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INTERNATIONAL STANDARDS RELATING TO REPORTING AND DISCLOSURE REQUIREMENTS FOR NON-GOVERNMENTAL ORGANIZATIONS

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The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.

INDEX

Executive Summary

This review discusses reporting and disclosure requirements for NGOs in the Council of Europe Member States, against the background of international instruments governing freedom of association and its related rights.

The applicable international instruments and case law do not specifically address all the issues surrounding the legitimate scope of NGOs reporting and disclosure requirements. Rather, the determination of the compatibility of particular requirements with those standards generally turns on the outcome of contextual, case-by-case analyses. In efforts to facilitate this determination, the review discusses not only pertinent international standards, but also principles underpinning sound policy development impacting on NGOs.

The review also presents developments relating to the data protection law which have further strengthened the right of NGOs to privacy, thus narrowing the margin of appreciation of a state' legitimate interference with their internal affairs.

The review concludes with presentation of major policy considerations arising from the current practices of Member States with respect to the permissible scope of reporting and disclosure requirements for NGOs.

Introduction

1. This review examines international standards relating to the permissible scope of reporting and disclosure requirements for non-governmental organizations ('NGOs').[1] It was prepared against a background of increasing resort by States to the imposition of such requirements.

2. The concepts of reporting and disclosure requirements are often intertwined, thus posing a challenge to draw a clear-cut line between the two.

3. For the purpose of this review, *reporting requirements* are understood to pertain to the necessary information which NGOs are obliged to file with a competent *public authority* within a certain—often recurring—*period of time* and in a *prescribed format*. An example of such a requirement would include an obligation for NGOs to file an annual financial statement or an activity report.

4. *Disclosure requirements*, on the other hand, are understood to refer to particular information which NGOs are obliged to disclose to the competent *public authority* outside the remit of prescribed reporting requirements. Depending on circumstances, such an information will also have to be available to the *public*. An example of the former requirement would include a duty for NGOs to disclose identities of their members, non-public donors, volunteers, members of the governing board and other persons affiliated with an organisation—insofar as such a duty is not part of its regular financial or activity report. An example of the latter type of requirement would include an obligation for NGOs to label their publishing materials as being prepared by a "foreign agent".

5. *Disclosure requirements* may also be applicable for members of NGOs holding certain public positions; e.g., the duty of a judge to disclose to some supervisory authority his or her membership in certain kinds of NGOs.

6. The foregoing definitions are offered for clarity only, as the same international standards governing freedom of association and related rights pertain to both reporting and disclosure obligations. Depending on the issue at hand, they are discussed either separately or together.

7. Section I provides the general context of review, which illustrates why reporting and disclosure requirements are topical and timely issues. Section II provides an overview of the relevant international standards. It deals with both those governing the right to freedom of association and related rights and those governing the scope of legitimate

[1] The terms *NGOs*, *not-profit organisations* ('NPOs') and *civil society organisations* ('CSOs') are used inter-changeably, reflecting the different language used in the various instruments and documents which are the subject of review. As a norm, reporting and disclosure requirements pertain only to NGOs which have the legal entity status. Informal NGOs (those without the legal entity status) do not have their own property and cannot engaged in business transactions on their own Therefore, extending general reporting and disclosure requirements to those organisations would give rise to the issue of proportionality.

interference with freedom of association in case of terrorism and money laundering. The latter two grounds are particularly significant as they are often invoked by governments as justification for imposing particular reporting and disclosure requirements on NGOs. Section III discusses the extent to which particular reporting and disclosure requirements are compatible with international standards.

8. The review benefited immensely from comments provided by Jeremy McBride, the President of the Expert Council on NGO Law.

I. General Context

9. The imposition of onerous reporting and disclosure requirements on NGOs is widely considered to be linked to efforts leading to the shrinking of space for civil society.[2]

10. Thus, the final report of Mana Kai, the former UN Special Rapporteur on the rights to freedom of peaceful assembly and association, has noted that:

> 14. …Despite an ongoing and explicit rhetorical focus on 'supporting' and 'strengthening' civil society on the part of States and multilateral institutions, including the United Nations and regional human rights systems, the Special Rapporteur has observed the narrowing of political space for civil society. Laws and policies that constrain civil society, most often through direct attempts to unduly restrict the rights to freedom of peaceful assembly and of association, have flourished. Stigmatization, undue barriers to funding, and the wilful misapplication of antiterrorism and other legislation are tactics that have been applied by States to control and restrict the actions of civil society...
> 35. The rights to freedom of peaceful assembly and of association have been curtailed, while freedom of opinion, expression and other rights have been suppressed under the guise of combating extremism or terrorism. Ironically, curtailing rights and freedoms creates environments that propagate the very extremism that the authorities sought to eradicate. The existence of a robust civil society and respect for human rights in general is critical to combating extremism and channelling dissent and frustration in a legitimate way through the system. [3]

11. Similarly, the UN Special Rapporteur on the situation of the human rights defenders noted in his 2016 report that he was:

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[2] For a general overview see: CIVICUS, *State of Civil Society*, 2018, at https://www.civicus.org/index.php/state-of-civil-society-report-2018; The International Center for Not-for-Profit Law, *Civic Freedom Monitor*, at www.icnl.org/research/monitor; Amnesty International, *Human Rights Defenders Under Threat: A Shrinking Space for Civil Society*, 2017, at https://www.amnesty.org/en/documents/act30/6011/2017/en; United Nations Human Rights Council: *Civil Society Space: Engangement with International and Regional Organizations*, A/HRC/38/I./17/REV/1, 4 July 2018; and Expert Council, *Non-Governmental Organisatons: Review of Developments in Standards, Mechanisms and Case Law 2015-2017*, CONF/EXP(2017)4, December 2017, paras. 11-17, 20-24; see paras. 64-137. detailing country specific examples.

[3] UN General Assembly, *Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, thirty-fifth session 6-23 June 2017, A/HRC/35/28.

