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Comments on the Draft Act amending the Danish Penal Code, the Act on the Activities of the Police, and the Judicial Care Act ("Security for all Danes" Act)

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Executive Summary

Following previous measures purportedly aimed at addressing crime and insecurity in vulnerable residential areas, some of which attracted harsh criticism from human rights and community based groups, a new draft law referred to as the "Security for all Danes" Act was submitted to the Danish parliament by the government on 8 October 2020.

The European Center for Not-for-Profit Law (ECNL) analysed the provisions of this draft law with respect to their potential impact on civic space and civic freedoms, with a view to raise awareness and inform discussions happening by national stakeholders around this draft law.

Based on its expertise, ECNL is concerned that, in its current formulation, the draft law is not in line with international and European Union (EU) human rights standards.

In particular, as this analysis illustrates, the introduction of what is referred to in the draft law as the "security-creating assembly ban" would constitute a serious interference on the right to freedom of assembly which would not be in line with the principles of legality, necessity and proportionality, also considered in the light of its incompatibility with the principle of legality of criminal offences and penalties, its discriminatory approach and concerns as regards the respect of the right to an effective remedy – insofar as:

- the **conditions for the imposition of the ban would not meet the requirements of legality, in particular as regards the quality of the law in question**, due to (i) the vague formulation and lack of precision of the conditions enabling the imposition of the ban and (ii) the broad legal discretion left to the executive and the lack of safeguards against arbitrary decisions;

- **the ban would go beyond what is necessary to achieve the stated aims,** considering (i) the non-compliance with the last resort principle, (ii) the risk of arbitrary applications and disproportionate impact on gatherings and (iii) the nature and severity of the penalties;

- the lack of quality of the draft provision in question, which is criminal in nature, would also cast **doubts over the respect of the principle of legality and proportionality of criminal offences and penalties;**

- the implementation of the draft provision in question would be **likely to give rise to indirect discrimination against particular groups of persons defined by reference to their gender, age as well as their race, ethnicity, language, national or social origin, or minority status**;

- there is **no clarity over the respect of the right to an effective remedy,** as no reference is made to whether the police's assessment as to the necessity of the ban, the existence of the conditions to issue it and the legality of the police's related decision, including the respect of procedural rules as regards publication, would be open for judicial review.

The above considerations cast doubt as to whether the draft law does ensure adequate respect of the right to an effective remedy as regards the restrictions on freedom of assembly, and on other rights, which may derive from the application of draft Section 6b.

This would appear to run counter human rights standards as enshrined in key international instruments Denmark has signed and ratified, and in particular Articles 21, 15, 26 and 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and Articles 11, 7, 14 and 13 of the European Convention on Human Rights (ECHR).

This also bears relevance to the respect of Denmark's obligations under European Union law, and in particular EU rules on non-discrimination based on racial or ethnic origin (Article 2 of Directive 2000/43/EC) and, in connection with those, Articles 12, 49 and 47 of the EU Charter of Fundamental Rights.

1. Introduction

On 8 October 2020, the Danish government submitted to the national parliament a draft Act amending the Danish Penal Code, the Act on the Activities of the Police, and the Judicial Care Act (hereinafter, the "draft security law"). The package of provisions, referred to as the "Security for all Danes" Act, aims at introducing a "security-creating assembly ban", a ban on participation in nightlife for persons convicted of a crime and provisions extending the powers of criminal justice authorities to seize valuables. The government hopes to pass the draft law by July 2021.

The present analysis is intended to raise awareness and inform discussions happening by national stakeholders around this draft law.

The analysis was conducted in the light of Denmark's obligations under key international and regional human rights instruments, and in particular the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) read in light of the case-law of the European Court of Human Rights (ECtHR).

The draft law was also reviewed in the light of Denmark's obligations pursuant to European Union (EU) law, as set out in particular by Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the "Race Equality Directive"), taken in conjunction with relevant provisions of the EU Charter of Fundamental Rights (EU CFR).

2. National provisions considered

As explained in its explanatory memorandum, the draft law purportedly aims at addressing the existence of "areas in Denmark that are plagued by criminals and groups of young people that create insecurity", in particular due to "groups of often young men" that "gather in certain places in the public space and (whose) behaviour and appearance create insecurity among residents and by-passers in the area".

