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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

KYRGYZSTAN

OPINION

ON LAW No. 72 OF 2 APRIL 2024 AMENDING THE LAW "ON NON-PROFIT ORGANISATIONS"

Adopted by the Venice Commission
at its 140th Plenary Session
(Venice, 11-12 October 2024)

on the basis of comments by

Ms Veronika BÍLKOVÁ (Member, Czechia)
Mr David KAYE (Member, United States of America)
Ms Herdis KJERULF THORGEIRSDÓTTIR (Member, Iceland)
Mr Zlatko KNEŽEVIĆ (Member, Bosnia and Herzegovina)

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I. Introduction

1. By letter of 18 October 2023 the Minister of Justice of the Kyrgyz Republic, Mr Ayaz Baetov, requested from the Venice Commission an Opinion on the draft law "On Amending Certain Legislative Acts of the Kyrgyz Republic (the Law of the Kyrgyz Republic "On non-profit organisations" of Branches (Representative Offices) and the Criminal Code of the Kyrgyz Republic" ("the draft law") which had been tabled before the *Jogorku Kenesh* (Parliament) on 19 May 2023.

2. By letter of 2 November 2023 Minister Baetov informed the Commission that on 25 October 2023 the draft law had passed its first reading in the *Jogorku Kenesh* and that it would undergo serious revisions, taking also into account comments made by the Ministry of Justice and the Cabinet of Ministers. Thus, the Minister requested that the Venice Commission remove from its agenda this item, noting that a new revised draft law would be sent to the Venice Commission at the end of 2023 or at the beginning of 2024, requesting an Opinion. The Venice Commission accepted to postpone the preparation of Opinion pending this revision.

3. On 14 March 2024 the *Jogorku Kenesh* adopted[1] the draft law and on 2 April 2024 the President of the Kyrgyz Republic signed Law No. 72 amending the Law "On non-profit organisations" (hereinafter "the Law" - CDL-REF(2024)034), which entered into force on 15 April 2024. By letter of 25 June 2024 the President of the Venice Commission informed Minister Baetov that at its 139th Plenary Session (21-22 June 2024) the Commission had decided to proceed to the preparation of an Opinion on the Law for its 140th Plenary Session (11-12 October 2024) and requested the adopted text.

4. By Resolution No 518 of 27 August 2024 the Cabinet of Ministers approved its Regulation "On the procedure for maintaining the Register of NPOs performing the functions of a foreign representative and conducting an audit of their activities" (CDL-REF(2024)040). On 9 September 2024, when the Regulation entered into force, the Minister of Justice issued Order No 169 "On Measures for the Implementation of the Cabinet of Ministers Resolution No 518". The present Opinion will take this Regulation into account when assessing the Law.

5. In view of the preparation of the present Opinion, Ms Veronika Bílková (Member, Czechia), Mr David Kaye (Member, United States of America), Ms Herdis Kjerulf Thorgeirsdóttir (Member, Iceland) and Mr Zlatko Knežević (Member, Bosnia and Herzegovina) acted as rapporteurs.

6. On 18 September 2024, a delegation of the Commission composed of Ms Bílková, Ms Kjerulf Thorgeirsdóttir, and Mr Knežević, accompanied by Mr Nikolaos Sitaropoulos, from the Secretariat, visited the Kyrgyz Republic and held meetings in Bishkek with the Minister of Justice and other officials of the Ministry of Justice, the Office of the Ombudsman, the European Union Delegation to Kyrgyzstan, the Central Asia Regional Office of the United Nations High Commissioner for Human Rights, and representatives of civil society organisations. The Commission is grateful to the Ministry of Justice of the Kyrgyz Republic for its support in organising this visit. It regrets that no MP was available to meet and exchange with the delegation in Bishkek.

7. This Opinion was prepared in reliance on the English translation of the Law and its Explanatory Note. The translation may not accurately reflect the original version on all points.

8. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 18 and 19 September 2024 which were held in Bishkek. Following an exchange of views with Minister Baetov, it was adopted by the Venice Commission at its 140th Plenary Session (Venice, 11-12 October 2024).

[1] For the adoption of the Law voted 66 MPs while five voted against.

II. Background to the introduction of the Law and its effects

A. Domestic developments affecting freedom of association and Civil Society Organisations (CSOs)

9. The Kyrgyz Republic has enjoyed a reputation of being "the most progressive Central Asian country when it comes to its democratic and human rights record".[2] Nonetheless, in recent years serious concerns about democracy, Rule of Law and human rights, including freedom of association, in the country have been recorded and expressed by a number of international institutions. For example, the European Union in its 2023 Annual Report on Human Rights and Democracy in the World – country reports noted with regard to the Kyrgyz Republic that "[t]he deterioration in the overall human rights situation continued in 2023, including regarding to freedom of expression, freedom of association and assembly, freedom of the media, good governance, torture, discrimination, labour rights and rights of religious minorities."[3]

10. According to the Explanatory Note to the draft law, there are around 18,500 CSOs registered in the capital, Bishkek, alone.[4] Reportedly, the CSO sector has been dynamic,[5] while the majority of CSOs actively operating in the country receive grants, including from international organisations and foreign donors.[6]

11. Prior to 2024, other Laws were perceived as pursuing the control of the public debate in civil society in this country of seven million people. For example, the draft law on the media introduced in 2022 evoked strong criticism in civil society and the media community for potentially threatening independent journalism in the country. The Venice Commission recommended a comprehensive revision of this draft law[7] which was withdrawn in March 2024.

B. Creation of a new category of NPOs "performing functions of a foreign representative" in the context of an environment creating chilling effects on the CSO sector

12. The Law (on its content see below) introduced specific regulations concerning the registration of NPOs which are established in the Kyrgyz Republic and are funded by foreign (legal) persons or states (NPOs "performing functions of a foreign representative"), as well as a system of control by the "authorised body" (Ministry of Justice) of activities of the above NPOs. According to the Explanatory Note to the draft law, the latter was "developed to ensure openness, publicity of activities of non-profit organisations, including structural subdivisions of foreign non-profit organisations, as well as non-profit organisations performing functions of a foreign representative and financed from foreign sources".

13. The Explanatory Note also indicates that "[a] significant part of [NPOs], contrary to their constituent documents, interfere in the political life of the state, participating, including through funding, in the organisation and holding of political actions in the Kyrgyz Republic, striving to form public opinion for the adoption of decisions by state authorities that contradict the consistency and purposefulness of state policy for the sustainable development of the country." Similar comments very critical of CSOs in the country were made publicly by the President of the Republic on 2 April 2024 in a social media post[8] where he stated that he had signed the Law

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[2] See, *inter alia*, EU, 2020 Annual Report on Human Rights and Democracy in the World – country reports, p.64.
[3] EU, 2023 Annual Report on Human Rights and Democracy in the World – country reports, p. 64. See also UN HRC Concluding Observations on the third period report by Kyrgyzstan, esp. paras 45-46; 49-50, 9 December 2022, IDEA Kyrgyzstan – country profile, June 2024, CIVICUS Monitor, Update, 25 April 2024.
[4] See Explanatory Note to the Law; see also https://www.rferl.org/a/kyrgyzstan-foreign-agents-chill/32893000.html.
[5] https://www.adb.org/sites/default/files/publication/29443/csb-kgz.pdf
[6] https://www.ohchr.org/en/press-briefing-notes/2024/04/kyrgyzstan-new-law-risks-undermining-work-ngos
[7] Venice Commission, CDL-AD(2023)040, Kyrgyzstan - Opinion on the Draft Law of the Kyrgyz Republic about the media para 102.
[8] https://m.facebook.com/story.php?story_fbid=pfbid0PUeSTmFkxWxtQdwhf7jksTzJKxubNE1XUmgKvqKob2tzfQRXKwCYtCjsJoc2umsZl&id=100036867657324&mibextid=ncKXMA

because "CSOs that have been working in the country for 30 years were not registered anywhere. They were not accountable to anyone. They just opened bank accounts, took money from foreign donors and used it as they saw fit, including for personal purposes. From now on they will be registered with the Ministry of Justice like everyone else. They will open bank accounts. They will start to work openly. There will be no more confusion", adding that there are "CSOs that spread false information and manipulate donors, claiming that they would face persecution if the Law is adopted".

14. A first attempt to amend the 1999 Law on NPOs introducing very similar legislation concerning foreign-funded NPOs in the country dates back to 2013. The then draft law, which had attempted to regulate NPOs which act as "foreign agents" was the subject of a Joint Interim Opinion by the Venice Commission and OSCE/ODIHR.[9] The 2013 Opinion (§§11-12) noted that it was "not clear whether the establishment of these statuses/regimes is truly necessary in a democratic society and proportional to the legitimate aims pursued by the regulation. Should the special statuses/regimes be maintained, the extent and content of the additional obligations imposed on non-commercial organisations need to be carefully reconsidered to avoid that these obligations are disproportionately more cumbersome than those foreseen for non-commercial organisations in general. Advocacy work on issues of public concern, regardless of whether or not it is in accordance with governmental policy, should not be affected, or limited…In the light of the analysis contained in greater detail hereinafter, the relevant stakeholders in the Kyrgyz Republic are recommended to reconsider this Draft Law in its entirety and to not pursue its adoption by the *Jogorku Kenesh"*. The 2013 draft law was finally not adopted by the *Jogorku Kenesh*.[10]

15. The legislative preparatory process (see details below) and the final adoption of the Law have given rise to a series of very strong critical statements and comments by international institutions. Notably, in April 2024 the UN High Commissioner for Human Rights (OHCHR) issued a statement[11] calling on the Kyrgyz authorities to repeal the Law as not in accordance with international human rights standards. The OHCHR noted, *inter alia*, that the Law "grants the authorities extensive oversight of non-commercial organisations and stipulates that NGOs engaging in what are broadly termed 'political activities' and receiving foreign funding must register as 'foreign representatives'. Failure to do so could result in their operations being suspended for up to six months, and possibly forced liquidation." The OHCHR added that "[t]he majority of NGOs actively operating in Kyrgyzstan receive grants, including from international organisations and foreign donors. We are concerned that many of the affected NGOs could feel compelled to close to avoid being stigmatised as 'foreign representatives', exposed to arbitrary checks by the authorities, and having to pay for annual audits. Those that choose to be registered as 'foreign representatives' could end up having to self-censor. This, in turn, would lead to legitimate public advocacy, human rights monitoring and reporting, and discussion of matters of public interest being seriously stifled."[12]

16. During the mission to Bishkek the Venice Commission delegation was informed that as of 10 September 2024 three NPOs were voluntarily registered in the Register of NPOs performing the functions of a foreign representative ("FR"): the "Eurasian Business Club"; the "Business Association ZHIA"; and a UK-based NPO "Fauna and Flore International in the Kyrgyz Republic".

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[9] Venice Commission, CDL-AD(2013)030, Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic; see also CDL-REF(2013)044, Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic.

[10] See also The Diplomat, Kyrgyzstan adopts Law targeting foreign-funded NGOs, 15 April 2024.