> … furthermore concerned about the rising challenge posed by the closing of civil society space in many parts of the world. In that context, he notes with apprehension the recent trend of restrictive legislation aimed at curtailing civil society activities and their funding in more than 90 States, and the measures taken to restrict significantly the freedoms of expression, peaceful assembly, association and movement in more than 96 States. The causes for the closing of civil society space are complex and may involve a combination of multifaceted factors, such as a global democratic deficit; an increase in the State's preoccupation with security and the proliferation of counter-terrorism measures; a rise in ideological and religious fundamentalism; or a reaction by the political elite to the power of civil society and its impact on domestic politics.[4]

12. The Secretary General of the Council of Europe voiced similar concerns in his 2017 annual report:

> The Council of Europe institutions have been signalling a growing number of cases where the freedoms of assembly and association have been violated. In some states, the exercise of freedom of association has become more difficult. NGOs have been targeted by legislative interventions and their activities have been curtailed through excessive requirements, reporting obligations or arbitrary sanctions...NGOs are subject to financial statementing obligations, limits on foreign funding and/or other requirements that impede the operation of NGOs (Hungary, Russian Federation, and Turkey). They are labelled in a negative manner merely on account of receiving foreign funds and subsequently face adverse consequences… In some cases, additional administrative requirements are imposed on a selected number of NGOs, solely based on their supposed or actual activity (Hungary Azerbaijan and Turkey)…Legitimate concerns such as protecting public order or preventing extremism, terrorism and money laundering cannot justify controlling NGOs or restricting their ability to carry out their legitimate watchdog work, including human rights advocacy. [5]

13. Furthermore, in his 2018 annual report of the Secretary General specific instances were given of excessive reporting and disclosure requirements imposed on NGOs in several Member States on the grounds of *transparency* and *national security* (Hungary, Bulgaria, Romania, and Ukraine).[6]

14. Moreover, a Resolution and a Recommendation of the Parliamentary Assembly of the Council of Europe ('PACE') – both entitled *How can inappropriate restrictions on NGO activities in Europe be prevented*? - - also highlight the adverse impact on NGOs of certain reporting and disclosure obligations.

15. Thus, the Resolution, which is concerned with the situation in Azerbaijan, Hungary, Turkey and the Russian Federation, states that:

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[4] *Report of the Special Rapporteur on the situation of human rights defender*s, UN Doc. A/HRC/31/55 (2016), par. 28.

[5] *Report on the State of Democracy, Human Rights and the Rule of Law*, 2017. pp. 59-60, 69, 71, 72, at https://edoc.coe.int/en/an-overview/7345-pdf-state-of-democracy-human-rights-and-the-rule-of-law.html.

[6] *Report on the State of Democracy, Human Rights and the Rule of Law*, 2018, pp. 55-62. See also Commissioner for Human Rights, Human Rights Comment, *The Shrinking Space for Human Rights Organisations*, at www.coe.int/en/web/commissioner/-/the-shrinking-space-for-human-rights-organisations.

> 2. The Assembly stresses that all States Parties to the European Convention on Human Rights (ETS No. 5) have agreed to ensure respect for freedoms of assembly and association and of expression and information, and thus to create a favourable environment for the exercise of those freedoms, guided by the case law of the European Court of Human Rights, Committee of Ministers Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe and the Joint guidelines on freedom of association adopted in December 2014 by the European Commission for Democracy through Law (Venice Commission) and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe…..
> 4. The Assembly notes that in certain Council of Europe member States the situation of civil society has dramatically deteriorated over the last few years, in particular following the adoption of restrictive laws and regulations, some of which have been strongly criticised by the Venice Commission, the Council of Europe Commissioner for Human Rights and the Conference of International Non-governmental Organisations. In certain member States, NGOs encounter various impediments to their registration, operating and financing… [7]

16. In efforts to contribute to the reversal of the foregoing negative trends, the recent PACE Resolution entitled: *New restrictions on NGOs activities in Council of Europe Member States* called on Member States to:

> fully implement Recommendation CM/Rec(2007)14; review and repeal or amend legislation that impedes the free and independent work of NGOs and ensure that this legislation is in conformity with international human rights instruments regarding the rights to freedom of association, assembly and expression (including the Joint Venice Commission–OSCE/ODIHR Guidelines on Freedom of Association and on Freedom of Peaceful Assembly), by making use of the Council of Europe, and in particular of the Venice Commission and the Expert Council on NGO Law of the Conference of International Non-Governmental Organisations; refrain from adopting new laws which would result in unnecessary and disproportionate restrictions or financial burdens on NGO activities; ensure that NGOs have unhindered access to funds; and ensure that NGOs are effectively involved in the consultation process concerning new legislation which concerns them and other issues of particular importance to society, such as the protection of human rights.[8]

17. In addition, the 2017 report of the European Union Agency on Fundamental Rights ('FRA') has also noted an increasingly challenging environment for NGOs which operate in the EU Member States, including additional reporting and disclosure requirements (Greece, Ireland, United Kingdom, Romania, Hungary). Among others, the report has noted "cumbersome reporting procedures that can be disproportionate to the funding amount received", thereby stifling the ability of NGOs to seek resources.[9]

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[7] Resolution 2096(2016), 28 January 2016, at http://www.assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=23213&lang=EN.
[8] PACE, Resolution 2226 (2018) provisional version, at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24943&lang=en.
[9] European Agency for Fundamental Rights ('the FRA'), *Challenges facing civil society organisations working on human rights in the EU*, Luxemburg, 2018.. pp. 9, 34.

II. Applicable International Standards

18. The general guarantees of human rights, including the European Convention on Human Rights ('ECHR') and the International Covenant on Civil and Political Rights ('ICCPR'), do not deal specifically with either reporting or disclosure requirements for NGOs.

19. However, they are still relevant because the application of reporting and disclosure requirements could run counter to the right to freedom of association, as well as that to respect for private life and the prohibition on discrimination.[10] Thus, any requirements affecting such rights must have a legal basis (for which precision as much as a formal provision is essential),[11] a legitimate aim such as national security and the prevention of disorder or crime[12] and be proportional in the way that that aim is to be achieved.[13]

20. Moreover, two specific instruments concerned with NGOs - namely, the Council of Europe's *Recommendation on the Legal Status of Non-governmental Organizations in Europe* ('*Recommendation (2007)14'*) and the OSCE/ODIHR and Venice Commission *Joint Guidelines on Freedom of Association*, ('*Joint Guidelines*') not only are shaped by

[10] Articles 11, 8, and 14 of the ECHR respectively. See also Articles 17 (right to privacy), 22 (freedom of association), and 26 (prohibition of discrimination) of the ICCPR.

[11] See, e.g., *Maestri v. Italy* [GC], no. 39748/98, 17 February 2004, § 30. See also *Koretskyy and others v. Ukraine*, no. 40269/02, 3 April 2008, § 47. Unless otherwise indicated, references to the case law in the review entail rullings of the European Court of Human Rigths ('the European Court'), in which it found a violation of pertinent provisions of the ECHR.

[12] See, e.g., *Handyside v. United Kingdom*, no. 5493/72, 7 December 1976, §48-49; *Sidiropulos and Others v. Greece* no. 26695/95, 10 July 1998, § 40; *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, no. 29221/95, 2 October 2001; *Gorzelik and Others v. Poland* [GC], no. 44158/98,17 February 2004; *Emin and Others v. Greece, no. 34144/05,* 27 March 2008; And *Tourkiki Enosi Xanthis and Others v. Greece, no. 26698/05,* 27 March 2008.