In this context, the introduction of a ban on assembly is seen as a means to put an end to citizens' feeling of insecurity and restore safety so that people can move safely everywhere, including in parks, on city squares and on train and bus stations. It is also seen as a means to prevent and discourage young people to be influenced by persons affiliated to criminal groups and choose a criminal path. The ban would be additional to the possibility for the police, which already exists, to issue a ban targeted at specific individuals by reason of their own behaviour. In fact, the new measure would consist of a ban of general application, issued on the mere basis of the existence of a group of persons whose presence and appearance creates a sense of insecurity in the area concerned.

To that effect, **Section 2(1) of the draft security law** aims to introduce **a new Section 6b in the Act on Police Activities** (Executive Order no. 1270 of 29 November 2019), which would allow the police to "issue a ban on assembling in a specific place to which there is ordinary access (security-creating assembly ban)."

According to **paragraph 2 of the draft provision**, the ban may be issued "if the behaviour of a group of people in the area in question is creating insecurity for people living or moving in the area", provided that such ban "is considered an appropriate tool and that less intrusive measures are not considered sufficient to restore security in the area". It is up to the police to make an overall police professional assessment of the specific situation in the area in question as to whether the conditions for issuing a security-creating assembly ban are met.

Pursuant to **paragraph 4 of draft Section 6b**, and as clarified in the draft law's explanatory memorandum, such security-creating assembly ban should apply to a defined area ("e.g. an outdoor platform at a train and route car station, a specific place, park or road"). It may last for a period of up to 30 days and may be extended by up to 30 days at a time. The decision may be formulated so that the ban only applies at certain times of the day.

According to **paragraph 5 of draft Section 6b**, the ban would be imposed by means of a decision by the chief commissioner of police or the person authorized by the chief to do so. It would be published and contain a statement of reasons and an indication of the defined geographical area and time period to which the decision applies.

The police should draw attention to the prohibited area by means of signs at the place pursuant to paragraph 6 of the same draft provision as well as, as clarified in the explanatory memorandum, by means of publication of the decision on the police's official website or similar.

While according to **draft Section 6b(1)** "a security-creating assembly ban does not hinder normal movement in the area", paragraph 3 of the same draft provision foresees punishment for the violation of the ban by means of a fine (set in its minimum at DKK 10,000 (around 1,300 EUR), unless mitigating circumstances apply) or imprisonment for up to 1 year (set in its minimum at 30 days in case of repeated violation).

3. Analysis

3.1 Freedom of assembly

// *Existence of an interference*

The right to freedom of assembly is enshrined, respectively, in **Article 21 of the ICCPR** and in **Article 11 of the ECHR.** The right applies to both private meetings and meetings in public places, including gatherings of an essentially social character (see, e.g., Human Rights Committee General Comment No. 37 (2020) on Article 21, ICCPR, paras 4, 6; ECtHR, Emin Huseynov v. Azerbaijan, § 91, Djavit An v. Turkey, § 60 or The Gypsy Council and Others v. the United Kingdom (inadmissibility decision0).

An outright ban, legal or de facto, of assembly, as well as enforcement measures aimed primarily at the assembly participants, whether actual, aspiring or past, such as crowd-control, dispersal of an assembly, arrest of participants and/or subsequent penalties clearly are to be considered restrictions on the right to peaceful assembly. The security-creating assembly ban, and the penalties attached to its violation, as provided for by draft Section 6b pursuant to Section 2(1) of the draft law, would undisputedly fall within such category of restrictions – as also acknowledged in the explanatory memorandum to the draft law.

