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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

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

Adopted by the Venice Commission
at its 114th Plenary Session (Venice, 16-17 March 2018)

on the basis of comments by

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I. Introduction

1. By letter of 14 December 2017, the Chair of the Monitoring Committee of the Council of Europe's Parliamentary Assembly requested the Venice Commission to prepare an Opinion on compliance with the Council of Europe standards of the draft law of Ukraine "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" (draft law No. 6674) and of the draft law "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" (draft law No. 6675) ([CDL-REF\(2018\)005](#) and [CDL-REF\(2018\)004](#) respectively). In accordance with standing practice, it was decided that the Venice Commission prepare the Opinion jointly with the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR).
2. Mr Richard Clayton, Mr Jørgen Steen Sørensen and Mr Vardan Poghosyan acted as rapporteurs for this Joint Opinion. Mr David Goldberger, Ms Katerina Hadzi-Miceva Evans, Ms Muatar Khaydarova and Ms Alice Thomas were appointed as legal experts for the OSCE/ODIHR.
3. On 30-31 January 2018, a delegation composed of Mr Richard Clayton and Mr Vardan Poghosyan, on behalf of the Venice Commission, accompanied by Mr Michael Janssen from the Secretariat, and Mr Marcin Walecki, Head of the Democratization Department of the OSCE/ODIHR, visited Kyiv and met with representatives of a large number of relevant authorities, civil society, international organisations and foreign donors. This Joint Opinion takes into account the information obtained during the above-mentioned visit.
4. The present Joint Opinion was discussed at the Sub-Commission on Fundamental Rights (Venice, 15 March 2018) and was subsequently adopted by the Venice Commission at its 114th Plenary Session (Venice, 16-17 March 2018).
5. The Venice Commission and the OSCE/ODIHR remain at the disposal of the Ukrainian authorities for any further assistance that they may require.

II. Scope of the Joint Opinion

6. The scope of this Joint Opinion covers only the draft laws, submitted for review, and the legislation that they are amending. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the right to freedom of association in Ukraine.
7. The Joint Opinion raises key issues and provides indications of areas of concern relating to draft laws No. 6674 and No. 6675. The ensuing recommendations are based on relevant Council of Europe and other international human rights standards and obligations, OSCE commitments, good national practices, and on previous recommendations where relevant.
8. This Joint Opinion is based on an unofficial English translation of the draft laws No. 6674 and No. 6675. Inaccuracies may occur in this Joint Opinion as a result of incorrect translations.
9. In view of the above, the Venice Commission and the OSCE/ODIHR would like to note that this Joint Opinion does not prevent them from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation in Ukraine in the future.

III. Executive Summary and Conclusions

10. Draft laws No. 6674 and No. 6675 are designed to replace previously imposed and criticised e-declaration requirements for anti-corruption activists¹ by a regime of burdensome tax reporting and enhanced public disclosure of detailed financial information, to be submitted by civil society organisations (public associations) whose total annual income exceeds 300 subsistence minimums (currently approximately €14 350) and individual beneficiaries of international technical assistance. The new financial disclosure regime would conflict with human rights and fundamental freedoms, namely, the freedom of association, the right to respect for private life and the prohibition of discrimination. The Venice Commission and the OSCE/ODIHR cannot see a need for such amendments and recommend that they be reconsidered in their entirety. If the authorities nevertheless maintain their plans to introduce new financial reporting and disclosure obligations, it would be necessary to clearly substantiate the need for such amendments and to significantly improve the existing draft provisions so as to ensure their legitimacy and proportionality. In their current form, the stringent disclosure requirements, coupled with severe sanctions in case of non-compliance, are likely to have a chilling effect on the civil society and may even jeopardise the very existence of a number of civil society organisations which may lose their non-profit status as a sanction. The Venice Commission and the OSCE/ODIHR welcome the fact that during meetings held in Kyiv, the authors of the draft laws have indicated their readiness to amend the draft laws in several aspects.

11. The Venice Commission and the OSCE/ODIHR furthermore welcome Ukraine's plans to cancel the e-declaration requirements for anti-corruption activists, which were introduced by Law No. 1975-VIII of 23 March 2017 amending the Law on Prevention of Corruption and which likewise raise several serious human rights issues, as was effectively acknowledged by the various state bodies the delegation met. It is essential that the planned cancellation is enacted as a matter of urgency, before the deadline of 1 April 2018 for submission of the first e-declarations by anti-corruption activists.

12. Furthermore, given the impact that the draft laws may have on the activity of civil society organisations, the relevant stakeholders are encouraged to ensure that the draft amendments undergo effective consultation processes throughout the drafting and adoption process, to ensure an open and transparent process, and thereby increase confidence and trust in the adopted legislation, and in the relevant state institutions in general.

13. In conclusion, in order to ensure compliance of the draft laws with Council of Europe and other international human rights standards and OSCE commitments, the Venice Commission and the OSCE/ODIHR make the following recommendations:

¹ For the purpose of the Joint Opinion, the term "anti-corruption activist" refers to the definition provided in Article 3 part 1 item 5 of the Law on Prevention of Corruption (as amended in March 2017) namely "physical persons who:

- receive funds or property for the implementation in Ukraine of programmes (projects) of technical or other assistance in the area of preventing and countering corruption;
- systematically, throughout the year, with use of technical or other assistance in the area of preventing and countering corruption, perform tasks or provide services regarding the implementation of standards in the area of anti-corruption policy, monitoring of anti-corruption policy in Ukraine, preparing proposals regarding the formulation or implementation of such policy;
- or are members of a governing body of a civil society organisation or other non-entrepreneurial entity that is active in preventing and countering corruption, implementing standards in anti-corruption policy, monitoring of anti-corruption policy in Ukraine, drafting proposals for shaping and implementing such policy and/or taking part in activities that are linked to preventing and countering corruption.

- A. Cancel the e-declaration requirements for anti-corruption activists introduced by Law No. 1975-VIII of 23 March 2017, as foreseen by draft law No. 6674, and ensure that the cancellation enters into force before the deadline of 1 April 2018 for submission of the first e-declarations by anti-corruption activists [paragraph 64];
- B. Remove the new financial reporting and disclosure requirements under draft laws No. 6674 and 6675 in their entirety or, at a minimum, narrow them down substantially, so as to ensure that they fully respect international standards pertaining to the freedom of association, the right to privacy and the prohibition of discrimination and are based on compelling evidence that they are necessary in a democratic society and proportionate to a legitimate aim. In particular,
- public associations should not be made subject to stricter financial reporting and disclosure requirements than other non-profit organisations, businesses or other legal entities and they must be guaranteed the same rights as other legal entities;
 - the income threshold for determining the organisations covered by the new requirements should be significantly increased, and less stringent requirements should apply to organisations which have not received any form of public support;
 - reporting on and public disclosure of the identity of the ten most-paid employees of civil society organisations, and of some of the donors and contractors of such organisations should be removed;
 - the reporting and disclosure requirements for individual persons who receive income from donors of international technical assistance should be removed [paragraphs 48 and 49];
- C. If new financial reporting and disclosure obligations for these civil society organisations were to be introduced, to significantly amend the provisions on sanctions of draft law No. 6675 so as to ensure better clarity as well as proportionality, including by
- providing for the possibility to correct potential mistakes;
 - extending the range of sanctions available which should be proportionate to different types and degrees of violations of the rules;
 - removing loss of organisations' non-profit status from the list of sanctions or, at a minimum, making it clear that this can only be imposed – preferably by a court – as a sanction of last resort [paragraph 52]; and
- D. Conduct inclusive and effective consultations concerning draft laws No. 6674 and 6675 at all stages of the lawmaking process, including during discussions before Parliament up until and in any case before their adoption. It should be ensured that civil society organisations, which will be affected as a result of the entry into force of this legislation and the general public are fully informed and be given a meaningful opportunity to submit their views in good time, prior to the adoption of the draft laws [paragraph 30].