[13] It is incumbent on a Contracting Party to prove that the interference in question is not only *necessary in a democratic society* i.e. serves *pressing social needs*, but is also *proportional* to the needs it purports to serve: a Party must prove that the interference in question is the minimum level of interference necessary to attain legitimate goals. Thus, the necessity for an interference must rest on plausible evidence of a sufficiently imminent threat to the state or to a democratic society and must be convincingly established, while the exceptions should be narrowly construed. Furthermore, an interference should never completely extinguish the right nor encroach on its essence. See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 13 February 2003, § 57, 86; *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009, § 68; *Klass and others v. Germany* [P], no. 5029/71, 6 September 1978, §42; *Sunday Times v. United Kingdom (No. 1*) [P], no. 6538/74, 26 April 1979, § 6;. *Observer and Guardian v. United Kingdom* [P], no. 13585/88, 26 November, 1991, § 72;. *Sindicatul "Păstorul cel Bun" v. Romania*, judgment]GC], no. 2330/09, 9 July 2013, § 69 with further references to case law. See also Expert Council, *The Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organizations Performing the Function of Foreign Agents*, OING Conf/Exp (2013) 1, Strasbourg, August 2013, paras 18-34. (hereinafter*: Opinioin on the Russian NGOs Foreign Agent Law*).

the foregoing standards, but also contain specific principles underpinning NGOs reporting and disclosure obligations.[14]

21. Thus, the *Joint Guidelines* provides that "reporting requirements, where these exist, should not be burdensome, should be appropriate to the size of the association and the scope of its activities...'.[15]

22. Furthermore, both those instruments specifically address the right of NGOs to seek, secure and use resources. The potential significance of this right stems from the fact that NGOs receiving public, foreign and other funds are often time subject to additional reporting and disclosure requirements.[16]

23. Several additional instruments govern the scope of permissible interferences with freedom of association under the ECHR and ICCPR, namely, in case of terrorism and money laundering, which necessarily have implications for the adoption of reporting and disclosure requirements.

24. These instruments include: the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* ('the *Additional Protocol*'),[17] the revised *Recommendation No. 8 on International Standards on Combating Money-Laundering and the Financing of Terrorism & Proliferation* of the Financial Action Task Force ('*FATF Recommendation No* 8') [18] and the Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission ('the *EU Directive 2015/849*').

25. The *Additional Protocol* supplements the original treaty by addressing the issue of criminalisation by States Parties of certain acts. The offences set forth in the Protocol, like those in the Convention, are mainly of a preparatory nature in relation to terrorist

[14] It should be noted that many of the principles enshrined in the *Recommendation 2007(14)* have been specifically referenced in the case law of the European Court. Thus, in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan* the Court made specific references to the Recommendation's principle governing the dissolution, the internal governance, the permissible objectives, and the supervision and liability of a NGO (§ 39; see also *Lovrić v. Croatia*, judgment of 4 April 2017, § 22, 23, 66.). The case law therefore underscores the point about the role of the Recommendation in the overall structure of the Council of Europe designed to protect democracy, human rights and rule of law.

[15] Explanatory Note, par. 225.

[16] Par. 50. of *Recommendation 2007(14)*, principle 7 of the Joint Guidelines.

[17] CETS No. 217. The Additional Protocol was opened for signature on 22 October 2015 and is in force for the 12 Member States that have ratified it: Albania, Bosnia and Herzegovina, Czech Republic, Denmark, France, Italy, Latvia, Monaco, Montenegro, Republic of Moldova, Portugal and Turkey; https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/217/signatures?p_auth=lLUtHaLo

[18] The FATF currently has 35 member states and two regional organisations, the European Commission and the Gulf Co-operation Council. The Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL) is FATF Associate Member; http://www.fatf-gafi.org/about/membersandobservers.

acts.[19] Those include *inter alia* "participating in an association or group for the purpose of terrorism".[20]

26. However, while the Additional Protocol does recognize a State Party's margin of appreciation in addressing criminalisation of certain acts,[21] Article 8 thereof provides important safeguards in this respect in that it obliges a Party to ensure that implementation of the Protocol, including the establishment, implementation and application of the criminalisation under Articles 2 to 6, is carried out while respecting human rights obligations, in particular the right to freedom of movement, freedom of expression, freedom of association and freedom of religion, pursuant to the ICCPR, the ECHR, and other obligations under international law.

27. In addition, it is specified that the establishment, implementation and application of the criminalisation under Articles 2 to 6 of this Protocol should be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, [22] "and should also exclude any form of arbitrariness or discriminatory or racist treatment".[23]

28. *FATF Recommendation No. 8,* which deals with the issue of using NGOs as an institutional tool of choice for terrorist financing, was originally drafted in 2001 and was subsequently revised in June 2016, along with the Interpretative Note.[24] The revised Recommendation brings about significant changes in that it makes it clear that it does not regard the *entire* NGO sector as vulnerable to terrorism financing thus reducing the legitimate grounds for interference with freedom of association and related rights on the grounds of money laundering and terrorism.

[19] Explanatory Report to the Additional Protocol, Riga, 22. 10. 2015. par. 10.
[20] Article 2.
[21] In addition to participating in an association or group for the purpose of terrorism (Art. 2), these include: receiving training for terrorism (Art. 3.); travelling abroad for the purpose of terrorism (Art. 4); funding travelling abroad for the purpose of terrorism (Art. 5); and organising or otherwise facilitating travelling abroad for the purpose of terrorism (Art. 6).
[22] Explanatory Report to the Additional Protocol, par. 11. Thus, Article 8(1) of the Protocol makes it clear that the margin of appreciation a State Party enjoys with respect to criminalisation of acts set forth in articles 2-6 of the Protocol cannot be exercised at the expense of human rights— including freedom of association. Par. 2 sets out legitimate scope of interference with those rights: it underscores that gravity of the perceived public danger associated with planning of terrorist activities does not relinquish a Party from an obligation to ensure that any such interference serves legitimate aim and is proportional to the aim it purports to serve**.** See also Expert Council, *Non-Governmental Organisations: Review of Development in Standards, Mechanism and Case Law,* paras. 25-28.
[23] Article 8(2)
[24] The Recommendation uses the term 'not-for-profit organisations' ('NPO's), rather than non-governmental organizations ('NGOs') which is the term used by the Council of Europe bodies and institutions. Revisions in the Recommendation No. 8. were necessary in order to bring it in line with the FATF *Typologies Report on Risk of Terrorist Abuse of NPOs* (June 2014) and the *FATF Best Practices on Combatting the Abuse of NPOs* (June 2015) which had both already clarified that not all NPOs were high risk and intended to be addressed by the Recommendation, and in order to better align the implementation of the Recommendation and Interpretative Note thereto with the risk-based approach.