In this context, the fact that the right to freedom of assembly only protects the right to "peaceful assembly", bears no relevance for the purpose of assessing whether people concerned by the security-creating assembly ban in question benefit from the protection offered by Articles 21 ICCPR and Article 11 ECHR. While the notion of "peaceful assembly" would not apply to gatherings where the organisers or participants have violent intentions, the case-law is clear that this concerns cases where such violent intentions are clearly shown, i.e. participants incite violence or otherwise reject the foundations of a democratic society. Such an assessment must be referred to the specific circumstances of the case: the ECtHR, for example, has clarified that **an individual does not cease to enjoy the right to**

freedom of peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration (see, e.g., ECtHR, Ezelin v. France, § 53; Frumkin v. Russia, § 99; Laguna Guzman v. Spain, § 35). The possibility of persons with violent intentions joining the gathering cannot either, as such take away that right (see, to that effect, Human Rights Committee General Comment No. 37 (2020) on Article 21, ICCPR, para 17; ECtHR, Primov and Others v. Russia, § 155).

// *Legality, necessity and proportionality of the interference*

The right to freedom of assembly is not an absolute right and may in certain cases be limited. Among others, restrictions may be justified based on the need to protect public safety as well as the rights and freedoms of others. This is reflected in the formulation of Article 21 ICCPR and similarly, in the wording of Article 11 ECHR, which also mentions the prevention of disorder or crime as a legitimate aim which may justify restrictions to this right.

Nonetheless, the same provisions also make clear that any such restrictions shall only be acceptable insofar as it meets the requirement of legality and is necessary and proportionate to a legitimate aim pursued – something which is for the national authorities to demonstrate.

As underlined by the UN Human Rights Committee in its recent General comment No. 37 (2020) on the right of peaceful assembly (from now on, "General Comment"), "the imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations on it." (General Comment, para. 38; see also Human Rights Committee, Turchenyak et al. v. Belarus, Communication No. 1948/2010, para. 7.4). In addition, "restrictions must not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect" (General Comment, para 36). In that connection, the General Comment points out that restrictions "should be based on a differentiated or individualized assessment of the conduct of the participants and the assembly concerned", whereas "blanket restrictions on peaceful assemblies are presumptively disproportionate." (General Comment, para. 38). Similarly, the ECtHR has recognized that the necessity and proportionality test must be particularly strict as regards general bans on assembly (see, e.g., ECtHR, Christians against Racism and Fascism v. the United Kingdom).

Case-law has further clarified that justifications related to the protection of public safety and the prevention of disorder and crime must be interpreted particularly narrowly: for example, while a prohibition on holding public events at certain locations is not incompatible with the right to freedom of assembly when it is imposed for security reasons, the ban should however be tailored narrowly to achieve that interest (see, e.g., ECtHR, Lashmankin and Others v. Russia, § 440; Öğrü v. Turkey, § 26). Similar reasoning has been applied by the ECtHR to the prevention of disorder (see ECtHR, Navalnyy v. Russia [GC], § 120). In that context, any restriction shall be assessed in the light of the circumstances of a particular case (see ECtHR, Galstyan v. Armenia, § 114), to verify whether the authorities' decision has been made on an acceptable assessment of the relevant facts. In this

respect, the General Comment reaffirms that "for the protection of "public safety" to be invoked as a ground for restrictions on the right of peaceful assembly, it must be established that the assembly creates a real and significant risk to the safety of persons (to life or security of person) or a similar risk of serious damage to property" (General Comment, para. 43).

The nature and severity of the penalties imposed, including whether the sanctions are criminal in nature, are also factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued (see, e.g., ECtHR, Kudrevičius and Others v. Lithuania [GC], § 146).

The protection of public safety, the prevention of crime and disorder and the protection of the rights and freedoms of others are the stated aims of the measures foreseen in draft Section 6b as set out in Section 2(1) of the draft law. While these are **legitimate aims** which could, in principle, justify a restriction on the right to freedom of assembly, such as the one that would result from the security-creating assembly ban in question, such measure, in the light of the general principles recalled above, does not seem to be in line with the **requirements of legality, necessity and proportionality**, for the following reasons.

The conditions for the imposition of the ban do not meet the requirements of legality

Consistent case-law has pointed out that the requirement for a restriction to be "prescribed by law" not only refers to the existence of a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see ECtHR, Kudrevičius and Others v. Lithuania [GC], § 108-110). This requires, in particular, the norm to be formulated with sufficient precision (ECtHR, Djavit An v. Turkey, § 65).

