

## ANALYSIS OF THE DRAFT LAW OF THE KYRGYZ REPUBLIC ON NON-COMMERCIAL NON- GOVERNMENTAL ORGANIZATIONS

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On November 2, 2022, the Department of Legal Support of the Presidential Administration of the Kyrgyz Republic published a draft of the Law of the Kyrgyz Republic on Non-commercial Non-Governmental Organizations (Draft Law) on the website of the Cabinet of Ministers of the Kyrgyz Republic for public discussion.<sup>1</sup>

Many non-commercial organizations (NCOs) believe that it is not advisable to adopt the Draft Law. This Analysis was prepared by the International Center for Not-for-Profit Law (ICNL)<sup>2</sup> at the request of NCOs concerned about the content of the Draft Law. Its purpose is to assess the compliance of the Draft Law with the international obligations of the Kyrgyz Republic and international good practice and to analyze the possible consequences of its adoption. The Analysis will examine those provisions of the Draft Law which would restrict the activities of Kyrgyzstani and foreign non-commercial organizations (FNCOs) in Kyrgyzstan.

Many provisions of the Draft Law contradict the International Covenant on Civil and Political Rights (ICCPR) to which Kyrgyzstan has been a party since 1994. The Draft Law would grant broad rights to government bodies to decide at their own discretion whether to register NCOs and FNCOs, to supervise any activities of NCOs and FNCOs, and to suspend their activities or liquidate them (which would be against the principle of “equal regulation of NCOs and commercial organizations.”)<sup>3</sup> If passed in its current

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<sup>1</sup> <https://www.gov.kg/ru/npa/s/4192>

<sup>2</sup> ICNL is an expert organization rendering assistance to government bodies and NCOs on matters of legal regulation of CSOs, charity and civil engagement. The address of ICNL's office in the Kyrgyz Republic is Suite 704, 125/1 ul. Toktogula, Bishkek. The e-mail address is [nidrisov@icnlalliance.kg](mailto:nidrisov@icnlalliance.kg).

<sup>3</sup> In accordance with international practice, in democratic countries the legal regulation of ordinary, NCOs which do not have the status of a charitable or socially beneficial organization, should be similar to that of commercial organizations regarding the procedure for registration, reporting, inspections by state authorities, liquidation, etc.

form, the Draft Law will have a negative effect on all NCOs, including charities, humanitarian organizations, and social service providers.

The Analysis consists of three sections:

1. Norms restricting a person's right of freedom of association:
  - absence of norms on the right of persons to establish NCOs that are not registered as legal entities;
  - increasing the minimum number of persons required to establish an NCO; and
  - restricting the right of foreign nationals and stateless persons to establish NCOs.
2. Norms regulating the establishment and activities of NCOs:
  - increasing NCOs reporting to government agencies;
  - broadening the powers of government bodies to supervise NCO activities;
  - eliminating the legal framework for the activities of state and municipal institutions as legal forms of NCOs;
  - extending the time frame for state registration of NCOs; and
  - narrowing NCOs' right to engage in entrepreneurial activity.
3. Norms governing the creation and operation of branches and representative offices of FNCOs:
  - creating uncertainty about FNCO activities without registration;
  - omitting certain time limits for registration and establishing broad grounds to refuse to register branches and representative offices of FNCOs;
  - establishing new requirements for the submission of information by FNCO branches/representative offices to government bodies;
  - restricting the activities of branches/representative offices of FNCOs; expanding the powers of government bodies to control the activities of FNCOs; and
  - giving discretion to liquidate branches/representative offices of FNCO on a wide range of grounds.

## Analysis of Draft Law

### 1. NORMS RESTRICTING A PERSON'S RIGHT OF FREEDOM OF ASSOCIATION

#### 1.1 ABSENCE OF NORMS ON THE RIGHT OF PERSONS TO ESTABLISH NCOS THAT ARE NOT REGISTERED AS LEGAL ENTITIES

According to Article 6 of the current Law of the Kyrgyz Republic on Non-commercial Organizations (Law on NCOs), *“non-commercial organizations may be created with or without the formation of a legal entity...”*

According to Article 26 of the Draft Law, *“a non-governmental organization is subject to state registration in accordance with the legislation of the Kyrgyz Republic on state registration of legal entities...”*

The justification of the Draft Law points out that *“a non-governmental organization, including branches and representative offices of a foreign non-profit non-governmental organization, shall be subject to mandatory state registration in the Ministry of Justice of the Kyrgyz Republic.”*<sup>4</sup> Although it does not prohibit them, the Draft Law does not include a provision on the possibility of creating unregistered NCOs, a change from the Law on NCOs that does include it. This raises concerns that the drafters may intend to prohibit unregistered NCOs after the Draft Law is adopted, to make registration of NCOs as legal entities mandatory. This might be the basis for future administrative or criminal sanctions for creating unregistered NCOs or engaging in their activity. A possible ban on unregistered NCOs would be a direct and serious violation of the international obligations of the Kyrgyz Republic.

