and transparency requirements shall not be unnecessarily burdensome, and shall be proportionate to the size of the association and the scope of its activities, taking into consideration the value of its assets and income.

Secondly, CSOs are already subject to stringent reporting requirements under the existing rules. All CSOs already need to submit a financial report and statistical report. In addition, CSOs need to prepare annual activity report and publicize it based on Article 7(3) of the draft Law. Also, CSOs that benefited from the 2% mechanism need to submit an additional report on the use of the funds, as provided by Article 9 of draft Law and chapter V of the Government Decision On Approving the Regulation On the Percentage Designation Mechanism. Hence, the existing law as well as other provisions in the draft Law already guarantee the transparent operation of Moldovan CSOs. The new quarterly reporting requirement will therefore **put additional administrative burden on CSOs unnecessarily** – which in turn will mean more resources needed to comply with (both staffing and funding). **The Ministry of Justice will also need more human and financial resources to manage thousands of additional reports submitted by CSOs.** The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association warned against the frequent, onerous and bureaucratic reporting requirements, which can eventually unduly obstruct the legitimate work carried out by associations and the misuse of transparency as a pretext for “extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment”.¹⁸

Finally, all reporting 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, as provided by Article 64 of the CoE Recommendation on the Legal status of NGOs in Europe. The draft Law foresees the Ministry of Justice and the Central Election Commission to further regulate the format and contents of the reports, which raises the concern that there will be excessive reports with even further details than what is already required by donors.

Therefore, the new reporting requirements of the Special Provisions also fail to comply with the European standards for any restriction to be *necessary in a democratic society*, and be *proportionate* to the purpose of ensuring transparency or enforcing the legislation already in place.

¹⁸ Article 38 of the Report of the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai. A/HRC/23/39, 24 April 2013.

5. The Special Provisions introduce harsh sanctions and liability for violation of the Special Provisions, including personal liability of the managing bodies.

Article 28 establishes liability and harsh sanctions for violation of the Special Provisions, including the liquidation of the organization. Penalties should be based on the law in force and observe the principle of proportionality.¹⁹ Dissolution is, according to the European Court, “the most drastic sanction possible in respect of an association and, as such, should be applied only in exceptional circumstances of very serious misconduct.”²⁰ Under the Special Provisions, failure to submit the quarterly report or submitting incomplete report can equally lead to liquidation.

In addition, the draft Law foresees sanctions for the members of the managing body. This goes against the principle established by the CoE Recommendation on the Legal status of NGOs 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. However, they can be made liable to the NGO, third parties or all of them for professional misconduct or neglect of duties*” (para. 75).

Moreover, it would impose restrictions on individuals’ right to the freedom of expression, which among others include the right to “*discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups*.”²¹

In sum, the Special Provisions, if further considered by the policy-makers, contradict not only such basic rights as freedom of association, access to resources, freedom of expression and participation in the conduct of public affairs but also other underlying principles, such as independence and sectoral equity. The draft Special Provisions will likely not pass European standards which require any restriction to be *necessary in a democratic society*, and *proportionate* to the purpose of ensuring transparency or enforcing the legislation already in place. In addition, we believe many of the proposed measures are already in place e.g. limitation on political activity and use of state funding – Art. 6.3 and Art. 9.1.c.; and reporting requirements – Art. 7.3 and Art. 9.4. Moreover, there are other laws that regulate the requirements of noncommercial organizations to submit financial reports or the political process itself. **Therefore, we strongly recommend to remove the Special Provisions from the draft Law.**

ECNL is ready to provide further assistance to the drafters of the NCO Law and the newly established working group.

¹⁹ Article 72 of the CoE Recommendation on the Legal status of NGOs in Europe

²⁰ See *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, European Court, Judgment of 8 October 2009

²¹ UN HRC Resolution on Freedom of opinion and expression. A/HRC/RES/12/16