

## ANALYSIS

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# Draft Law of Georgia on Transparency of Foreign Influence

FEBRUARY 22, 2023

## Introduction

Based on request from local partners, the International Center for Not-for-Profit Law (ICNL) and the European Center for Not-for-Profit Law (ECNL) conducted a comparative analysis of the draft Law of Georgia on Transparency of Foreign Influence #07–3/293; 14.02.2023<sup>1</sup> (the Draft Law) regarding its compliance with the international law and European standards (Analysis).

Under the Draft Law, non-entrepreneurial (non-commercial) legal entities (NNLEs)<sup>2</sup> and broadcasters, owners of print media outlets, owners, or users of internet domains (mass media) receiving funding or other material support from foreign powers (foreign support) are to be called “agents of foreign influence” (hereinafter referred to as “FAs”), if such support constitutes over 20% of their total revenue in the previous year. The Georgian translation of the term “agents of foreign influence” (“უცხოური გავლენის აგენტი”) carries a negative connotation and is usually interpreted as a synonym for a “foreign spy.” Further, the Draft Law introduces several new burdensome obligations on NNLEs and mass media receiving foreign support, expands the supervisory powers of the Ministry of Justice (MoJ) over all NNLEs and mass media, and introduces harsh penalties for violation of the Law’s requirements.

Georgia is a party to both the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup> and the European Convention on Human Rights (ECHR).<sup>4</sup> The Analysis provides references mostly to the ECHR and other relevant European sources of soft law. The argumentation regarding the violations of the ICCPR follows a similar logic. The Analysis shows that many Draft Law provisions are not compliant with Georgia’s obligations under international law and with EU standards. Specifically:

- **ARTICLE 11 of ECHR. Freedom of assembly and association (and Article 22 of the ICCPR):**
  - The Draft Law imposes limitations on the activities of NNLEs protected by the ECHR and the ICCPR by requiring them to label themselves as FAs, therefore stigmatizing them; limiting their access to funding support; imposing burdensome registration and reporting requirements; exposing them to unlimited government inspections, when such limitations do not meet the only permissible limitations established by the ECHR and the ICCPR; and establishing harsh penalties for violations of the Draft Law, which violates the freedom of association.
- **ARTICLE 14 of ECHR. Prohibition of discrimination (and Article 26 of the ICCPR):**
  - Without a justification compliant with international law, the Draft Law establishes discriminatory treatment of NNLEs and mass media by imposing burdensome requirements on those NNLEs and mass media that receive foreign funding, but not on other entities or individuals that also receive foreign funding.
- **ARTICLE 8 of ECHR (potentially). Right to respect for private and family life (and Article 17 of the ICCPR):**

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<sup>1</sup> Available at: <https://info.parliament.ge/file/1/BillPackageContent/38035?>

<sup>2</sup> NNLE is the most common form of NGO in Georgia.

<sup>3</sup> Ratified by Georgia on May 3, 1994.

<sup>4</sup> Ratified by Georgia on May 20, 1999.

- The Draft Law requires public access to personal data of NNLEs and mass media, as well as authorizes the MoJ to search for any necessary (as determined by the MoJ) information, including personal data, which may be exposed to the public. MoJ implementing regulations would establish the rules for such procedure.

Similarly, to NNLEs, the Draft Law restricts activities of mass media and journalists by stigmatizing those who receive foreign funding, undermining the public's trust in such mass media, as well as restricting their access to financial resources and preventing them from carrying out their activities. Article 14 of the ECHR on Prohibition of Discrimination (Article 26 of the ICCPR), as well as Article 8 of the ECHR on the Right to Respect for Private and Family Life, directly protect their rights in the same way as they protect the rights of NNLEs. Since many mass media organizations are established as NNLEs, they enjoy the same protection as other NNLEs.