IV. Analysis and Recommendations

A. International Standards

14. Civil society organisations (hereafter “CSOs”) play an important role in modern democratic societies. They enable individuals to associate in order to promote certain goals and/or pursue certain agendas. In cases where they engage in a form of public engagement parallel to that of participation in the formal political process, CSOs have to cooperate with public authorities while at the same time keeping their independence. Members of CSOs, as well as CSOs themselves, enjoy human rights, including the rights to freedom of association, freedom of expression and to respect for private life.

15. These rights are enshrined in numerous international legal instruments, such as the 1948 [Universal Declaration of Human Rights](#) (UDHR, Articles 19 and 20), the 1966 [International Covenant on Civil and Political Rights](#) (ICCPR, Articles 19 and 21), and the 1950 [European Convention for the Protection of Human Rights and Fundamental Freedoms](#) (ECHR, Articles 10 and 11). Although freedom of association and freedom of expression are not absolute rights, they can be limited, or derogated from, only under the strict conditions stipulated in human rights instruments.²

16. Relevant international legal documents also include the Recommendation of the Committee of Ministers of the Council of Europe [Rec\(2007\)14 on the Legal Status of Non-Governmental Organisations in Europe](#) (hereafter: *Recommendation Rec(2007)14*); the Council of Europe [Fundamental Principles on the Status of Non-governmental Organisations in Europe](#) of 2002 (hereafter: *Fundamental Principles*); the 2014 [Joint Guidelines on Freedom of Association](#) issued by the OSCE/ODIHR and the Venice Commission (hereafter: *Guidelines on Freedom of Association*);³ as well as relevant OSCE commitments under the 1990 [Copenhagen Document](#) and the 1999 [Istanbul Document](#), which stress individuals' right to freedom of association, including through non-governmental organisations.

17. Furthermore, the 1998 [UN Declaration on Human Rights Defenders](#)⁴ confirms that “everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels” (Article 1) and stipulates that states have to adopt measures to ensure this right. The Declaration further provides specifically (Article 13) that “everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means in accordance with Article 3 of the present Declaration”. The right of access to funding is to be exercised within the juridical framework of domestic legislation – provided that such legislation is consistent with international human rights standards (Article 3).

18. The Venice Commission and the OSCE/ODIHR have dealt with freedom of association more generally, and with the legal status of CSOs, in several Opinions; they have consistently stressed the importance of the freedoms of association, expression and assembly, as well as of the prohibition of discrimination.⁵

² See Articles 19(3) and 22(2) of the ICCPR, Articles 10(2) and 11(2) of the ECHR.

³ CDL-AD(2014)046.

⁴ UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders) of 9 December 1998.

⁵ See, for instance, the following Opinions of the Venice Commission: [CDL-AD\(2017\)015](#), Opinion on the Draft Law of Hungary on the Transparency of Organisations receiving support from abroad; [CDL-AD\(2016\)020](#), Opinion on Federal Law No. 129-fz on amending certain legislative acts (Federal law on undesirable activities of foreign and international non-governmental organisations) of the Russian Federation; [CDL-AD\(2014\)043](#), Opinion on the Law on Non-Governmental Organisations (Public Associations and Funds) as Amended of the Republic of Azerbaijan, 15 December 2014; [CDL-AD\(2014\)025](#), Opinion on Federal Law No. 121-FZ on non-commercial organisations (“law on foreign agents”), on Federal Laws No. 18-FZ and No. 147-FZ and on Federal Law No. 190-FZ on making amendments to the Criminal Code (“law on treason”) of the Russian Federation. See also, for example, [CDL-AD\(2013\)030](#), OSCE/ODIHR-Venice Commission Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic; and OSCE/ODIHR [Opinion on the Draft Act on the National Freedom Institute - Centre for the Development of Civil Society of Poland](#) (22 August 2017).

19. Relevant international standards concerning the prohibition of discrimination⁶ and the right to respect for private life⁷ are also referred to in the present Joint Opinion.

B. National Legal Framework and Recent Reforms

20. The two draft laws No. 6674 and 6675 foresee new transparency requirements for certain CSOs, namely for public associations whose total annual income exceeds 300 subsistence minimums (currently approximately €14 350).⁸ The Venice Commission and OSCE/ODIHR delegation was informed that there are more than 77 000 public associations operating in Ukraine,⁹ many of which¹⁰ generate an annual income exceeding €14 350 and would thus be subject to the reporting and disclosure requirements under the draft laws.

21. A public association is defined in Article 1 of the Law on Public Associations as “a voluntary association of physical persons and/or legal entities under private law for the purpose of exercising and protecting rights and freedoms and satisfying public, among them economic, social, cultural, environmental, and other interests.” It can take the form of a public organisation¹¹ or a public union¹² and may conduct its activity with or without legal entity status. A public association with legal entity status is a non-entrepreneurial (non-commercial) company for which making profit is not the main purpose (Article 1 paragraph 5 of the Law on Public Associations).

22. Pursuant to Article 23 of the Law on Public Associations in its current form, public associations with legal entity status are entitled to receiving financial support from the State Budget of Ukraine and local budgets in accordance with the law. Public associations receiving such financial support shall submit and publish reports on the use of such funds for designated purposes in accordance with the law. A public association with legal entity status and any legal entities (companies, enterprises) established by it shall keep accounting records and make financial and statistical reports, be registered with state taxation service bodies and make obligatory payments to the budget in accordance with the law. Any benefits, including taxation benefits, may be granted to public associations and legal entities (companies, enterprises) established by them on grounds and in accordance with the procedure established by the law. As stated in the provisions of paragraph 7 of the same Article, which were introduced in 2014 and 2015, public associations are furthermore obliged, in addition to keeping accounting documents, to prepare annual financial statements specifying a detailed analysis of income and expenses, and ensure internal financial control, storage of accounting documents and their submission to competent state bodies.

23. In addition, public associations are subject to reporting obligations under the current tax legislation. In particular, under Article 133.4.7 of the Tax Code, non-profit organisations have to submit to the tax authorities reports on the use of income as a part of the annual tax declaration in accordance with a special Order of the Ministry of Finance.¹³

⁶ Cf. Article 7 of the UDHR; Article 26 of the ICCPR; Article 14 of the ECHR.

⁷ Cf. Article 12 of the UDHR; Article 17 of the ICCPR; Article 8 of the ECHR.

⁸ As of 1 January 2018, the subsistence minimum corresponds to UAH 1,700 (approximately €47.8).

⁹ http://www.ukrstat.gov.ua/edrpoj/ukr/EDRPU_2017/ks_opfg/ks_opfg_0717.htm.

¹⁰ According to the [analysis of the Ukrainian Center of Independent Political Research](#) issued on 13 July 2017 (in the framework of the USAID “Citizens in Action” Project) more than 80% of the public associations would be concerned, but no official statistics are available.