[11] OHCHR, Statement of 5 April 2024.

[12] See also UN Special Rapporteurs address to the Government on the draft of the Law, 2 October 2023, EU EEAS Statement, 2 April 2024, Joint Statement by the EU Delegation and the Embassies of Canada, France, Germany, United Kingdom and the US, 14 March 2024, Amnesty International Public Statement, Kyrgyzstan at a Crossroads, 8 February 2024, FIDH et al., Open letter to the Kyrgyz authorities, 20 March 2024, Human Rights Watch, Kyrgyzstan: Veto Law to curb civil society, 15 March 2024. In April 2024, following the passing of the Law, the Open Society Foundations announced the closure of their national foundation in Kyrgyzstan.

It is noted that the third one, under Law No 72 may not be categorised as an FR, since under the Law (on the content of the Law see below) this is not legally established in the Kyrgyz Republic but as a "foreign NPO". Thus, its registration raises issues of legality under the Law. Interlocutors met in Bishkek indicated a new phenomenon of establishment of CSOs which are government-controlled, while some CSOs have been relocated to other (neighbouring) countries or attempt to rebrand their activities in order to not be covered by the Law's "political activities".

17. Indeed, while in Bishkek the Venice Commission delegation noticed the existence of grave fears that such legislative and regulatory measures already have and such fears will certainly grow and have a chilling effect on freedom of association (and expression), which, in turn, may lead to the destruction of the CSO sector in a country which until recently enjoyed a reputation of being a human-rights supporter and a hub of CSOs in the Central Asian region.[13] CSOs stressed during a meeting with the delegation that almost all the CSOs in the Kyrgyz Republic receive funds from abroad and, as a matter of course, participate actively in public discussions concerning various state policies, thus being directly affected by the Law. CSOs play indeed a vital role in the achievement by the Kyrgyz Republic of the UN Sustainable Development Goals which the President of the Republic has stated that his country wishes to reach by 2030 along with 29 more top countries. A large part of the UN development support (22 million USD) is provided to the country through implementing domestic CSOs.[14] At the same time, the delegation of the Venice Commission while in Bishkek noted with interest the statements made by the officials of the Ministry of Justice during their bilateral meeting that the authorities welcome expert discussions on the Law and amendments may be considered by them. They also stated that they do not have the intention to apply the Law in a repressive manner, or to force foreign-funded NPOs to register, and that the application of the Law by the authorities will have no drastic implications for CSOs in the country. Notwithstanding official assurances, it is noted that the Law under scrutiny constitutes part of a general disabling environment for CSOs in the country following, as noted above, a number of other legislative measures, and judicial proceedings, over recent years, which adversely affect the operation, effectiveness and ultimate survival of independent CSOs (including media outlets which often are registered as NPOs) in the Kyrgyz Republic.

III. International standards on freedom of association and of expression

A. General principles concerning freedom of association and of expression

18. Freedom of association is a cornerstone of a vibrant, pluralistic and participatory democracy and underpins the exercise of a broad range of other civil and political rights.[15] The Venice Commission has stressed in a number of previous Opinions[16] that 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, maintaining their independence.[17]

[13] During the mission the Ministry of Justice informed the Venice Commission delegation that there were around 71 000 NPOs in the country, of which around 10 000 were foreign-funded.
[14] Statement by the UN Resident Coordinator in Kyrgyzstan, 17 October 2023.
[15] ODIHR and Venice Commission, CDL-AD(2023)016, Joint Opinion on the draft law of Republika Srpska on the Special Registry and Publicity of the Work of Non-Profit Organizations, para. 16; CDL-AD(2014)046, Joint Guidelines on Freedom of Association, p. 5.
[16] See, for instance, CDL-AD(2017)015, Opinion on the Hungarian Draft Law on the Transparency of Organisations Receiving Support from Abroad, para 15; 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, paras 16-28, 62, 73 and 90.
[17] Venice Commission, CDL-AD(2017)015, Opinion on the Hungarian Draft Law on the Transparency of Organisations Receiving Support from Abroad, para 15.

19. In Europe, the European Convention on Human Rights (ECHR) constitutes a binding human rights instrument for those States which are members of the Council of Europe. While not binding on the Kyrgyz Republic, the guarantee of freedom of association found in Article 11 is similar in scope to that found in the ICCPR. This opinion thus also refers to the ECHR throughout, including relevant case law of the European Court of Human Rights (ECtHR), as a persuasive authority.

20. Members of CSOs, along with the organisations themselves, are endowed with human rights enshrined in international treaties, including the right to freedom of association (Article 11 ECHR, Article 22 ICCPR – to which Kyrgyzstan is a party), the right to freedom of expression (Article 10 ECHR, Article 19 ICCPR) and the right to respect for private life (Article 8 ECHR, Article 17 ICCPR), as well as the right to be free from discrimination (Article 14 of the ECHR and Protocol 12 to the ECHR, Article 26 of the ICCPR). In addition, states are endowed with positive obligations related to these rights and are thus obliged to respect, protect and facilitate the exercise thereof.[18]

21. Freedom of expression, which is enshrined in Article 10 of the ECHR and Article 19 of the ICCPR, is directly linked to freedom of association. The European Court of Human Rights has described this freedom as "one of the basic conditions for the progress of democratic societies and for the development of each individual".[19] Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[20] Also, the UN Human Rights Committee, in its General Comment No. 34, has noted that "freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society."[21]

22. Both ICCPR and ECHR provide for strict conditions for limitations to freedom of association, as well as to freedom of expression. Any such restriction must be prescribed by law in a clear and foreseeable manner, in the pursuit of one of the exhaustively listed legitimate aims, and necessary in a democratic society, which presupposes the existence of a "pressing social need" and respect for the principle of proportionality.

B. International standards concerning (foreign) funding of and reporting by NPOs

23. The 1999 UN Declaration on Human Rights Defenders[22] states that "everyone has the right, individually and in association with others, to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means" (Article 13). The provision does not make any distinction between the sources of funding (i.e. domestic, foreign or international) and makes eligible for access to funding both registered and unregistered associations. Article 6(f) of the 1981 UN Declaration on the Elimination of All Forms of intolerance and of Discrimination Based on Religion or Belief[23] also explicitly refers to the freedom of access to funding, stating that the right to freedom of thought, conscience, religion or belief shall include, inter alia, the freedom "to solicit and receive voluntary financial and other contributions from individuals and institutions".

[18] ECtHR, *Ouranio Toxo and Others v. Greece*, app. no. 74989/01, 20 October 2005, para 37.
[19] ECtHR, *Handyside v. the United Kingdom*, app. No. 5493/72, 7 December 1976, para 49.
[20] ECtHR, *Bédat v. Switzerland*, app. no. 56925/08, 29 March 2016, para 48.
[21] UN HRC General Comment No. 34 – Article 19: Freedoms of opinion and expression, 12 September 2011, para 2.
[22] 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.
[23] UN GA Resolution 36/55, 25 November 1981.

24. In June 2023 the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, issued the *General principles and guidelines on ensuring the right of civil society organizations to have access to resources.*[24] Under the principles contained therein, States notably must abide by Article 22 ICCPR and respect, protect and facilitate the right to seek, receive and use funding and other resources of all associations, without discrimination, ensure that associations are not subject to stigmatization, harassment, threats, and attacks, including on the basis of the sources of their funding, and meaningfully engage with CSOs when adopting any measures affecting their right to seek, receive and use resources.

25. Since 2012, the Venice Commission has had an opportunity to analyse several national legal acts related to the foreign funding of associations in its country-specific Opinions. Those Opinions related to legislation adopted in the Russian Federation,[25] Hungary[26] and Georgia[27] and the legal acts considered in the Republika Srpska[28] and in the Kyrgyz Republic itself.[29] The Venice Commission has also issued general studies dealing with the right to freedom of association[30] and with the funding of associations.[31]

26. Associations enjoy the right to receive funding for their activities from public or private sources, including foreign and international funding.[32] While the Venice Commission has accepted that "it is justified to require the utmost transparency in matters pertaining to foreign funding"[33] and that some associations, typically political parties, may be prevented from receiving foreign funding, it has also stressed that freedom to seek, receive and use resources, including resources from foreign and international sources, belongs among the 11 guiding principles in the area of the right to freedom of association.[34]

27. The Commission recalls that freedom of association, including the specific derivative right of associations to seek resources, may be restricted only under the three cumulative conditions foreseen notably in Article 11(2) of the ECHR and Article 22(2) of the ICCPR, i.e. the restriction must be prescribed by law (condition of legality, including the requirements of foreseeability and accessibility); the restriction must pursue at least one of the legitimate aims indicated in Article 11(2) ECHR and Article 22(2) ICCPR (the condition of legitimacy), and the restriction must be necessary in a democratic society to achieve that legitimate aim (the condition of necessity requiring also proportionality).[35]

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[24] UN GA Doc. A/HRC/53/38/Add.4, 23 June 2023.

[25] Venice Commission, CDL-AD(2014)025, Russian Federation - 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; Opinion No. 1014/2020, CDL-AD(2021)027, Russian Federation - Opinion on the compatibility with international human rights standards of a series of bills introduced by the Russian State Duma between 10 and 23 November 2020 to amend laws affecting "foreign agents", 6 July 2021.

[26] Venice Commission, CDL-AD(2017)015, Hungary - Draft Law - On the Transparency of Organisations Receiving Foreign Funds, 20 June 2017.

[27] CDL-PI(2024)013, Urgent Opinion on the Law of Georgia on Transparency of Foreign Influence, 21 May 2014.

[28] Venice Commission and ODIHR, CDL-AD(2023)016, Joint Opinion on the draft law of Republika Srpska on the Special Registry and Publicity of the Work of Non-Profit Organizations, 13 June 2023.

[29] Venice Commission, CDL-AD(2013)030, Joint Interim Opinion on the Draft Law amending the Law on non-commercial organisations and other legislative acts of the Kyrgyz Republic, 16 October 2013.

[30] Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, 17 December 2014.

[31] Venice Commission, CDL-AD(2019)002, Report on Funding of Associations, 18 March 2019.

[32] UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report on *Access to Resources*, UN Doc. A/HRC/50/23, 10 May 2022, para 9.

[33] Venice Commission, CDL-AD(2013)023, Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, para 43.

[34] Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, para 32.

[35] Venice Commission, CDL-AD(2019)002, Report on Funding of Associations, paras 9 and 137. A number of Opinions have also dealt with these issues in various countries: Venice Commission, CDL-AD(2024)020, Georgia - Urgent Opinion on the Law of Georgia on Transparency of Foreign Influence; Venice Commission and ODIHR, CDL-AD(2023)016, Bosnia and Herzegovina - Joint Opinion on the draft law of Republika Srpska on the Special Registry and Publicity of the Work of Non-Profit Organizations; Venice Commission, CDL-AD(2021)027, Russian Federation - Opinion on the Compatibility with international human rights standards of a series of Bills introduced to the Russian

28. The Venice Commission has previously concluded "that such a drastic measure, as 'public disclosure obligation' (i.e. making public the source of funding and the identity of the donors) may only be justified in cases of political parties and entities formally engaging in remunerated lobbying activities."[36]

29. It is also recalled that in its judgment in the case of *Ecodefence and Others v Russia*,[37] the ECtHR assessed the Russian Foreign Agents Act 2012, holding that the introduction of a new category of "foreign agent" organisations, along with the onerous auditing and reporting obligations and the imposition of excessive and arbitrary fines, have resulted in the applicant organisations being subjected to measures that were not deemed necessary in a democratic society.

