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Main Issues of Legislation on Foreign Donations

The document has been prepared based on the review of the provisions of Presidential Decree No. 5 dated August 31, 2015 “On foreign donations” and its practical application. It does not address the issue of getting assistance within humanitarian programs as at present we are not aware of the practice of initiation thereof by non-profit organizations, including due to the uncertainty and inaccuracy of the new Decree in respect of the implementation of such programs¹.

On August 31, 2015 the President of the Republic of Belarus signed Presidential Decree No. 5 “On Foreign Donations” (hereinafter – Decree No. 5). The Decree approved the Regulations on the Procedure for Obtaining, Recording, Registration, and Use of Foreign Gratuitous Aid, Control of its Receipt and Intended Use, as well as the Registration of Humanitarian Programs (hereinafter – the Regulations). Decree No. 5 provided substantial changes to the procedure for obtaining and registration of foreign donations. Despite the fact that Decree No. 5 came into effect on March 4, 2016, the Department for Humanitarian Activities under the Property Management Directorate of the President of the Republic of Belarus started to apply some of its provisions as early as the end of 2015.

In our opinion, the main problems in the obtaining, registration, and use of foreign donations are currently the following:

¹ However, the analysis of Decree No. 5 with regard to the possibility for humanitarian programs implementation by non-profit organizations shows that these provisions were developed without taking their (non-profit organizations) interests into account. For example, the Decree provides for that the list of the scheduled humanitarian program events should contain the name of the performers (co-performers) and the estimated funding for each event. However, some aid recipient organizations distribute the funds by themselves on a competitive basis so they cannot fulfill such requirements.

1. Authorization system for pre-registration of foreign donations.

Since 2011, there is an authorization system for pre-registration of foreign donations in Belarus. Decree No. 5 contains the same system for non-profit organizations. The current procedure for the registration of foreign gratuitous aid allows the state to arbitrarily refuse the registration of foreign donations. The system is not conducive to the attraction of foreign resources to the country reducing the load on government funding and addressing the issues of social protection, health care, environmental protection, education, and other important areas of Belarusian society life. The developed system of foreign donation registration does not comply with the international obligations of the Republic of Belarus with regard to freedom of association.

Moreover, in accordance with applicable law, the documents required for registration of foreign donations shall be submitted to the registration authority only after the funds arrival at the account of a legal entity. This provision raises a number of challenges for non-profit organizations in case of refusal to register foreign donations or registration without tax exemptions, in particular, due to the need to return such aid and conflict rules of the income tax legislation.

2. Lack of minimal donation amount not subject to registration.

The legislation does not establish the minimum amount of foreign donations, which a non-profit organization can receive without registration. The Regulations (para. 18) contain a provision that that foreign donations obtained in the form of goods (property) in the amount not exceeding 500 basic units (about USD 5,271) as at the date of its receipt to be used in production and business operations of a legal entity is not subject to registration. However, Belarusian legislation does not contain a definition of “production and business operation”. According to the oral explanations of the Department for Humanitarian Activities under the Property Management Directorate of the President of the Republic of Belarus (hereinafter - the Department for Humanitarian Activities), this provision only applies to profit making organizations. Thus, any foreign aid in any amount received by a non-profit organization shall be registered at the Department for Humanitarian Activities. This provision requires to appeal to the registration authority in the case of receiving from abroad minor sums of money or low-value property, which imposes an extra burden on both non-profit organizations and the state apparatus, and in general does not encourage organizations to receive the aid for their activities from abroad.

Case study: After a conference where representatives of a non-profit organization participated, the organization received from a foreign organization a parcel with books for no charge. However, the management of the non-profit organization decided to refuse receiving the parcel due to the need to register the parcel at the Department for Humanitarian Activities.

3. Existing list of purposes, for which foreign donations can be obtained.

The Regulations (para. 3) provides for a narrow list of purposes, for which foreign gratuitous aid could be obtained. Foreign donations for the purposes not specified in Decree No. 5 can be obtained only by a decision of the Property Management Directorate of the President of the Republic of Belarus (when obtaining the aid in the amount exceeding 500 basic units, such decision shall be taken only by the Directorate upon agreement with the President). This provision is also not conducive to attraction of foreign resources to the country and contrary to the norms of the Civil Code providing for the right of individuals and legal entities to acquire and exercise their civil rights willingly and in their interest (freedom of contract). Non-profit organizations are subject to state registration and may carry out their statutory activities as long as such activities comply with the law. Special permits may only be required to provide specific services to protect third-party health, rights, and interests, and this issue is resolved by the existing licensing institution. Establishment of the purposes of foreign donations makes it difficult to implement the projects, for which the funds were involved (including from domestic sources), due to the fact that the purposes of receiving foreign gratuitous aid and sponsorship may not be the same. The decision on whether or not the activities comply with the purpose stated in the law may be and often is subjective. In addition, the list of purposes specified in the current legislation on foreign donations does not meet the real needs of modern society. Despite the fact that Decree No. 5 extended the list of purposes a little in comparison with the previous applicable law, the purposes of obtaining foreign donations do not include such important goals as culture, healthy lifestyles promotion, needs of religious organizations, etc.