The right to establish unregistered (informal) associations is included in the Universal Declaration of Human Rights (Article 20), the International Covenant on Economic, Social and Cultural Rights (Article 8), and the ICCPR (Article 22). These international treaties, as well as the Constitution of the Kyrgyz Republic,<sup>5</sup> provide for *the right of every person to freedom of association with others*. This right is inalienable and belongs to everyone from birth.<sup>6</sup> The right of association must not be restricted except as set forth in the ICCPR.<sup>7</sup> This means, in particular, that a person can exercise this right at

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<sup>4</sup> The memorandum of justification of the Draft Law also refers to the optional registration of NCOs as a problem: *“...it is impossible to establish their exact number, since state registration of non-commercial organizations is optional, according to the requirements of the current law.”*

<sup>5</sup> Article 36 of the Constitution of the Kyrgyz Republic: *“Everyone shall have the right of freedom of association.”*

<sup>6</sup> Article 23 of the Constitution of the Kyrgyz Republic: *“The rights and freedoms of man shall be inalienable and belong to everyone from birth.”*

<sup>7</sup> Grounds for the restriction of freedom of association according to Article 22.2 of ICCPR: *(a) restrictions must be established by law; (b) restrictions are permissible only if they are necessary to protect at least one of the following interests: public safety, order, health or morals, or the fundamental rights and freedoms of others; (c) restrictions are not permitted on grounds not specifically provided for in the Covenant and may not be imposed or applied in a discriminatory manner; (d) restrictions must be directly related and proportionate to the specific purpose for which they are intended; (e) restrictions may be imposed only for those purposes for which they are intended; (f) restrictions must not impair the right in question, that is, they must not undermine the essence of the right in question; and (g) in determining the scope of restrictions, States parties should proceed from the need to protect the rights guaranteed by the Covenant, including the right to equality and freedom from any form of discrimination under articles 2, 3 and 26 of the Covenant.* In addition, the Committee explained

his or her will, for example, through the establishment of a public association with a legal personality, or simply through an informal, unregistered association. According to the OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association (Guidelines),<sup>8</sup> *“Legislation must recognize both informal and formal associations... Legislation should not compel associations to gain formal legal personality, but it should provide associations with the possibility of doing so.”*<sup>9</sup>

The right to freedom of association can be exercised by a person through informal association with others or by forming a legal entity of his or her own choosing. NCOs are unregistered associations of individuals exist in every country (e.g., parent committees in schools, movements for the rights of homeless dogs, courtyard clubs, village assemblies, etc.).

#### 1.2 INCREASING THE MINIMUM NUMBER OF PERSONS REQUIRED TO ESTABLISH AN NCO

Part 3 of Article 22 of the Draft Law provides *“an NCO may be established by at least three citizens.”* According to the current NCO Law, a public association may be created by at least three persons (among them citizens), and a foundation by even one individual. According to international standards, an agreement reached between two or more persons or groups of persons should ordinarily be a sufficient basis for the establishment of an association.<sup>10</sup> The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association *“considers as a best practice... the legislation that requires no more than two persons to establish an association.”*<sup>11</sup> Therefore, the Draft Law restricts a person’s right of association by impairing the conditions for the creation of foundations by individuals in the Kyrgyz Republic.

#### 1.3 RESTRICTING THE RIGHT OF FOREIGN NATIONALS AND STATELESS PERSONS TO ESTABLISH NCOS

Part 2 of Article 22 of the Draft Law prohibits foreign nationals and stateless persons from establishing NCOs in the Kyrgyz Republic. This contradicts Article 36 of the Constitution of the Kyrgyz Republic, which has the following norm: *“Everyone has the right of freedom of association.”* This norm repeats relevant provisions of the Universal Declaration of Human Rights (Article 20), ICCPR (Article 22), and other generally recognized international human rights documents. Such a restriction contradicts the principles of equal treatment and non-discrimination in the Guidelines<sup>12</sup> and other

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that the concept of morality derives from many social, philosophical, and religious traditions. Therefore, the establishment of limitations in order to protect morals should not be based on principles deriving solely from one single tradition.

<sup>8</sup> <http://www.osce.org/ru/odihr/160961?download=true>

<sup>9</sup> Paragraph 9 of the Guidelines.

<sup>10</sup> Para. 148 of the Guidelines.