30. In this context, the judgment of the Court of Justice of the European Union ("CJEU") in case C-78/18 is highly relevant. Having assessed the Hungarian Law on the transparency of organisations which receive support from abroad, the CJEU held that the legislation requiring certain civil society organisations receiving support from abroad beyond a certain threshold to register, declare, and publish their funding sources and allowing for penalties in case of non-compliance was discriminatory and unjustified, resulting in violation of the EU primary law.[38]

IV. National legal framework

31. Under Article 36 of the Constitution of the Kyrgyz Republic, as amended in 2021,[39] "Everyone has the right to freedom of association", while Article 8 (1) of the Constitution provides that "Political parties, trade unions and other public associations may be created in the Kyrgyz Republic to implement and protect the rights, freedoms and interests of a human and a citizen". The Constitution furthermore guarantees other relevant human rights and freedoms, such as the right to freedom of expression, freedom of speech and the press (Article 32(2)), the right to privacy (Article 29) and the prohibition of discrimination (Article 24(1)).

32. In addition, the principle of protection of human rights and freedoms is enshrined in Article 23 of the Constitution which provides also for conditions on which restrictions to human rights may be foreseen. Notably, under Article 23(2) "[t]he rights and freedoms of a human and a citizen may be limited by the Constitution and laws to protect national security, public order, protect the health and morals of the population, protect the rights and freedoms of others. … The restrictions imposed must be proportionate to the stated objectives, while under Article 23 (3) "[i]t is prohibited to adopt by-law acts restricting the rights and freedoms of a human and a citizen".

33. By virtue of Article 6(3) of the Constitution of the Kyrgyz Republic, "universally recognised principles and norms of international law, as well as international treaties entered into force in accordance with the legislation of the Kyrgyz Republic, are an integral part of the legal system of the Kyrgyz Republic". Moreover, Article 55 of the Constitution provides that "The Kyrgyz Republic recognises and guarantees the rights and freedoms of a human and a citizen in accordance with the generally recognised principles and norms of international law, as well as international treaties that have entered into force in the manner prescribed by law, to which the Kyrgyz Republic is a

State Duma between 10 and 23 November 2020, to amend laws affecting "foreign agents"; Venice Commission and ODIHR, CDL-AD(2018)013, Hungary - Joint Opinion on the Provisions of the so-called "Stop Soros" draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration); Venice Commission, CDL-AD(2016)020, Russian Federation - Opinion on federal law no. 129-fz on amending certain legislative acts (Federal law on undesirable activities of foreign and international non-governmental organisations).

[36] Venice Commission, CDL-AD(2019)002, Report on Funding of Associations, para. 106.

[37] ECtHR, *Ecodefence and others v. Russia*, Appl. no. 9988/13+, 14 June 2022.

[38] CJEU, C-78/18 - *Commission v Hungary (Transparency of associations),* 18 June 2020.

[39] Official text of the Constitution.

party". The Kyrgyz Republic is bound by the International Covenant on Civil and Political Rights (ICCPR), having acceded to it on 7 October 1994 (in force as from 7 January 1995), which enshrines, *inter alia*, freedom of association in Article 22.[40] The Kyrgyz Republic is also a party to the CIS Convention on Human Rights and Fundamental Freedoms, which guarantees the same right in Article 12.

V. Analysis of the Law

A. Legislative background and content of the Law

1. Legislative background

34. In February 2021 a revised draft law "on the Constitution of the Kyrgyz Republic" contained a draft Article 8(4) providing that "public associations shall ensure transparency of their financial and economic activities". This draft law was the subject of a Joint Opinion by the Venice Commission and OSCE/ODIHR[41] which underlined (para. 137) that "the aim of 'enhancing transparency' of civil society would by itself not appear to be a legitimate aim according to international human rights instruments".[42] It was thus recommended "to remove the reference to transparency of public associations' financial and economic activities and allow for legislation to set the standards for reporting and accountability obligations of associations, in accordance with international law and good practice". Current Article 8(4) of the Constitution reads: "Political parties, trade unions and other public associations ensure the transparency of their financial and economic activities".

35. As regards the Law on NPOs, it was adopted on 15 October 1999,[43] replacing an older Law on public associations adopted in 1991 and was then amended several times. In June 2021 the 1999 Law on NPOs was amended and Article 17 ("Openness of a non-profit organisation") provided for certain financial reporting obligations of NPOs which included: submission to competent authorities of information concerning receipts, size and composition of property, as well as relevant annual reports to the tax authorities. In its 2022 Concluding Observations on the third period report by the Kyrgyz Republic[44] the UN Human Rights Committee expressed "deep concerns about the Law on Non-Profit Organisations, adopted in 2021, which imposes unreasonable and burdensome reporting requirements on non-governmental organisations…". It called on the Kyrgyz Republic to "revise the provisions of the Law on Non-Profit Organizations to bring it into full compliance with the provisions of articles 19, 22 and 25 of the Covenant. It should ensure that any legislation governing public associations and NGOs does not lead in practice to undue control over or interference in the activities of NGOs".

36. A draft law on NPOs was tabled in the *Jogorku Kenesh* on 2 November 2022 by the Presidential Administration of the Kyrgyz Republic and posted on the Unified portal for public discussion of draft regulatory legal acts of the Kyrgyz Republic. On 21 November 2022, a draft

[40] Article 22 of ICCPR reads: "1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right…."
[41] Venice Commission and ODIHR, CDL-AD(2021)007, Joint Opinion on the Draft Constitution of the Kyrgyz Republic.
[42] See e.g., Venice Commission and ODIHR, CDL-AD(2018)004, Joint Opinion on Draft Law No. 140/2017 of Romania on Amending Governmental Ordinance No. 26/2000 on Associations and Foundations (16 March 2018), para. 64. See also Venice Commission and ODIHR, Joint Guidelines on Freedom of Association, para 224, which states that "[t]he need for transparency in the internal functioning of associations is not specifically established in international and regional treaties owing to the right of associations to be free from interference of the state in their internal affairs. However, openness and transparency are fundamental for establishing accountability and public trust. The state shall not require but shall encourage and facilitate associations to be accountable and transparent".
[43] Закон Кыргызской Республики № 111 «О некоммерческих организациях», 15 октября 1999 г.
[44] UN HRC, Concluding Observations on the third period report of Kyrgyzstan, 9 December 2022, paras 49-50.

law amending several legal acts of the Kyrgyz Republic (Law on Non-Profit Organizations, Law on state registration of legal entities persons, branches/representative offices, and the Criminal Code of the Kyrgyz Republic), tabled by the MP Ms Nadira Narmatova, was also posted on the Unified portal for public consultation. At the request of the Akyikatchy (Ombudsperson) of the Kyrgyz Republic, the two drafts were assessed by the OSCE-ODIHR,[45] which identified serious deficiencies in the two drafts and recommended not to pursue the adoption of either of them. The same recommendations were provided by CSOs assessing the drafts.[46]

37. The Law under scrutiny originates in the latter draft law which, with some revisions, was formally submitted on 19 May 2023 by Ms Narmatova and other MPs to the *Jogorku Kenesh*.[47] It was assessed by the Cabinet of Ministers on 19 June 2023[48] and passed the first reading in the *Jogorku Kenesh* on 25 October 2023.[49] In the subsequent discussions in late 2003 and early 2024, several revisions of the draft law were accepted, mostly upon the proposals from the members of the *Jogorku Kenesh*. Most importantly, Article 2 of the draft law, which sought to amend the Criminal Code (introducing a new offence of the Establishment of a non-profit organisation infringing on the personality and rights of citizens – Article 200-1) was dropped. The revised draft, now only amending the Law on NPOs, was adopted by the J*ogorku Kenesh* in the second reading on 22 February 2024[50] and in the third reading on 14 March 2024. It was signed by the President of the Kyrgyz Republic, on 2 April 2024 and entered into force, in line with its Article 2, ten days after its publication in the Official Gazette, on 15 April 2024.

2. Introduction of the legal concept of a NPO "performing functions of a foreign representative"

38. The Law amended Article 2 of the Law on NPOs introducing the new legal concept of a *non-profit organisation performing functions of a foreign representative* (некоммерческая организация, выполняющая функции иностранного представителя - hereinafter "FR"). Under this definition**,** FR is "a non-profit organisation established in the Kyrgyz Republic which receives funds and other property from foreign states, their state bodies, international and foreign organisations, foreign citizens, stateless persons or persons authorised by them receiving funds and other property from the specified sources (with the exception of open joint-stock companies with state participation and their subsidiaries) (hereinafter referred to as foreign sources), and which participates, including in the interests of foreign sources, in political activities carried out on the territory of the Kyrgyz Republic".

39. The said provision also provides that a "non-profit organisation is recognised as participating in political activity carried out on the territory of the Kyrgyz Republic if, regardless of the goals and objectives specified in its constituent documents, it participates (including through financing) in the organisation and conduct of political actions for the purpose of influencing the adoption of decisions by state bodies aimed at changing the state policy they are pursuing, as well as in the formation of public opinion for the said purposes".

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[45] Opinion-Nr. NGO-KGZ/451-452/2022, Urgent Interim Opinion on The Draft Law "On Non-Profit Non-Governmental Organizations" And Draft Amendments On "Foreign Representatives", 12 December 2022.

[46] See, for instance, ОФ «Гражданская Платформа», Анализ к проекту закона об иностранных агентах, 29. 11. 2022 (online at https://platforma.kg/our-priorities/2022/analiz-k-proektu-zakona-ob-inostrannyh-agentah/); and Адилет, Предложения и рекомендации к проекту Закона Кыргызской Республики «О внесении изменений в некоторые законодательные акты Кыргызской Республики (Закон Кыргызской Республики «О некоммерческих организациях», Закон Кыргызской Республики «О государственной регистрации юридических лиц, филиалов (представительств)», Уголовный кодекс Кыргызской Республики)», 5. 12. 2022 (online at https://adilet.kg/ky/tpost/lk12hsn471-predlozheniya-i-rekomendatsii-k-proektu).

[47] No. 6-7100/23, О проекте Закона «О внесении изменений в некоторые законодательные акты Кыргызской Республики (Закон Кыргызской Республики «О некоммерческих организациях» филиалов (представительств) и в Уголовный кодекс Кыргызской Республики»)», 19 мая 2023 г. (online at https://kenesh.kg/ru/bills/634426%20).

[48] Распоряжение Председателя Кабинета Министров Кыргызской Республики № 290, 19 июня 2023 г.

