



An Initial Analysis of the Package of Draft Laws Related to CSOs Receiving Foreign Funding in Ukraine

Developed by the European Center for Not-for-Profit Law Stichting
(ECNL)¹
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Introduction

At the beginning of 2020 three separate draft laws were introduced in the Ukrainian Parliament (Rada) that concern the receipt of foreign funding by civil society organizations (CSOs) and impose limitations to the work of CSOs such as:

- Prohibition for certain individuals associated with foreign-funded CSOs to serve either on the Boards of state banks, state enterprises or to be state officials;
- Introduction of a special regime of registration and reporting for foreign-funded CSOs;
- A requirement for executive managers and/or persons, elected to the senior organ of a foreign-funded CSO to pass a polygraph test.

Based on request from local partners, ECNL reviewed the draft laws regarding their compliance with international and European standards and provides the following initial analysis of the law. ECNL is concerned that the draft laws are likely not compliant with international and European standards as they interfere with freedom of association, access to funding, privacy, as well as the prohibition of discrimination and inhuman and degrading treatment. They also seem not to be compliant with the principles of legality, foreseeability and legitimate aim of the restrictions.

If adopted the draft laws will:

- Stigmatise CSOs;
- Have retroactive effect (and sanction individuals for engaging in activities which at the time of their implementation were not illegal);
- Lead to legal uncertainty (as to which individuals may be affected and in what cases);
- Discriminate specifically against individuals engaged with CSOs;
- Violate the privacy and human dignity of CSO leaders that will have to prove their loyalty to Ukraine by passing a polygraph test.

As a general effect, the draft laws will likely discourage individuals to engage with CSOs because of the possible negative consequences that may affect them personally.

Summary of the draft laws

The three drafts law are (1) draft law 3193-1 on state bodies, (2) draft law 3326 on lustration and (3) draft law 3564 on foreign funding.

The **draft law 3193-1 on state bodies** introduces limitations regarding who can serve as a **member of the supervisory boards of state-owned enterprises and business associations** (where the state-owned stake in the charter capital exceeds 50 percent), as well as **state banks**. It essentially limits the possibility to be appointed to such positions for authorised representatives or current or former members of the governing bodies of associations, which are receiving or within the last five years have received funds from or have cooperated with foreign states and/or foreign non-governmental organizations. All current members of the above-mentioned bodies of state-related entities must comply with this requirement (i.e. if they fall within the above categories they need to resign from their positions).

The proposed amendments to the **draft law 3326 on lustration** impose a **ban on individuals to become state officials**, if they have been engaged in the last 10 years with a CSO (public association or another non-profit company) which directly or through some third parties has received funds, property or services from foreign sources (such as foreign states,

international CSOs, foreign citizens or persons without citizenship (regardless of the fact if they reside in Ukraine or not), foreign legal entities such as foundations, or any other source located outside of Ukraine). All current state officials that fall within the above categories will have to be dismissed within 1 month after the entry into force of the proposed amendments.

The ban covers persons that have been engaged with such CSOs in their position of chief executives; members of a governing body; or members of the association or the non-profit company. In addition, persons, who regularly (over 3 times a year) within the last 10 years, performed work, rendered services or in any other way were involved in the activity of the CSO (if they knew or must have known and might have known, that their work, services or other engagement was paid out of the funds or property received from a financing source located outside of Ukraine).

The **draft law 3564 on foreign funding** introduces several requirements for organisations receiving foreign funding.