<sup>11</sup> Report of the Special Rapporteur to the UN Human Rights Council on the rights to freedom of peaceful assembly and of association), UN Doc. A/HRC/20/27, 21 May 2012, para. 54, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/135/88/PDF/G1213588.pdf?OpenElement>.

<sup>12</sup> Subsection 2(A) of the Guidelines, p. 49.

universally recognized international human rights instruments. In all countries with an established democratic tradition, *everyone willing (nationals, foreigners, refugees, migrants, stateless persons, and other categories of persons)*<sup>13</sup> can unite to protect common interests, solve common problems, or achieve socially useful goals. Separate restrictions on foreign participation may be imposed only on narrow groups of organizations (e.g., political parties), but not on all types of NCOs.

## 2. NORMS REGULATING THE ESTABLISHMENT AND ACTIVITIES OF NCOS

### 2.1 INCREASING NCOS REPORTING TO GOVERNMENT AGENCIES

Parts 2 and 4 of Article 45 of the Draft Law contain the following norms:

*“2. A non-governmental organization provides information about its activities to government statistical and tax offices, the Ministry of Justice and its territorial bodies, the prosecutor’s office of the Kyrgyz Republic, as well as its founders and other persons provided for by the legislation of the Kyrgyz Republic and the founding documents of the non-commercial organization.*

...

*“4. A non-governmental organization is required to submit documents containing a report on its activities and the personal composition of its governing bodies, as well as documents on the expenditure of funds and the use of other property, including those received from international and foreign organizations, foreign nationals and stateless persons, to the government statistical and tax offices, the Ministry of Justice and its territorial bodies, and the prosecutor’s office of the Kyrgyz Republic. The forms and deadlines for submission of these documents are determined by the Cabinet of Ministers of the Kyrgyz Republic.”*

At present, in compliance with the Law on NCOs (Article 17), NCOs are required to publish information about the sources of their income and its expenditure, as well as property acquired, used, and disposed of, on the website of the State Tax Service (STS) annually not later than April 1. This provision entered into force on June 29, 2021, and was adopted in order to ensure the transparency of NCOs.

The Draft Law introduces the additional requirement to submit the above reports to statistical and tax offices, the Ministry of Justice and its territorial bodies (Ministry of Justice), as well as the General Prosecutor’s Office of the Kyrgyz Republic and its territorial bodies (Prosecutor’s Office).

The Draft Law also requires additional information which NCOs are not currently required to post on the STS website:

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<sup>13</sup> Article 15 of the UN Convention on the Status of Apatrides (1954), Article 15 of the Convention Relating to the Status of Refugees (1951), Article 26 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Para. 139 of the Guidelines.

- 1) documents containing a report on the NCO's activities; and
- 2) documents on expenditure of funds and use of other NCO property.

It is not yet clear what the frequency of reporting and the content requirements will be. These are to be determined by a legal act of the Cabinet of Ministers after the adoption of the Draft Law. Many CSOs believe that the current reporting requirements for NCOs are already excessive and fail to meet both international standards and international good practice. NCOs are concerned that the new reporting requirements proposed in the Draft Law may be even more burdensome than the current ones.

The government should not demand accountability and transparency from associations but should encourage and stimulate them to do so.<sup>14</sup> Reporting is undoubtedly an important aspect of NCOs' activity because their reporting enables the public to understand what they actually do, – both as a source and a recipient of funding. Neither the commercial sector nor individuals will support an organization about which nothing is known. Nonetheless, reporting is a burden for any organization. In international practice, laws encourage NCOs to be open to the public.

The requirements established by law should be correlated with and proportional to the privileges received by an organization (tax benefits, special licensing, government funding, etc.). It is a recognized good practice that only certain categories of NCOs, for example, charitable organizations, are required to report, in particular on program activities, in exchange for special tax benefits. Another such category includes non-profit foundations that manage endowments. Reports can also be required in case of special activities, such as fundraising from the public (crowdfunding). In particular, NCOs such as associations without special status are not required to submit any program reports in Belgium, France, Germany, and most other European countries. The requirement that all NCOs submit reports is inconsistent not only with good practice but also with international standards. According to the Guidelines, *“Reporting requirements, where these exist, should not be burdensome, should be appropriate to the size of the association and the scope of its operations and should be facilitated to the extent possible through information technology tools. Associations should not be required to submit more reports and information than other legal entities, such as businesses, and equality between different sectors should be exercised. Special reporting is permissible, however, if it is required in exchange for certain benefits, provided it is within the discretion of the association to decide whether to comply with such reporting requirements or forgo them and forsake any related special benefits, where applicable.”*<sup>15</sup>

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<sup>14</sup> Council of Europe. Fundamental Principles on the Status of Non-governmental Organizations in Europe, 2002, paras. 60-65.