¹¹ I.e. a public association the founders and members (participants) of which are physical persons.

¹² I.e. a public association the founders of which are legal entities under private law and whose members (participants) may be legal entities under private law and/or physical persons.

¹³ [Order No. 469 of the Ministry of Finance](#), dated 28 April 2017.

24. The present draft laws must be seen in the context of Law No. 1975-VIII “on amending certain laws of Ukraine regarding peculiarities of financial control over certain categories of public officials”, which was adopted on 23 March 2017 by the *Verkhovna Rada*. This law had been initiated by the President of Ukraine in order to release contract military service personnel and mobilised soldiers from the duty to submit declarations (notably due to technical constraints); however, the proposed draft was modified during the Parliament session discussion, including by adding a specific requirement for anti-corruption activists to file electronic asset declarations in the same form envisaged for public officials.¹⁴ A number of different interlocutors of the Venice Commission and OSCE/ODIHR delegation considered this measure as a retribution against those who had fought for the introduction of the strict e-declaration regime for public officials (including MPs),¹⁵ which “has been challenged and faced hostility from its start” and “has subsequently stalled in its implementation”.¹⁶

25. The imposition of e-declaration requirements on anti-corruption activists was heavily criticised by national¹⁷ and international¹⁸ CSOs and by different international instances including in May 2017 by the Council of Europe’s Commissioner for Human Rights¹⁹ and in June by the Group of States against Corruption (GRECO).²⁰ Against this background, in September 2017, the Monitoring Committee of the Council of Europe’s Parliamentary Assembly had first asked for an Opinion by the Venice Commission on Law No. 1975-VIII.²¹

26. Meanwhile, the Presidential Administration of Ukraine had responded to the Council of Europe’s Commissioner for Human Rights that further reforms in this area were under preparation, and on 10 July 2017, the two draft laws No. 6674 and 6675 initiated by the President of Ukraine were posted on the parliamentary website. They would annul the new e-declaration requirements on anti-corruption activists and replace them by other reporting requirements applicable to a broader range of CSOs (public associations) and to individual beneficiaries from international technical assistance. In light of these developments, the Monitoring Committee decided to ask for an opinion by the Venice Commission on the new draft legislation rather than on Law No. 1975-VIII of 23 March 2017. That said, it must be borne in mind that both are closely interconnected. If the relevant provisions of the March 2017 law are not repealed, anti-corruption activists will have to submit e-declarations – for the first time before 1 April 2018. It therefore appears crucial that the e-declaration requirements be repealed before the expiry of such deadline.

27. Representatives of the Presidential Administration indicated to the delegation that draft laws No. 6674 and 6675 were to be seen as an attempt to reach a political compromise. While they saw no realistic prospects for the adoption of the alternative draft law No. 6271,

¹⁴ Under the Law on Prevention of Corruption. In particular, the scope of subjects covered by this law was widened accordingly, see Article 3 part 1, item 5 as amended.

¹⁵ See Articles 45ff. of the Law on Prevention of Corruption. In September 2016, the certified electronic register went live.

¹⁶ See GRECO’s most recent evaluation report on Ukraine, made public in August 2017, [GrecoEval4Rep\(2016\)9](#), paragraph 33, which provides further details.

An appeal filed by 48 MPs against the e-declaration system is pending before the Constitutional Court. The MPs challenged several key aspects of the system regarding the handling of personal data (i.e. obligation to report assets of family members, valuable movable property, cash, financial liabilities, significant changes in assets situation, assets belonging to third parties), as well as in relation to institutional matters (access of the NACP to registries from other authorities, power of the NACP to verify accuracy of forms and monitoring lifestyle of declarants).

¹⁷ See e.g. the [AntAC Memorandum](#) and [Analysis](#) and the statement by the [Reanimation Package of Reforms](#).

¹⁸ See e.g. the statements by [Freedom House](#) and by [Transparency International](#).

¹⁹ See the Commissioner’s [Letter of 2 May 2017](#).

²⁰ See [GrecoEval4Rep\(2016\)9](#), paragraph 34.

²¹ By a letter of the Chair of the Monitoring Committee of 11 September 2017.

which is also pending before Parliament and simply provides for cancellation of the e-declaration requirements for anti-corruption activists, they declared their readiness to significantly amend draft laws No. 6674 and 6675, taking into account the present Joint Opinion. This constructive commitment is clearly to be welcomed.

28. In the Explanatory Notes to draft laws No. 6674 and 6675, it is stated that both of them are intended to further harmonise the current legislation with international standards and that they are interlinked: draft law No. 6674 is aimed at introducing a transparent reporting system for public associations regarding their income and expenditures, increasing the transparency in their activities and eliminating a number of shortcomings in the Law on Prevention of Corruption; draft law No. 6675 is meant to ensure proper implementation of the provisions of draft law No. 6674. Both drafts are therefore considered together in the present Joint Opinion.

29. Similarly to Law No. 1975-VIII of 23 March 2017, draft laws No. 6674 and 6675 met with significant criticism by a number of actors such as the Ukrainian Parliament Commissioner for Human Rights,²² various CSOs²³ and representatives of the international community including experts of the Council of Europe.²⁴ They expressed concerns that the drafts might violate relevant standards on freedom of association and data protection and would lead to considerable problems in practice, both for the subjects of the reporting obligations and the tax administrations. Those concerns were confirmed by numerous interlocutors, including representatives of the State Fiscal Service and other authorities, throughout the visit. Moreover, national CSOs complained about the lack of meaningful public consultation prior to the submission of the draft laws to Parliament. In this regard, the Venice Commission and OSCE/ODIHR delegation was informed that CSO representatives were only informed about the draft legislation during an *ad hoc* meeting organised by the Presidential Administration a few days before the submission of the draft laws to Parliament. While the establishment of a working group with the involvement of civil society had been envisaged after the adoption of the March 2017 legislation, no such working group ended up being set up for the preparation of draft laws No. 6674 and 6675.

30. In this connection, attention is drawn to Council of Europe *Recommendation Rec(2007)14*, which stipulates that “NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation”.²⁵ This is also stressed in the *Guidelines on Freedom of Association*, which furthermore stress that legal provisions concerning associations should “be adopted through a broad, inclusive and participatory process, to ensure that all parties concerned are committed to their content.”²⁶ Conducting a public consultation with CSOs prior to the adoption of legislation

²² See the [Joint Statement of the Commissioner for Human Rights](#) and others.

²³ See e.g. the [Statement by the Human Rights Agenda](#) and the [Call by the NGO Forum Ukraine](#).

²⁴ An expert analysis was prepared in September 2017 in the framework of the EU/CoE Partnership for Good Governance Project “Fight against Corruption”, at the request of the Chair of the Anti-Corruption Committee of the *Verkhovna Rada*. See also e.g. the [analysis of the Ukrainian Center of Independent Political Research](#) issued on 13 July 2017 (in the framework of the USAID “Citizens in Action” Project), the [analysis of the International Center for Not-for-Profit Law](#) issued on 17 July 2017, as well as numerous public statements of national and international CSOs.

²⁵ Paragraph 77. The Explanatory Memorandum to the Recommendation clarifies that “it is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the law which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of the important contribution that they are able to make to democratic societies but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed” (paragraph 139).