- (1) **Limitations for the chief executive and members of the supervisory boards of various state enterprises and business associations** (where the state-owned stake in the charter capital exceeds 50%) to serve in such function if they have occupied in the last 5 years senior positions in public associations with foreign support, or have concluded employment agreements (contracts) with such associations; or have conducted transactions in the sphere of entrepreneurial activity with such public associations. A similar limitation has been proposed for entering public service (becoming a state official). All individuals that fall within the above categories will have to be dismissed within 1 month after the entry into force of the proposed amendments.
- (2) **Labelling and stigmatising organisations- public association with foreign support: additional burdensome requirements and violation of privacy.** The amendments propose changes in the Law on Public Associations and introduce a definition of a public association with foreign support which is a public association registered in Ukraine that receives funds and/or other property from foreign states or authorities, foreign non-governmental organizations, foreign and international organizations, foreign citizens and persons without citizenship or persons authorized by them, and/or from legal entities and citizens of Ukraine, receiving the above-mentioned financial aid. Such an organisation also has to simultaneously meet the following conditions:
 - Be engaged in activities in one of fifteen specifically listed and broadly defined areas related to participation in decision making, activities of local or national authorities, democracy promotion and human rights;
 - Its income from foreign sources exceeds 50 % of its overall annual budget;
 - Its total income exceeds 50 000 EUR annually.

In addition, all **information materials** of such associations should state that they have been developed and/or spread with foreign support and list the main sources of funding. The information that should be published includes: the name of a foreign country, which is directly or indirectly funding a public association with foreign support or the first and last name of an individual foreign donor. Moreover, copies of the above-mentioned materials before being spread shall be sent to the Ministry of Justice of Ukraine.

- (3) **Mandatory registration or re-registration.** Any association which has the intention of carrying out activities as a public association with foreign support or in the last 3 months has fulfilled the legal conditions must submit an application to the registration body and add the words “with foreign support” in its name. Even

organizations that do not have legal entity status are obliged to comply with the law and de facto register as legal entities within 30 days after they fulfil the legal conditions. The list of public associations with foreign support should be published on the website of the Ministry of Justice. Changes to the information in the list should be made within 2 days after the declared circumstances change. Moreover, the draft law does not provide for a clear procedure to change the name/registration as an organization “with foreign support” should the organization stop meeting the conditions for such organizations set in the law.

- (4) **Requirement for polygraph test – degrading treatment and violation of human dignity.** The executive managers and/or persons, elected to the senior organ of a public association with foreign support should **pass a polygraph test (with their consent)**. While consent of the individual is required, the information about the fact whether a test was taken (or there was a refusal to take it) must be made public through the CSO web site and also included in the report to the state registration body. The polygraph test should check the likelihood of committing an offense related to betrayal of state interests of Ukraine. It will be based on a list of mandatory questions approved by the National Security and Defence Council of Ukraine. The test should include “*obligatory video-recording of psychophysiological reactions to certain psychological stimuli of a person, undergoing a test and graph indicators of physiological reactions, registered by the polygraph machine*”.
- (5) **Additional reporting requirements.** Until March 1 of each year, each public association with foreign support should submit an additional report to the Ministry of Justice (that is also published on its website) providing various types of information about its sources of funding including the income and expenditure of the foreign funding it has received. Until April 1 each year, the Ministry of Justice should publish Report on the activity of public associations with foreign support in Ukraine, providing the information concerning each association that includes among others information on foreign funding received and information about executive managers and/or persons, elected to the senior organ of a public association with foreign support, with indication of passing a polygraph test or a refusal to undergo such a test.
- (6) **Penalties:** The violation of the above requirements may lead to the termination of the public association based on a court decision.

Analysis

The draft laws raise several problematic issues, but the 3 key ones we will address in our analysis include:

- The limitation on the possibility for certain individuals associated with foreign-funded CSOs to serve either on the Boards of state enterprises or state banks or to be state officials (such limitation is provided in all three proposed draft laws);
- The introduction of a special regime of registration and reporting for foreign-funded CSOs (*draft law 3564 on foreign funding*);
- The requirement for executive managers and/or persons, elected to the senior organ of a foreign-funded CSO to pass a polygraph test (*draft law 3564 on foreign funding*).

Ukraine is a party to both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). It also seeks closer partnership with the European Union (EU), and therefore it also needs to ensure its laws comply with the EU standards.

Several countries, including Azerbaijan, Egypt, Kyrgyzstan, Russia, Hungary and even Ukraine in the past, have been condemned for introducing or planning to introduce limitations on foreign funding or the concept of “foreign agent”. There have been numerous opinions by the Venice Commission, OSCE/ODIHR and the Council of Europe Expert Council on NGO Law that have explained why provisions that impose additional requirements on organisations receiving foreign funding, such as in the current draft laws, may be seen as interference with the rights to association and privacy under the ECHR and ICCPR standards.