[49] Постановление Жогорку Кенеша Кыргызской Республики № 1528-VII , 25 октября 2023 г.

[50] Постановление Жогорку Кенеша Кыргызской Республики № 1896-VII, 22 февраля 2024 г.

40. The Law also introduced a definition of *political activity*, defining it as "activities in the sphere of state structure, protection of the foundations of the constitutional system of the Kyrgyz Republic, protection of sovereignty and ensuring territorial integrity, legality, law and order, state and public security, defence, foreign policy, socio-economic and national development". It further specifies that a political activity may take on the following forms:

"*- participation in the organisation and holding of public events in the form of meetings, rallies, demonstrations, marches or pickets, or various combinations of these forms, organising and conducting public debates, discussions, speeches;*
- participation in activities aimed at obtaining a certain result in elections, referendums, in the monitoring the conduct of elections, referendums, the formation of election commissions, commissions for conducting referendums, in the activities of political parties;
- public appeals to government bodies, local authorities local governments, their officials, as well as other actions that influence the activities of these bodies, including the adoption, amendment, repeal of laws or other regulatory legal acts;
- distribution, including using modern information technologies, of opinions on decisions made by government bodies and policies pursued;
- the formation of socio-political views and beliefs, including by conducting public opinion polls and publishing their results or conducting other sociological research;
- involvement of citizens, including minors, in the said activity.
Political activity does not include activities in the field of science, culture, art, health care, protection of citizens' health, social support and protection of citizens, social support for the disabled, protection of motherhood and childhood, promotion of a healthy lifestyle, physical education and sports, protection of flora and fauna, as well as charitable activities".

3. Specific legal obligations and control of FRs

41. In addition, a new Article 17[1] was introduced in the Law on NPOs entitled "Openness of a non-profit organisation performing the functions of a foreign representative". This provision provides for a number of specific, additional obligations for FRs, and a system of state oversight and sanctioning in case of violations of the new regulations which may be summarized as follows:

Registration of FRs: FRs shall be obliged to submit an application to the "authorised body" (Ministry of Justice) for their inclusion in the Register of FRs which will be maintained by the former. Information contained in the Register shall be published on the official website of the "authorised body".

Information on FRs' materials: Materials produced and (or) distributed by FRs included in the Register, including through the media and (or) using the Internet, must be accompanied by an indication that these materials (information) were produced, distributed and (or) sent by a FR;

Annual audit reports: FRs shall annually submit to the "authorised body" an audit report of an independent auditor.

4. Sanctions and remedies

42. In case of violation by a FR of the above-mentioned obligations, the "authorised body" shall send a *written notice* indicating the violations committed and the period for their elimination, which shall not exceed one month. In case a FR fails to eliminate violations specified in the notice, the authorised body shall *suspend* its activities by its decision for a period of no more than six months. In case of suspension of activities of a FR, it is prohibited to use bank deposits, with the exception of settlements for business activities, employment contracts, compensation for losses caused by its actions, payment of taxes, fees and fines. If within the established period of suspension, the FR eliminates the violations specified in the

notice, it resumes its activities. If the FR fails to eliminate the violations specified in the notice, the "authorised body" shall apply to the court for *liquidation* of the legal entity in accordance with Article 96 of the Civil Code.

43. As for remedies, the decision to suspend the activities may be appealed in accordance with the Law "On the Fundamentals of Administrative Activity and Administrative Procedures".[51] Legal experts who met the Venice Commission delegation in Bishkek indicated that under this Law an appeal before a court may not be lodged directly but only after an internal (administrative) appeal of the Minister of Justice's decision. The filing of a complaint in accordance with the procedure established by this Law does not suspend the execution of the contested decision.

44. Lastly, Article 17[1] also contains another new provision concerning the c*ontrol of activities of NPOs*.[52] Under this provision, the "authorised body" in the field of state registration exercises control over the compliance of the activities of a FR with the goals provided for in its constituent documents and the legislation of the Kyrgyz Republic. For this purpose, the "authorised body" has the right to:
- request from the FR governing bodies their administrative documents;
- request and receive information on financial and economic activities of FRs from state statistics bodies, tax authorities and other state supervision and control bodies, as well as credit and other financial organisations;
- send their representatives to participate in events organised by the FR;
- conduct compliance checks on the activities of NPOs, including the expenditure of funds and use of other property, for the purposes provided for in their constituent documents, in the manner established by the "authorised body".

5. Cabinet of Ministers Regulation of 27 August 2024

45. By Resolution No 518 of 27 August 2024 the Cabinet of Ministers approved its Regulation "on the procedure for maintaining the Register of NPOs performing the functions of a foreign representative and conducting an audit of their activities" (hereinafter "CabMin Regulation", CDL-REF(2024)040). On 9 September 2024, when the Regulation entered into force, the Minister of Justice issued Order No 169 "On Measures for the Implementation of the Cabinet of Ministers Resolution No 518". It contains an application template for NPOs to be registered as FRs, a template for NPOs' applications to be excluded from the Registry, and a table showing the fields of information contained in the Registry.

46. It is noteworthy that the CabMin Regulation goes beyond clarifying procedural details for the application of Law No. 72 raising issues of legality. In fact, it goes beyond the scope set by the provisions of the Law,[53] reinforcing control of and intrusiveness into FRs, expanding the powers of the executive and prosecutors in this domain, and making the relevant procedures very cumbersome and lengthy.

47. Notably the Regulation provides the following: Under §8 the FR-related information on the Register does not include only the FR name, and "information about the founders and director" (as per new Article 17[1] of the Law) but also, among others, "bank account details" and

[51] Закон Кыргызской Республики № 210 Об основах административной деятельности и административных процедурах, 31 июля 2015 г.
[52] "A non-profit organisation is a voluntary self-governing organisation established by individuals and (or) legal entities on the basis of commonality of their interests for the realisation of spiritual or other non-material needs in the interests of its members and (or) the whole society, for which profit-making is not the main purpose of activity, and the profit received is not distributed among members, founders and officials" (Article 2 of the Law). The Law refers to control of NPOs, while the implementing Cabinet Regulation (§34) refers to control of NPOs performing the functions of a foreign representative.
[53] Under Article 6.2 of the Law on Normative Legal Acts, "a normative legal act must not contradict a normative legal act that has a higher legal force in comparison with it". See also ICNL, Analysis of the implementing Regulations to the Law on Foreign Representatives, 17 September 2024.

"information about employees". This list of information data under §8 in fact duplicates information that all legal entities (including NPOs) have to report to the tax authorities under the State Tax Service Order on the Registry of all Employed Staff of all Legal Entities of 31 July 2024.[54] The required information concerning a FR's employees was detailed by the Minister of Justice Order No 169 of 9 September 2024: "surname, first name and patronymic; PIN; position held; details of the order on appointment of the employee/contract".[55];[56]
Under §25 a FR may be excluded from the Register (deregistered) only if during one year before the relevant application it did not receive foreign funds or if during one year it did not carry out "political activities";
Under §27 the "authorized body" has a period of sixty days to verify the information and issue a decision concerning a FR's application for exclusion from the Register;
Under §35.2 State bodies (reportedly this will be in practice the Ministry of Culture) will be competent to control the (labelling of) materials produced and/or distributed by FRs;
Under §36 the "authorized body" may conduct inspections of FRs when it receives "appeals" (without specifying the form and manner) from government bodies, local authorities and media regarding violations of the Law;
Under §37 such appeals may be transmitted for further control and action to tax authorities (in cases concerning "financial transparency"), to the Ministry of Culture (in cases concerning the materials produced/disseminated by FRs), the Prosecutor's Office (in cases concerning participation in political activities) for investigation and "issuance of an appropriate conclusion", or to "relevant authorized state bodies" (in cases concerning conformity of a FR's activities with its statutory goals.;[57]
Under §40 violations concerning the materials of FRs are considered by the "authorized body" to be eliminated only after confirmation by the Ministry of Culture.

B. Legislative process – public consultation

48. The draft law was posted on the official website of the *Jogorku Kenesh* for the procedure of public discussion but following the public discussion, as noted in the Explanatory Note, "the proposals were not taken into account and no comments were received". In December 2022 Adilet, a legal clinic in Bishkek, one of the CSOs to which the Law will apply, had sent in their proposals on the earlier version of the draft law, maintaining it was virtually identical to the 2013 draft law. Adilet claim that none of their proposals were considered.[58] In October 2023 three UN Special Rapporteurs submitted a communication[59] to the Government of the Kyrgyz Republic urging to "refrain from approving the draft law in its current form", and encouraging them "to consult broadly with all sectors of civil society to develop a new comprehensive law, which ensures an enabling environment for civil society, and which complies with the international human rights obligations and best practices".

49. Moreover, the Commission is not aware of any actual risk assessment or an impact assessment of the draft law which could usefully analyse and examine with particular scrutiny its

[54] Issues of legality also arise under Article 67.4 of the Law "On Banks and Banking Activity", which reads: "information constituting a banking secret shall be provided to any other persons, [except for financial intelligence agencies and the authorised tax authority], exclusively on the basis of a judicial act". In accordance with Article 2.3 of the same Law, "in cases of conflict between the norms of [the KR Law "On Banks and Banking"] and the norms of other laws of the Kyrgyz Republic, the norms of [the KR Law "On Banks and Banking"] shall apply to regulate banking legal relations".
[55] Also, under §31 of the CabMin Regulation FRs are obliged to notify within seven calendar days the "authorised body" of the hiring or dismissal of employees. CSOs that met the Venice Commission delegation in Bishkek noted that a number of CSO employees have already resigned in fear of having their names (publicly) linked to FRs.
[56] In this context it also noted that under Article 63 of the Constitution, "The state guarantees everyone the protection of personal data. Access to personal data of citizens and their receipt are carried out only in cases provided for by law".
[57] It is noted that the control by the above institutions is not foreseen by the Law while this new competence granted by the CabMin Regulation to the Prosecutor's Office raises specific issues of legality since this competence is not provided for by the 2021 Constitutional Law "On the Prosecutor's Office".
[58] https://adilet.kg/ky/tpost/lk12hsn471-predlozheniya-i-rekomendatsii-k-proektu.
[59] UN Special Rapporteurs address to the Government, 2 October 2023.

impact on the civil society sector. Such an impact assessment could also explain why the existing NPO reporting obligations, including financial ones, would be insufficient. In addition, it appears that there has been no assessment of compatibility of the draft law with international standards during the legislative process, which might have been expected, especially given the background and the 2013 assessment by the Venice Commission and OSCE/ODIHR of a very similar draft law.[60]

50. During the mission to Bishkek the Venice Commission delegation was informed that on 17 October 2023 the *Jogorku Kenesh* had held public hearings on the draft law after its adoption in its first reading by the Parliamentary Committee on Constitutional Legislation. Certain CSOs that the delegation met reported their participation in the above hearing along with their deep disappointment that their proposals were not taken into account during the further elaboration of the draft law. The only proposal that led to a modification was the one concerning the removal of the aforementioned draft provision concerning criminal sanctions on NPOs, which took place at the second reading on 22 February 2024.