Highlighting the importance of independent mass media in the EU, in December 2022, the European Commission proposed the European Media Freedom Act.<sup>5</sup> Thierry Breton, Commissioner for the Internal Market, stated: *"The EU is the world's largest democratic single market. Media companies play a vital role but are confronted with falling revenues, threats to media freedom and pluralism, the emergence of very large online platforms, and a patchwork of different national rules. The European Media Freedom Act provides common safeguards at EU level to guarantee a plurality of voices and that our media are able to operate without any interference, be it private or public. A new European watchdog will promote the effective application of these new media freedom rules and screen media concentrations so they do not hamper plurality."*

Multiple international sources, including the Recommendations of the Committee of Ministers to Member States (EU), the decisions of the European Court on Human Rights and the European Court of Justice (ECJ) and the opinions of the European Commission for Democracy through Law of the Council of Europe (Venice Commission), provide in depth interpretation of the mentioned articles of the ECHR and the ICCPR.

The Analysis reviews problematic provisions in the Draft Law and provides some quotes of the mentioned international sources, clarifying how the Draft Law's provisions are in violation of international law.

**It is important to note that Hungary is the only EU country that adopted legislation similar to the proposed Draft Law. On June 18, 2020, the ECJ ruled that Hungary's Law on Transparency of Organizations Supported from Abroad (Transparency Law) was in breach of EU law,<sup>6</sup> including the Treaty on the Functioning of the European Union (Article 63), and the Charter of Fundamental Rights of the EU (Articles 7, 8, and 12). Details of the ECJ decision are provided under the section "Impact on EU accession" below. As a result of the ECJ decision, Hungary repealed the law in 2021.**

The Explanatory Note on the Draft Law referenced the US Foreign Agents Registration Act (FARA) as an example of international experience on which the Draft Law was developed. The leader of the ruling political party in Georgia stated that the Draft Law is based upon and is *"far softer"*<sup>7</sup> than the US FARA. US FARA, while containing a number of shortcomings, is fundamentally different and should not be compared with legislation specifically designed to restrict NNLEs and mass media. While we are prepared to provide a separate detailed comparative legal analysis to show the clear differences between the Draft Law and the US FARA, below are a few key points:

- Under FARA one does not have to register simply because one receives funds from a foreign source. Rather one must be an agent of a foreign principal, such as if one acts at the direction and control of a foreign government.

<sup>5</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_5504](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5504)

<sup>6</sup> <http://curia.europa.eu/juris/document/document.jsf?text=&docid=227569&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5811640>

<sup>7</sup> Interview with MP Guram Macharashvili by Interpressnews:

<https://www.interpressnews.ge/en/article/123906-guram-macharashvili-we-are-thinking-of-translating-the-american-law-completely-then-they-will-no-longer-say-that-it-is-russian-law-if-they-still-say-it-then-it-turns-out-that-there-is-russian-legislation-in-america-so-what-they-have-against-us>

- Many US non-governmental organizations (NGOs) and media organizations receive foreign grants and other support, but the US has not required them to register as foreign agents under FARA.
- Only about 5% of those registered under FARA are non-profit organizations. Of the small number of non-profit organizations that are registered, they are frequently overseas branches of foreign political parties.

Many Georgian and international organizations are concerned that the ramifications of the Draft Law will be extremely damaging to Georgian people, who will be deprived of important social services and other support, including the most vulnerable groups, such as persons with disabilities. Furthermore, civil society and independent mass media, which are crucial to preservation of democracy in Georgia, will be substantially weakened. The Office of the Public Defender of Georgia reacted to the Draft Law and considers that the proposed draft does not comply with international and national standards of human rights protection and is incompatible with the basic principles of a modern democratic state.<sup>8</sup>

Independent mass media also have reported that the “foreign influence” against Georgian national interests is being channeled through some major businesses and politicians, often supporting foreign, including Russian interests, which are not covered under the Draft Law.<sup>9</sup>

The Explanatory Note on the Draft Law envisions minimal impact on the state budget, “*The draft law does not envisage the state taking new financial obligations.*” However, the implementation of the Draft Law will require very substantial administrative and financial resources. Presently the MoJ, which is slated to be a primary enforcer of the Draft Law, does not perform any inspections of NNLEs or other legal entities and is compliant with common international practice. Inspecting over 29,000 NNLEs and mass media in order to ‘find’ FAs would require a substantial budget, without a proper justification of why such funds must be allocated for this purpose, particularly when there are many important and under-resourced needs among citizens throughout the country. Despite the claims in the Explanatory Note, the Draft Law would have serious budget implications.