This analysis will not aim to cite all of the opinions and issues, but rather focus on key aspects of why the laws are problematic and seem to violate standards and commitments. ECNL remains available to provide specific input or opinion on any other issue.

Overarching Issues

A. Stigmatization of CSOs

The limitations proposed by the draft laws do not affect only the CSO that has received the funding (e.g. by requiring to change the name of the organization; additional reporting; labelling of published materials; etc.) but also various individuals associated with it (e.g. limitation to take public office; etc.). Such measures lead to stigmatisation of CSOs, especially those receiving support from foreign sources.

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. The Venice Commission has clearly stated in its Opinion on Russia 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”*.²

On June 18, 2020 the European Court of Justice (ECJ) officially sentenced that Hungary’s Law on the transparency of organisations supported from abroad is in breach of EU law, including provisions of the EU Charter of Fundamental Rights. According to the ECJ, the *“systematic obligations imposed on the associations and foundations falling within the scope of the Transparency Law to register and present themselves under the designation ‘organisation in receipt of support from abroad’”* are *“of such a nature as to create a generalized climate of mistrust vis-à-vis the associations and foundations at issue, in Hungary, and to stigmatize them.”*³

B. The draft laws do not satisfy the principle of legality and foreseeability of legislation

The draft laws introduce requirements and subsequent consequences for being engaged in activities of an organisation that receives foreign funding or for receiving funding from foreign sources with a retroactive effect. Such retroactivity contradicts basic legal principles

² Para. 61, Venice Commission Opinion on Federal Law N. 121-Fz on Non-Commercial Organisations (“Law on Foreign Agents”), on Federal Laws N. 18-Fz and N. 147-Fz and on Federal Law N. 190-Fz on Making Amendments to the Criminal Code (“Law On Treason”) of the Russian Federation (2014)

³ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=227569&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5811640>

guaranteed by ICCPR and ECHR. According to Article 15 of ICCPR “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”. **Therefore, the provisions are likely to violate the requirement for non-retroactivity of the legislation.**

Further, **the categories of individuals that could be potentially affected are extremely vague** and do not give sufficient clarity as to who is covered and under what circumstances. The draft laws cover a wide circle of relations (not just the receipt of foreign funding), including cooperation with foreign non-governmental organizations; performed work, rendered services or any other involvement in the activity of the foreign-funded CSOs; or conducted transactions in the sphere of entrepreneurial activity with such public associations. If the draft laws are adopted, *ad absurdum* the participation in the activities of any international network could qualify as cooperation with foreign CSOs; or cleaning the office of a CSO would qualify as rendering services to a foreign-funded CSO; or even joint participation in an EU-funded project between a CSO and a state authority may lead to the fact that all the participating state officials would be considered involved in the activities of a foreign-funded CSO (and would therefore have to be dismissed from state office).

Such vague wording is problematic because it does not allow CSOs and individuals to foresee what type of behaviour would lead to future limitations for them. Therefore, **the legislation would likely fail to meet the requirement of foreseeability.**

C. The draft laws do not fully satisfy the requirement that restrictions of rights need to be based on a legitimate aim

The draft laws are justified by the need to:

- ensure economic sovereignty of Ukraine and increase independence of supervisory boards (draft law 3193-1 on state bodies),
- prevent the potential violation of interests of the country and interference into public politics from foreign countries/individuals/legal entities, etc. (draft law 3326 on lustration);
- ensure better access of tax payers and society in general to information about sources of funding and expenditures of CSOs with over 50% foreign funding (draft law 3564 on foreign funding)

International standards clearly list the only possible aims for which freedom of association could be limited - “*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 list is exclusive.

Moreover, 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*”.⁴

The explanatory memoranda of the laws do not provide concrete evidence of risk that justifies such blanket bans that would affect numerous organisations and interfere with

⁴ 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 114th Plenary Session (Venice, 16-17 March 2018)

the freedom of association. Therefore, the limitations introduced by the draft laws would likely fail to meet the requirement of legitimate aim.