29. The *EU Directive 2015/849* calls on Member States to align their approach with the FATF recommendations, as well as the EU data protection law and the protection of fundamental rights, as stipulated in the *Charter of Fundamental Rights of the European Union*. While the Directive does not target NGOs specifically, it requires an operational approach—that is, the risk-assessment, evidence-based decision-making, and proportionate approach, which takes into account the specific needs and the nature of the business of the entities that will be affected (Art. 22.-27.). Furthermore, the Directive does not envisage a special register for foreign funded NGOs as such—nor would such a measure would be easy to justify, given the principles underpinning the Directive.[25]

30. While the foregoing instruments provide a useful general guidance as to the factors relevant for adoption of reporting and disclosure requirements for NGOs, the determination as to whether or not specific requirements are permissible invariably turns on a contextual, case-by-case analysis. Thus, while individual reporting and disclosure obligations might seem unproblematic at face value, difficulties might arise either from the level of detail required, the burden resulting from the accumulation of requirements and the way in which NGOs reporting and disclosure obligations are portrayed by public authorities, such as labelling them as foreign agents. These are discussed in the following section.

III. Evaluating the various requirements

31. This section discusses particular reporting and disclosure requirements for NGOs which have been subject of scrutiny by the Council of Europe, as well as other pertinent legislation in Member States which might be viewed as problematic in light of international standards.

32. The analyses provided herein underscores the need for Member States to observe sound principles in policy development impacting on NGOs. Thus, Principle 8 of the *Joint Guidelines* provides that any legislation impacting on NGOs needs to be developed in a manner that is timely, free of political influence and transparent.[26]

33. In addition, both *Recommendation (2007)14*[27] and the *Joint Guidelines* underscore that any regulation interfering with freedom of association should be adopted through a

[25] See the European Parliament Report on the proposal for Directive (EU) 2015/849; http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0056+0+DOC+XML+V0//EN.

[26] See also Explanatory Note to the Joint Guidelines, par. 33.

[27] Par. 77. The Explanatory Memorandum to the *Recommendation 2007(14)* further clarifies that: "it is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the law which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of the important contribution that they are able to make to democratic societies but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed" (par. 139).

democratic, participatory and transparent process[28] and that NGOs need to be consulted in a meaningful way about the introduction and implementation of any legislation, policies and practices that concern their operations.[29]

34. The right to participation is guaranteed by the ICCPR, which provides that every citizen has the right to participate in public affairs directly or through his freely chosen representatives[30]. Best practice suggest that this entails not only the right of NGOs to participate in public consultations on draft laws and other public policy instruments, but also the right to be consulted in the preparation of impact assessment analyses which should precede the drafting of any policy instrument deemed to have an impact on NGOs.[31]

35. Furthermore, in setting out reporting and disclosure obligations, there shall be presumption in favour of the lawfulness of the establishment of NGOs and of their objectives and activities, as stated in Principle 1 of the *Joint Guidelines*. As the OSCE/ODHIR and Venice Commission have repeatedly stated:

> excessively burdensome or costly reporting obligations could create an environment of excessive state monitoring which would hardly be conducive to the effective enjoyment of freedom of association.[32]

36. Likewise, given that any reporting and disclosure requirement for NGOs is deemed an interference with freedom of association, it is incumbent on a Member State to ensure that the frequency and mandatory content of those requirements as well as sanctions levied for the breach of those duties meet international standards, including the exhaustive *legitimate grounds* for interference and *proportionality*.[33]

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[28] Principle 9 of the *Joint Guidelines*. The Guidelines further clarifies that NGOs should be consulted in the process of introducing and implementing any regulations or practices that concern their operations (par. 106.). See also the *Code of Good Practice for Civil Participation in the Decision-Making Process*, elaborated by the Conference of INGOs , Venice Commission, *Opinion on the Law on nongovernmental organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan*, CDL-AD(2014)043), 15 December 2014. par. 42 and United Nations Human Rights Council resolutions A/HRC/24/L.24 on civil society space: creating and maintaining, in law and in practice, a safe and environment, 23 September 2013. A/HRC/27/L.24 on civil society space, 23 September 2014 and A/HRC/32/L.29 on civil society space, 27 June 2016. A/HRC/30/L.27/Rev.1 on equal participation in political and public affairs, 30 September 2015.

[29] Paras. 76-77 of the *Recommendation 2007(14) and* principle 8 of the *Joint Guidelines*.

[30] Article 25.

[31] See, for example, the *Serbian Law on Planning System* which provides that NGOs and public at large should be consulted in all stages of public policy development, including the preparation of an *ex ante* impact assessment analyses (Art. 3. Par. 1, point 11). See also Expert Council, *Opinion on the Romanian draft Law 140/2017 on Associations and Foundations,* as adopted by the Senate on 20 November 2017, CONF/EXP(2017)3, 11 (hereinafter: *Opinion on the Romanian draft NGO Law*), par. 5.

[32] OSCE/ODIHR, Venice Commission *Joint Opinion on the Ukraine Draft Laws No. 6674 and 6675* par. 40 (CDL/AD(2018)006, 16 March 2018, par. 33; *Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic*, CDL-AD(2013)030, 16 October 2013. par. 69.

[33] See, for example, OSCE/ODHIR, Venice Commission *Joint Opinion on the Ukraine Draft Laws No. 6674 and No. 6675*, par. 33. In *Azerbaijan,* pursuant to the Cabinet of Ministers Decision No. 201 of 25 December 2009, in connection with Article 29. 4 of the NGO Law, an NGO was obliged to file an annual financial statement, which was composed of four forms: on the NGO's financial state, on the results of financial action,

37. Against this background, this section discusses the following issues: the frequency and content of financial statements, including a duty to disclose information about donors therein, the additional financial and other reporting requirements imposed on NGOs- the recipients of foreign funding, the duty to report on activities, including "political activities, the labelling requirements, the permissible scope of interference with private data of persons affiliated with a NGO (members, volunteers, members of the board), the duty to disclose a membership in a NGO, and sanctions levied for breach of reporting and disclosure requirements.