The comparative Analysis of specific problematic provisions and concepts in the Draft Law follows.

## Analysis

### IMPACT ON EU ACCESSION

At the time when Georgia is actively working to obtain EU candidate status, the adoption of this Draft Law might derail these efforts. In the European Parliament Resolution on the implementation of the EU Association Agreement with Georgia from 14 December 2022, the EU Parliament called “*on the Georgian authorities to uphold the highest standards of democracy, the rule of law, human rights and fundamental freedoms*” (point 2). It also calls on “*all Georgian political forces to constructively participate in and contribute to these efforts and calls on Georgian authorities to take into account proposals submitted by civil society organisations, in order to ensure the meaningful and credible involvement of civil society in decision making processes at all levels*” (point 2).<sup>10</sup> The European Parliament highlights the importance of actively supporting NGOs: “*Emphasises the crucial role of civil society organisations in democratic oversight; calls on the Commission and the Member States to provide political, technical, and financial support to civil society and independent media and to distribute core funds to civil society to boost capacity-building and expertise*”(point 33).

The Draft Law is contrary to the EU’s understanding that support of NGOs, including through providing access to foreign funding from member states and the EU itself, is important for Georgia’s accession process.

ECJ found that legislation similar to the Draft Law proposed in Georgia is contrary to the EU obligations of Member States and directly violates several EU laws. Therefore, such legislation would be problematic for

<sup>8</sup> <https://netgazeti.ge/news/655541>

<sup>9</sup>For example: [https://idfi.ge/en/russian\\_capital\\_in\\_georgia](https://idfi.ge/en/russian_capital_in_georgia); <https://netgazeti.ge/news/598704>; <https://mtavari.tv/post-factum/79287>.

<sup>10</sup> European Parliament Resolution of 14 December 2022 on the Implementation of the EU Association Agreement with Georgia (2021/2236(INI)).

prospective Member States as well. Regarding a similar law introduced in Hungary (in Commission vs. Hungary, June 2020), the ECJ stated:

- Firstly, *“the obligations of registration, declaration and publication imposed on the ‘organisations in receipt of support from abroad’ under Paragraphs 1 and 2 of the Transparency Law and the penalties provided for in Paragraph 3 of that law constitute a restriction on the free movement of capital, prohibited by Article 63 TFEU”*<sup>11</sup> (point 65).
- Secondly, *“the objective of increasing the transparency of the financing of associations, although legitimate, cannot justify legislation of a Member State which is based on a presumption made on principle and applied indiscriminately that any financial support paid by a natural or legal person established in another Member State or in a third country and any civil society organisation receiving such financial support are intrinsically liable to jeopardise the political and economic interests of the former Member State and the ability of its institutions to operate free from interference”* (point 86).
- Thirdly, *“Hungary seems to have based the Transparency Law not on the existence of a genuine threat but on a presumption made on principle and indiscriminately that financial support that is sent from other Member States or third countries and the civil society organisations receiving such financial support are liable to lead to such a threat”* (point 93).
- Finally, the ECJ concluded that in addition to violating Article 63 of the Treaty on the Functioning of the European Union, by introducing provisions of the Transparency Law *“which impose obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and which provide for the possibility of applying penalties to organisations that do not comply with those obligations, Hungary has introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations”*, and has also violated Articles 7, 8 and 12 of the Charter of Fundamental Rights of the EU (covering respectively the right to respect for private and family life, the right to the protection of personal data and the right to freedom of association).