<sup>15</sup> Para. 225 of the Guidelines.

In practice, the requirement to submit more reports may create problems not only for NCOs, but also for government bodies, because under current law, NCOs themselves must post relevant information on the STS website and government bodies have no obligation to receive, examine and process those reports. If the Draft Law is adopted, thousands of NCOs will submit reports to the Ministry of Justice and Prosecutor's Office, and even to read these reports, those bodies would need more staff. What budgetary resources would this require and will it be appropriate compared to the real needs of those bodies to ensure law and public order, fight crime, and prevent terrorist threats? This is all the more noteworthy because NCOs have not acted to the detriment of the country in violation of the legislation of the Kyrgyz Republic.

## 2.2 BROADENING THE POWERS OF GOVERNMENT BODIES TO SUPERVISE NCO ACTIVITIES

The norms included in parts 2 and 3 of Article 46 of the Draft Law broaden the powers of the Ministry of Justice, Prosecutor's Office and tax offices to supervise the activity of NCOs. When analyzing such norms, it is necessary to remember that *all normative acts and practices concerning oversight and supervision of associations must be based on the principle of minimal government interference in their activities*. As the analysis below shows, the right to privacy applies to NCOs and their members. This means that the oversight and supervision of NCOs must have a clear legal basis and be proportionate to the legitimate objectives they pursue.<sup>16</sup> External intervention in the management or operation of an association may only take place in exceptional circumstances. No intervention is permissible unless necessary to put an end to a serious violation of legal requirements (e.g., when an NCO has failed to remedy such a serious violation or when it is necessary to prevent an imminent violation with serious consequences).<sup>17</sup> *"Oversight and supervision of associations should not be invasive, nor should they be more exacting than those applicable to private businesses. Such oversight should always be carried out based on the presumption of lawfulness of the association and of its activities."*<sup>18</sup>

The following powers proposed by the Draft Law to be given to the Prosecutor's Office, the Ministry of Justice, and tax bodies are contrary to the above standards:

- ***To request and review internal documents and conduct inspections of NCOs at their discretion.*** The Draft Law grants the Ministry of Justice, Prosecutor's and tax offices the power to inspect, request and review any internal documents of NCOs, including those on internal governance, internal regulations, internal

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<sup>16</sup> Venice Commission, Opinion on Law #121-FZ On Non-Commercial Organisations ("Law on Foreign Agents"), on Federal Laws #18-FZ and #147-FZ, and on Federal Law #190-FZ On Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation, CDL-AD(2014)025, 27 June 2014, Para. 90, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)025-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)025-e).

<sup>17</sup> ECHR, Case of Freedom and Democracy Party (Özdep) v. Turkey, Application # 23885/94, Judgment of 8 December 1999, paras. 46-47; Council of Europe, Recommendation CM/Rec(2007)14 of the Committee of Ministers to Member States on the Legal Status of Non-governmental Organisations in Europe, paras. 2, 6 and 70.

<sup>18</sup> Para. 228 of the Guidelines.

oversight of the organization's management and finances (Article 45, part 2). These provisions contradict Article 30 of the Constitution of the Kyrgyz Republic, which contains guarantees to protect the rights of individuals and legal entities, including NCOs. Granting government bodies unlimited authority to request and inspect any internal documents of NCOs would be a direct violation of the constitutional *"right to inviolability of the home and other objects in his [any person's] possession or other right."* These provisions also contradict Article 22 (see above) and Article 17 of the ICCPR, according to which *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family life, arbitrary or unlawful interference with his home or correspondence, or unlawful attacks on his honor and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."* These guarantees apply to NCOs, as has been repeatedly affirmed by decisions of the UN Committee for Human Rights.

- ***To send their representatives to participate in any internal NCO activities.*** The Draft Law allows the Ministry of Justice, Prosecutor's Office, and tax offices to send their representatives to participate in the internal activities of NCOs, without any restrictions (Article 46). A government official may participate in an internal meeting of members of an organization, for example, on how to influence a decision of a government body that may conflict with the public interest. Such participation by a government official would be considered interference in the activities of an NCO and would conflict with Articles 17 and 22 of the ICCPR and Article 30 of the Constitution of the Kyrgyz Republic. *Under no circumstances should laws prescribe or allow the presence of government representatives at closed meetings of association members<sup>19</sup> (unless they are invited by the association itself).<sup>20</sup>*
- **To apply sanctions, up to and including liquidation,** in the event of a decision that an NCO's activities are not consistent with its charter. The Draft Law grants the Ministry of Justice, Prosecutor's and tax offices the right to assess at their own discretion whether an NCO's activities are or are not consistent with the purposes of its creation. In the event of an arbitrary decision on non-compliance, a government body would be able to issue a written warning to the NCO and apply to the court for its liquidation. For example, an NCO's charter may state that it will engage in educational activities, but its members or supervisory body decide that the organization will provide food or equipment to an orphanage. Because such activities are not stated in the charter, are not educational and, despite their socially useful nature, they could be

