

INTERNATIONAL STANDARDS ON ACCESS TO FOREIGN FUNDING FOR CSOs



European Center for
Not-for-Profit Law

The present material¹ aims to highlight the international standards on access to resources and specifically – access to foreign funding. It was developed by the European Center for Not-for-Profit Law Stichting (ECNL) to support stakeholders in Ukraine to make informed decisions with regard to any possible regulation of CSOs receiving foreign funding and people affiliated with them. More detailed information on access to foreign funding can be found in the [CSO Meter tool](#) and the analysis [Enabling the Flow of Donations](#).

ACCESS TO RESOURCES IS PART OF FREEDOM OF ASSOCIATION

“The ability to seek, secure and use resources is essential to the existence and effective operations of any association, no matter how small. The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.”²

Maina Kiai,

former UN Special Rapporteur
on the rights to freedom of peaceful assembly and of association

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.³



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LIMITED GROUNDS FOR RESTRICTIONS

Freedom of association and therefore the ability to seek, receive and use financial, material and human resources is not an absolute right and can be restricted. However, any such restrictions must be “*prescribed by law, pursue a legitimate aim in conformity with the specific permissible grounds of limitations set out in the relevant international standards, as well as be necessary in a democratic society and proportionate to the aim pursued*”⁴.

Legality and Legitimate aim. Any limitation must not only be listed in the law but needs also to be clear and foreseeable. 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*”⁵. This list is exclusive.

Even if the objective of limitation is within this list, according to the Venice Commission⁶ “*restrictions on the freedom of association can, however, 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*”.

Necessity and Proportionality. Even if the limitation pursues a legitimate aim, **the final and most important test for any limitation would be to prove that it is necessary for the achievement of the objective and a less stringent measure is not more appropriate.** For example, 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*”⁷. 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.

FREEDOM FROM DISCRIMINATION

In addition to its effect on freedom of association and access to resources, the regulation of foreign funding may lead to a violation of the non-discrimination principle which is applicable to both CSOs and persons associated with them. 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 analysis⁸ 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 Ukraine⁹ stating that there was no sufficient ground for introducing additional reporting requirements for CSOs as compared to businesses.

STIGMATIZATION AND OTHER EXAMPLES OF VIOLATIONS

“The Special Rapporteur is extremely concerned about increased denigration and unfounded accusations against individuals and organizations receiving foreign funding. Special procedures mechanisms have expressed their particular dismay about cases of vicious verbal attacks, intimidation, property damage, physical assaults and even criminalization against activists accused of having ties to a foreign entity, on the sole ground that they had allegedly received foreign funding.”¹⁰

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Several international bodies, including 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”*.¹¹

Countries that have been condemned for introducing or planning to introduce limitations on foreign funding or the concept of “foreign agent” include Azerbaijan, Egypt, Kyrgyzstan, Russia, etc. Hungary is the only EU member state that has introduced a similar law. It has received criticism from the Council of Europe, the Venice Commission and OSCE/ODIHR and the European Commission, among others. The European Commission has started a case before the European Court of Justice (ECJ) for violation of the principle of free movement of capital and the Charter of Fundamental Rights of the EU. The EU Advocate General has proposed that the ECJ should declare that *“the Hungarian legislation at issue unduly restricts the free movement of capital, in that it includes provisions which amount to unjustified interference with the fundamental rights of respect for private life, protection of personal data and freedom of association protected by the Charter”*¹².

ENDNOTES

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2 Para. 8, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (24 April 2013), UN Human Rights Council, A/HRC/23/39

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

4 Joint Guidelines on Freedom of Association, Venice Commission and OSCE/ODIHR, para. 220

5 Art. 11, European Convention on Human Rights.

6 Para. 81, Report on Funding of Associations, Venice Commission, CDL-AD(2019)002

7 Para. 27, CoE Expert Council on NGO Law, Opinion on the Hungarian Draft Act on the Transparency of the Organizations Supported from Abroad (April 2017)

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

9 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

10 Para. 33, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (24 April 2013), UN Human Rights Council, A/HRC/23/39

11 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)

12 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200002en.pdf>

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