**Contrary to the Explanatory Note of the Draft Law, which states that the draft does not conflict with EU law, the above illustrates how the Draft Law contradicts several EU laws.**

#### **VIOLATION OF ARTICLE 11. FREEDOM OF ASSEMBLY AND ASSOCIATION OF THE ECHR**

Article 11 of the ECHR states:

*“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”*

To claim an Article 11 violation, it needs to be shown that there is interference with the freedom of association. Such an interference or restriction on the freedom of association is not permissible unless it meets narrowly defined criteria for restrictions. According to the ECHR, a permissible restriction must be:

- prescribed by law;
- necessary in a democratic society; and
- 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.

<sup>11</sup> The Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE IV: FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL - Chapter 4: Capital and payments - Article 63.

Below the Draft Law will be analyzed to determine whether there is interference with the protected right and whether that interference is permissible.

#### INTERFERENCE WITH FREEDOM OF ASSOCIATION

The Draft Law constitutes interference with freedom of association because it requires NNLEs to change their behavior. They need to decide whether to register as an FA (and be subject to additional reporting) and/or decide to limit their receipt of foreign funding. Non-compliance with the Draft Law leads to heavy fines, which will also influence their decision. In addition, regardless of whether they register, they will be subject to the MoJ's special monitoring. All of this leads to the conclusion that there is interference with freedom of association. A similar conclusion was reached by the ECHR regarding the Russian law on "foreign agents."<sup>12</sup>

Provisions of the Draft Law establishing restrictions on the freedom of association include:

1. creating a hostile environment by labelling NNLEs and mass media as "agents of foreign influence," which can be interpreted as "foreign spies" or "traitors";
2. limiting access of NNLEs and mass media to funding support;
3. imposing burdensome registration and reporting requirements on NNLEs and mass media;
4. exposing NNLEs and mass media to unlimited government inspections; and
5. establishing harsh penalties for violations of the Draft Law.

Below the provisions in the Draft Law will be analyzed to assess whether any of the proposed restrictions is permissible.

#### PRESCRIBED BY LAW

For a restriction to be considered "prescribed by law," the law needs to be sufficiently clear and foreseeable. There should also be a "protection against arbitrary interference by public authorities".<sup>13</sup> The Draft Law does not comply with the standard to be prescribed by law for the following reasons:

- It is not sufficiently clear who will be designated as an FA.<sup>14</sup>
- The MoJ is granted a broad and vaguely defined authority to initiate monitoring of any NNLEs or mass media.<sup>15</sup>

The Draft Law defines that a FA must receive at least 20% of its revenue from a foreign power (Article 2 of the Draft Law). The provision in Paragraph 4 of Article 2 of the Draft Law states that revenue is recognized as received from a foreign power when:

- "a) the entity received revenue directly or indirectly from a foreign power";*
- b) the entity received revenue directly or indirectly from a legal entity that received revenue directly or indirectly from a foreign power, or when*
- c) source of the revenue is not identified."*

This provision carries uncertainty because it requires NNLEs and mass media to engage in rigorous due diligence to identify the sources of their revenue. It is possible, even after conducting such due diligence, that a NNLE might not be able to identify, for example, whether a Georgian legal entity proposing to support a NNLE has revenue from foreign powers, as Georgian legal entities are not obligated to disclose the sources of their revenue to a NNLE.

Paragraphs 1-3 of Article 8 of the Draft Law provide the MoJ with authority to monitor all NNLEs and mass media, not just those that are included in the FA register. It states that:

*"1. To identify an agent of foreign influence or to verify compliance with any of the requirements of this law, the Ministry of Justice of Georgia may, at any time, examine and study the issue accordingly, i.e., carry out monitoring ("the monitoring")."*

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<sup>12</sup> <https://hudoc.echr.coe.int/fre?i=001-217751>; Case of Ecodefence and Others v. Russia, 14 June 2022, see par. 78-87.

<sup>13</sup> <https://hudoc.echr.coe.int/fre?i=001-217751>; Case of Ecodefence and Others v. Russia, 14 June 2022, Point 90.

<sup>14</sup> Paragraph 4 of Article 2 of the Draft Law.