51. The Venice Commission notes in this context that serious concerns about complete lack of public consultation exist with regard to the Cabinet Resolution and Regulation of 27 August 2024 on the Register maintenance procedure. Under Article 22 of the Law "On Normative Legal Acts" "draft normative legal acts directly affecting the interests of citizens and legal entities [...] are subject to public discussion by means of posting on the official website of the norm-making body". Thus, the complete lack of public consultation in this case raises serious issues of conformity with a clear legal obligation.

52. In conclusion, the Venice Commission has doubts whether the Law's public consultation process was meaningful, while the complete absence of public consultation concerning the implementing Cabinet Regulation whose provisions went beyond the Law violated both international standards and national law. The procedure of the adoption of the Law and of the subsequent Regulation, which undoubtedly qualify as complex, comprehensive and very controversial, does not comply with standards of the principle of legality, an essential element of the Rule of Law. The Commission has repeatedly stressed the importance of public debates and meaningful consultation with civil society. This is particularly important when adopting laws and regulations which have widespread impact and affect the nature of the societal fabric and fundamental elements concerning the operation of CSOs in a country.

C. Compliance of the Law with the conditions of legality, legitimacy, necessity and proportionality

53. The Law (accompanied by the CabMin Regulation) interferes with and severely limits freedom of association, as well as other human rights and fundamental freedoms, such as freedom of expression and the right to privacy.[61] Such an interference can only be legally justified if it fulfils certain conditions foreseen by international human rights instruments, notably ICCPR to which the Kyrgyz Republic is a party, and by the aforementioned Article 23 of the Constitution of the Kyrgyz Republic. These conditions are threefold and encompass the conditions of legality, legitimacy, and necessity/proportionality. The condition of legality is met when the restriction is prescribed by law, i.e., it has a legal basis and this legal basis is precise, certain and foreseeable, making it possible for natural and legal persons to understand which acts are expected or prohibited to them.[62] Under the condition of legitimacy, restrictions need to pursue one of the

[60] Venice Commission, CDL-AD(2013)030, Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic.
[61] "[F]undraising activities are protected under article 22 of the [ICCPR], and funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with article 22." see Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/23/39, 24 April 2013, para 16.
[62] ECtHR (GC), *Hasan and Chausch v. Bulgaria*, appl. No. 30985/96, 26 October 2000, para 84; ECtHR, *Aliyev and others v. Azerbaijan,* appl. No. 28736/05, 18 December 2008, para 35.

legitimate aims indicated in the relevant instruments. Under the condition of necessity/proportionality, restrictions must be necessary in a democratic society to achieve the legitimate aim and they also have to be proportionate to that aim.[63] All the three conditions need to be met cumulatively. At the same time, measures restricting freedom of association must not be discriminatory in nature or effect. These points are analysed below.

1. Legality

54. The condition of legality posits that any restrictions imposed upon human rights and fundamental freedoms need to be prescribed by law. This means that there must be a law foreseeing the restriction (presence of the legal basis) and that this law must be accessible, clear and foreseeable. Thus, it must enable the (legal or physical) persons concerned to regulate their conduct (quality of the legal basis) and limit the discretion of the state to impose arbitrary rules. According to the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, adopted in 1984 and considered to constitute an authoritative interpretation of the ICCPR,[64] the condition of legality also entails that "laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable" (para 16) and that "adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights" (para 18).

55. The Law under examination herein, as well as the Law on NPOs itself, are undoubtedly "laws" in the sense of Article 22(2) of the ICCPR, 11(2) of the CIS Convention and Article 23(1) of the Constitution. Secondary legal acts issued by executive organs, such as the Ministry of Justice or the Cabinet of Ministers (cf. above-mentioned Regulation of 27 August 2024), would, by contrast, not qualify as such and while they may provide details on the implementation of the legislation, they may not introduce further restrictions of human rights which are not provided for by statutory legislation. Also, it is noted that Article 23(3) of the Constitution provides that *"the adoption of by-laws restricting human and civil rights and freedoms shall be prohibited".*

56. As regards the quality of the legal basis, the Venice Commission notes that the Law seeks to define a new "basic term": a NPO performing functions of a foreign representative. Thus, a NPO is considered to perform functions of a foreign representative, if three conditions are met cumulatively: a) the NPO is established in the Kyrgyz Republic; b) the NPO receives money from foreign sources; c) the NPO is involved in political activities in the territory of the Kyrgyz Republic. This definition is almost identical to that contained in the 2013 draft law (which used the term "foreign agents" instead of "foreign representatives"), and very similar to those contained in certain other national legal acts, such as the Law on Non-Commercial Organisations of the Russian Federation.

57. The Venice Commission notes that whereas the condition of the establishment in the Kyrgyz Republic seems *prima facie* clear, the definition of "structural divisions of foreign non-profit organisations" now introduced by the Law,[65] seems to suggest that foreign NPOs will only be able to operate in the territory of the Kyrgyz Republic through their structural divisions established under the Kyrgyz legislation. However, whether the Law on NPOs, as amended, truly limits the operation of foreign and international NPOs in the Kyrgyz Republic, conditions the operation on the establishment of a structural division, remains somewhat unclear, as the Law on NPOs does

[63] See also UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, General principles and guidelines on ensuring the right of civil society organizations to have access to resources, esp. Principle 4 on Restrictions on associations' right to seek, receive and use resources must meet requirements, UN GA Doc. /HRC/53/38/Add.4, 23 June 2023.

[64] UN Doc. E/CN.4/1985/4, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1984.

[65] "Structural divisions of foreign non-profit organizations - branches and representative offices of foreign non-profit organizations, subject to state registration and acquiring legal capacity on the territory of the Kyrgyz Republic from the date of entry into the register of branches and representative offices of international organizations and foreign non-profit organizations of information about the corresponding structural unit in the manner prescribed by the legislation of the Kyrgyz Republic".

not explicitly prohibit such direct operation (although some legal experts that the Venice Commission delegation met submitted that this was the case).[66]

Foreign sources

58. Foreign sources are defined by the Law as "funds and other property from foreign states, their state bodies, international and foreign organisations, foreign citizens, stateless persons or persons authorised by them, receiving funds and other property from the specified sources (with the exception of open joint-stock companies with state participation and their subsidiaries)" (Article 2 of the Law on NPOs, as amended by the Law). Under this open-ended provision, no minimal amount of foreign funding is required, which means that a single euro provided from abroad is sufficient for the condition to be met. There is also no distinction made between various foreign sources. This makes the above provision unclear and unforeseeable.

59. In its Report on Funding of Organisations, the Venice Commission has stressed that "a distinction should be made between foreign States and international organisations: if a risk of inappropriate political influence in the pursuit of foreign interests may at times be argued with respect to financial contributions to associations by the first, the same may not be said to be true in respect of international organisations to which the recipient State is a party or of which it is actively seeking membership. By joining an international organisation, a State proclaims to share its values and objectives and participates in the definition of the strategies and actions, including possibly through financing of eligible NGOs. Allocations of funds by an international organisation to a domestic NGO cannot therefore be seen, in this context, as pursuing 'alien' interests".[67] The Law does not make any distinction between the various types of foreign funding. This, together with the absence of any minimal amount of foreign funding, again makes it highly likely that the condition would be met by the vast majority of, if not all, NPOs operating in the Kyrgyz Republic.

Political activities

60. Political activities are defined as "activities in the sphere of state structure, protection of the foundations of the constitutional system of the Kyrgyz Republic, protection of sovereignty and ensuring territorial integrity, legality, law and order, state and public security, defence, foreign policy, socio-economic and national development" (Article 2 of the Law on NPOs, as amended by the Law). The Law specifies that "a non-profit organisation is recognised as participating in political activity…if, regardless of the goals and objectives specified in its constituent documents, it participates (including through financing) in the organisation and conduct of political actions for the purpose of influencing the adoption of decisions by state bodies aimed at changing the state policy they are pursuing, as well as in the formation pf public opinion for the said purposes". As noted above, activities in certain fields, such as science, culture or art, are excluded from the definition of political activity.

61. The definition of political activity, and the forms of it cited in the Law are in fact all-encompassing, covering any kind of conduct by an NPO. Virtually any activity carried out by NPOs could be declared political in nature, especially activities related to the promotion and defence of public interests (such as human rights, environmental protection or social inclusion). Since, moreover, the qualification is independent of the goals and objectives set in the NPOs' constituent documents and since, as it seems, a single activity labelled as "political" may be sufficient for the condition to be met, the range of NPOs that can be found to "participate in political activities" again seems extremely broad. Of particular concern is the provision concerning NPOs' participation "in the formation of public opinion". By their nature most NPOs, not least those dealing with human rights protection, aim to reach out and impact upon public opinion, as

[66] ICLN, Law of the Kyrgyz Republic on Amendments to the Law of the Kyrgyz Republic on Non-commercial Organizations (also known as the Law on Foreign Representatives), Updated 4 April 2024, pp. 10-11.
[67] Venice Commission, CDL-AD(2019)002, Report on Funding of Associations, 18 March 2019, para 98.

well as on relevant decisions by state bodies. NPOs do not operate in a vacuum as they are a functional part of civil society uniting people in pursuing certain interests.

62. In conclusion, the Venice Commission finds that the Law fails to fully meet the condition of legality due, mainly, to the vague and potentially all-encompassing definitions contained in it and to the large discretion granted notably to the Ministry of Justice to interpret the amended Law on NPOs and sanction NPOs for non-compliance. This is also true with regard to the subsequent Cabinet of Ministers Regulation whose provisions, contrary to the principle of legality, stretch beyond the provisions of the Law and there is little doubt that its enforcement will lead to arbitrary limitations of NPOs' freedom of association.

2. Legitimacy

63. Restrictions to human rights and freedoms, in order to be lawful, need to pursue one of the legitimate aims prescribed in international human rights instruments to which a State is a party and in its Constitution. Article 22(2) ICCPR, to which the Kyrgyz Republic is a party, makes it possible to impose restrictions on freedom of association "which are prescribed by law, and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others". Also, Article 23(2) of the Constitution stipulates that "human and civil rights and freedoms may be restricted… with the aim of protecting national security, public order, public health and morals, and the rights and freedoms of others".