Case study: A non-profit organization received foreign donation for an educational project including educational events and coordination of organizations working in the field of education and enlightenment. However, the project was recognized impractical due to the fact that the Decree does not directly provide for educational activities but just specifies education (training) among the purposes.

4. Prohibition to obtain foreign donations for seminars or other forms of political and mass agitation work among the population.

The Regulations (para. 4) prohibits using foreign donations for seminars or other forms of political and mass agitation work among the population. Potentially, the existence of this rule

may serve as the grounds for refusal to register the project incorporating seminars and other forms of education. Moreover, in accordance with the Regulations (para. 52), a single obtaining foreign donations for prohibited purposes can serve as the basis for the liquidation of a non-profit organization.

5. Vague regulation of the issue of releasing foreign donations from income tax.

According to Art. 128 of the Tax Code of the Republic of Belarus, non-operating income of non-profit organizations does not include the value of gratuitously received goods (executed works, rendered services), property rights, sums of money gratuitously received, provided that such goods (works, services), property rights, and money are used according to their intended purpose, and in case when the intended purpose has not been determined by the transferring party – to fulfill the statutory objectives of such non-profit organizations, and thus such goods (works, services), property rights, and money are not subject to income tax. At the same time, the Regulations (para. 31) provides for the procedure for the release of the received foreign donations from taxes and charges by the Property Management Directorate of the President of the Republic of Belarus on an individual basis. Thus, there is a conflict of two regulations and the totality of these rules is differently interpreted by the experts of supervising bodies. The approach to the provision of benefits on an individual basis violates the principle of equality of the parties in the civil turnover stipulated by the Civil Code of the Republic of Belarus. The government should be interested in establishing effective legal mechanisms to develop charity. Nearly all countries support charity organizations providing tax and other benefits to them. In order to avoid abuse of the provided benefits by non-profit organizations, the legislation stipulates clear mechanisms to ensure the transparency of their operations. The transparency is achieved by means of open public access to the programs and projects of non-profit organizations, including to their financial statements.

6. Requirement to submit state authorities' opinions to register donations.

The Regulations (para. 22) states that for the release of donations from taxes and charges (duties) the organization should submit to the Department for Humanitarian Activities an opinion issued by the competent authority regarding the approval of the purposes to be covered by the donation and / or the reasonableness of its exemption from taxes and charges (duties). The Regulations (para. 33) defines the level of authority to issue an opinion depending on the amount of donations and the territory of its use, as well as the criteria the public authorities are guided by when issuing the opinion. Thus, the law requires additional coordination of the purposes of foreign gratuitous aid. Only non-profit organizations that cooperate or implement joint projects with the state may register foreign donations according

to such procedure. At the same time, many non-profit organizations in Belarus cannot cooperate with the state due to the nature of their activities. There is a number of challenges for the non-profit organizations when obtaining the above-mentioned opinions:

- 1) Public authorities are not willing to provide such opinions or to take responsibility and apply for donations exemption from taxes;
- 2) The law does not contain any mechanisms to force public authorities to issue opinions and the interaction between the Department for Humanitarian Activities and the competent public authorities in respect of opinions issue;
- 3) Public authorities may be subjective in assessing the appropriateness of the donations received;
- 4) Public authorities often require making adjustments to the project, including the purposes of donations;
- 5) Non-profit organizations may cooperate with certain public authorities and do not cooperate with other bodies which, by law, should issue relevant opinions to them.

Case study: A non-profit organization has been operating in cooperation with the Ministry of Internal Affairs for many years and submitted the letters of support issued by the Ministry to the Department for Humanitarian Activities before Decree No. 5 coming into force. After the entry of Decree No. 5 into force, the organization received foreign gratuitous aid. In accordance with the Regulations (para. 33), the organization should submit an opinion of Minsk City Executive Committee to the Department for Humanitarian Activities. However, Minsk City Executive Committee refuses to provide an opinion in view of the fact that the organization did not cooperate with it in the course of activities.

7. Non-registrability of long-term projects (except for humanitarian programs, which, according to the above, does not currently work for non-profit organizations).