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<sup>19</sup> OSCE ODIHR, Comments on the Law of Turkmenistan On Public Associations, Opinion # NCO – TUR/154/2010 (LH), 22 June 2010, <http://www.legislationline.org/documents/id/16059>, para. 41.

<sup>20</sup> Para. 176 of the Guidelines.



characterized as inconsistent with the charter and therefore serve as grounds for sanctioning the NCO including liquidation by court order. According to part 2 of Article 53 of the Constitution of the Kyrgyz Republic and customary international practice, NCOs, like commercial organizations, have broad legal capacity – *the right to engage in any activity not prohibited by law*. Reasonable restrictions on the activities of NCOs may only be those stipulated by Articles 17 and 22 of the ICCPR<sup>21</sup>. Additional restrictions may apply to certain groups of NCOs (such as charities) that enjoy significant tax and other benefits, but not to all NCOs. Provided NCOs operate within the law, it is up to an NCO itself and its highest governing body to assess whether or not its activities comply with its charter. *“Under no circumstances should associations be sanctioned solely on the grounds that their activities are in violation of their own internal rules and procedures (provided that these activities are not otherwise unlawful).”*<sup>22</sup>

### 2.3 ELIMINATING THE LEGAL FRAMEWORK FOR THE ACTIVITIES OF STATE AND MUNICIPAL INSTITUTIONS AS LEGAL FORMS OF NCOS

The current Law on NCOs regulates the activities of four organizational and legal forms of NCOs, namely, public associations, foundations, institutions (state, municipal and private), and associations of legal entities (ALE). The Draft Law provides for regulation of the activities of four organizational and legal forms of NCOs - public associations, foundations, private institutions and ALEs. The Draft Law does not include regulation of the activities of state and municipal institutions. Article 48 of the Draft Law states that, upon the adoption of the Draft Law, the Law on NCOs will become null and void. The majority of the institutions whose activities are regulated by the current NCO Law are state and municipal institutions, including thousands of educational (kindergartens, schools, universities), medical (clinics, hospitals), cultural (museums, community cultural centers, music groups), and other institutions. The adoption of this Draft Law will lead to the elimination of the legal framework for the operation of these state and municipal institutions.

### 2.4 EXTENDING THE TIME FRAME FOR STATE REGISTRATION OF NCOS

Part 8 of Article 26 of the Draft Law provides for a 30-day deadline for the registration of NCOs. According to the current legislation of the Kyrgyz Republic on state registration of legal entities, the current deadline for state registration of NCOs is five working days. Such a provision worsens conditions for registration of NCOs, discriminates against them in comparison with for-profit entities (for which the deadline for state registration is three days), without justification and in contradiction of international standards on *“equal regulation of NCOs and commercial*

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<sup>21</sup> Article 22 of the ICCPR: “[The exercise of this right] shall not be subject to any restrictions except those No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security public safety or public security, public order, the protection of public health or morals or the protection of the rights and freedoms of others...”.

<sup>22</sup> Para 178 of Guidelines.

*organizations.*<sup>23</sup> *“Oversight and supervision of associations should not be invasive, nor should they be more exacting than those applicable to private businesses. Such oversight should always be carried out based on the presumption of lawfulness of the association and of its activities.”*<sup>24</sup>

#### 2.5 NARROWING NCOS’ RIGHT TO ENGAGE IN ENTREPRENEURIAL ACTIVITY

Articles 16, 17 and 35 of the Draft Law include norms that NCO entrepreneurial activities must be *“consistent with the purposes of creation”* of the NCO. Under the NCO Law (Article 12), NCOs have the right to engage in entrepreneurial activities that are not *“contrary to their statutory purposes.”* The provision of the Draft Law narrows the possibilities for NCOs to carry out entrepreneurial activities, because there is a risk that they will have to prove to the state bodies that the activities are consistent with their statutory purposes, which is much more limited than the right to engage in any activities that are not contrary to the statutory purposes. This restriction contradicts part 2 of Article 53 of the Constitution of the Kyrgyz Republic, which provides broad legal capacity (*the right to carry out any activity not prohibited by law*), and is generally recognized in democratic countries.