Section 6b of the Act on Police Activities, as it would be introduced by Section 2(1) of the draft law, introduces the possibility to impose a security-creating assembly ban which rests on conditions whose formulation does not meet the requirements of legality, insofar as they are formulated in a very vague and broad manner and leaves too wide of a margin of discretion to law enforcement authorities.

a) Vague formulation and lack of precision of the conditions enabling the imposition of the ban

The **vague formulation and lack of precision** concerns, in particular:

- the illustration of a behaviour "suitable to create insecurity", which would be the precondition for the imposition of the ban: this may refer, pursuant to the indications provided in the explanatory memorandum, to any "behaviour that is suitable for creating insecurity for people who live or move in the area", such as where "the group exhibits harassing, threatening or intimidating behaviour towards passers-by, whether the group's behaviour causes noise nuisance and / or traffic nuisance, whether persons in the group ingest or are under the influence of alcohol or other drugs, whether persons in the group have brought

aggressive dogs such as. fighting dogs or muscle dogs, etc." – without being a requirement that the conduct is criminal in nature;

- the definition of what constitutes a "group of persons" exhibiting a conduct suitable to create insecurity for the purpose of the provision: while draft Section 6b itself does not provide any indication in that regard, the explanatory memorandum states that a group must be intended as "a number of people who together form a group". This however shall not be understood in the light of existing provisions (e.g., Section 81a of the Criminal Code), but rather assessed on a case-by-case basis based on "the number of people gathered and whether the people appear as a group to the outside world". This second element would allow even a gathering of 2-3 people to be defined as a group "if the people appear to the outside as a single group". Furthermore, it is not required that the behaviour in question be exhibited by all members of the group, as it may suffice that only some of the members of the group engages in such behaviour;

- the illustration of what taking up assembly in the designed area means for the purpose of sanctioning: while draft Section 6b limits itself to mention that "a security-creating assembly ban does not hinder normal movement in the area", the explanatory memorandum provides ambiguous indications as to what that means. In particular, it states that taking up assembly would be prohibited "even though it may be perceived as natural in relation to the area", while at the same presence and short-term stays may not constitute an illegal assembly if they appear connected to ordinary travel in the area – with the decisive factor being "whether the presence in the area has a natural connection with the character of the area". However, depending on the circumstances, it is pointed out that "it would be contrary to the prohibition under the proposed provision to use park areas, etc. covered by a ban on recreational purposes such as ball games, picnics, etc., just as it may, depending on the circumstances, constitute a stay in violation of the prohibition to take a seat on a bench or the like in a prohibited area in connection with a passage from one store to another in that area".

b) The broad legal discretion left to the executive and the lack of safeguards against arbitrary decisions

The fact that the assessment of the existence of the conditions to issue a security-creating assembly ban, pursuant to such broad and vague formulations, is fully left to the chief commissioner of police, or to the person instructed by the chief, also detracts from the draft provision's respect of the legality requirement. Indeed, case-law indicates that, for a law to meet the legality requirement as regards the quality of the law, it must refrain from granting **legal discretion to the executive** in terms of an unfettered power. Namely, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise, and afford a measure of legal protection against arbitrary interferences (see, e.g., ECtHR, Navalnyy v. Russia [GC], § 113). There are **no indications in the current formulation of draft Section 6b of safeguards and guarantees to prevent the police from**

making arbitrary assessments and offer the persons concerned effective means to challenge them.

The ban goes beyond what is necessary to achieve the stated aims

Even if the formulation of **draft Section 6b of the Act on Police Activities** were regarded as meeting the requirements of legality, the provision **may not be regarded as necessary and proportionate** to the aims pursued, for the following reasons.

a) Non-compliance with the last resort principle

While there is a stated intention to respect the **last resort principle**, the draft law lacks the conditions for its genuine implementation.

The last resort principle is particularly relevant when it comes to blanket bans on gatherings which do not by themselves constitute a danger to public safety or the rights and freedom of others. It derives from case-law that only if the disadvantage of such gatherings being caught by the ban is clearly outweighed by the security considerations justifying the issue of the ban, and if there is no possibility of avoiding such undesirable side effects, can the ban be regarded as being necessary within the meaning of Article 11 ECHR (see to that effect, ECtHR, Christians against Racism and Fascism v. the United Kingdom).