The law provides for the required registration of each foreign donation amount received under long-term projects and for reporting thereon, which is not conducive to the effective implementation of projects.

Case study: A public association has been implementing the nine-year long-term project. At the same time, the funds under the agreement between the sender and the recipient are received by several tranches every three months. The organization has to separately register each tranche under the same project with the same purpose at the Department for Humanitarian Activities. Thus, the time is spent on drafting and reviewing the documents, issuing opinions, respectively, inefficient spending of resources both of the organization itself as well as of public authorities.

8. Lack of statutory deadlines for the registration of foreign donations applying for tax exemptions.

The Regulations (para. 28) change the deadlines for registration of foreign donations in case the organization does not claim the donation exemption from taxes or does not require additional approval of the purposes of donation use. Previously, the term for registration of such donations was 1 month. Decree No. 5 reduced the term to 10 business days. With regard to donations applying for the exemption from taxes and duties or requiring additional approval of its purposes, Decree No. 5 has not determined the exact deadlines for registration yet. It is established that the registration deadline is 5 business days following the day of the President's approval of the purpose and / or exemption from taxes and fees. However, the term for approval has not been determined. The provisions of law on the issue of the opinion of public authorities with regard to the approval of purposes of using donations and/or the reasonableness of their exemption from taxes and charges (duties) within 5 business days following the day of the application receipt is also violated in practice. At the same time, the law does not provide for the use of donations before obtaining the certification (donation registration at the Department for Humanitarian Activities). The law does not also provide for an opportunity for the compensation for costs associated with the project but arising before the registration of any donation.

Case study: A non-profit organization has received aid for the implementation of a short-term project (organization of children's recreation). However, the project has never been realized due to the fact that the registration deadlines were delayed and the project became impossible, since the events had to be held in a certain period in accordance with the terms and conditions of the project and the organization operation plan.

9. Requirements for the detailed plans on targeted use (distribution) of foreign donations.

Prior to the enforcement of Decree No. 5, the plan for the targeted use (distribution) of foreign gratuitous aid specified donation purposes, types of goods (works, services) to be acquired by means of donation, and total amount to be received. At the moment, the Department for Humanitarian Activities requires to specify the amounts as a budget item, for example, payroll, equipment purchase, and administrative costs. A problematic aspect in this matter is a permanent change of exchange rates in Belarus, therefore, the possibility of a lack of funds to repay certain costs. The banks monitor the issuance of foreign donations in strict compliance with the plan of the intended use thereof. Moreover, the Regulations (para. 57) does not allow non-profit organizations to use within a calendar year more than 20 percent of tax-exempt cash donations to pay to the employees performing organizational and administrative functions. At the same time, the law does not define the concept of the "employees performing

organizational and administrative functions”. In practice, this can result to non-uniform interpretation of this restrictive rule by the Department for Humanitarian Activities and to the lack of its understanding by recipient non-profit organizations and their donors. The rules of para. 57 do not clearly specify the specific donation in question received during the calendar year and exempted from taxes: the donation received within the framework of all projects implemented by the association or aggregate thereof; projects and humanitarian programs or aggregate thereof; and foreign gratuitous and international technical aid received, which is also exempt from taxes.

10. Need to make settlements on the project in Belarusian rubles.

The Regulations (para. 2) specifies that foreign donations may be received by natural persons, including individual entrepreneurs, and by legal entities of Belarus, including public authorities, which received donations for use, possession and/or disposal from the senders and also received donations through their distribution under the plan of the donations targeted use. However, those receiving donations through distribution (with some exceptions), including organizations that jointly implement a project, may receive donations only in Belarusian rubles. Exchange rates fluctuations lead to difficulties and financial losses in the implementation of projects. Based on the nature of their activities, non-profit organizations sometimes need to purchase equipment, such as rehabilitation equipment, outside the Republic of Belarus. However, it is impossible to purchase such equipment by foreign donations.

11. Need to approve at the Department of Humanitarian Activities of the purposes to use the property donation after the project completion.

The Regulations (para. 55) states that if 5 years passed after the approval of purposes of the property received as donation as well as acquired at expense of donations and if it is impossible to further use such property for the intended purpose in accordance with the plan agreed by the Department for Humanitarian Activities, the recipients use such property for other purposes approved by the Department. A special regime for the use of real estate has also been established (para. 58 of the Regulations). According to the regime, the recipient is not entitled without the consent of the Department for Humanitarian Activities:

- To enter into transactions with real estate received as donations resulting in the creation, transfer or termination of rights that provide for the transfer of the rights to such real estate to third parties;
- To carry out reconstruction and other activities, which involve changes to the technical characteristics of real estate.