²⁶ See paragraphs 22 and 186. In this context, it is also worth recalling that OSCE commitments require legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives” ([Moscow Document](#) of 1991, paragraph 18.1).

directly concerning such organisations therefore constitutes part of the good practices that the European countries should strive to adhere to in their domestic legislative processes. To guarantee effective participation, consultation mechanisms must provide for adequate timeframes²⁷ and allow for input at an early stage and throughout the process, both when the draft is being prepared by the government and when it is discussed before Parliament (e.g. through the organisation of public hearings).²⁸ **The Venice Commission and the OSCE/ODIHR recommend that inclusive and effective consultations concerning draft laws No. 6674 and 6675 should be conducted at all stages of the lawmaking process, including during discussions before Parliament up until and in any case before their adoption. It should be ensured that CSOs, which will be affected as a result of the entry into force of this legislation and the general public are fully informed and be given a meaningful opportunity to submit their views in good time, prior to the adoption of the draft laws.**

C. Analysis of the Key Provisions of Draft Laws No. 6674 and No. 6675

1. Overview of the Draft Amendments

31. Article I.2 of draft law No. 6674 introduces new reporting and disclosure requirements in the Law on Public Associations. Namely, the public associations whose total annual income exceeds 300 subsistence minimums (currently approximately €14 350), must make public on their own website (if available) and submit for publication on the official website of the central executive tax authority an annual financial report on their activities that contains specified information.²⁹ Article I.3 of this draft law amends the Law on Prevention of Corruption in order to repeal the e-declaration requirements for anti-corruption activists. Further amendments to that law³⁰ as well as amendments to the Criminal Code (under Article I.1 of the draft law) are not directly relevant to the matter at hand and will not be considered in the present Joint Opinion. The Venice Commission and the OSCE/ODIHR are therefore not taking any position on the concerns expressed by some interlocutors in Kyiv in this regard.

32. Draft law No. 6675 includes a series of amendments to the Tax Code. In particular, the above-mentioned obligation for public associations to publish an annual financial report is also introduced in Article 133 of the Tax Code;³¹ here, it is stipulated that in case of failure to comply with this obligation, the public association shall be excluded by the responsible supervisory authority from the register of non-profit institutions and organisations and shall be deemed payer of profit tax, and such failure shall also be a ground for imposing penalties and fines provided for by the Tax Code.³² Moreover, Articles 177 and 296 of the Tax Code are amended to require sole proprietors,³³ who received income from donors of international technical assistance provided in accordance with the international agreements of Ukraine, to report such income and the payments made from it in a separate attachment to the tax statement, which will be published on the official website of the central executive tax authority; Articles 291 and

²⁷ See e.g. the recommendation made by GRECO, [GrecoEval4Rep\(2016\)9](#), paragraph 64.

²⁸ See e.g. the [OSCE/ODIHR Guidelines on the Protection of Human Rights Defenders \(2014\)](#), Section III, Sub-Section G on the Right to participate in public affairs.

²⁹ Article 23(8) of the Law on Public Associations as amended.

³⁰ E.g. to exempt gifts received abroad by members of the supervisory board of a state-owned bank, state enterprise etc. from the value thresholds (established by Article 23 of the Law on Prevention of Corruption) for gifts that may be accepted, and to exclude enterprises and corporate rights abroad which are owned by such persons from the obligations (under Article 36 of the Law on Prevention of Corruption) aimed at preventing conflicts of interest.

³¹ Article 133.4.8 of the Tax Code as amended.

³² Article 133.4.4 of the Tax Code as amended.

³³ Natural persons-entrepreneurs and single tax-payers of categories 1-3.

298 of the Tax Code are amended to provide for tax penalties,³⁴ to be imposed on sole proprietors who fail to submit the attachment to the tax statement.

2. Reporting and Publication Requirements

33. Draft laws Nos. 6674 and 6675 interfere with certain CSOs' right to freedom of association by imposing new burdensome reporting obligations on them, namely requiring them to submit detailed information – including the number of members and amount of membership fees, the total amount of income and a list of physical and legal persons who contributed with more than 50 subsistence minimums (approximately €2 400) to the organisation, a list of ten employees who were paid the largest amounts of wages in the reporting year, the total amount of funds used to pay third parties, as well as a detailed list of the entities that received payments exceeding 50 subsistence minimums (approximately €2 400), the personal composition of the organisation's governing bodies, the participation of its executives in the governing bodies of other public associations and in other legal entities under private law – and by introducing severe sanctions in case of non-compliance. Especially smaller CSOs risk not being able to comply with those reporting obligations with their present number of staff, losing the status of non-profit organisations and consequently being obliged to pay profit tax – with retroactive effect starting from the moment of violation of the rules.

34. International human rights standards make it clear that restrictions to the freedom of association are justifiable only if they are “necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”³⁵ The European Court of Human Rights has consistently stated that because of “the essential nature of freedom of assembly and association and its close relationship with democracy there must be convincing and compelling reasons to justify an interference with this right.”³⁶ Any restriction on the right to freedom of association and on the rights of associations, including sanctions, must be prescribed by a precise, certain and foreseeable law; it must pursue one or more legitimate aims; and it must be necessary in a democratic society, which presupposes the existence of a “pressing social need”, and respect the principle of proportionality.³⁷

35. The Explanatory Notes to the two draft laws justify their adoption by the need to enhance the publicity of information on the financing of public associations, in particular when they benefit from public support, including tax privileges, and from international technical assistance. This aim is not *per se* mentioned as a legitimate aim in the above international instruments. In this context, the *Guidelines on Freedom of Association* indicate that “the state shall not require but shall encourage and facilitate associations to be accountable and transparent”.³⁸ The former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association specifically warned against the misuse of

³⁴ I.e. they cannot be assigned to the first-third groups of single tax payers.

³⁵ Cf. Article 11(2) of the ECHR. See also Article 22(2) of the ICCPR.

³⁶ ECtHR, Case of *Barankevich v. Russia*, Application No. 10519/03, 26 July 2007, paragraph 25; Case of *Ouranio Toxo v. Greece*, Application No. 74989/01, 20 October 2005, paragraph 36; Case of *Makhmudov v. Russia*, Application No. 35082/04, 26 July 2007, paragraph 64; Case of *Adali v. Turkey*, Application No. 38187/97, 31 March 2005, paragraph 267.

³⁷ See e.g. ECtHR, Case of *Sindicatul “Păstorul cel Bun” v. Romania*, Application no. 2330/09, 31 January 2012, paragraphs 66ff., and 9 July 2013 [GC], paragraphs 150ff.; Case of *Koretskyy and Others v. Ukraine*, Application no. 40269/02, 3 April 2008, paragraphs 43ff.; Case of *Chassagnou and Others v. France* [GC], Application nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, paragraphs 104ff. See also Principles 9 and 10 of the *Guidelines on Freedom of Association*, which include further references to ECtHR case law.