A. Financial statements

38. As noted, reporting requirements pertain only to NGOs which have the *legal entity* status.[34] A cursory review of European practices in this respect suggests that NGOs are put on equal footing with private businesses as regards their minimum reporting obligations in that they are both required to file an *annual financial statement* with the competent public authority.[35]

39. Insofar as there is an income to report, this measure is largely perceived as the legitimate *quid pro quo*, in acknowledgement that along with benefits arising from the legal entity status (limited liability, tax benefits and public funds available to NGOs) come certain responsibilities, including the need for greater transparency. In most instances NGOs are required to file financial statements which are otherwise prescribed for small and medium sized businesses. In addition, some countries (e.g. *Croatia*) have introduced a simplified annual financial statement for organisations whose annual turnover is beyond the threshold prescribed by law, in recognition of their not-for-profit character.[36]

40. The foregoing practice seems consistent with the general principle underpinning Paragraph 7 of the *Recommendation (2007)14* and Principle 5 of the *Joint Guidelines* which provide that NGOs with legal personality should have the same capacities as are generally enjoyed by other private legal persons (private businesses), and should be subject to reporting and other administrative obligations generally applicable to those legal persons (*prohibition of discrimination*).[37] However, it should be noted that the

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on changes in real assets or capital and on the process of funds. The Cabinet of Ministers Decision No. 16 of 27 January 2015 removed the last two forms.

[34] Supra, footnote 1.

[35] http://www.efc.be/legal_profile/.

[36] https://gov.hr/moja-uprava/aktivno-gradjanstvo-i-slobodno-vrijeme/udruge/racunovodstvo-udruga/1566.

[37] See Article 14 of the ECHR. The European Court's case law clearly indicates that prohibition of discrimination pertains to both direct and indirect discrimination (See *Thlimmenos v. Greece* [GC], no. 34369/97, 6 April 2000; *D.H. and Others v. Czech Republic*[GC], no. 57325/00, 13 November 2007.). While a Contracting Party does have some margin of appreciation in providing a differential treatment, in order for it to be justified, it must have an objective and reasonable justification, pursue a legitimate purpose, as well as satisfy the proportionality test (*James and Others v. United Kingdom* [P], no. 8793/79, 21 February 1986.). The scope of legitimate margin of appreciation depends on the circumstances, the subject matter and the existence of common grounds between the laws of contracting parties. In the absence of such common ground a Contracting Party enjoys a wider margin of appreciation (*Holy Monasteries v. Greece*, no. 13092/87, 9

application of this principle is justified insofar as reporting and disclosure requirements for private businesses are themselves not deemed excessive.

41. The *Joint Guidelines* further clarify that "the principle of equal treatment of NGOs does not preclude differential treatment of certain NGOs insofar as it is based on objective criteria, rather than subjective viewpoints and beliefs", and that "the differential treatment of different associations is discriminatory if it has *no objective* and *reasonable* justification, that is, if it does not pursue a *legitimate* aim or if there is no reasonable relationship of *proportionality* between the means employed and the intended aim" (emphasis ours).[38]. It is therefore incumbent on a Member State to demonstrate that any differential treatment of certain categories of NGOs is based on objective assessment, pursues a legitimate aim and is proportionate to that aim.

42. The application of the principle of equal treatment has arisen with respect to the *additional financial* reporting and disclosure requirements for certain categories of NGOs regarding both the *frequency* and the *content* of the reporting required.

43. As for the former, a proposed measure which would require NGOs directly engaging in economic activities to submit their financial statements every six months, rather than annually, appears problematic on face value, as it seems to unduly discriminate NGOs against private businesses—despite the fact that those may be equally susceptible to improper use of funds.[39]

December 1994; *Canea Catholic Church v. Greece*, no. 25582/94, 16 December 1997; *Chabauty v. France*[GC], no. 57412/08, 4 October 2012; *Danilenkov and Others v. Russia*, no. 67336/01, 30 July 2009 (violation of Article 14 in connection with Article 11); *Rasmussen v. Denmark*, no. 8777/79, 28 November 1984; *Abdulaziz, Cabales, and Balkandali v United Kingdom* [P], no. 9214/80, 28 May 1985; *Moustaquim v. Belgium*, no. 12313/86, 18 February 1991; *Grzelak v. Poland*, no. 7710/02, 15 June 2010**;** *Aleksyev v. Russia*, judgment of 21 October 2010). See also United Nations General Assembly, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, U.N. Doc. A/HRC/70/266 (4 August, 2015) which concludes with a set of comprehensive measures which the Special Rapporteur has recommended in order to create a more enabling environment for NGOs. These among others include the need for governments to ensure that civil society and private enterprises are treated equitably in law and in practice, that any restrictions to the rights to freedom of peaceful assembly and of association are prescribed by law, necessary in a democratic society and proportionate to the aim pursued, and do not conflict with the principles of pluralism, tolerance and broadmindedness, and that NGOs are free to seek resources and participate in public connsulttions (pp. 20-21). The UN Special Rapporteur found that states often impose more burdensome regulation upon associations, both in law and in practice, with businesses receiving more favourable treatment, although in many cases states could meet their obligation with respect to freedom of association by treating NGOs and businesses in a more equitable manner (paras. 2-4).

[38] Explanatory Note, Principle 5, par. 94.

[39] See the 2017 *draft amendments to the Romanian Law on Associations and Foundations*. A new provision, which follows Article 48 of the Law, would require NGOs engaging in direct economic activities to submit their financial reports every six months (rather than annually), by 31 July and 31 January, in Part IV of the Official Gazette their financial statements for the previous semester – and have it published it in the Official Gazette. Pursuant to the Law, an NGO may engage in direct economic activities which are of auxiliary nature and are closely related to its primary purpose. As a general rule in Romania, private business and NGOs are required submit annual financial statements which is in line with European practice. See also, Expert Council, *Opinion on the Romanian draft NGO Law*, par. 60.

44. In particular, it has been noted by OSCE-ODIR and the Venice Commission that, in order for such a measure to be deemed legitimate, a Member State would need to present compelling evidence about the gravity of problems it seeks to address, as well as demonstrate that the current legislation is ill-equipped to respond to these challenges and that the proposed measure is the minimum interference necessary to address problems at hand.[40] In addition, it would need to demonstrate that the proposed measure serves a legitimate goal. This is particularly a high goal to reach in the absence of impact assessment or evidence based research that would reveal serious criminality or wrongdoing of NGOs, as well as proper public consultations which would facilitate the process of articulating and addressing the alleged problems.[41] Any additional burden imposed on NGOs which are subject to additional financial reporting would only further compound problems of compatibility of such a measure with international standards.[42]

45. As regards the legitimate goal, the foregoing measure was said to be justified on the grounds of *transparency* and *accountability*. However, as the Venice Commission has noted, the aim of enhancing *transparency* of NGOs: "would by itself not appear to be a legitimate aim as described in the above international instruments; rather, transparency may be a means to achieve one of the above-mentioned aims set out in Article 11 (2) ECHR".[43]

46. The *Joint Guidelines* further stipulates in this respect that the

> "need for transparency in the internal functioning of associations is not specifically established in international and regional treaties owing to the right of associations to be free from interference of the state in their internal affairs. However, openness and transparency are fundamental for establishing accountability and public trust. The state shall not require but shall encourage and facilitate associations to be accountable and transparent".[44]

47. The foregoing analyses applies in equal measure to instances in which the increased frequency of financial reporting, or for that matter other reporting, is justified by invoking the specific source of funding or the privileged treatment of certain categories of NGOs (charities and public benefit organisation), given the necessity to observe the NGOs right to seek and utilise resources. With respect to the latter, increasing the frequency of financial reporting for NGOs with charitable or public benefit status would

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[40] OSCE/ODIHR-Venice Commission, *Joint Opinion on Draft Law No. 140/2017 of Romania on Amending Governmental Ordinance No. 26/2000 on Associations and Foundations*, CDL-AD(2018)004, 16, March 2018. paras. 12-13 (hereinafter: *Joint Opinion on the Romanian draft NGO Law*). Expert Council, *Opinion on the Romanian draft NGO Law*, paras. 61-64.