64. According to the Explanatory Note to the draft law, the latter was "developed in order to ensure openness and publicity of the activities of non-profit organisations, including structural divisions of foreign non-profit organisations, as well as non-profit organisations performing the functions of a foreign representative and financed from foreign sources". In this regards the Venice Commission recalls the Guidelines on Freedom of Association, under which, while openness and transparency are fundamental for establishing accountability and public trust, "the state shall not require but shall encourage and facilitate associations to be accountable and transparent".[68] Therefore, "transparency" (or "openness" in the current case) should not be understood as a legitimate aim in itself, but rather is to be accepted as a means to achieving a legitimate aim. When a State invokes transparency (or "openness") as a justification, its link with one of the legitimate aims indicated in the second paragraph of Article 22 ICCPR (equivalent to Article 11(2) ECHR) must be established. While it may be argued that a State may seek to prevent foreign political influence, this potentially falling under the legitimate aims of protecting national security or public safety, the automatic presumption that any foreign funding, however limited and dispersed, equals foreign influence seems hard to sustain and is of itself insufficient to justify the restrictions provided for by the Law.[69]

65. The Venice Commission furthermore notes that the Explanatory Note to the draft law fails to establish, or even indicate, any link between the alleged interferences by certain NPOs in the political life of the State and foreign funding. In fact, unlike other States having adopted similar legal acts in recent years, in the case under consideration it is not explicitly argued that foreign funding entails undesired foreign political influence. Nor is there any empirical data provided which would substantiate the view that foreign-funded NPOs have a higher propensity of engaging in any type of problematic activities. The lack of a connection of the claim of a legitimate interest with a factual basis for its expressed concern undermines any claim of legitimate basis for this legislation.

[68] Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, para 224.
[69] See also Venice Commission, CDL-AD(2019)002 Report on Funding of Associations, para 97 ff. See also Venice Commission, CDL-AD(2024)020, Georgia - Urgent Opinion on the Law of Georgia on Transparency of Foreign Influence , para 59 ff.

66. The Explanatory Note also indicates that "according to the Ministry of Justice of the Kyrgyz Republic, 18,500 different non-profit organisations are registered in Bishkek alone… A significant part of them, contrary to their constituent documents, interfere in the political life of the state, participating, including through financing, in the organisation and holding of political actions in the Kyrgyz Republic, striving to form public opinion for the adoption of decisions by public authorities that contradict the consistency and purposefulness of state policy for the sustainable development of the country."

67. The Venice Commission underlines that abstract public concern and suspicions about the legality and honesty of financing of CSOs, without providing a substantiated concrete risk analysis concerning any specific involvement of CSOs in the commission of criminal offences, such as corruption or money-laundering may not constitute a legitimate aim justifying restrictions to freedom of association.[70]

68. Also it is to be noted that under Article 25 ICCPR every citizen shall have "the right and the opportunity…[t]o take part in the conduct of public affairs" without any discriminatory distinction. This presupposes and includes free communication of information and ideas about public and political issues among citizens. It requires, at the same time, the full enjoyment and respect for the rights guaranteed in Articles 19 (freedom of expression), 21 (right of peaceful assembly) and 22 (freedom of association) of the Covenant, including (under Article 25) freedom to engage in political activity individually or through political parties and other organisations, freedom to debate public affairs, to criticise and oppose, to publish political material, and to advertise political ideas.[71] In fact, the right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by Article 25 ICCPR.[72]

69. Also, the Venice Commission recalls that it is quite common for associations to play a role in "achieving goals that are in the public interest",[73] for instance goals in the area of human rights, democracy and Rule of Law, and that such activities should not be automatically seen as interference in the activities of state bodies or officials, which is prohibited by Article 5(3) of the Law on NPO and is now accentuated by the new provisions of the Law under scrutiny. It is also recalled that any action against an association and/or its members may only be taken where the articles of its founding instrument are unambiguously unlawful, or where specific illegal activities have been undertaken.[74]

70. In view of the above considerations, the Venice Commission concludes that the Law's purported aim of limiting and restricting foreign-funded NPOs' action and impact on the country's political life and public authorities' decisions may hardly be considered to pursue legitimate aims serving a real and pressing social need in a democratic society.as prescribed by international human rights law.

3. Necessity and proportionality

71. If intended at ensuring legitimate interests, - which, as just stated, is very doubtful -, restrictions imposed upon human rights and fundamental freedoms, such as freedom of association, must respond to a pressing social need and be the least intrusive measure to do so. Restrictions moreover must not impair "the democratic functioning of the society"[75] and the

[70] Venice Commission, CDL-AD(2019)002, Report on Funding of Associations, para 81.
[71] See UN HRC, General Comment No. 25 on Article 25, 27 August 1996, para 25.
[72] Ibid. para 26.
[73] Venice Commission, CDL-AD(2019)002 Report on Funding of Associations, para 9.
[74] Ibid. para 68.
[75] UN Doc. E/CN.4/1985/4, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1984, para 20.

burden to demonstrate that this is not so is upon the State. When adopting restrictions, States enjoy a certain discretion allowing them to take account of their constitutional values, their historical experience and the challenges they face. This discretion reflects the fact that States are the best placed to assess the situation on their territory and decide on the measures to be adopted. At the same time however, States need to take into consideration the importance of the protected human rights and fundamental freedoms which are enshrined in their Constitution and in international treaties by which they are bound, and, when considering restrictions to freedom of association, the significant role played by CSOs in democratic societies.

72. The Venice Commission recalls that foreign funding of associations "may give rise to some legitimate concerns"[76] and that restrictive measures other than a blanket ban may be applied to it. However, in line with international standards, it has always stressed that such measures have to be strictly necessary and proportionate to the legitimate aim, which, as noted earlier, does not appear to exist in the present case. In the Report on Funding of Associations, the Venice Commission describes several measures that States take in this respect (special taxation rules, the need to transfer foreign funds via a specific bank account, the need to use foreign funding for specific purposes, etc.).[77] It also identifies measures that are particularly problematic and where an enhanced burden of proof lies on the State to prove that such measures are truly necessary: the so-called "foreign agents"/"foreign representatives" legislation is one of such measures.

73. Under Principle 4 of the 2023 General principles and guidelines on ensuring the right of civil society organisations to have access to resources,[78] issued by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, "[t]o meet the condition of necessity, authorities must demonstrate that the restriction can truly be effective in pursuing the legitimate aim and be the least intrusive means among those which might achieve the desired objective. The State must also prove that the measure is necessary to avert a real and not a hypothetical threat to one of the grounds for limitation, such as national security or public order." Principle 4 also stresses that "[w]hen assessing the proportionality of a restriction imposed on associations' access to funding, States must examine, in consultation with the civil society sector, whether the measure is excessively burdensome, and whether the nature and severity of the sanctions imposed in case of non-compliance are proportionate to the gravity of the wrongdoing. Restrictions should not impair the essence of the concerned right or be aimed at discouragement and casting a chilling effect to deter its enjoyment."

74. As noted earlier, the Law has four main components, introducing restrictions to freedom of association, encompassing the following: a) the introduction of the category (and label) of an NPO "performing functions of a foreign representative"; b) the introduction of additional legal obligations for such an NPO; c) the regulation of sanctions on such an NPO; and d) the expansion of the competencies of oversight and control by the Ministry of Justice of NPOs. Although interrelated, these four components will be examined separately in order to assess their compatibility with the condition of necessity and proportionality.

Category (and label) of an NPO "performing functions of a foreign representative"

75. The Venice Commission has stressed that States should refrain from imposing negative labels on foreign-funded associations which may stir distrust of the public in those associations and have a chilling effect on their legitimate activities.[79] In this vein, the ECtHR has considered that attaching the label of "foreign agent" to CSOs which received funds from foreign entities, was "liable to have a strong deterrent and stigmatising effect on their operations. That label coloured them as being under foreign control, in disregard of the fact that they saw themselves as members of national civil society working to uphold respect for human rights, the rule of

76 Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, para 221.
77 Venice Commission, CDL-AD(2019)002, Report on Funding of Associations, paras 47-51.
78 UN GA Doc. A/HRC/53/38/Add.4, 23 June 2023.
79 Venice Commission, CDL-AD(2019)002, Report on Funding of Associations, p. 45.

law and human development…"[80] Similarly, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has called upon States to recognise that "regulatory measures which compel recipients of foreign funding to adopt negative labels constitute undue impediments on the right to seek, receive and use funding".[81] Moreover, under Principle 7 of the 2023 General principles and guidelines on ensuring the right of civil society organizations to have access to resources,[82] issued by the same UN Special Rapporteur, "States and state agents must not subject associations to harassment, smear campaigns and other forms of stigmatization, threats, undue audits and other attacks on the basis of the sources of their funding. Receipt of foreign funding as such does not justify the imposition of additional restrictive measures, nor stigmatisation measures such as requiring all associations receiving foreign funding to be labelled as "foreign agents," nor targeting, whether through audit procedures, the imposition of penalties or otherwise". The Venice Commission shares these views.

76. NPOs which are established in the Kyrgyz Republic receive money from foreign sources and are involved in "political activities" in the territory of the Kyrgyz Republic, now constitute a new category, that of "non-profit organizations performing functions of a foreign representative". These NPOs would be included in a separate, public electronic registry and would be required to use this negative label in any material that they produce and disseminate. NPOs that fail to register would be liable to sanctions: The Ministry of Justice could suspend their activities for up to six months without the need of a prior court approval and, after that, request a court to liquidate them (see section below on sanctions).

77. It is noted that the term "foreign representative" replaced the term "foreign agent", which featured in the 2013 version of the draft law. While the new term may be somewhat less pejorative than the earlier one, it still has negative, stigmatising connotations. Arguably it suggests that NPOs with this status serve the interests of a foreign state or organisation rather than the interests of the country and its people.[83] As noted earlier, there is nothing in the Explanatory Note that would justify such a suggestion. Moreover, provided that the category of NPO performing functions of a foreign representative includes all NPOs receiving foreign funding, however minimal this funding is, such a suggestion seems highly implausible.

78. In addition, the term suggesting that certain NPOs serve the interests of foreign entities is in fact stigmatising. Hence its use is very likely to have negative consequences for the reputation and actual activities of such NPOs, stirring distrust and suspicion against them in the public. It implies that these NPOs serve foreign interests and do not work to the benefit of their own target communities or country.

79. Reportedly the majority of NPOs in the Kyrgyz Republic rely entirely on funding from foreign sources, while at the same time foreign funding is diminishing and there is a lack of local financial sources.[84] Hence, there is a valid concern, confirmed during the Venice Commission delegation's visit to Bishkek, that many of the affected NPOs will find themselves compelled to close down to avoid being stigmatised as "foreign representatives", exposed to potentially arbitrary checks by the authorities, and having to pay for annual audits.[85] Also, those NPOs that decide to be registered as "foreign representatives" could end up having to resort to self-censorship. This, in turn, would ruin their legitimate public advocacy, and their essential participation in the public debate, and adversely affect activities concerning the promotion and protection of human rights

[80] ECtHR, *Ecodefence and others v. Russia*, appl. no. 9988/13+, 14 June 2022, para 136.
[81] UN Doc. A/HRC/23/39, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 24 April 2013, para. 20.
[82] UN GA Doc. A/HRC/53/38/Add.4, 23 June 2023.
[83] ICNL, Law of the Kyrgyz Republic on Amendments to the Law of the Kyrgyz Republic on Non- commercial Organizations (also known as the Law on Foreign Representatives), updated 4 April 2024, p. 5.
[84] ICNL, Civic Freedom Monitor, Kyrgyz Republic, updated 23 April 2024.
[85] In April 2024, following the passing of the Law, the Open Society Foundations announced the closure of their national foundation in Kyrgyzstan. During its visit to Bishkek the Commission delegation was informed that this foundation was under liquidation.

and freedoms in the country. Also, although the Law does not directly target news outlets it applies to media rights organisations and NPOs that run several of the prominent independent news websites in the country. Such media which play a role of public watchdog will be prevented from expressing themselves as it can be deemed to be "participating in political activities."