### 3. NORMS GOVERNING THE CREATION AND OPERATION OF BRANCHES AND REPRESENTATIVE OFFICES OF FNCOS

The norms of international law guaranteeing the right to freedom of association, including the right to freedom of establishment and operation of NCOs also apply to FNCOs. *“The foregoing standards should equally be observed with respect to the formation of branches of associations, foreign associations or unions and networks of associations, including those operating at the international level.”*<sup>25</sup>

Because FNCOs are foreign legal entities, the adoption of the Draft Law could violate bilateral investment treaties. In many mutual investment protection treaties, FNCOs fall directly under the definition of “investor.” Moreover, financing that FNCOs provide to Kyrgyzstani NCOs under investment treaties falls under the definition of “investment” and is protected by the terms of these treaties. For example, in the treaty between Kyrgyzstan and the United States, “investment” means an investment in any form”. Currently, the Kyrgyz Republic is a party to bilateral agreements on mutual support, promotion and protection of investments with more than 20 countries.<sup>26</sup> These treaties provide foreign and domestic investors with equal rights and favorable

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<sup>23</sup> Para. 225 of the Guidelines.

<sup>24</sup> Para. 228 of the Guidelines.

<sup>25</sup> Para 166 Guidelines, UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report to the UN Human Rights Council (Best practices related to the rights to freedom of peaceful assembly and of association), UN Doc. A/HRC/20/27, 21 May 2012, para. 59. 9

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<https://invest.gov.kg/ru/2019/07/26/%D0%B4%D0%B2%D1%83%D1%81%D1%82%D0%BE%D1%80%D0%BE%D0%BD%D0%BD%D0%B8%D0%B5-%D0%BE%D1%82%D0%BD%D0%BE%D1%88%D0%B5%D0%BD%D0%B8%D1%8F/>

conditions for investment under international law, and provide guarantees of investment protection and fundamental rights.

It is beyond the scope of this Analysis to survey all investment treaties between Kyrgyzstan and other countries, but it should have been done by the initiators of the Draft Law and relevant state bodies to assess the impact and avoid violation of many investment treaties with the adoption of the Draft Law. Under many treaties, FNCOs are likely to be able to prove that the Draft Law requirements increased economic risk, i.e., the uncertainty of a successful outcome from an investment. The inability to predict whether an FNCO will register a branch or representative office, and whether a government agency will prohibit financing of a particular NCO, will be a source of such risk. The consequences of investment treaty violations can lead to the deterioration of relations between treaty states parties, withdrawal of investments already made, termination of new ones, and legal disputes in international arbitration courts.

### 3.1 CREATING UNCERTAINTY ABOUT FNCO ACTIVITIES WITHOUT REGISTRATION

Part 2 of Article 6 of the Draft Law states: "*A foreign non-governmental organization carries out its activities in the territory of the Kyrgyz Republic through its structural subdivisions - branches and representative offices.*" Although the Draft Law does not directly prohibit the activities of FNCOs without registering a branch or representative office, such an outcome can be anticipated from the Draft Law provision quoted above.<sup>27</sup> The Draft Law does not provide the basis for FNCOs to carry out their activities in the Kyrgyz Republic without registering a branch or representative office.

The procedure for the registration of branches/representative offices of FNCOs provided for in the current legislation of the Kyrgyz Republic on state registration of legal entities complies with democratic standards, whereas the new procedure proposed in the Draft Law discriminates against FNCOs contrary to international law.

### 3.2 OMITTING CERTAIN TIME LIMITS FOR REGISTRATION AND ESTABLISHING BROAD GROUNDS TO REFUSE TO REGISTER BRANCHES AND REPRESENTATIVE OFFICES OF FNCOS

Article 6 of the Draft Law mandates FNCOs to register their structural subdivisions (branches and representative offices) in order to carry out activities in the Kyrgyz Republic, but the Draft Law does not contain a clear deadline to register a branch/representative office of FNCO. This may impede its registration. Paragraph 155 of the Guidelines on Freedom of Association states that *insufficient clarity of registration procedures is a violation of the right to freedom of association* (which includes the right to establish NCOs and FNCOs). Based on the experiences of other countries, problems with registration, such as an unstated time frame for action and a

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<sup>27</sup> The executive summary accompanying the bill also says that "a non-governmental organization, including branches and representative offices of a foreign non-profit non-governmental organization shall be subject to mandatory state registration with the Ministry of Justice of the Kyrgyz Republic."

possibly long waiting period for a decision, along with broad grounds for refusal of registration (listed in paragraph 2, part 2 of Article 27 of the draft Law), is likely to reduce the flow of foreign investment into the Kyrgyz Republic, especially in the social sphere, where investment comes through grants to NCOs.