<sup>15</sup> Paragraphs 1- 2 of Article 8 of the Draft Law.

2. Monitoring may be initiated based on:

a) A decision of an authorized official of the Ministry of Justice of Georgia;

b) A written application submitted to the Ministry of Justice of Georgia containing appropriate indications related to a particular agent of foreign influence.

3. With the aim of conducting monitoring, an authorized official of the Ministry of Justice of Georgia may, according to the law, search for necessary information, including personal data.”

Based on this article, the MoJ, at the discretion of its authorized official, may effectively “monitor” any NNLE or mass media. The only limitation to this power is in Paragraph 4 of Article 8, which states that such monitoring cannot be conducted more often than every six months. According to Paragraph 3 of Article 8, the Draft Law provides for an unlimited monitoring scope and lacks the procedure on how this monitoring will be conducted, thus providing government authorities with the opportunity to interfere in the activities of any NNLE or mass media. Therefore, the Draft Law violates the requirement to comply with “prescribed by the law” test.

#### PURSUING A LEGITIMATE AIM

There is a narrow list of legitimate aims in Paragraph 2 of Article 14. The list is exclusive and includes only restrictions 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.

The Explanatory Note on the Draft Law states that the purpose is “ensuring transparency of the foreign influence.” This may be a legitimate goal (as part of national security), but it is not enough to state it in order to impose restrictions on freedom of association. As discussed above, any permissible restriction must meet all requirements for the permissible interference at once, including being prescribed by law; necessary in a democratic society; as well as having a legitimate goal. If the transparency of foreign influence is the government’s genuine goal, then it raises the question as to why the Draft Law does not cover public figures and other entities receiving foreign funding, particularly those with significant political and financial power that influences Georgia’s national interests.

By mere reference to the need for transparency, the Draft Law cannot be justified as compliant with the freedom of association as defined by the ICCPR and ECHR.

#### NECESSARY IN A DEMOCRATIC SOCIETY

Even if a legislative restriction has a legitimate aim, it must be proportionate to the aims sought to be achieved and “necessary in a democratic society”. According to the Venice Commission, restrictions on the freedom of association can be “*considered to pursue legitimate purposes only if they aim to avert a real, and not only hypothetical danger. Any restrictions therefore can only be based on a prior risk assessment indicating “plausible evidence” of a sufficiently imminent threat to the State or to a democratic society*”.<sup>16</sup>

The Council of Europe Expert Council on NGO Law, in its Opinion on the Hungarian Draft Act on the Transparency of the Organizations Supported from Abroad stated that “*the reasoning does not actually indicate any problems that have arisen in practice that could not be dealt with by existing legal provisions or less intrusive measures. Therefore, it is not likely to pass the ‘necessary in democratic society’ nor ‘proportionality’ test*”<sup>17</sup>.

The Draft Law introduces several restrictions on NNLEs and mass media creating significant impediments to their activities, which are in violation of the freedom of association, as they are not necessary in the democratic society and not proportionate to the aim sought to be achieved:

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<sup>16</sup> Para. 81, Report on Funding of Associations, Venice Commission, CDL-AD(2019)002. See also discussion under Venice Commission and ODIHR 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 114<sup>th</sup> Plenary Session (Venice, 16-17 March 2018).

<sup>17</sup> Para. 27, CoE Expert Council on NGO Law, Opinion on the Hungarian Draft Act on the Transparency.

### **1. *Creating a hostile environment labelling NNLEs and mass media as “agents of foreign influence” interpreted as “foreign spies” or “traitors”***

All NNLEs and mass media receiving over 20% of the total revenue in the previous year from foreign powers must register and label themselves as FAs, with such term in Georgian having a very negative connotation and usually interpreted as a synonym of a “foreign spy” or a “traitor.” All FAs face the possibility of public mistrust, which may jeopardize their relationships with beneficiaries and supporters, as well as workers and volunteers, thus undermining their activities. Several international bodies, including the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, the Venice Commission, the OSCE/ODIHR, and the Council of Europe have raised concerns about the stigmatization of civil society for receiving foreign funding. Notably, the Venice Commission has clearly stated in its opinion on Russia’s law on FAs that, *“in the light of the undisputable, very negative connotation of the label “foreign agent”, the Venice Commission finds that the immediate effect of the law is that of stirring the suspicion and distrust of the public in certain non-commercial organisations and of stigmatizing them, thus having a chilling effect on their activities”*.<sup>18</sup> No European or other democratic countries would use such labeling to stigmatize specifically NNLEs and mass media on the mere fact that they receive foreign support.