³⁸ *Guidelines on Freedom of Association*, paragraph 224.

transparency as a pretext for “extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment”.³⁹

36. At the same time, publicity or transparency in matters pertaining to funding may be required as a means to combat fraud, embezzlement, corruption, money-laundering or terrorism-financing. Such measures may qualify as being in the interests of national security, public safety or public order.⁴⁰ That said, restrictions to the freedom of association can only be justified if they are necessary to avert a real, and not only hypothetical danger.⁴¹ According to the European Court of Human Rights, a “pressing social need” for such restrictions presupposes “plausible evidence” of a sufficiently imminent threat to the state or to a democratic society.⁴² In this respect, it must be stressed that the Explanatory Notes to draft laws 6674 and 6675 do not refer to any concrete risk or threat posed by certain CSOs that would justify the new measure.⁴³ Nothing indicates that there are “convincing and compelling reasons” – in the words of the European Court of Human Rights – to justify an interference with the freedom of association of such proportions. During the discussions held in Kyiv, certain interlocutors stated that some CSOs in Ukraine were used as “money-laundering machines”; however, this was not further substantiated. Importantly, both the State Fiscal Service and the two anti-corruption agencies interviewed by the delegation clearly stated that they did not consider CSOs as a significant risk area for corruption, money-laundering and connected crimes. Even if there were indications of money laundering activities on the side of individual NGOs, the correct response to this would be criminal investigations against these particular associations, and not blanket reporting requirements that affect numerous other organisations engaging in entirely legitimate activities.

37. It is furthermore noted that current legislation already requires public associations to prepare annual financial statements specifying a detailed analysis of income and expenses; in addition, public associations receiving financial support from the state or local budgets must submit and publish reports on the use of such support, and public associations which are non-profit organisations have to submit to the tax authorities reports on the use of income as a part of the annual tax declaration (see above).⁴⁴ Both the State Fiscal Service and anti-corruption agencies informed the delegation that the already existing reporting requirements provided them with sufficient tools to check financial operations of public associations.

³⁹ UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, [Report to the UN Human Rights Council of 24 April 2013](#) (Funding of associations and holding of peaceful assemblies), paragraph 38.

⁴⁰ *Guidelines on Freedom of Association*, paragraph 220.

⁴¹ See e.g. the U.N. Human Rights Committee, *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005), paragraph 7.2. In this context, attention is also drawn to international instruments related to the prevention of money laundering and terrorism financing, which call for the application of a risk-based approach applying focused measures to the subset of non-profit organisations which are identified by the country as being likely to be at risk of abuse. See the [Financial Action Task Force \(FATF\) standards](#) (in particular Recommendation 8 on Non-Profit Organisations) and the [EU Directive 2015/849](#).

⁴² See e.g. ECtHR, Case of *Sindicatul “Păstorul cel Bun” v. Romania*, Application no. 2330/09, 31 January 2012, paragraph 69, which includes further references to ECtHR case law.

⁴³ Given the potential impact of the draft laws on freedom of association, it is advisable that such legislation be preceded by an in-depth regulatory impact assessment, completed with a proper problem analysis using evidence-based techniques to identify the best efficient and effective regulatory option (including the “no regulation” option). See e.g. the [OSCE/ODIHR Report on the Assessment of the Legislative Process in the Republic of Armenia](#), paragraphs 47-48.

⁴⁴ Cf. Article 23 of the Law on Public Associations; Article 133.4.7 of the Tax Code and the corresponding Order No. 469 of the Ministry of Finance, dated 28 April 2017.

38. Against this background, the introduction of additional reporting requirements as foreseen by the draft laws cannot be considered necessary. On the one hand, they duplicate already existing requirements⁴⁵ and add a further, redundant layer of reporting,⁴⁶ which would be extremely burdensome, in particular for small associations. On the other hand, they go beyond the current obligations, without there being a concrete objective need for this.

39. At this point, it must be reiterated that international standards do not only require that any restrictions to the freedom of association be based on a legitimate aim – which seems to be absent in the present case – but also require that the measures chosen are necessary and proportional. A fair balance must be struck between the interests of persons exercising the right to freedom of association, associations and the interests of society as a whole; the need for restrictions needs to be carefully weighed and backed up by compelling evidence to ensure that the least intrusive option is always chosen and that restrictions are narrowly construed. In the opinion of the Venice Commission and OSCE/ODIHR, the new reporting and disclosure obligations under draft laws 6674 and 6675 clearly fail to meet these requirements – in particular, when it comes to the presentation of a list of all donors who provided more than approximately €2 400 to a public association, a list of all entities that received payments from them exceeding approximately €2 400 and a list of ten employees who were paid the largest amounts of wages in the reporting year.⁴⁷ In this connection, the delegation was interested to hear from the authors of the draft laws that they would be ready to amend the draft legislation to some extent, in particular by removing the list of “top ten employees” from the reporting requirements.

40. While it is in line with the case law of the European Court of Human Rights,⁴⁸ as well as with previous statements made by the Venice Commission and the OSCE/ODIHR,⁴⁹ 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”, they must do so “in a manner compatible with their obligations under the European Convention” and other international instruments. It is thus understood that state bodies should be able to exercise some sort of limited control over non-commercial organisations’ activities with a view to ensuring compliance with relevant legislation within the civil society sector, but such control should not be unreasonable, overly intrusive or disruptive of lawful activities. Excessively burdensome or costly reporting obligations could create an environment of excessive state monitoring which would hardly be conducive to the effective enjoyment of freedom of association.

41. In the present case, it is not clear why public associations should submit such detailed information. As mentioned above, neither the draft laws nor the Explanatory Notes provide any evidence of present problems and damage to the public interest caused by the fact that

⁴⁵ E.g. regarding information on total amounts of the association’s income, expenses and the number and salaries of its employees. Further details have been presented in the already mentioned [analysis of the Ukrainian Center of Independent Political Research](#) of 13 July 2017.

⁴⁶ In this connection, see also paragraph 227 of the *Guidelines on Freedom of Association*, according to which “reporting requirements should not be regulated by more than one piece of legislation, as this can create diverging and potentially conflicting reporting requirements and, thus, diverging liability for failure to fulfil them.”

⁴⁷ The inclusion of those requirements in the Tax Code also seems to be inappropriate for systematic reasons. As was pointed out by the State Fiscal Service, such information would not allow for the calculation of taxes.

⁴⁸ Cf. ECtHR, Case of *Sidiropoulos and Others v. Greece*, Application No. 26695/95, 10 July 1998, paragraph 40.

⁴⁹ See, for example, [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, paragraph 69. See also [CDL-AD\(2017\)015](#), Opinion on the Draft Law of Hungary on the Transparency of Organisations receiving support from abroad, paragraph 39.

public associations do not currently report all the information required by the draft laws. In the absence of any such evidence, the proposed requirements cannot be qualified as being “necessary in democratic society”, “proportionate to their legitimate aim” and “the least intrusive option”.⁵⁰ In addition, reference is made here to paragraph 104 of the *Guidelines on Freedom of Association*, where it is stressed that reporting and transparency requirements “shall be proportionate to the size of the association and the scope of its activities, taking into consideration the value of its assets and income.” In this context, it should be noted that several interlocutors met by the delegation clearly found the income threshold for public associations which are covered by the draft laws to be too low. Instead of the proposed threshold of 300 subsistence minimums (approximately €14 350), they advocated for higher amounts, e.g. for 1 000 subsistence minimums (approximately €47 800); the authors of the draft laws admitted during the interviews held in Kyiv that they had first envisaged 800 subsistence minimums, which appears to be more appropriate than the current proposal.