[41] Expert Council, *Opinion on the Romanian draft NGO Law*, paras. 4-5, 56-59.

[42] Thus, the *Romanian draft NGO Law* would also subject NGOs directly engaging in economic activities to fees for having the financial statements published in the Official Gazette, which at the time those amendments were introduced were 13 euro per page and 1 euro per row for anything in a tabular form.

[43] Venice Commission, OSCE/ODHIR, *Joint Opinion on the Romanian draft NGO Law*, par. 64; see also paras. 12-14; *Opinion on Federal Law N. 121-FY on Non-Commercial Organisations* (*'Law on Foreign Agents'*) *and on Federal Law N. 10—FZ on Making Amendments to the Criminal Code* (*"Law on Treason"*) *of the Russia Federation*, paras. 58-59. (hereinafter: *Opinion on the Russian NGOs Foreign Agent Law*). Expert Council, *Opinion on the Romanian draft NGO Law*, paras. 4-5, 56-59.

[44] Para. 224.

be particularly difficult to justify if tax benefits and access to public funding are available only to those NGOs. On face value, such a measure would seem *disproportionate*.

48. In addition, *duplicative* financial reporting and disclosure obligations are also highly unlikely to reach the threshold of compatibility with international standards. Thus, an obligation for NGOs that are registered under the state law to submit their annual financial reports to the ministry of justice, in addition to the entity level oversight agencies, would give rise to the issue of *legality* in view of the lack of jurisdiction over financial oversight of NGOs on the side of the state level government. It also gives rise to the issue of *proportionality*.[45]

49. Similarly, a requirement for NGOs to submit an information about the amount of any donation accepted and the identity of a donor to both the ministry of justice and the ministry of finance, within 15 days of the receipt of donation, gives rise to the issue of *proportionality*, among others.[46]

50. Several Member States require certain categories of NGOs to disclose *information* about *donors* in their financial statements.[47] As a general rule, *Recommendation (2007)14* provides that "all reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality" (par. 64.).

51. The Venice Commission has further noted in this respect that the publication of donors' personal information would make them publicly identifiable and information about their affiliation, political opinion or belief may be deduced from the fact that they are donating to or dealing with certain NGOs and not others, which is protected by the *right to privacy*[48]. The fact that such information will be publicly available may have a chilling effect on them and other potential donors, thus running the risk of limiting NGOs' access to resources. In particular if the disclosure obligation pertains to all donations irrespective of their size, including crowed-funding and SMS donations.[49]

[45] See Article 5(5) of the Bosnia and Herzegovina (BiH) Law on Associations and Foundations as amended. The BiH Ministry of Justice argued that imposing the duplicative reporting obligation was nevertheless necessary in order for BiH to honour its commitment towards the CoE and strengthen the regime of protection against money laundering. Nevertheless, due to lack of jurisdiction the amendments did not envisage any sanctions for NGOs that are found in breach of the new reporting requirement.

[46] See Article 24-1.5 of the Azerbaijan NGO Law and Article 1.2, 6 of the Cabinet of Ministers Decision No. 336 of 21 October 2015.

[47] Thus, a new provision in the *Romanian draft NGO Law* which would follow Article 48 of the Law on Associations and Foundations requires *inter alia* that financial statements disclose separately each private donors contribution, i.e. "individual or activity (whichever is the case), generating each income, as well as the value of each income", irrespective of the amount involved. For *Russia* and *Hungary* see *infra*, paras. 51, 53. See also Venice Commission, *Opinion on the Law on nongovernmental organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan*, paras. 41, 67.

[48] Paras. 100-126.

[49] Venice Commission, OSCE/ODIHR, *Joint Opinion on the Romanian Draft Law*, par. 67.

52. Likewise, the Expert Council on NGO Law ('the Expert Council') has noted that the European Court would likely question the legitimacy and necessity of asking for private information of donors, as the list of individuals providing financial support to certain NGOs will likely expose their affiliation, opinion and belief, and thus such a measure would interfere with their personal privacy and violate data protection regulations depending on how the information may be used. In addition, it considered that the requirement for donor disclosure, in particular if justified on the ground of national interest, can affect delivery of important services, not only because some groups may not want to receive services from NGOs funded from abroad, but also due to its likely negative effect on private philanthropy, which would reduce available resources to address people's needs.[50]

53. The Expert Council has further noted that there may be situations in which a government may have well founded reasons to require the disclosure of an identity of those who make donations to an NGO. However, such disclosure should not to be automatically required by reference just to the amount involved.[51]

54. Disclosing information about donors can give rise to the issue of *legitimacy*, in particular, if such a measure is not based on the prior impact assessment, and if there is lack of evidence of criminality and wrong doing on the side of NGOs. A lack of broad and timely public consultations on the issue would only compound the problems arising from such a measure.[52]

55. In addition, it can give rise to the issue of *proportionality*, if the legitimate goal such a measure purports to serve can be accomplished by less intrusive interference. The frequency, the level of detail, the overall costs incurred by a NGO to comply with such a measure, as well as the probability and the nature of the perceived risks associated with the disclosure of donors and others' private data, would be the major factors in the overall deliberation of its compliance with the requirement of proportionality.[53]

56. As regards proportionality, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted that "associations should be accountable to their donors, and at most, subject by the authorities to a mere notification procedure of the reception of funds and the submission of reports on their accounts and activities".[54]

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[50] Expert Council, *Opinion on the Hungarian Draft Act on the Transparency of the Organisations Supported from Abroad*, CONF/EXP(2017)1, 24 April 2017, paras. 68.-70; hereinafter: *Opinion on the Hungarian draft NGO Transparency Law*.

[51] Expert Council, *Opinion on the NGO Law of the Republic of Azerbaijan in the Light of Amendments Made in 2009 and 2013 and Their Application*s. OING Conf/Exp (2014) 1, September 2014, paras. 188, 190-191.