### **2. *Limiting NNLEs and mass media access to funding support***

The Draft Law restricts access of NNLEs and mass media to foreign support and potentially other sources of support by imposing new requirements on NNLEs and mass media, exposing them to government control, and stigmatizing them through the “FA” label. Many NNLEs and mass media may be forced to stop receiving support from foreign powers. The right to freedom of association includes the freedom to seek, receive, and use funds by NGOs. Article 13 of the UN Declaration on Human Rights Defenders<sup>19</sup> states 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”*. Principle 7 of the OSCE/ODIHR – Venice Commission Guidelines on Freedom of Association<sup>20</sup> also reaffirms this principle. Specific reporting requirements for foreign-funded NGOs affects their right to use such resources and introduces additional burdens on them. The initiators of the Draft Law did not provide justification why limiting and or potentially terminating foreign support to NNLEs and mass media is necessary in Georgia. The Draft Law requirements will restrict access to foreign support to all kinds of NNLEs, including many social service providers supporting disadvantaged groups, such as persons with disabilities, as well as providing much needed services that the government is unable to provide. Since NNLEs and mass media serve as independent watchdogs that help keep Georgian democracy in check, termination of such funding would mean the reduction of important social investments. NNLEs and mass media will also lose local sources of support. Stigmatization of FAs may also result in reduction of support from Georgian people and entities. In addition, all sources which do not require donors to expose their personal information might be in jeopardy. For example, the use of crowdfunding platforms or SMS charitable campaigns in Georgia could be considered as revenue from a foreign power because the exact source of the revenue (who donated through the SMS or crowdfunding campaign) cannot be identified in most cases. The Draft Law’s initiators did not provide a risk assessment and “plausible evidence” of the need of such restrictions. Therefore, we can conclude that provisions of the Draft Law would be in violation of the ECHR and ICCPR.

### **3. *Imposing burdensome registration and reporting requirements of NNLEs and mass media***

The Draft Law requires FAs to be included in the FA Registry and fill out an annual financial declaration, according to a form to be approved by the MoJ. It is not clear yet how burdensome the new reporting requirements will be. However, any new obligations are a burden and impediment to activities of NNLEs, and they are not compliant with the ECHR and ICCPR unless justified. Thus far, the drafters provided the need for transparency as an aim of the Draft Law, including the new reporting requirements. However, as

<sup>18</sup> Para. 61, Venice Commission Opinion on Federal Law N. 121-Fz on Non-Commercial Organizations (“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 (2014).

<sup>19</sup> General Assembly Resolution A/RES/53/144 <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

<sup>20</sup> <https://www.osce.org/files/f/documents/3/b/132371.pdf>



mentioned earlier, restrictions on freedom of association in compliance with the international law are “only if they aim to avert a real, and not only hypothetical danger. Any restrictions therefore can only be based on a prior risk assessment indicating “plausible evidence” of a sufficiently imminent threat to the State or to a democratic society”.<sup>21</sup> The Draft Law’s initiators have not provided a risk assessment or “plausible evidence” of the need for such restrictions.

#### **4. Exposing NNLEs and mass media to unlimited government inspections**

The Draft Law empowers the MoJ to monitor (inspect) any NNLE or mass media, at its own discretion (by a decision of an authorized official of the MoJ; or based on a written application submitted to the MoJ by anyone containing appropriate indications related to a particular FA. The MoJ may search for any necessary information, including personal data. Regardless of whether a NNLE or mass media is receiving foreign support, all NNLEs and mass media are exposed to potential inspection by the government. The Draft Law’s initiators have not provided a risk assessment nor “plausible evidence” of the need for such restrictions.