This regulation does not specify the time for approval of new purpose of use after the acquisition of property. In the first case, the Regulations also fail to determine the property in question: either fixed assets or acquired property, including low-value one.

12. Non-referring of property acquired by donations to foreign donations and non-coverage of such property by tax exemption rules.

The Regulations (para. 27) specify that the property acquired by donations, including in the framework of humanitarian programs, is not a donation and is subject to exemption from taxes and charges (duties) in the manner provided for the release of foreign donations. At the same time, many non-profit organizations buy and transfer goods to various categories of the population. The Tax Code of the Republic of Belarus stipulates that both cash and in-kind income is subject to personal income tax. Art. 163 of the Tax Code provides for the following incomes to be exempted from the income tax:

- 1) Income received from natural persons and individual entrepreneurs not being remunerations for fulfilling of full-time labour or other duties, in the amount not exceeding 99 Belarusian rubles, from each source in the course of a tax period;
- 2) Gratuitous (sponsor's) aid in cash and in kind being received from Belarusian organizations and citizens of the Republic of Belarus by disabled persons, minor orphans and children without parental care (only by these kinds of citizens), in the amount not exceeding 9,886 Belarusian rubles, in aggregate from all sources in the course of a tax period; as well as by payers in need of medical assistance, including performance of operations, upon availability of a respective confirmation issued in the manner established by the Ministry of Health of the Republic of Belarus;
- 3) Income received from foreign gratuitous aid (including that received by children and persons accompanying them in relation to rehabilitation of children abroad) or international technical aid in the manner and on conditions established by the President of the Republic of Belarus.

Thus, reviewing the rules and provisions of the Tax Code, we can conclude that the property provided to low-income citizens, except for certain categories, acquired by foreign donations in the amount exceeding the established one, is subject to income tax. At the same time, the Regulations do not set forth the exact property in question.

13. No criteria to distinguish between foreign donations and international technical aid.

Current legislation does not clearly distinguish between “foreign donations” and “international technical aid”. In practice, this creates problems in determining the registration procedure for incoming donations. This situation is also contrary to the Law of the Republic of Belarus “On

Normative Legal Acts of the Republic of Belarus”, according to which the concepts used in the text of the regulation should be clear and unambiguous.

14. Constantly changing requirements of the Department for Humanitarian Activities to the documents submitted for the registration of foreign donations.

Since December 2015, the Department for Humanitarian Activities in practice has been constantly changing requirements to the documents submitted for registration of foreign donations. However, there are no clear written recommendations of the Department for Humanitarian Activities regarding the performance of vague provisions of the new legislation on foreign donations.

Conclusions:

The law of the Republic of Belarus provides for a complex and cumbersome procedure for obtaining, recording and use of foreign gratuitous aid by non-profit organizations. It does not take into account the specific nature of non-profit organizations as well as makes it impossible for non-profit organizations that are not working in close cooperation with public authorities to attract tax-exempted aid. The registration of foreign donations is selective. Belarusian law also provides for the possibility of bringing to justice those who violate the legislation on foreign donations. Thus, according to the Regulations (para. 52), the misuse of donation by a non-profit organization it is the basis for its compulsory liquidation, including in case of a single violation. According to Art. 23 of the Code of Administrative Offences of the Republic of Belarus, the use of foreign donations by the recipient before obtaining a certificate confirming its registration is punishable by a fine in the amount of twenty to one hundred basic units (about USD 211 to 1,054). The misuse (full or partial) of foreign donations by their recipients or any organizations or individuals of the Republic of Belarus that received such aid as distributed in accordance with the plan, as well as the misuse of property and other funds received from its sale, or the use of such aid and/or funds in violation of the law is punishable by a fine in the amount of twenty to two hundred basic units (about USD 211 to 2,108), with or without confiscation of such donations and / or funds; and the misuse of foreign donations by a legal entity is punishable by a fine up to one hundred percent of the obtained foreign donations, with or without confiscation of such donations and / or funds received from their sales.

These restrictions do not comply with international obligations voluntarily assumed by the Republic of Belarus. In particular, the Guidelines on Freedom of Association developed jointly by the OSCE Office for Democratic Institutions and Human Rights and the Council of Europe's Commission for Democracy through Law (Venice Commission), according to which the unimpeded obtaining of resources, including foreign and international, is an integral part of the

freedom of associations. The aim of the legislation governing foreign donations should be creating the most favorable conditions for non-profit organizations and their access to funds received from abroad. The absence of obstacles for foreign donations results in such donations inflow to the country, particularly in the form of social investments for social programs, which are of priority for the state. To change the situation, it is necessary to amend the legislation taking into account all problems specified herein as well as the views of other non-profit organizations and interested parties.