### 3.3 ESTABLISHING NEW REQUIREMENTS FOR THE SUBMISSION OF INFORMATION BY FNCO BRANCHES/REPRESENTATIVE OFFICES TO GOVERNMENT BODIES

Part 6 of Article 45 of the Draft Law envisages new requirements for branches and representative offices of FNCOs to provide information to the statistics and tax authorities and the Ministry of Justice in regard to “the volume of funds and other property received, their intended allocation, purposes of their expenditure or use and their actual expenditure or use, on programs planned for implementation in the Kyrgyz Republic as well as on the disbursement of funds provided to individuals and legal entities and the use of the other allocated assets.” (emphasis added)

According to the Law on NCOs, branches/representative offices of FNCOs (if the parent organization is registered as a public association, foundation, institution, or association of legal entities) shall annually publish on the website of the state taxation service summary information for the previous year in regard to their sources of funds and purposes of expenditures and information about their acquired, utilized, and divested property. The Draft Law would require all branches/representative offices of FNCOs to submit the following additional information to the Ministry of Justice:

- intended distribution, the purpose of expenditure of funds and property received;
- programs expected to be implemented on the territory of the Kyrgyz Republic;
- expenditure of the funds provided to individuals and legal entities and on the use of other property provided to them.

The Draft Law’s information requirements are much more burdensome than those of the Law on NCOs. Moreover, it is not yet clear what the periodicity, form, and content of these requirements will be, because they are to be determined by a legal act of the Cabinet of Ministers after the adoption of the Draft Law. Because the Draft Law does not specify the details of the information to be submitted to the Ministry of Justice, and in light of other increased requirements, FNCOs are concerned that these requirements may be burdensome and difficult to comply with. For example, it is possible that the Ministry of Justice will require FNCO to submit reports of its grantees (NCOs and individuals) as part of the information “on spending of the specified funds provided to individuals and legal entities and on use of other property provided to them.”

The negative consequences of burdensome reporting for FNCOs are similar to those discussed with respect to new reports for NCOs set forth above in Section 2.1. of this Analysis.

### 3.4 RESTRICTING THE ACTIVITIES OF FNCO BRANCHES/REPRESENTATIVE OFFICES. EXPANDING THE POWERS OF GOVERNMENT BODIES TO CONTROL THE ACTIVITIES OF FNCOS

The norms included in Parts 5 and 6 of Article 46 of the draft Law give the Prosecutor's Office and the Ministry of Justice the right to prohibit FNCOs from implementing a declared program or part thereof in the territory of the Kyrgyz Republic or financing individual citizens or organizations "*in order to protect the foundations of the constitutional system, morality, health, rights, and lawful interests of citizens, national defense, and State security.*" According to the Law on NCOs, the justice authorities and the Prosecutor's Office currently do not possess such rights.

Given the broad wording of the grounds for the ban, the Draft Law provides essentially unlimited authority to the prosecution and justice agencies to decide at their own discretion to terminate funding individual NGOs and civic activists, because the Draft Law articulates no criteria for imposing a ban on the financing of their activities.

Restrictions on NCO activities, including access to funding, which is necessary for NCOs to carry out their activities, must comply with the requirements of Article 22 of the ICCPR. According to the Guidelines, "*associations shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities. In particular, states shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source, nor stigmatize those who receive such resources.*"<sup>28</sup>

### 3.5 GIVING DISCRETION TO LIQUIDATE BRANCHES/REPRESENTATIVE OFFICES OF FNCOS ON A WIDE RANGE OF GROUNDS

According to Part 5 of Article 31 of the Draft Law, the Prosecutor's Office and the Ministry of Justice have the right to apply to the court for the liquidation of a branch/representative office of FNCO in the following cases:

- systematic failure of the FNCO branch/representative office to provide the information required by the Draft Law to the Prosecutor's Office, justice, statistics, and tax authorities;
- non-compliance of the activities of the branch/representative office of FNCO with the objectives set out in its constituent documents; and
- the implementation on the territory of the Kyrgyz Republic by the branch/representative office of FNCO of a program or part thereof, as well as the financing of citizens or organizations, the implementation and financing of which was prohibited by the Prosecutor's Office or the Ministry of Justice.

*In democratic states, liquidation should only be forced where a breach gives rise to a serious threat to the security of the state or of certain groups, or to fundamental*

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<sup>28</sup> Para 32 of the Guidelines (Principle 7).