#### **5. Establishing harsh penalties for violations of the Draft Law**

The Draft Law establishes administrative liability for violation of the Draft Law’s provisions, which vary from the equivalent of \$3,700 to \$9,000, making any citizens engagement into activities of NNLEs and mass media extremely risky and undermining the entire non-profit sector and independent media. Such penalties may be considered unreasonable, considering that the activities are identified as administrative offenses. As discussed in earlier sections of this analysis, the requirements in the Draft Law do not comply with international law requirements and should not be recognized as legitimate.

Overall, the Draft Law requirements to be imposed on NNLEs and mass media fail to meet “necessary in a democratic society” and proportionality test.

### **ARTICLE 14 OF THE ECHR. PROHIBITION OF DISCRIMINATION**

Article 14 of the ECHR requires that all of the rights and freedoms set out in the ECHR must be protected and applied without discrimination, including those included in Article 11 of the ECHR.<sup>22</sup> According to the Guide on Article 14 by the ECHR, “Discrimination occurs when a person (a physical person as well as associations) protected under the ECHR is treated less favorably than another person in a similar situation and this treatment cannot be objectively and reasonably justified.”<sup>23</sup>

“51. When deciding cases of discrimination, the Court will apply the following test:

1. Has there been a difference in treatment of persons in analogous or relevantly similar situations – or a failure to treat differently persons in relevantly different situations?
2. If so, is such difference – or absence of difference – objectively justified? In particular,
  - a. Does it pursue a legitimate aim?
  - b. Are the means employed reasonably proportionate to the aim pursued?”

The Draft Law establishes discriminatory treatment for NNLEs and mass media receiving over 20% of their revenue in the previous year from foreign powers compared to those NNLEs and mass media which do not fulfill this requirement. Such treatment cannot be justified based on the ECHR and ICCPR. The Venice Commission has condemned such discriminatory concept on many occasions. For example, in the case of the Russian FA law,<sup>24</sup> the Venice Commission recalled that in its case law the ECHR was reluctant to accept the “foreign origin of an NGO as a legitimate reason for a differentiated treatment; the same

<sup>21</sup> Para. 81, Report on Funding of Associations, Venice Commission, CDL-AD(2019)002. See also discussion under Venice Commission and ODIHR Joint Opinion on Draft law no. 6674on 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. 6675on 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 114<sup>th</sup> Plenary Session (Venice, 16-17 March 2018).

<sup>22</sup> *Bączkowski and Others v. Poland*, 2007 <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-80464%22%7D>

<sup>23</sup> Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention/Prohibition of Discrimination.

<sup>24</sup> The Law of the Russian Federation on Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents (2012)



*reluctance would a fortiori be in place in case of mere foreign funding.*<sup>25</sup> Furthermore, as the Expert Council on NGO Law concluded, the labeling requirement will likely provide additional grounds for undue discrimination of NGOs for political reasons.<sup>26</sup>

The Draft Law does not impose the same restrictions on persons and entities that are not NNLEs and mass media, including commercial legal entities or public officials, despite the fact that they may also be a channel for the so-called foreign influence. As mentioned earlier, discrimination is any unjustified difference in treatment of certain people or groups of people who are in the same, or at least similar situations. The Venice Commission in its analysis<sup>27</sup> on NGO funding has stated that *“unequal treatment between the civil society sector and other legal persons/non-state entities, for instance, the business sector, may raise issues when the State fails to provide specific justification for it and demonstrate that there are legitimate grounds for imposing for example additional reporting obligations only to associations”*. This has been confirmed in the 2018 joint Venice Commission and OSCE/ODIHR Opinion on Ukraine<sup>28</sup> stating that there was no sufficient ground for introducing additional reporting requirements for NGOs as compared to businesses. In its recent judgment on the Hungarian law, the ECJ also confirmed that the law *“introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations”*.<sup>29</sup>

The same arguments are valid for the Draft Law. If the drafters consider foreign influence a danger to Georgia or want to prevent foreign powers’ interference in Georgian politics, then they should have proposed similar measures for other persons and entities that receive or work with foreign funding.