Draft Section 6b states, in its **paragraph 2**, that "it is a precondition that the issue of a security-creating ban is considered an appropriate tool and that less intrusive measures are not considered sufficient to restore security in the area". However, the very vague and broad formulation of the conditions to impose the ban, as recalled above and further below, coupled with the wide margin of discretion afforded to the police in assessing the existence of such conditions, clearly stand in the way of the ban being used as a last resort measure. In this respect, it suffices to refer, by means of example, to the fact that the notion of "group of persons" may apply to groups of as few as 2 people, and it therefore does not appear coherent to state that in such cases, more targeted and less intrusive measures, such as the introduction of visitation zones and the carrying out of inspections or the prohibition of stay applicable to specific individuals by reason of their behaviour, would not be sufficient an attempt to restore security in the area.

The non-compliance with the last resort principle, in substantive terms, is further corroborated by the fact that, as stated in the explanatory memorandum, "it (would not be) a requirement under the proposed provision that the police, prior to the decision to issue a security-creating stay, must have issued prior warning, injunction or similarly tried to curb the behaviour of the persons in the group in order to normalize the situation in the area".

In addition, the possible non-suitability of the ban in restoring security in the area is not a reason for ensuring a regular reassessment and evaluation of the measures, but on the contrary, is among the possible reasons justifying the extension of the ban: this is indicated in the explanatory memorandum, which states that "it may be

relevant to extend the assembly ban if groups of persons, despite the prohibition, continue to behave (in a manner which causes insecurity) in the area in question".

b) Risk of arbitrary applications and disproportionate impact on gatherings

The **broad and vague conditions for the imposition of the ban, coupled with its effects and duration, pursuant to draft Section 6b** indicate that the measure goes beyond what is necessary to attain the pursued objectives.

On the one hand, as illustrated above, the lack of precision of the draft provision opens the door to arbitrary and disproportionate applications of the ban: for example, against the background of a group of as few as 2 people, of whom one exhibits behaviour considered threatening, for example by the mere fact of causing noise or traffic nuisance, being under the influence of alcohol or possessing aggressive dogs (as per the guidance provided in the explanatory memorandum to the draft law). The explanatory memorandum even clarifies that "it (would not be) a requirement under the proposed provision that there must be a concrete expression of a feeling of insecurity in relation to the group's behaviour from other people in the area, as the behaviour of the group in question must only be suitable for creating insecurity."

On the other hand, the impact of the ban and its potential chilling effect are very serious, considering its effects and potential duration. The ban would in fact apply to everyone with the only exception of allowing for the possibility of "normal movement in the area" – a concept which is defined in a very ambiguous and narrow manner, as explained above. The area concerned might be small but this may not rule out disruptions and side effects hampering the enjoyment of the right to assembly in other, geographically connected areas – as it would be the case, for example, for parking lots or parks connected to a public square. In addition, the duration of the ban, initially set at 30 days, could potentially be extended indefinitely.

c) Disproportionate nature and severity of the penalties

Case-law has clarified that when the sanctions imposed on participants to gatherings are **criminal in nature**, they require particular justification (see for example ECtHR, Rai and Evans v. the United Kingdom (dec.)). No peaceful gathering should, in principle, be rendered subject to the threat of criminal sanctions, and notably to deprivation of liberty (see to that effect, ECtHR, Akgöl and Göl v. Turkey, § 43 and Gün and Others v. Turkey, § 83).

In this case, **draft Section 6b provides**, in its **paragraph 3**, that the violation of the ban shall be subject to a fine (of a minimum of around EUR 1,300, as per the explanatory memorandum) or imprisonment of up to one year (and minimum 30 days in case of repeated violation, as per the explanatory memorandum). Similar sanctions clearly are very serious in nature without there being sufficient elements to justify their proportionality.

3.2 Related human rights concerns

The legality, necessity and proportionality of the interference on the right to freedom of assembly is further called in question in the light of additional concerns regarding the draft provision's compatibility with other international human rights standards.