Limitations to specific freedoms

Right to Freedom of Association and Access to Funding

The right to freedom of association, according to international and European standards, involves the right of associations to exist and conduct activities and the right of their members to participate in associations and their activities. While limitations to the freedom of association are possible, in order for them to be permissible under international law, it is important to first assess whether (i) they are prescribed by law, (ii) whether they pursue a legitimate aim, and (iii) whether the proposed measures are necessary and proportionate to achieve this aim (see Article 22 par 2 of the ICCPR and Article 11 par 2 of the ECHR).

Beyond the issues of foreseeability, legality and the legitimacy described above **the draft laws would also need to prove that the limitations proposed are necessary for the achievement of the objective (necessity) and a less stringent measure would not be more appropriate (proportionality).**

Limitations on individuals associated with CSOs

All three draft laws impose various limitations on different groups of individuals that have been associated with foreign-funded CSOs. The imposition of those requirements will serve as deterrent for individuals to associate and form organisations, as they would fear consequences for their future career options or for being stigmatised or viewed negatively. This interferes with the individual right to freedom of association.

The draft laws would limit the rights of an extremely large and not identifiable group of Ukrainians to serve on the boards of state enterprises and banks or be state officials. The proposed limitations extend to groups of people that even marginally cannot be claimed to pose any threat to the economic sovereignty of Ukraine such as members of such organizations (that may not be actively involved in the activities or decisions in the CSOs) or contractors of such organizations who simply provide services to them.

Limitations of rights need to be based on the individual circumstances of each situation, meaning that in each individual case, the rights of the individual need to be balanced versus the public interest. Blanket bans or restrictions cover a wide group of people, or in this case, CSOs and individuals, and do not foresee such individual assessments.⁵

As stated in the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association, **blanket bans or requirements, that have negative effects on large parts of society but are actually aimed at preventing improper or criminal actions of individuals, are usually not in line with the principle of proportionality.** ⁶ The ECtHR has discussed the effect of

⁵ See ECNL, Enabling the Flow of Donations, 2019, <http://ecnl.org/wp-content/uploads/2019/10/Enabling-the-flow-of-donations.pdf>

⁶ Joint Guidelines on Freedom of Association, Venice Commission and OSCE/ODIHR, para 35 and 115. 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 114th Plenary Session (Venice, 16-17 March 2018)

membership in an association to the position of a state official with regard to the membership in a masonic lodge and has found that the limitations of the Italian legislation violate art. 11 (freedom of association) and art. 14 (prohibition for discrimination) of the ECHR⁷.

Under two of the draft laws (draft law 3193-1 on state bodies and draft 3326 on lustration), receiving even 1 EUR donation from a foreign source in the last 5 years (10 years in the case of the draft law 3193-1 on state bodies) may lead to very serious consequences for many people associated with the respective CSO. Therefore, **it is thus doubtful that the proposed measures for individuals associated with CSOs are necessary or proportionate.**

Limitation on funding

The draft law 3564 on foreign funding proposes additional obligations for CSOs receiving more than 50% of their income from foreign sources if the income is above 50 000 EUR annually. It would require them to add to their name “with foreign support” and would subject them to requirement for public reporting as well as labelling all their communications, among others. In addition, the chief executives and Board members of such organizations are de-facto forced to take a polygraph test to prove that they are not traitors acting against the interest of their own country.

Freedom of association is an internationally recognized fundamental human right and the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities is an indispensable part of it.⁸ Any additional burdens or limitations on CSOs or on their ability to receive funding, regardless of the source is a limitation to the freedom of association.

With respect to the question of **necessity**, it is important to note that according to the ECtHR, even if limitations of the right to freedom of association aim to protect a legitimate aim, this is still only permissible to counter a **concrete threat**, or if there is a **concrete indication of individual illegal activity**;⁹ hypothetical dangers will not be sufficient in this respect.¹⁰

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*”¹¹.