#### **ARTICLE 8 OF ECHR (POTENTIALLY). RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE.**

Article 8 of the ECHR states:

*“1. Everyone has the right to respect for his private and family life, his home and his correspondence.  
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, 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.”*

This Article protects not only individuals but other entities, such as NNLEs and mass media, enjoying their rights guarantees under the ECHR.<sup>30</sup>

The Draft Law establishes public access<sup>31</sup> to the personal data of NNLEs and mass media. According to Paragraph 1 of Article 6, a FA shall, in January of every year, following its registration as an FA, fill out an electronic form (to be established by the MoJ) and submit a financial declaration. The financial declaration shall include the applicant’s identification data, address, website, information about the source of funding, amount and purpose of money or other types of material benefits received by the applicant during the previous calendar year, information about the amount and purpose of money spent by the applicant during the previous calendar year, and the date of filling out the application. Depending on the requirements to be established by the MoJ, this information may include personal data protected by other laws of Georgia. This concern is based on the fact that the same Article in the Draft Law authorizes the MoJ to *“search for necessary information including personal data”* in order to verify submitted information.

<sup>25</sup> Opinion of the Venice Commission on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents (August 2013)

<sup>26</sup> Expert Council On NGO Law, Opinion On The Hungarian Draft Act On The Transparency Of Organisations Supported From Abroad, 2017 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168070bfb>

<sup>27</sup> Para. 125, Report on Funding of Associations, Venice Commission, CDL-AD(2019)002

<sup>28</sup> Para. 42-45, Venice Commission and OSCE/ODIHR, 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 (16 March 2018), CDL-AD(2018)006

<sup>29</sup> <http://curia.europa.eu/juris/document/document.jsf?text=&docid=227569&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5811640>

<sup>30</sup> Guide to the Case-Law of the of the European Court of Human Rights Data protection - page 8 - [https://www.echr.coe.int/Documents/Guide\\_Data\\_protection\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Data_protection_ENG.pdf)

<sup>31</sup> Article 5 of the Draft Law.

In addition, the MoJ has the right to search for unregistered FAs and to verify compliance with any of the requirements of this law at any time, i.e., carry out monitoring (*“the monitoring”*) by searching for necessary information, including personal data.<sup>32</sup> It is possible that the MoJ will also collect not just personal data of NNLEs and mass media, but also personal data on their donors and beneficiaries.

The procedure for conducting monitoring, including the scope and the purpose of collecting personal data from potentially all NNLEs and mass media, is unclear.

The Draft Law provides the MoJ with the power to determine the procedures for:

- the search of information, including personal data of NNLEs and mass media that are already registered or request their registration as FAs;
- the exact content of the financial declaration that has to be submitted annually by registered entities; and
- the scope of the MoJ’s monitoring of all NNLEs and mass media.

These facts alone might lead to the conclusion that the limitations on the right to privacy are not prescribed by law, as they will be provided by an act of the executive branch.

## Conclusion

If adopted, the Draft Law will violate multiple Georgian commitments in the ECHR and the ICCPR, as well as Georgia’s obligations to guarantee freedom of association, right to privacy, as well as the prohibition of discrimination. The adoption of the Draft Law will also have a negative impact on Georgia’s EU accession.

The Draft Law would also substantially weaken Georgia’s civil society, as it will undermine the public’s trust and support to NGOs and mass media and prevent them from being efficient watchdogs, service providers, and contributors to democracy.

This document was developed by the International Center for Not-for-Profit Law (ICNL) and the European Center for Not For-Profit Law (ECNL) under the USAID Civil Society Engagement Program.

The contents of this document are the authors and do not necessarily reflect the views of USAID or the United States Government.

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<sup>32</sup> Article 8 of the Draft Law.