*democratic principles.*<sup>29</sup> Non-compliance of the activities of a branch/representative office of FNCO with the objectives stipulated by its constituent documents should not be a ground for its liquidation. Branches/representative offices of FNCOs should have broad legal capacity as do local NCOs. The state can limit the goals and areas of activities of branches/representative offices of FNCOs only in exceptional cases, for instance when an association's objectives and activities *promote propaganda for war, the incitement of national, racial or religious hatred and violence.*<sup>30</sup>

The possibility of forced liquidation of FNCO branches/representative offices on a wide range of grounds as proposed in the Draft Law is not in line with positive international practice and would seriously worsen the legal situation of FNCO in the Kyrgyz Republic.

The liquidation of branches/representative offices of FNCO on a wide range of grounds may result in a reduction in foreign funding of social and other areas important for the Kyrgyz Republic and curtailment of the activities of FNCOs that provide substantial support in addressing the country's social, economic, and other problems.

## Conclusion

The provisions of the Draft Law restricting the establishment and activities of NCOs and FNCOs that do not meet the standards of NCO regulation in democratic countries will undoubtedly lead to a downgrading of the Kyrgyz Republic in international political and economic rating indices, that foreign businesses use to assess investment risks when deciding whether to invest in a particular country. Political and economic indices are closely linked. For instance, for three of the five criteria for the Sovereign Risk Indicators by S&P<sup>31</sup>, political risks are deemed to be key factors. The World Bank uses the Investment Competitiveness Diagnostics<sup>32</sup> and the Worldwide Governance Indicators<sup>33</sup>, where political risks play a significant role. A recent World Bank study found that investors consider "political risk" to be the second major factor in deciding whether to invest in developing and "transition" economies. In addition, there are purely political indices that all major companies look at before investing in any country. The main political indices are the World Rule of Law Index<sup>34</sup>, the Freedom Ratings<sup>35</sup>, the Corruption Perception Index<sup>36</sup>, and the TRACE Bribery Risk Matrix<sup>37</sup>. It is highly probable that with the introduction of restrictions on NCOs and FNCOs the ratings of

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<sup>29</sup> Para 235–239 of the Guidelines.

<sup>30</sup> Para 179 of the Guidelines.

<sup>31</sup> Sovereign Risk Indicators 2022 Estimates: <https://disclosure.spglobal.com/sri/>.

<sup>32</sup> Investment Competitiveness Diagnostics: <https://www.worldbank.org/en/topic/investment-climate/brief/investment-competitiveness-diagnostics-and-research>.

<sup>33</sup> Worldwide Governance Indicators:

[https://info.worldbank.org/governance/wgi/#:~:text=The%20Worldwide%20Governance%20Indicators%20\(WGI.Government%20Effectiveness](https://info.worldbank.org/governance/wgi/#:~:text=The%20Worldwide%20Governance%20Indicators%20(WGI.Government%20Effectiveness).

<sup>34</sup> The World Justice Rule of Law Index by World Justice Project: <https://worldjusticeproject.org/rule-of-law-index/>.

<sup>35</sup> Freedom Ratings by Freedom House: <https://freedomhouse.org/countries/freedom-world/scores>.

<sup>36</sup> Corruption Perception Index by Transparency International: <https://www.transparency.org/en/cpi/2021>.

<sup>37</sup> The TRACE Bribery Risk Matrix: <https://www.traceinternational.org/trace-matrix>.

the Kyrgyz Republic will deteriorate, which may lead to a decrease in investment in the country's economy.

Kyrgyzstan has a well-deserved reputation as one of the most progressive countries in Central Asia and Eurasia in terms of ensuring and protecting fundamental human rights and freedoms, creating a legal environment where civil society assists the Parliament, the President and the Cabinet of Ministers in carrying out their main mission of improving the living standards of citizens.

The Analysis shows that the Draft Law, if adopted, will significantly worsen the conditions for the establishment and the legal status of both local and foreign NCOs in the Kyrgyz Republic. Many norms in the Draft Law contradict the ICCPR and other major sources of international human rights law<sup>38</sup>. Although the authors of the Draft Law state that it is proposed in the “*interests of the state and ensuring public safety, protection of morals, public health, national and religious feelings of citizens,*” the Analysis shows that the Draft Law does not correspond to the overarching state interest in building a genuine democracy in the country, which is enshrined in the Constitution of the Kyrgyz Republic. The adoption of the Draft Law and application of its norms may lead to appeals to the UN Human Rights Committee about violations of the rights of individuals and NCOs in the Kyrgyz Republic.

Based on the foregoing, the adoption of the Draft Law is inadvisable.

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<sup>38</sup> The Universal Declaration of Human Rights (Article 20) (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11) (1950), and the International Covenant on Civil and Political Rights (Article 22) (1966) contain virtually the same provisions.