With respect to the question of whether the publication and reporting requirements are **proportionate** measures to achieve the intended aims, it is important to look at the

⁷ In the CASE OF GRANDE ORIENTE D’ITALIA DI PALAZZO GIUSTINIANI v. ITALY <http://hudoc.echr.coe.int/eng?i=001-59623>, the ECtHR stated that “*freedom of association is of such importance that it cannot be restricted in any way, even in respect of a candidate for public office, so long as the person concerned does not himself commit any reprehensible act by reason of his membership of the association*” and therefore the limitation for members of the masonic lodge to become judges was not “*necessary in a democratic society*”. In a consequent decision (GRANDE ORIENTE D’ITALIA DI PALAZZO GIUSTINIANI v. ITALY (No. 2), the ECtHR found also that in addition to a violation of freedom of association (art. 11 ECHR), there was also a violation of the prohibition of discrimination (art. 14 ECHR) because of the different treatment of the masonic lodge to other legally existing associations.

⁸ Art. 13, UN Declaration on Human Rights Defenders; para. 32, Joint Guidelines on Freedom of Association, Venice Commission and OSCE/ODIHR

⁹ See ECtHR, Sindicatul “Păstorul cel Bun” v. Romania, application no. 2330/09, judgment of 31 January 2012, par 69.

¹⁰ See 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), par 7.2.

¹¹ Para. 27, CoE Expert Council on NGO Law, Opinion on the Hungarian Draft Act on the Transparency

potential effects of these measures. Most of the information that such CSOs will be required to provide to the Ministry of Justice is included in the financial reports that they already submit. In case some additional clarifications may be needed with regard to the reported information, it is much more reasonable to introduce such requirements in the current reporting format that CSOs submit, instead of creating a separate Register for foreign-funded CSOs and requiring them to submit yet another report to the government.

For the reasons set out above, it is thus doubtful that the proposed measures for foreign-funded CSOs are necessary and proportionate in a democratic society.

Prohibition for Discrimination

Discrimination based on funding

The draft law proposes different treatment between those organizations that receive foreign funding and those that don't. The Venice Commission recalled that in its case law the European Court was reluctant to accept the “foreign origin of an NCO as a legitimate reason for a differentiated treatment; the same reluctance would a fortiori be in place in case of mere foreign funding.”¹² Furthermore, as the Expert Council on NGO Law concluded, the labelling requirement will likely provide additional grounds for undue discrimination of CSOs for political reasons.¹³

Discrimination between entities

The draft laws introduce limitations to foreign funded non-profit organizations, their members and members of their governing bodies. Such limitations do not seem to exist for other type of legal entities.

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 analysis¹⁴ on CSO 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 Ukraine¹⁵ stating that there was no sufficient ground for introducing additional reporting requirements for CSOs as compared to businesses. In its recent judgment on the Hungarian law the ECJ also confirmed that the law (which is similar to the Ukrainian Draft Law 3564) “introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations”.¹⁶

The same arguments are valid in the case of the proposed three draft laws. If the drafters consider foreign funding a danger to the economic sovereignty of Ukraine or want to prevent interference into public politics from foreign countries, then they should have

¹² Opinion 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)

¹³ 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=090000168070bfbb>

¹⁴ Para. 125, Report on Funding of Associations, Venice Commission, CDL-AD(2019)002

¹⁵ 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

¹⁶ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=227569&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5811640>

proposed similar measures for other legal entities that receive or work with foreign funding (e.g. commercial companies, banks, etc.). Moreover, the danger would be even greater when state officials are directly engaged in negotiating foreign funds (e.g. from the International Monetary Fund or the European Union) as they could directly influence the state policy or agree to conditions which may not be beneficial for Ukraine.

Discrimination between types of activities

Another aspect of the discrimination is the difference of treatment of CSOs receiving foreign funding but working in different areas. Draft law 3564 provides extremely high requirements for CSOs with foreign support working in specifically listed areas but excludes organizations engaged in science, culture, art, health protection and disease prevention, social protection of citizens, maternal and child health, welfare support of persons with disability, promotion of healthy lifestyles, physical culture and sports or environmental protection.