// *Incompatibility with the principle of legality and proportionality of criminal offences and penalties*

The principle of legality and proportionality of criminal offences and penalties is enshrined in **Article 15 ICCPR** and in **Article 7 ECHR.**

The principle of **legality** requires the offences and corresponding penalties to be clearly defined
by law. Similarly to what mentioned above as regards the legality of interferences on the right to freedom of assembly, the concept of "law" comprises qualitative requirements, in particular those of precision, accessibility and foreseeability (see, e.g., ECtHR, G.I.E.M. S.R.L. and Others v. Italy (merits) [GC], §§ 242; Cantoni v. France, § 29; Kafkaris v. Cyprus [GC], § 140; Del Río Prada v. Spain [GC], § 91; Perinçek v. Switzerland [GC], § 134).

The principle of **proportionality** must, in this case, be read in the context of freedom of assembly. In this respect, the already cited General Comment has clarified that, "where criminal (...) sanctions are imposed on organizers of or participants in a peaceful assembly for their unlawful conduct, such sanctions must be proportionate, non-discriminatory in nature and must not be based on ambiguous or overbroadly defined offences (...)" (General Comment, para. 67).

In the light of the considerations made above as regards the legality of the interference on freedom of assembly, as well as the nature and severity of the penalties that would derive from **draft Section 6b of the Act on Police Activities**, there are serious doubts that the provision in question could be regarded as in line with the principle of legality and proportionality of criminal offences and penalties.

// *Discriminatory approach*

A reading of the right of assembly in the light of the principle of non-discrimination, reaffirmed by **Article 26 ICCPR** and **Article 14 ECHR**, points at the need for everyone to be able to enjoy without discrimination the right of assembly. As underlined by the already cited General Comment, this concerns citizens and non-citizens alike, including foreign nationals, migrants, asylum seekers and refugees. In particular, this implies that "laws and their interpretation and application do not result in discrimination in the enjoyment of the right of peaceful assembly, for example on the basis
of race, colour, ethnicity, age, sex, language, property, religion or belief, political or other

opinion, national or social origin, birth, minority, indigenous or other status (...)"; and that efforts are made "to ensure the equal and effective facilitation and protection of the right of peaceful assembly of individuals who are members of groups that are or have been subjected to discrimination, or that may face particular challenges in participating in assemblies" (General Comment, paras. 24-25).
While the formulation of **draft Section 6b** appears neutral, the explanations provided in the explanatory memorandum as well as the context in which the draft law was proposed point at risks that the implementation of this provision may give rise to **indirect discrimination against particular groups of persons**. Indeed, the explanatory memorandum explicitly refers to the group's "presence and *appearance*", which would be, as such, a reason for insecurity. It also makes various references to young people, and in particular young men, being at the origin of the situations of insecurity the draft law aims at tackling. Mention is also made of the relevance to be given to whether persons in the group "wear back marks or other characteristics that may give the impression that the group is part of or associated with a gang or criminal group". At the same time, in a speech delivered on 6 October 2020 when the draft law was presented to the parliament, the Danish Prime Minister put the initiative in context by making direct reference, when explaining the reasons behind the proposal, to the fact that "one in five young men with a non-western background, born in 1997, had violated the Danish criminal code before his 21st birthday."

These elements point at the **risk that the apparently neutral provision is intended in fact to be implemented with a view to targeting specific groups of people that are likely to be identified and profiled by the police based on their "appearance", with particular reference to their gender, age as well as, likely, their race, ethnicity, language, national or social origin, as well as minority status**. This would constitute **indirect discrimination in the enjoyment of the right to assembly** which would be prohibited by Articles 26 ICCPR and 14 ECHR.

// *Concerns as regards the respect of the right to an effective remedy*

The right to an effective remedy for anybody whose fundamental rights and freedoms were violated is reaffirmed by **Article 2(3) ICCPR** and by **Article 13 ECHR.** This right implies that need for a **readily available remedy** against restrictions before courts or other tribunals, including the possibility of appeal or review. As underlined by the already cited General Comment, this also covers restrictions to the right to assembly (General Comment, paras. 90-91).