Additional legal obligations for NPOs performing functions of a foreign representative

80. The Law (new Article 17^1) (as complemented by the Cabinet of Ministers' Regulation of 27 August 2024) introduces additional legal obligations for NPOs performing functions of a foreign representative. These obligations are mainly threefold and encompass: a) the obligation to register and provide data concerning the founders and the head to be published in a special public register created for these NPOs, b) disclosing obligations, i.e., the obligation to use the label on all materials and information produced and distributed by such NPOs, and c) reporting obligations, i.e., the obligation to submit annually an audit report of an independent auditor.

81. The Venice Commission first reiterates that the Kyrgyz authorities have failed to show convincingly why certain NPOs – those falling under the category of NPOs performing functions of a foreign representative – should have special legal obligations compared to other legal entities. This in itself seems to constitute a violation of the right to freedom of association and of the principle of non-discrimination. Moreover, some of the additional obligations give rise to further issues of compatibility with international standards. It is noted in this regard that under the 2023 Guidelines on ensuring the right of civil society organisations to have access to resources, issued by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, States should repeal laws and regulatory measures that unduly restrict foreign funding, including, measures requiring additional burdensome and overly intrusive reporting or public disclosure obligations from CSOs seeking to access or use foreign funds.[86]

82. As regards the obligation to register and provide data to be published in the new special electronic Register, the Venice Commission underlines that associations should not be under a general obligation to disclose the names (and addresses) of their members (as it seems to be possible under §8 of the aforementioned Cabinet Regulation), since this would be incompatible with both their right to freedom of association and the right to respect for private life.[87] Article 17^1(1) of the Law indicates that "the Register includes the name of the non-profit organisation, information about the founders and director". Article 17^1(2) however adds that the "procedure for maintaining the Register, including the requirements for the data contained therein shall be established by the authorised body". Thus, it is up to the Ministry of Justice to "specify, by its order, what information a "foreign representative" must submit on its founders and director for inclusion in the register".[88] This was given effect by the aforementioned Order No 169 of 9 September 2024 concerning the implementation of the Cabinet of Ministers Regulation (and Resolution). However, the Commission notes that private information, including personal data, should not be requested and made accessible to the general public, as that would violate the right to privacy (Article 17 ICCPR and Article 29 of the Constitution).[89]

83. The Venice Commission furthermore notes that the Law itself remains silent on the procedure of and requirements for de-registration. It is of concern that such a significant remedial issue for freedom of association and the operation of NPOs was left to be regulated by the Cabinet of Ministers Regulation (§§25-28, on the content see above).

[86] Op. cit. para 50.
[87] Venice Commission, CDL-AD(2019)002, Report on Funding of Associations, para 167.
[88] ICNL, Law of the Kyrgyz Republic on Amendments to the Law of the Kyrgyz Republic on Non-commercial Organizations (also known as the Law on Foreign Representatives), Updated 4 April 2024, p. 6.
[89] See also Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, 17 December 2014, para 164.

84. As regards the reporting obligations, i.e., the obligation to submit an annual audit report of an independent auditor, the Venice Commission recalls and underlines that excessively burdensome or costly reporting obligations, as now established by the Cabinet Regulation, will lead to an environment of excessive State monitoring which is hardly conducive to the effective enjoyment of freedom of association,[90] while an audit should not be tantamount to an inspection or the reconciliation of accounts. Under no circumstances should the audit process result in the harassment of an association.[91] Annual audit involves additional financial costs that especially smaller NPOs may not be able to afford. The International Centre for Not-for-Profit Law (ICNL) has expressed the fear that "as a consequence of this financially burdensome requirement, some N[P]Os will be forced to cease operations owing to a lack of funds to pay for independent audits. Others will have to redirect funds that could have been used to support individuals in need of assistance".[92] Annual audits may thus constitute a serious burden that does not seem to be justified by any special necessity. Such onerous and bureaucratic reporting requirements can eventually obstruct the legitimate work carried out by associations and put in jeopardy their legitimate existence as they become de facto under continuous administrative control.

Sanctions foreseen by the Law

85. The failure by an NPO "performing functions of a foreign representative" to register, or the failure to either indicate the label on the materials and information produced or distributed by it or to submit an annual audit, shall have legal consequences foreseen by Article 17^1(7-10) of the amended Law on NPOs. As noted earlier, these consequences include: a) the issuance by the Ministry of Justice of a written notification; b) the suspension of the activities of the NPO concerned; and c) the liquidation by a court. Under the Joint Guidelines on Freedom of Association, legislation may introduce administrative, civil and criminal sanctions for associations, as for other entities, in case they are in violation of relevant regulations.[93] However, 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.[94]

86. The Venice Commission welcomes that the imposition of any formal sanction is preceded by a warning which shall contain information on the alleged violations and shall provide time (one month) for the NPO concerned to rectify the above irregularities. However, it also stresses that the association should be given ample time to rectify the violation or omission[95] and notes that the period foreseen by the Law, i.e., a period not exceeding one month, may turn out to be unrealistically short, mainly in case of a failure to submit an annual audit. The Venice Commission moreover has doubts whether it should be left to an executive organ, the Ministry of Justice, to make a *prima facie* determination that a certain entity should have registered as an NPO performing functions of a foreign representative. Such a determination requires special expertise and, also, neutrality and impartiality which can hardly be expected to be available in an executive organ.

87. Also, the power of the Ministry of Justice to suspend for a period up to six months the activities of an NPO which fails to eliminate alleged violations of the Law on NPOs gives rise to concerns. It is stressed that under the 2023 Guidelines on ensuring the right of civil society organizations to

[90] See e.g. Venice Commission and ODIHR, CDL-AD(2018)006, Ukraine –Joint Opinion on Draft Law no. 6674 "On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance" and on Draft Law No. 6675 "On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance", para. 40.
[91] Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, 17 December 2014, para 233.
[92] ICNL, Law of the Kyrgyz Republic on Amendments to the Law of the Kyrgyz Republic on Non-commercial Organisations (also known as the Law on Foreign Representatives), updated 4 April 2024, p. 6.
[93] Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, 17 December 2014, para 235.
[94] Ibid. para 237.
[95] Ibid. para 238.

have access to resources, issued by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, "minor infractions, such as the failure to submit or publish financial statements, should never lead to enhanced inspection, suspension or dissolution of an association. Rather, the association should be requested to promptly rectify its situation".[96] Under the said Guidelines "suspensions of an association [may] only be based on grave violations of law, such as potential threats to the security of the state or of certain groups, or to fundamental democratic values, and should only be imposed following a judicial order".[97]

88. The Venice Commission recalls that "sanctions amounting to the effective suspension of activities are of an exceptional nature. They should only be applied in cases where the breach gives rise to a serious threat to the security of the state or of certain groups, or to fundamental democratic principles".[98] It also recalls that a lengthy suspension of activities would otherwise effectively lead to a freezing of the operations of an association, resulting in a sanction tantamount to dissolution.[99] Since the Law makes the suspension possible in case of the non-elimination of any alleged violation and the period of suspension can be rather lengthy, these standards are not really met.

89. The Commission welcomes that the suspension decision may be appealed before a court under the Law on administrative activities and procedures. It however recalls that appeals against sanctions imposed should have the effect of suspending the enforcement of sanctions until the appeals are completed.[100] This is not the case under the Law, thus creating the risk of situations, in which lengthy appeal procedures lead to the de facto disappearance of the association due to frozen accounts or high penalties, even where the appeal is ultimately successful.[101] While in exceptional cases concerning serious crimes or national security interests, the suspending effect might be removed, such a removal shall not be the general rule as is the case under the Law.

90. Lastly, the Venice Commission welcomes that the liquidation of an NPO can only be decided upon by a court, under Article 96 of the Civil Code. It also notes with satisfaction that by virtue of this provision, such liquidation can only take place in case of repeated or serious violations of law or of a systematic implementation of activities contrary to the statutory goals of the legal entity. Indeed, under the Joint Guidelines on Freedom of Association, associations should not be prohibited or dissolved owing to minor infringements. [102] According to the said Guidelines, the burden of proof for violations leading to sanctions on associations should always be on the authorities. This includes providing adequate evidence to support the claim of a violation leading to sanctions. In addition, it is stressed that procedures leading to the imposition of sanctions should be transparent and clear, but do not always need to be accompanied by a high level of publicity. This is to ensure that the public right to information is adequately balanced with the potential damage to the reputation of the association prior to a finding as to its liability or guilt.[103]

New powers of NPO control by the Ministry of Justice

91. By virtue of the Law the Ministry of Justice has obtained certain new powers of control over NPOs. It shall "exercise control over the compliance of the activities of a non-profit organisation with the goals provided for in its constituent documents and the legislation of the Kyrgyz Republic". Doing so, the Ministry of Justice may: a) request from the governing bodies of NPOs their administrative documents; b) request and receive information on financial and economic activities of NPOs from relevant state (and non-state) institutions; c) send its representatives to participate in events held by NPOs; and d) carry out inspections of compliance of the activities of

[96] UN GA Doc. A/HRC/53/38/Add.4, 23 June 2023, para 53.
[97] Idem.
[98] Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, 17 December 2014, para 239.
[99] Ibid. para 255.
[100] Ibid. para 240.
[101] Ibid. para 240.
[102] Ibid. para 253.
[103] Ibid. para 241.

NPOs, with the purposes provided for in their constituent documents (Article 17[1](11)). The Ministry of Justice has also acquired powers mentioned earlier, i.e., the power to adopt specific by-laws or the power to issue a warning, suspend the activities of an NPO or appeal to a court for the liquidation of an NPO.