Based on the above, we can conclude that **the proposed draft laws will like be violating Article 14 of ECHR (prohibition of discrimination).**

The Right to Privacy and the Prohibition to be Subject to Inhuman or Degrading Treatment

The draft law 3564 on foreign funding introduces a requirement for the chief executives and Board members of foreign funded organizations to take a polygraph test to prove that they are not traitors acting against the interest of their own country. While the tests should be conducted with consent, failure to take the test must be published on the web site of the CSO thus making the information public. The provisions regarding the polygraph raise several concerns.

Article 3 of ECHR provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” and this right is absolute, i.e. it does not leave scope for any limitations. The requirement to publish information for individuals who have refused to take the test may result in humiliating and degrading treatment. The European Court concluded that “*the authorisation of some to use a lie detector would inevitably compromise the position of others who would refuse to submit –their refusal possibly being interpreted as a sign of guilt.*”¹⁵ **The requirement to publicize the results of such polygraph tests would likely also be violation of the right to privacy (article 8 of ECHR).**

The requirement for taking a polygraph test violates the presumption of innocence for such individuals.¹⁶ Individuals are required to take such tests without any evidence of wrongdoing hence through such tests they have to practically prove their innocence.

In addition to the degrading treatment and violation of their privacy, **the requirement for individuals to take a polygraph test is likely a violation of human dignity.** The Universal Declaration of Human Rights¹⁷ states that human dignity is inviolable (art. 1) and that no one should be subject to attacks upon his honour and reputation (art. 12). individuals publish information that they have not taken the test, their reputation

Finally, according to Article 5 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108 as amended by the Protocol CETS No. 223; hereinafter: **CoE Convention 108**) data processing (as in the case of the results of the polygraph test):

- should be proportionate (art.5.1); and

- shall be carried out on the basis of the **free**, specific, informed and unambiguous consent of the data subject or of some other legitimate basis laid down by law. (art.5.2)

The fact that draft law 3564 requires that the results of the test or the rejection to take it be made public, deprive individual of the possibility for free choice and will likely not be in compliance with CoE Convention 108.

In addition, the CoE Convention 108 requires that certain special categories of data are only allowed “*where appropriate safeguards are enshrined in law, complementing those of this Convention*” (art.6.1). The draft law does not provide any special safeguards for the information collected. It is not clear what will authorities do with the data/video-recording gathered during the polygraph test of a person; how long will they keep the collected information; where will they store it; etc. More importantly, “*such safeguards shall guard against the risks that the processing of sensitive data may present for the interests, rights and fundamental freedoms of the data subject, notably a risk of discrimination*” (art 6.2). As we have already shown above, the proposed draft laws interfere with several fundamental rights and discriminates certain organisations. Therefore, **we can conclude that the draft law 3564 on foreign funding likely contradicts the obligations that Ukraine has undertaken under the CoE Convention 108.**

Possible Negative Effects of the Draft Laws

ECNL is concerned about the negative effects the draft laws may have on state authorities, CSOs, their donors and the general public. In particular, ECNL has noted the following:

1. **The draft laws would affect negatively a very high number of CSOs** as according to the Ukrainian State Statistic Service, as of January 1, 2020, there were 88,882 registered public associations, 19,112 charitable organizations, 1,718 unions of public associations, 26,347 religious organizations, 28,486 trade unions, 317 creative unions, and 1,614 self-organized bodies¹⁷. According to the 2018 CSO Sustainability Index for Ukraine, foreign funding amounts to 33 % of the total CSO sector revenue so a large part of these organizations would be affected.
2. The draft laws discriminate against and stigmatize CSOs that receive foreign funding (and the individuals engaged with them) and **would hinder the activity of foreign-funded CSOs to provide important services to the people of Ukraine** because of the additional administrative burdens imposed on such organizations. Many of these organizations are working for the benefit of Ukraine and its development, organizing fundraising campaigns and attracting funding and other support for solving the problems of the country, supporting policy development, protecting human rights, etc.
3. The proposed draft laws would **limit engagement and public participation**. People may be discouraged to get engaged with CSOs in order to avoid having unforeseen negative effect on their future career path (if they consider a career in the state administration) or on their image and privacy, or because of the potentially humiliating treatment to go through a polygraph test to prove that they are not traitors acting against the interest of their own country.
4. The proposed limitations apply not just to leaders but also to members of the governing bodies of such organizations (and some of the drafts affect even members or service providers of such CSOs) which **would affect a disproportionately large number of individuals who may wish to engage in CSOs**. Moreover, it is a common practice for influential people, decision-makers, scientists, sports people, actors and celebrities to participate in the boards of civil society organizations whose