Draft Section 6b does not make reference to the availability of remedies allowing concerned persons to challenge the police's imposition of a security-creating ban or the measures adopted to enforce it. While presumably a remedy would be available pursuant to general rules against sanctions imposed on those who violate the ban, it is not clear whether the police's assessment as to the necessity of the ban, the existence of the conditions to issue it and the legality of the police's related decision, including the respect of procedural rules as regards publication, are open

for judicial review; and, if so, whether introducing such an action would produce suspensive effects.

This lack of clarity is enhanced by the fact that the explanatory memorandum mentions that, for example, inadequate signposting of the police's decision imposing a security-creating ban in the concerned area – which would affect the decision's legality – would not affect the decision's validity but may only be taken into account for the purpose of the determination of the penalty against a person who violated the ban.

The above considerations cast doubt as to whether the draft law does ensure adequate respect of the right to an effective remedy as regards the restrictions on freedom of assembly, and on other rights, which may derive from the application of **draft Section 6b**.

3.3 Compliance with EU law obligations

The provisions of **draft Section 6b** also need to be analysed in the light of their compatibility with Denmark's obligations under EU law, including the EU Charter of Fundamental Rights ("CFR").

// *EU rules on non-discrimination on grounds of race and ethnic origin*

The EU Race Equality Directive prohibits discrimination on grounds of race and ethnic origin. It covers, among others, the field of access to goods and services which are available to the public. The Directive's main obligation, enshrined in its **Article 2**, is to refrain from any direct or indirect discrimination based on racial or ethnic origin in the fields covered by the Directive. This may also include instructions to discriminate against persons on grounds of their racial or ethnic origin.

Should the implementation of **Section 6b** determine obstacles in the access to goods or services available to the public as a consequence of the ban on assemblies (because, for example, it renders access to shops, transports or other services in the area more difficult) such situation may fall within the scope of the Race Equality Directive.

As noted above, there are elements which point at a discriminatory approach in the way the draft provision is intended to be applied, which also relate to people's racial and ethnic origin. Arguably, the imposition of a security-related assembly ban and/or the measures adopted to enforce it, insofar as they constitute an indirect discrimination based on racial or ethnic origin, might translate into a discriminatory obstacle in the access to goods and services available to the public which would be forbidden by Article 2 of the Race Equality Directive.

// *EU Charter of Fundamental Rights*

Insofar as the imposition of a security-related assembly ban and/or the measures adopted to enforce it were found to constitute discrimination based on racial or ethnic origin pursuant to Article 2 of the Race Equality Directive, such measures would also need to be examined in the light of their compatibility with relevant provisions of the EU CFR (see, *mutatis mutandis*, the decision of the Court of Justice of the EU in case C-78/18, Commission v Hungary).

In that context, the concerns raised above as regards the legality, necessity and proportionality of the restriction to the right to freedom of assembly would remain relevant, and point to a possible violation of **Article 12 EU CFR**. Similarly, the considerations made as regards the respect of the principle of legality and proportionality of criminal offences and penalties and of the right to an effective remedy would point to a possible violation of **Articles 49** and **47 EU CFR**, respectively.

4. Conclusion

For all the reasons illustrated above, the formulation of **draft Section 6b,** as it would be introduced in the Act on Police Activities pursuant to **Section 2(1) of the draft security law**, raises serious concerns as regards its compatibility with the right to freedom of assembly as enshrined in **Article 21 ICCPR** and **Article 11 ECHR**, also considered in the light of its incompatibility with the principle of legality of criminal offences and penalties (**Article 15 ICCPR** and **Article 7 ECHR**), its discriminatory approach (**Article 26 ICCPR** and **Article 14 ECHR**) and concerns as regards the respect of the right to an effective remedy (**Article 2(3) ICCPR** and **Article 13 ECHR**).

For the same reasons, in ECNL's opinion the draft law would also appear incompatible with Denmark's obligations under EU law, and in particular **Article 2 of the EU Race Equality Directive**, taken in conjunction with **Articles 12, 49** and **47 of the EU CFR**.