42. The above-mentioned concerns are valid for all public associations, which are covered by the draft laws; they appear even more pressing in respect of those who do not benefit from any public funding, since international standards do allow for stricter financial reporting obligations to be imposed on CSOs who are granted public support.⁵¹ The Explanatory Note to draft law No. 6674 itself explicitly refers to such standards in order to justify the new obligations (namely, to the *Fundamental Principles*),⁵² but the proposed reporting obligations would also apply to public associations which do not receive any direct or indirect support such as tax privileges. Even if the Explanatory Notes indicate that CSOs “tend to get the status of non-profit organisations, and their activity is not taxed”, this is not always the case with public associations.

43. The new reporting requirements are also highly problematic with regard to the prohibition of discrimination as enshrined in international human rights instruments,⁵³ in several respects. First, associations should not be required to submit more reports and information than other legal entities, such as businesses,⁵⁴ and CSOs with legal personality should be subject to the administrative, civil and criminal law obligations and sanctions generally applicable to other legal persons.⁵⁵ However, the Venice Commission and OSCE/ODIHR delegation was informed that if the draft laws were adopted, the number of tax reports required from public associations would exceed the number of reports required from the business sector.

44. Second, it is not clear why the draft laws single out public associations, whereas other organisations, such as charitable organisations, foundations, professional and creative unions are not addressed. The Explanatory Notes to the draft laws do not answer this question. The Venice Commission and the OSCE/ODIHR delegation was not given any convincing reasons why CSOs which are organised as public associations should be subject

⁵⁰ In [CDL-AD\(2017\)015](#), Opinion on the Draft Law of Hungary on the Transparency of Organisations receiving support from abroad, paragraphs 51ff., the Venice Commission has recognised that it may be legitimate for states to monitor who the main sponsors of CSOs are, but this should be limited to the main donors who have a major influence on the organisation.

⁵¹ See paragraph 62 of *Recommendation Rec(2007)14*: “NGOs which have been granted any form of public support can be required each year to submit reports on their accounts and an overview of their activities to a designated supervising body”. See also paragraph 60 of the *Fundamental Principles* and paragraphs 224ff. of the *Guidelines on Freedom of Association*.

⁵² The Explanatory Notes to both draft laws also refer to paragraph 32 of the *Fundamental Principles*; however, this paragraph only deals with accountability of CSOs “seeking legal personality”.

⁵³ Cf. Article 7 of the UDHR; Article 26 of the ICCPR; Article 14 of the ECHR.

⁵⁴ Cf. the *Guidelines on Freedom of Association*, paragraph 225. See also the [UN Report of the Special Rapporteur](#) on the rights to freedom of peaceful assembly and of association of 4 August 2015.

⁵⁵ Cf. *Recommendation Rec(2007)14*, paragraph 7.

to particularly demanding transparency rules, when compared with other legal entities and non-profit organisations. What is more, some interlocutors (including law enforcement officials) stated that other entities, such as charitable organisations and foundations, which were set up e.g. to provide consultation services, constituted a far more relevant risk area in terms of money-laundering and connected crimes.

45. Third, the fact that individual persons who receive income from donors of international technical assistance – a term which is not defined in draft law No. 6675 – are also subject to extensive reporting and disclosure obligations⁵⁶ gives rise to concern and seems to be a breach of the prohibition of discrimination. The Venice Commission and the OSCE/ODIHR have not been provided with any justification as to why such obligations are introduced specifically in relation to international/foreign donors but not in relation to domestic donors, and only for certain individuals such as private entrepreneurs but not for legal entities (except public associations) who receive the same types of income. The Explanatory Notes to the draft laws remain silent on this matter. In this connection, the delegation was concerned to hear that donor involvement in international technical assistance in Ukraine could be considerably affected by the proposed measures.

46. The new disclosure obligations furthermore interfere with the right to privacy, which is protected by international human rights instruments⁵⁷ and applies to associations,⁵⁸ since they require the submission and public disclosure (on the Internet) of information on the public associations' managers, certain employees, donors and beneficiaries. It must be noted that the right to privacy may be interfered with only if necessary in a democratic society, within the limits of proportionality. Furthermore, in paragraph 64 of *Recommendation Rec(2007)14*, it is stipulated that all reporting by CSOs "should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality".⁵⁹ Generally, a donor's desire to remain anonymous should be respected. However, the need to respect private life and maintain confidentiality are not absolute and should not be an obstacle to the investigation of criminal offences.⁶⁰ In the present case, the authors of the draft laws have not substantiated any possible risk that the current legislation may hamper the investigation of criminal offences.⁶¹ In particular, public disclosure – on the Internet – of personal and financial information on the public associations' employees, donors and beneficiaries cannot be justified with such considerations. Also, adequate safeguards should be in place to ensure that the personal data that will be collected, processed and stored during that process are protected against misuse and abuse in line with international standards, particularly the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.⁶²

⁵⁶ Reporting and disclosure obligations for such individual persons (including the identification of relevant donors and of third parties to whom payments were made from such income) are provided by draft law No. 6675, through amendments to Articles 177 and 296 of the Tax Code.

⁵⁷ Cf. Article 12 of the UDHR; Article 17 of the ICCPR; Article 8 of the ECHR.

⁵⁸ See the *Guidelines on Freedom of Association*, paragraphs 228 and 231, which state that "the right to privacy applies to an association" (paragraph 228) and that "[l]egislation should contain safeguards to ensure the respect of the right to privacy of the clients, members and founders of the associations, as well as provide redress for any violation in this respect" (paragraph 231).

⁵⁹ See also paragraph 63 of the *Fundamental Principles*.

⁶⁰ Cf. paragraph 116 of the Explanatory Memorandum to *Recommendation Rec(2007)14*.

⁶¹ As already mentioned, information gathered by the delegation clearly suggests that public associations and individual beneficiaries of international technical assistance do not constitute a particular risk area for money-laundering or other crimes in Ukraine.

⁶² See [Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#) (ETS 108), Strasbourg, 28 January 1981, ratified by Ukraine on 30 September 2010.

47. CSO representatives shared with the Venice Commission and OSCE/ODIHR delegation their concerns that, under the current circumstances in Ukraine, exposing the names of certain employees of public associations⁶³ would endanger their safety (particularly those who work in the occupied territories⁶⁴ or who deal with certain issues such as anti-corruption, protection of victims of domestic violence or non-discrimination on the basis of gender, sexual orientation and gender identity) potentially making them subject to harassment. They see a clear risk that a number of individuals would then no longer be willing to work for such CSOs. Likewise, exposure of donors and contractors of public associations – and of individual persons who receive income from donors of international technical assistance – would very likely affect donors' readiness to continue their support for and cooperation with these associations if they were publicly identified. In the view of the Venice Commission and the OSCE/ODIHR, such a far-reaching measure interferes both with the right to privacy and with the right to freedom of association of the above persons and entities and cannot be justified as being "necessary in a democratic society". To achieve certain legitimate aims such as protecting national security or preventing disorder or crime, much less intrusive disclosure rules could be designed, for example, requiring only the publication of anonymous data or total figures. In such cases, these disclosure requirements should be the same for all legal entities (any exceptions need to be clearly and objectively justified).