¹⁷ http://www.ukrstat.gov.ua/edrpoj/ukr/EDRPU_2020/ks_opfg/ks_opfg_0120.htm

missions they share. Such a proposal would affect some of the key leaders in Ukraine whose knowledge and experience will not be used for the benefit of Ukraine and will deprive state institutions, state enterprises and state banks from the possibility to benefit from engaging highly qualified experts such as the experts associated with CSOs.

5. The draft laws would have a retroactive effect and lead to legal uncertainty as they introduce sanctions for being engaged in activities which at the time of their implementation were not illegal. They would result in uncertain and possible discretionary interpretation. For example, some of the draft provisions cover an even wider circle of relations (not just the receipt of foreign funding), including cooperation with foreign non-governmental organizations; performed work, rendered services or any other involvement in the activity of the foreign-funded CSOs; or conducted transactions in the sphere of entrepreneurial activity with such public associations.

Annex 1: Extracts from the draft laws

See below for detailed explanation of each law.

1. Amendments to Some Legal Acts as to Ensuring Equal Rights and Possibilities of Citizens from Representation in Supervisory Boards and Governing Bodies of State Unitary Enterprises, Business Associations and State Banks and Fair Foundation and Efficient Activity of Such Supervisory Boards with Consideration of National Interests of Ukraine (Draft Law 3193-1), introduced by MP Derkach and MP Dubinsky (hereinafter: *draft law 3193-1 on state bodies*)

The draft law introduces limitations regarding **who can serve as members of the supervisory boards of state-owned enterprises and business associations** (where the state-owned stake in the charter capital exceeds 50 percent), as well as **state banks**. These provisions prohibit the following categories of individuals to serve on such boards:

- Current or former (in the last 5 years) members of the governing body of a public association or its authorized representative;
- Current or former (in the last 5 years) members of a public association, which is receiving or within the last five years has received funds from foreign states and/or foreign non-governmental organizations;
- Current or former (in the last 5 years) members of a public association, which is cooperating or within the last five years has cooperated with foreign non-governmental organizations.

All current members of supervisory boards of state-owned enterprises, business associations and state banks have to comply with the requirements of the proposed draft and the Cabinet of Ministers, the National Bank of Ukraine and the National Commission for Securities and Stock Market will have 30 days to ensure this.

2. Amendments to the Law of Ukraine on Government Cleansing (Lustration) (Draft Law 3326), introduced by MP Khrystenko (hereinafter: *draft law 3326 on lustration*)

The proposed amendments impose a **ban on individuals to become state officials** (to which the Law on Government Cleansing (Lustration) applies), **if they have been engaged in the last 10 years with a CSO (public association or another non-profit company) which directly or through some third parties has received funds, property or services from foreign sources**. All current state officials that fall within the above categories will have to be

dismissed within 1 month after the entry into force of the proposed amendments. Foreign sources include:

- foreign states;
- authorities or officials of foreign states;
- international non-governmental organizations or non-governmental organizations of foreign states;
- foreign legal entities;
- foreign citizens;
- persons without citizenship or persons authorized by them; or
- any other source, located outside of Ukraine.

The ban covers persons that have been engaged with such CSOs in their position of:

- chief executives;
- members of a governing body;
- members (of the association or the non-profit company); or
- persons, who regularly (over three times a year) within the last 10 years, performed work, rendered services or in any other way were involved in the activity of the CSO (if they knew or must have known and might have known, that their work, services or other engagement was paid out of the funds or property received from a financing source located outside of Ukraine).