92. Some of the concerns formulated above apply here as well. For instance, when issuing by-laws the Ministry of Justice needs to make sure that it does not overstep the borders of its lawful discretion and does not act arbitrarily. Or, when requesting and receiving a document from an NPO and information from State institutions, the Ministry needs to ensure that the right to privacy and to the protection of personal data is fully respected (Article 17 ICCPR and Article 29 of the Constitution).[104]

93. In addition, the Venice Commission doubts whether the Ministry of Justice has the capacity to send its representatives to attend meetings of foreign-funded NPOs which, as noted earlier, at the moment amount to around 10 000 in the country. Concerning public meetings, it is usually the task of law-enforcement agencies to ensure order and prevent unlawful acts in such meetings. Their presence tends not to be a general rule but, rather, they are only present if there is serious suspicion of, and information that, such acts could happen or are happening.[105] As regards non-public events of an association, the Venice Commission recalls that under no circumstances should legislation mandate or permit the attendance of State agents at non-public meetings of associations, unless they are invited by the association itself.[106]

94. Concerning the power of the Ministry of Justice to conduct inspections of compliance of the activities of NPOs with the purposes provided for by their constituent documents, the Venice Commission recalls that States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their international obligations. Hence, State bodies should be able to exercise some sort of limited control over non-profit organisations' activities with a view to ensuring compliance with relevant legislation within the civil society sector, but such control should not be unreasonable, overly intrusive or disruptive of lawful activities.[107]

95. The Commission also notes that there should be a presumption in favour of the lawfulness of the establishment of associations and of their objectives and activities, regardless of any formalities applicable for establishment.[108] Consequently, the inspections foreseen by Article 17[1](11) should be exceptional and reserved to situations when there is suspicion of a serious contravention of the legislation, and should only serve the purpose of confirming or discarding the suspicion.[109] Importantly, such inspections should only be permitted upon court order, where there is clear evidence of a possible violation of existing legislation.[110] The Law seems to provide the Ministry of Justice with excessively wide interfering competencies. There is an additional risk that such unscheduled inspections, if not based on clear legal grounds and a legitimizing court

[104] See also, Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, 17 December 2014, para 164.
[105] See also UN HRC General Comment No. 37 (2020) on the right of peaceful assembly (article 21), 17 September 2020, paras 74-95.
[106] Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, 17 December 2014, para 176.
[107] Venice Commission and ODIHR, CDL-AD(2018)006, Ukraine – Joint Opinion on Draft Law No. 6674 "On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance" and on Draft Law No. 6675 "On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance", para. 40; CDL-AD(2023)016, Bosnia and Herzegovina - Joint Opinion on the draft law of Republika Srpska on the Special Registry and Publicity of the Work of Non-Profit Organizations, para 61.
[108] Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, 17 December 2014, para 26.
[109] Ibid. para 231.
[110] Venice Commission, CDL-AD(2013)030, Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic, para 77.

order, could constitute a tool of potential intimidation and harassment in the hands of authorities, which could be used against organisations which voice criticism or dissent.

96. The Venice Commission also notes with serious concern that the grounds for and procedure of conducting the inspections are not indicated in the Law and that no limits on the frequency of such inspections are introduced. The grounds for and procedure concerning inspections were left to and were regulated by the implementing Cabinet of Ministers Regulation (§36ff). No regulation though appears to be in place with regard to the frequency of inspections. The Commission recalls that under the Joint Guidelines on Freedom of Association, to ensure greater transparency and increase regulatory independence, legislation should define the grounds for inspecting associations, the duration of inspections and the documents that need to be produced during inspection.[111] It is also recalled that inspections conducted with the primary purpose of verifying compliance with internal procedures of an association should not be permissible.[112] All the above standards should be expressly incorporated into the Law on NPOs.

97. In view of the preceding analysis, the Venice Commission considers that, should they pursue a legitimate aim, which is more than doubtful, the restrictions introduced by the Law to the freedom of association of foreign-funded NPOs, and NPOs in general, do not meet the condition of necessity and proportionality. The authorities have not provided any convincing argument that these restrictions respond to a pressing social need in a democratic society or that they are the least intrusive possible. If applied, they would rather lead to discouragement and have a serious chilling effect, adversely affecting freedom of association in the country.

D. Access to effective remedies

98. It is recalled that under Article 2(3) ICCPR the Kyrgyz Republic is bound: "(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

99. The Venice Commission recalls that according to the Joint Guidelines on Freedom of Association, associations, their founders and members shall have access to effective remedies in order to challenge or seek review of decisions affecting the exercise of their rights, meaning providing them with the right to bring suit or to appeal against and obtain judicial review of any actions or inactions of the authorities that affect their rights; remedies should be timely and include adequate reparation.[113]

100. The Commission also underlines that independent and impartial judicial review of legal restrictions imposed upon and of non-legal measures against associations that wish to receive and use foreign funding is all the more important as these regulations or measures may serve a political purpose that is alien to the freedom of association. They may be directed against a particular association or group of associations, or against a particular foreign donor or group of donors. This may result in discriminatory restrictions, in arbitrary measures and in abuse of power. In general, that kind of governmental behaviour will be against the legal order of the State concerned, but associations in most cases may only find effective protection if they can rely on a legal remedy by an independent and impartial court with adequate powers to annul such legal

[111] Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, 17 December 2014, para 229.
[112] Ibid. para 178.
[113].Venice Commission and ODIHR, CDL-AD(2014)046, Joint Guidelines on Freedom of Association, Principle 11 and para 36. See also the 2023 Guidelines on ensuring the right of civil society organisations to have access to resources issued by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, cited above.

restrictions or leave them out of application, to prohibit such non-legal measures or take away their effects, or accord damages; and this in fair and speedy proceedings. This confirms the importance of the existence of an independent judiciary in the country. Its absence may create the risk that the discriminatory or unduly restrictive measures will remain in force.[114]

101. New Article 17[1](8) introduced by the Law provides expressly for a judicial remedy only in the case of an NPO suspension decision, which may be appealed in accordance with the Law concerning administrative activities and procedures. The decision to suspend the activities may be appealed in accordance with the Law "On the Fundamentals of Administrative Activity and Administrative Procedures".[115]

102. It is also noted with concern that in light of the failure of the Law (and of the subsequent Cabinet of Ministers Regulation) to meet the condition of legality due to, *inter alia*, its vagueness, this may well provide both the executive and judicial authorities with excessive discretion, in the latter case potentially leading to a consistent rejection of remedial demands of the NPOs affected by the Law. Also, the Law is silent on remedial action that may be taken in cases concerning liquidation or the decisions of the Ministry of Justice related to the aforementioned forms of wide-ranging and intrusive control of NPOs. This situation is compounded by expert reports expressing serious concerns about the independence and impartiality of courts in the Kyrgyz Republic,[116] as well as the above-mentioned political and legal environment which favours limitations over full enjoyment of freedom of association (and of expression), adversely affecting NPOs.

103. In conclusion, the Venice Commission has doubts whether the Law (accompanied by the Cabinet of Ministers Regulation) may be considered to provide an effective remedial scheme, while the sanctions for non-compliance provided for and analysed earlier are harsh and the one concerning suspension of activities is disproportionate.

VI. Conclusion

104. Following a request by the Minister of Justice of the Kyrgyz Republic, the Venice Commission has assessed the Law amending the "Law on Non-Profit Organisations", taking into account where appropriate the implementing Cabinet of Ministers Regulation, which was adopted by the *Jogorku Kenesh* on 14 March 2024, signed by the President of the Kyrgyz Republic on 2 April 2024 and entered into force on 15 April 2024. The text of the Law is quite similar to the draft law discussed in the Kyrgyz Republic in 2013, which was critically assessed by the Venice Commission and OSCE/ODIHR and finally was not adopted. It also bears important similarities to legislation on so-called "foreign agents" laws considered for adoption or adopted in recent years in other countries, such as Bosnia and Herzegovina, Georgia and the Russian Federation.

105. The Venice Commission regrets that the Kyrgyz Republic proceeded to the adoption of the Law, despite the fact that in 2013 the Venice Commission and ODIHR had recommended not to proceed to the adoption of a very similar draft law, and the very strong criticism with regards to the new draft law and its adoption which was expressed by CSOs and international institutions, including UN bodies. Also, it is of concern to the Commission that this Law was adopted with limited public consultation process, although the Law is complex and very controversial, while there was no public consultation over the subsequent Cabinet of Ministers Regulation, as prescribed also by domestic law. Moreover, the authorities have not provided any adequate

[114] Venice Commission, CDL-AD(2019)002, Report on Funding of Associations, 18 March 2019, para 130.
[115] Закон Кыргызской Республики № 210 Об основах административной деятельности и административных процедурах, 31 июля 2015 г.
[116] Notably, in its 2022 Concluding Observations on the third period report by Kyrgyzstan (§37) the UN HRC noted that it was "concerned about reports of the lack of independence and impartiality in the judiciary of the State party, in particular due to the President's involvement in selecting and appointing judges, as well as allegations of political pressure, including in high-profile political cases". See also Freedom House, Nations in Transit 2023; Freedom in the World 2024 (Kyrgyzstan).

justification, including an analysis and concrete data showing convincingly that the introduction of this Law served a real and pressing social need in a democratic society.

106. The Law (and the implementing Cabinet of Ministers Regulation) has introduced into the legal order of the Kyrgyz Republic the category of "non-profit organisations performing functions of a foreign representative", established additional (registration, disclosure and reporting) obligations for such NPOs, introduced a sanctions mechanism applicable in case of alleged violations of such obligations, and strengthened the powers of control by the executive with respect to these NPOs and NPOs in general.

107. The Venice Commission notes that States have the right and, indeed, the obligation to establish the legal framework for the operation of associations. It also notes that they may impose restrictions on freedom of association but such restrictions have to meet the conditions of legality, legitimacy, necessity and proportionality, and non-discrimination which are foreseen by the Constitution of the Kyrgyz Republic and international human rights instruments, notably ICCPR to which the Kyrgyz Republic is a party. The Law under scrutiny is not in compliance with these standards.

108. The Law contains vague and potentially all-encompassing definitions, especially that of NPOs performing functions of a foreign representative and of political activities, and grants very large discretion of sanctioning and control, especially to the Ministry of Justice. This is compounded by the subsequent Cabinet of Ministers Regulation whose provisions notably go beyond the scope of the Law. Thus, neither the Law nor the Regulation are compatible with the condition of legality. The aims pursued by the Law are not clearly stipulated and it is therefore impossible to conclude that the condition of legitimacy is met. Lastly, the Kyrgyz authorities have failed to produce any data substantiating the necessity to introduce a special regulation for NPOs receiving foreign funding and engaging in vaguely defined political activities. Such regulation is therefore incompatible with the right to freedom of association as well as with the principle of non-discrimination. Certain provisions of the Law (and the Cabinet of Ministers Regulation) moreover give rise to concerns about the potential violations of other human rights and fundamental freedoms such as freedom of expression and the right to privacy.

109. The application of the Law (along with the subsequent Cabinet of Ministers Regulation) entails the serious and real risk of stigmatising, silencing and eventually eliminating NPOs in the country receiving even a low part of their funds from abroad. In particular, a real risk exists that NPOs critical of the government will be affected and this will adversely affect open and informed public debate, democracy and the rule of law. The situation is compounded by the fact that the Law does not appear to provide a full remedial scheme before independent and impartial courts.

110. In view of the above, the Venice Commission believes that the Law strikes a severe blow to the human rights and Rule of Law record of the country, which until recently deservedly enjoyed a reputation in Central Asia as a strong supporter of human rights and freedoms, as well as of CSOs. Thus, the Commission recommends that the Kyrgyz authorities repeal the Law and overhaul the Law on NPOs, in order to enable a free and enabling environment for civil society fully in line with international human rights standards and the country's international legal obligations.

111. The Venice Commission notes with interest the statement made by the officials of the Ministry of Justice to the Commission's delegation during its visit to Bishkek that the authorities are open to expert discussions about the Law and willing to continue their co-operation with the Commission. The Venice Commission welcomes this and remains at the disposal of the Kyrgyz authorities for further assistance in this matter.