[52] Venice Commission, OSCE/ODIHR, *Joint Opinion on the Romania draft NGO Law*, paras. 65-67, 70.

[53] Ibid. par., 69.

[54] Second report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, par 37; ODIHR-Venice Commission *Joint Opinion on the draft law amending the law on non-commercial organisations and other legislative acts of the Kyrgyz Republic*, par. 70; *Opinion on the Russian NGOs Foreign Agent Law*, par. 89.

57. Furthermore, disclosing private data of donors can also give rise to the issue of *discrimination*, insofar as such requirement does not pertain to other private legal entities, including businesses, or pertains to certain categories of NGOs which have been singled out on subjective, rather than objective criteria. [55]

58. Given the foregoing, a requirement for a NGO to disclose personal data of *large donors* only might bring it closer to meeting the proportionality test. However, the *legitimacy* and *non-discriminatory* nature of such a measure would still need to be established.[56]

59. The foregoing analyses applies in equal measure to NGOs which are required to disclose information about donors separately from their financial statements.[57]

B. Reporting requirements relating to foreign funding

60. As already noted, there is a growing number of Member States that have imposed or seek to impose additional financial and other reporting and disclosure obligations on NGOs which are recipients of foreign funding (*supra*, paras. 13-15., 17.). This issue therefore calls for additional scrutiny.

61. Thus, the *Russia 'NGOs-Foreign Agent Law'*[58] requires NGOs which are registered as "non-commercial organisations" in Russia, which receive foreign funding and which

[55] Expert Council, *Opinion on the Romania draft NGO Law*, paras. 57-60.

[56] See Venice Commission, OSCE/ODIHR, *Joint Opinion on the Romania draft NGO Law*. It was suggested that one of the options to rectify the perceived problems with the draft Law with respect to the disclosure of information about donors would be to limit this obligation to the identity of donors which are 'main sponsors' (par. 13.). Likewise, in its opinion on the *Draft Law on the Transparency of Organisations Receiving Support from Abroad (*CDL-AD(2017)015 of 20 June 2017) the Venice Commission has stated that "disclosing the identity of all sponsors, including minor ones, is, however excessive and also unnecessary, in particular with regard to the requirements of the right to privacy as enshrined under Article 8 ECHR. These sponsors can hardly have any major influence on the relevant organisation and there is thus no legitimate reason and necessity for their inclusion in the list" (par. 53). While the European Court has not yet ruled on that issue, the Supreme Court of the United States in *Agency for International Development at all v. Alliance for Open Society International at all* struck down a USAID regulation requiring NGOs to adopt the government's anti-prostitution policy, in order to receive funds to combat the worldwide spread of HIV/AIDS. The Court has observed that the government cannot use a federal funding programme to compel adherence to governmental policy which by its nature cannot be confined within the scope of the government programme and ruled violation of *free speech* enshrined in the First Amendment to the US Constitution. As stated in the Expert Council *Opinion on the Russia NGOs Foreign Agent Law*, "the implication of this decision is significant: just because a NGO is a recipient of government's funds, it does not necessarily mean that it has to agree with or espouse governmental policy on a particular issue i.e. it has to act as an "agent" of the government" (par. 43). The same presumption should merit consideration in case of private donors, domestic and foreign alike, irrespective of the size of a donation.

[57] In *Azerbaijan* a NGO may not accept any donation exceeding 200 AZN without first presenting a copy of a signed agreement on donation to the Ministry of Justice for approval, thus disclosing the identity of a donor.

[58] The full title of the Law is the "Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents". The Law applies to various legal forms of NGOs, but does not extend to religious associations, state corporations and state companies, as well as to the non-profit organisations, state and municipal (in particular budget-finance) institutions established by them, and associations of employers

engage in "political activities" to maintain separate accounting of funds and other property generated through local and foreign sources, submit financial statements and activity reports as well as information about the composition of its governing bodies to the Ministry of Justice every six months, publish an activity report on its Internet site or in mass media, and submit a statement on expenditures of funds and other property, including those from foreign sources, on a quarterly basis. They are also required to use the label "foreign agents" on all their materials and pass through a mandatory annual audit.[59] By contrast, other NGOs are required to submit financial statements and activity reports annually.[60]

62. The new reporting and disclosure requirements as well as other measures in the Law were introduced in the interest of national security, in order to ensure "openness and publicity" as well as "social control" of those NGOs.[61]

63. Similarly, the *Hungarian Law on the Transparency of the Organisations Receiving Support from Abroad* ('Hungarian Transparency Law') requires NGOs annually receiving money or other assets from abroad reaching twice the amount specified in Article 6(1) b) of the Act CXXXVI of 2007 on the Prevention and Combatting of Money Laundering and Terrorist Financing (which amounts to 7.2 million forints – around 24 000 euros) to *inter alia* declare in a separate form attached to the Law (Annex I) the total sum of foreign financial support they received in the relevant year and to disclose the identity of an individual donor whose contribution exceeds 500 000 forints (around 1 600 euros), with the name, country and city for natural persons and name and registered address for legal persons, together with the sum provided by the donor. This list is to be made public. The Law also provides that "the organization supported from abroad" title should be entered into the registry, along the name of a NGO, and be marked on the organisation's website, its press materials and publications.[62]

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and chambers of commerce and industry. Article 1(4), 2(6) of the Federal Law on Non-Commercial Organisaitons No. 7-FZ of January 12, 1996 ('LNCO') as amended.

[59] Article 32.paras. 1., 3.2 of the LNCO Law as amended.

[60] Article 32, par. 3 of the LNCO as amended.

[61] Venice Commission, *Opinion on the Russian NGOs Foreign Agent Law*, par. 57. Compatibility of the Law with international standards has been challenged by 61 Russian NGOs before the European Court; http://bellona.org/news/russian-human-rights-issues/russian-ngo-law/2017-06-rights-heavy-weights-join-european-court-case-against-russias-ngo-law.