48. In view of the above paragraphs, the Venice Commission and the OSCE/ODIHR conclude that the new reporting and disclosure requirements foreseen by the two draft laws conflict with the freedom of association, the prohibition of discrimination and the right to respect for one's private life. Since no legitimate aim or concrete need for those amendments have been substantiated, and given the requirements set out by the international instruments quoted above, the Venice Commission and the OSCE/ODIHR **recommend that the new financial reporting and disclosure requirements foreseen by draft laws No. 6674 and 6675 be removed.**

49. **Should new reporting requirements nonetheless be considered necessary by the relevant authorities, they need to be substantially narrowed down so as to ensure full respect of the freedom of association, the right to respect for private life and the prohibition of discrimination. They should also be based on compelling evidence that they are necessary in a democratic society and proportionate to their legitimate aim. In particular,**

- **public associations should not be made subject to stricter financial reporting and disclosure requirements than other non-profit organisations, businesses or other legal entities and they must be guaranteed the same rights as other legal entities;**
- **the income threshold for determining the organisations covered by the new requirements should be significantly increased, and less stringent requirements should apply to organisations which have not received any form of public support;**
- **reporting on and public disclosure of the identity of the ten most-paid employees of civil society organisations, and of some of the donors and contractors of such organisations should be removed;**
- **the reporting and disclosure requirements for individual persons who receive income from donors of international technical assistance should be removed.**

3. Sanctions Available in Case of Breach of the Obligations

50. As indicated above, provisions on sanctions are included only in draft law No. 6675, which foresees amendments to the relevant Articles of the Tax Code. In case of failure to

⁶³ According to the draft laws, *inter alia* a list of 10 employees with the highest salaries would have to be made public.

⁶⁴ For example, they referred to persons working for CSOs implementing human rights activities in Crimea and certain districts of Donetsk and Luhansk oblasts and their beneficiaries.

comply with the new reporting and disclosure obligations, the public association shall be excluded by the responsible supervisory authority from the register of non-profit institutions and organisations and shall be deemed payer of profit tax, and such failure shall also be grounds for imposing penalties and fines provided for by the Tax Code; as for sole proprietors who fail to report on income from donors of international technical assistance (and on expenses incurred from that income), they are subject to tax penalties.⁶⁵

51. These provisions again interfere with the freedom of association (as far as public associations are concerned) and can only be justified if they have a legal basis, pursue a legitimate aim, are necessary in a democratic society and respect the principle of proportionality. Further guidance is provided by paragraph 72 of *Recommendation Rec(2007)14*, according to which in most instances, the appropriate sanction against CSOs for breach of the legal requirements applicable to them “should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality”, i.e. they must be the least intrusive means to achieve the desired objective,⁶⁶ and they must be subject to judicial supervision.⁶⁷ The European Court of Human Rights considers that the nature and severity of the sanction imposed are factors to be taken into account when assessing the proportionality of the interference.⁶⁸

52. The sanctions proposed by draft law No. 6675 are highly problematic in light of these standards. First of all, the draft amendments to Article 133.4.4 of the Tax Code lack the necessary clarity regarding the enforcement of sanctions; a strict reading seems to imply that the different sanctions would be imposed cumulatively. Representatives of the State Fiscal Service confirmed this understanding, while at the same time underscoring the need for more precise provisions.⁶⁹ In any case, the sanctions appear severe and disproportionate because loss of the non-profit status (coupled with tax penalties and fines) is the only and automatic penalty, depriving the authorities of having any discretion to impose a penalty which was appropriate to the particular circumstances under consideration. Loss of the non-profit status would, according to the statements made by several CSOs, put at risk their very existence. Less severe sanctions such as warnings or small fines would be more adequate, at least for certain minor violations of the rules, and such sanctions should be available, if appropriate. Loss of the non-profit status should either be removed from the list of sanctions or should only be available as a sanction of last resort. On previous occasions, the Venice Commission has expressed its clear preference for penalties to be imposed along a gradual scale of punishment.⁷⁰ In any case, even before the issuance of a warning, the public association should be offered the possibility to seek clarifications about the alleged violation. There should thus be a range of sanctions which are proportional to the gravity of the wrongdoing⁷¹ (i.e. short delay or complete failure to report, minor unintentional mistakes or intentional misinformation, etc. should lead to lighter sanctions), and the possibility to correct errors should be provided for. The delegation was interested to hear from the authors of the draft laws that they would be

⁶⁵ I.e. they cannot be assigned to the first-third groups of single tax payers.

⁶⁶ See the *Guidelines on Freedom of Association*, paragraph 237.

⁶⁷ See paragraphs 9 and 72 of the *Fundamental Principles*.

⁶⁸ ECtHR, Case of *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application No. 37083/03, 8 October 2009, paragraph 82.

⁶⁹ They also pointed out that liability under the Tax Code is problematic for systematic reasons: The information to be submitted under the draft legislation (e.g. the identity of donors or of “top ten employees”) would not allow for the calculation of taxes.

⁷⁰ See e.g. [CDL-AD\(2017\)015](#), Opinion on the Draft Law of Hungary on the Transparency of Organisations receiving support from abroad, paragraphs 59ff.

⁷¹ See e.g. [CDL-AD\(2014\)025](#), Opinion on Federal Law No. 121-FZ on non-commercial organisations (“law on foreign agents”), on Federal Laws No. 18-FZ and No. 147-FZ and on Federal Law No. 190-FZ on making amendments to the Criminal Code (“law on treason”) of the Russian Federation, paragraphs 101f.

ready to introduce such a possibility in the draft legislation. **It is thus recommended that, if new financial reporting and disclosure obligations for civil society organisations were to be introduced, the provisions on sanctions of draft law No. 6675 be clearly formulated and significantly amended so as to ensure respect for the principle of proportionality, including by**

- **providing for the possibility to correct potential mistakes;**
- **extending the range of sanctions available, which should be proportionate to different types of violations of the rules;**
- **removing loss of the non-profit status from the list of sanctions or, at a minimum, making it clear that this can only be imposed – preferably by a court – as the sanction of last resort.**

53. As far as appeal possibilities are concerned, the Venice Commission and OSCE/ODIHR delegation was satisfied with the information provided by the authorities that the decisions by the tax administration on the above-mentioned sanctions could be challenged according to the general rules, i.e. through administrative appeals and before the competent administrative courts.

4. Cancellation of E-declaration Requirements for Anti-corruption Activists

54. The provisions of draft law No. 6674 abrogating the e-declaration requirements for anti-corruption activists, which had been introduced by Law No. 1975-VIII of 23 March 2017, are clearly to be welcomed. Many of the critical observations on the new reporting and disclosure requirements under draft laws 6674 and 6675 are also relevant with regard to the amendments under Law No. 1975-VIII. The international standards concerning the right to privacy,⁷² the prohibition of discrimination⁷³ and freedom of association⁷⁴ are equally applicable here – bearing in mind that “freedom of association is a right that has been recognised as capable of being enjoyed individually or by the association itself in the performance of activities and in pursuit of the common interests of its founders and members”,⁷⁵ and that the persons targeted by Law No. 1975-VIII include managers of anti-corruption CSOs, who thus also may invoke this fundamental right.

55. The extension of the e-declaration regime under the Law on Prevention of Corruption – burdensome reporting obligations, financial control by the National Agency on Corruption Prevention (NACP) and severe sanctions available in case of infringements⁷⁶ – to managers of anti-corruption CSOs thus interferes with their right to freedom of association. The relevant provisions are therefore only justified if they are prescribed by law (i.e. they must be sufficiently clear to allow individuals and legal persons to ensure that their activities comply with the restrictions), pursue a legitimate aim, are necessary in a democratic society and, thus, proportional.