3. Amendments to Some Legal Acts of Ukraine (as to Transparent Activity of Public Associations with Foreign Support) (Draft Law 3564), introduced by MP Dubinsky. (hereinafter: *draft law 3564 on foreign funding*)

The draft law introduces limitations for the chief executive and members of the supervisory boards of various state enterprises and business associations (where the state-owned stake in the charter capital exceeds 50 percent). These limitations prohibit the following categories of individuals to serve on such boards:

- Individuals that occupied senior positions in public associations with foreign support;
- Individuals who concluded employment agreements (contracts) with such associations;
- Individuals who conducted transactions in the sphere of entrepreneurial activity with such public associations.

The amendments also propose changes in the Law on Public Associations and introduce a **definition of a public association with foreign support** which is a public association registered in Ukraine that receives “*funds and/or other property from foreign states, state authorities of foreign states, foreign non-governmental organizations, foreign organizations, international organizations, foreign citizens and persons without citizenship or persons authorized by them, and/or from legal entities and citizens of Ukraine, receiving the above-mentioned financial aid*”. In addition, such organisation also has to simultaneously meet the following conditions:

- Be engaged in activities in fifteen specifically listed areas related to participation in decision making, activities of local or national authorities, democracy promotion and human rights, etc. There is a separate list of activities that are specifically exempted from the definition such as science, culture, art, health protection and disease prevention, social protection of citizens, maternal and child health, welfare support of persons with disability, promotion of healthy lifestyles, physical culture and sports or environmental protection;
- Its income from foreign sources exceeds 50 % of its overall annual budget;
- Its total income should exceed 50 000 EUR annually.

Any association which has the intention of carrying out activities as a public association with foreign support (or in the last 3 months has fulfilled the legal conditions) must submit

an application to the registration body and add the words “with foreign support” in its name. Even organizations that do not have legal entity status are obliged to comply with the law and de facto register as legal entities within 30 days after they fulfil the legal conditions. The list of public associations with foreign support should be published on the website of the Ministry of Justice. Changes to the information in the list should be made within 2 days after the declared circumstances change. Moreover, the draft law does not provide for a clear procedure to change the name/registration as an organization “with foreign support” should the organization stop meeting the conditions for such organizations set in the law.

The executive managers and/or persons, elected to the senior organ of a public association with foreign support should **pass a polygraph test**. While consent of the individual is required, the information about the fact whether a test was taken (or there was a refusal to take it) must be made public through the CSO web site and also included in the report to the state registration body. The polygraph test should check the likelihood of committing an offense related to betrayal of state interests of Ukraine. It will be based on a list of mandatory questions approved by the National Security and Defence Council of Ukraine. The test should include *“obligatory video-recording of psychophysiological reactions to certain psychological stimuli of a person, undergoing a test and graph indicators of physiological reactions, registered by the polygraph machine”*.

Until March 1 of each year, each public association with foreign support should submit an additional report to the Ministry of Justice (that is also published on its website) providing various types of information about its sources of funding including the income and expenditure of the foreign funding it has received. Until April 1 each year, the Ministry of Justice should publish Report on the activity of public associations with foreign support in Ukraine, providing the information concerning each association that includes among others:

- amount of funds received by the public association with foreign support, with indication of the country of origin, from foreign states; state authorities of foreign states; foreign non-governmental organizations; international organizations; and foreign citizens or persons without citizenship;
- information about executive managers and/or persons, elected to the senior organ of a public association with foreign support, with indication of passing a polygraph test or a refusal to undergo such a test.

In addition, all information materials of such associations should state that they have been developed and/or spread by a public association with foreign support and list the main sources of funding. The information that should be published includes: the name of a foreign country, which is directly or indirectly funding a public association with foreign support or the first and last name of an individual foreign donor. Moreover, copies of the above-mentioned materials before being spread shall be sent to the Ministry of Justice of Ukraine.

The violation of the above requirements may lead to the termination of the public association.

Through a proposed amendment to the Law on Charity and Charitable Organizations charitable organizations that receive more than 50 % of their income from foreign sources are obliged to follow similar requirements.