56. In this connection, the Venice Commission and the OSCE/ODIHR share the concerns expressed by a broad range of stakeholders about the unclear scope of the e-declaration requirements and in particular the lack of a clear definition of what is meant by “activities that

⁷² Cf. Article 12 of the UDHR; Article 17 of the ICCPR; Article 8 of the ECHR.

⁷³ Cf. Article 7 of the UDHR; Article 26 of the ICCPR; Article 14 of the ECHR.

⁷⁴ Cf. Article 20 of the UDHR; Article 22 of the ICCPR; Article 11 of the ECHR.

⁷⁵ *Guidelines on Freedom of Association*, paragraph 16.

⁷⁶ The relevant obligations are regulated in Section VII (Articles 45ff.) of the Law on Prevention of Corruption. They include the annual submission of e-declarations (which must contain detailed personal and financial information on assets and liabilities, income and expenditure), the submission of an electronic notification of significant changes in the declarant’s assets, notification if the declarant or his/her family member opens an account in a non-resident bank, and lifestyle monitoring which the NACP may conduct with regard to declarants based on external information or its own initiative. Violation of the rules gives rise to administrative and criminal sanctions.

are linked to preventing and countering corruption”. Both CSOs concerned and representatives of the NACP were alarmed about the fact that Article 3 part 1 item 5 of the Law on Prevention of Corruption, as amended, does not precisely define the range of persons covered; for instance, they were uncertain about the question whether sub-contractors of anti-corruption CSOs/activists (e.g. providers of accommodation, catering and other services) would also have to submit declarations. Moreover, such vague wording could potentially apply to a large number of public associations, for instance those undertaking general human rights work, election observation or those working on transparency in local or national budgets as they may all be linked in some ways with anti-corruption work. The unclear provisions defining the scope of the e-declaration requirements thus appear to breach the obligation to ensure that interferences with the right to freedom of association under Article 11 ECHR are prescribed by law and reasonably foreseeable. This state of affairs is all the more worrying in view of the fact that e-declarations will have to be submitted shortly – i.e. by 1 April 2018 – and that non-compliance with the rules gives rise to administrative and criminal sanctions.

57. Moreover, the authorities failed to identify any reasonable justification for the extension of the e-declaration regime to managers of anti-corruption CSOs, at least not when the CSOs concerned do not receive public funding. International anti-corruption standards call for the establishment of “effective financial disclosure systems for appropriate public officials” but not for private actors.⁷⁷ Such asset declaration regimes are specifically designed for the public sector, and according to comparative research carried out by different institutions, there seem to be no examples in Europe and beyond where such tools would be extended to CSO representatives.⁷⁸

58. As already mentioned, in paragraph 62 of *Recommendation Rec(2007)14* it is clearly stated that only “NGOs which have been granted any form of public support can be required each year to submit reports on their accounts and an overview of their activities to a designated supervising body”. In contrast, the provisions of Law No. 1975-VIII require the submission of asset declarations by managers of anti-corruption CSOs independently of whether those CSOs received public support. This goes well beyond the wording of *Recommendation Rec(2007)14*, both with respect to the rationale of the reporting requirement, and with respect to the target (individuals as opposed to organisations).

59. Moreover, as has been pointed out by the Council of Europe’s Commissioner for Human Rights, in Ukraine CSOs are already subject to financial reporting rules,⁷⁹ and natural persons concerned by Law No. 1975-VIII must pay taxes and submit reports to the tax authorities. It is therefore difficult to identify a need for additional reporting in the form of asset declarations as proposed by that law. As stated by the Commissioner, “[i]n contrast, reporting on assets may be required of elected officials and civil servants, because they have been entrusted with spending public money, which entails corruption risks.”⁸⁰

60. Law No. 1975-VIII is also problematic with regard to other human rights, in particular the freedom of expression⁸¹ – since the law applies to anti-corruption activists (this term might include e.g. investigative journalists) – and the right to privacy, given that e-declarations require automatic disclosure of a significant amount of personal data of the declarant and of his/her family members.⁸² Here again, even if a legitimate aim could be identified, the Venice

⁷⁷ See the 2003 [United Nations Convention against Corruption](#) (UNCAC), Article 52(5).

⁷⁸ See e.g. the [U4 Expert Answer](#) “Income and asset declarations for NGOs”, which includes further references.

⁷⁹ *Inter alia*, under the Law on Public Associations and under the Tax Code, as described above.

⁸⁰ [Letter of 2 May 2017](#).

⁸¹ Cf. Article 19 of the UDHR; Article 19 of the ICCPR; Article 10 of the ECHR.

⁸² Such as name and address, place of work, as well as detailed financial information.

Commission and the OSCE/ODIHR cannot see how the extension of this regime to anti-corruption activists could be justified in terms of necessity and proportionality.

61. Attention is also drawn to relevant statements made by the Council of Europe's Group of States against Corruption (GRECO), which echoed "the concern voiced by other international organisations and donors about the discriminatory nature and intimidating intent of such a requirement solely targeting anticorruption activists and urge[d] the authorities to reconsider their position."⁸³ In the view of the Venice Commission and the OSCE/ODIHR, the fact that Law No. 1975-VIII singles out anti-corruption activists and thus one particular sector of civil society, without a clear objective reason, in order to submit them to e-declaration requirements, also gives rise to significant concerns with respect to the prohibition of discrimination.

62. In light of the above, the Venice Commission and the OSCE/ODIHR conclude that the provisions of Law No. 1975-VIII of 23 March 2017 extending the e-declaration requirements to anti-corruption activists raise several serious issues relating to the rights of the respective individuals and associations to freedoms of association and expression, their right to privacy and the prohibition of discrimination. Moreover, they share the concerns of the Council of Europe's Commissioner for Human Rights⁸⁴ that the introduction of e-declaration requirements for anti-corruption activists had not been prepared in consultation with the CSOs and individuals concerned, as required by the international standards already quoted above with respect to draft laws No. 6674 and 6675,⁸⁵ and that it had only been added to Law No. 1975-VIII at the final stages of legislative proceedings.⁸⁶

63. In addition, many interlocutors of the delegation expressed their concerns about the practical implications of Law No. 1975-VIII: bearing in mind that already before this reform, around 1 million persons had been obliged to submit e-declarations to the NACP, the latter's capacity to deal with an additional, possibly high number of declarations by anti-corruption activists appears highly questionable. According to a number of observers, the credibility of the whole e-declaration system – which was meant to be a cornerstone of the recent anti-corruption reforms – would be at risk if it was applied to civil society representatives working on preventing and countering corruption.

64. Given the above-mentioned concerns, **it is crucial that the e-declaration requirements for anti-corruption activists introduced by Law No. 1975-VIII of 23 March 2017 be cancelled before the deadline of 1 April 2018 for submission of the first e-declarations by anti-corruption activists.**

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⁸³ See e.g. [GrecoEval4Rep\(2016\)9](#), paragraph 34.

⁸⁴ See the Commissioner's [Letter of 2 May 2017](#).

⁸⁵ In particular, *Recommendation Rec(2007)14*, paragraph 77; *Guidelines on Freedom of Association*, paragraph 22; OSCE Moscow Document of 1991, paragraph 18.1.

⁸⁶ As indicated earlier, the original purpose of this law was to release contract military service personnel and mobilised soldiers from the duty to submit declarations, notably due to technical constraints.