[62] The Law applies to all associations and foundations with the exception of associations and foundations that do not qualify as non-governmental organisations, associations that fall within the scope of Act I of 2004 on Sports, certain national minority organisations and associations concerned with the cultural autonomy of a national minority, and organisations that perform religious activities (Article 1(4), Law). In addition, pursuant to Article 1(3), funds received from the European Union through a budgetary state organ according to a separate law are not covered by the Law. Prior to the enactment of the Transparency Law, the Act CLXXV did not provide for a specific category of organisations receiving support from abroad, nor was foreign funding for NGOs, save for political parties, subject to specific requirements. Articles 20(1) a)-d) and (2) of the Act CLXXV required disclosure of the amount of funding, but not the source or funders. The reporting requirements under Article 29, similarly, required disclosure of amounts but not the source of funding. Moreover, the specific reporting obligations in relation to NGOs using double entry book keeping under this Act did not require disclosure of funders either. It should be noted that the *Hungarian NGO Transparency Law* was adopted on 13 June 2017 with several notable improvements as compared to the draft considered in the Venice Commission and the Expert Council respective opinions. However, the Venice Commission noted

64. The new measures were justified on grounds of national security, sovereignty and anti-money laundering and counter-terrorism financing.[63]

65. As regards the compatibility of foregoing measures with international standards, the case law of the European Court with respect to freedom of association has confirmed that NGOs ability to *seek, secure* and *use resources*, including foreign ones, is a fundamental component of their right to exist and effectively operate.[64]

66. The Venice Commission has recalled that the "ECtHR was reluctant to accept the foreign origin of an NCO as a legitimate reason for a differentiated treatment;[65] the same reluctance would *a fortiori* be in place in case of mere foreign funding".[66]

67. The Venice Commission has further noted that the preliminary review of the information gathered suggests that the majority of states surveyed (38 countries) does not have specific provisions regulating or restricting the ability of NGOs to receive funding from abroad, nor specific provisions imposing specific reporting or disclosure duties in respect of foreign funding.[67]

68. This prevailing practice is consistent with *Recommendation (2007)14* providing that "NGOs should be free to solicit and receive funding–cash or in-kind donations–not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties" (par. 50.).

69. Similarly, Principle 7 of the *Joint Guidelines* —in clear reference to paragraph 50 of *Recommendation (2007)14*—underscore that the NGO's right to seek *foreign resources*

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ex post in its Opinion *Draft Law on the Transparency of Organisations Receiving Support from Abroad (hereinafter: Opinion on the Hungarian Draft NGO Transparency Law*) that those improvements fell short of addressing the structural problems of the Law: "causing a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination, including due to the absence of comparable transparency obligations which apply to domestic financing of NGOs" (par. 64).

[63]The European Commission has launched an infringement procedure before the European Court of Justice against Hungary with respect to the NGO Transparency Law. See *infra*, par. 110.

[64] See *Ramazanova and Others v. Azerbaijan*, no. 44363/02, § 59. The European Court held that domestic law effectively restricted the association's ability to function properly as a charity because, not being able to register as a legal entity, it could not receive any grants or donations, which was one of the main sources of income for NGOs in Azerbaijan.

[65] *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, 5 October 2006, § 81-86.

[66] Venice Commission, *Opinion on the Russia NGOs Foreign Agent Law*, par. 59.

[67] Venice Commission, *Opinion on the Hungarian draft NGO Transparency Law*, par. 14. The notable exceptions to this rule include Azerbaijan, which prohibits foreign funding outright, and Russia and Israel which restrict foreign funding. There is also the perceived lack of clarity with respect to the prohibition of political parties being financed by third parties from abroad and the potential ramification of this restrictions on NGOs that engage in a political campaign during elections. See also Venice Commission, *Opinion on the Law on nongovernmental organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan*, par. 63.

shall be subject only to the requirements in laws that are generally applicable to customs, foreign exchange, the prevention of money laundering and terrorism, as well as those concerning transparency and the funding of elections and political parties, to the extent that these requirements are themselves consistent with international human rights standards.[68]

70. The right of a NGO to seek, secure and use resources is also confirmed in a number of UN documents, including the *Declaration on Human Rights Defenders of UN General Assembly,*[69] as well as the *Resolution 22/6* of the UN Human Rights Council which calls on Member States to ensure that reporting requirements do not inhibit the functional autonomy of NGOs and do not discriminatorily impose restrictions on potential sources of funding [70]

71. In addition, a UN Human Rights Council Resolution on Civil Society Space has underlined the link between the right to seek, secure and use resources and the ability to enjoy the right to freedom of association.[71]

72. There can be no objection to the argument that *terrorism* and *money laundering* fall within the legitimate grounds for interference with freedom of association under Article 11, par. 2 of the ECHR, and thus can serve as the legitimate ground for imposing additional reporting and disclosure obligations for NGOs, including those receiving foreign funding.

73. However, revised *FATF Recommendation No. 8* makes it clear that it does not consider the *entire* NGO sector *vulnerable* to money laundering and terrorism activities. It calls on Member States to apply *targeted* and *proportionate* measures, in line with the *risk-*

[68] The Explanatory Memorandum to the Joint Guideline notes that term 'resources is a broad concept that includes: financial transfers (for example, donations, grants, contracts, sponsorships and social investments); loan guarantees and other forms of financial assistance from natural and legal persons; in-kind donations (for example, the contribution of goods, services, software and other forms of intellectual and real property); material resources (for example, office supplies and information technology equipment); human resources (for example, paid staff and volunteers); access to international assistance and solidarity; the ability to travel and communicate without undue interference; and the right to benefit from the protection of the state. Resources also include both public and private funding, tax incentives (for example, incentives for donations through income tax deductions or credits), in-kind benefits and proceeds from the sale of goods belonging to the association, as well as other benefits attributed to an association (for example, income from investments, rent, royalties, economic activities and property transactions)' (par. 201).

[69] UN General Assembly resolution 53/144, annex. Article 13 of the Declaration provides that: "Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration". Although the Declaration is not a binding instrument, it was nevertheless adopted unanimously by the UN General Assembly and contains a set of principles and rights that are based on human rights standards enshrined in other international instruments which are legally binding (the ICCPR and the International Covenant on Economic, Social and Cultural Rights-ICESCR).

[70] Resolution No. 22/6 of 21 March 2013. See also United Nations Human Rights Committee, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association,* U.N. Doc. A/HRC/20/27 (May 21, 2012). *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association,* U.N. Doc. A/HRC/23/39, 24 April 2013.

[71] A/HRC//32/L.29, 27 June 2016.

based, flexible and *case by case* approach which would respect countries' obligations under the Charter of the United Nations and international human rights law, in order to protect them from terrorist financing abuse, which is the stated objective of this recommendation.[72] The same approach has been espoused in the EU *Directive (EU) 2015/84*.

74. The Interpretative Note to *FATF Recommendation No. 8* provides specific instances in which it might be legitimate for the supervisory authority to seek additional reporting and information from NGOs.[73]. These measures are deemed justified only with respect to *targeted NGOs* i.e**.** those which have been found to be at risk of being misused for financing terrorism.[74] Any other reading would be inconsistent with the proper implementation of a risk-based approach as stipulated under Recommendation No. 1, and the requirement that measures implemented under Recommendation No. 8 are consistent with State obligations' under the UN Charter and international human rights law.[75]

[72] FATF Recommendations, 2018, pp. 52-54. See also Expert Council, *Non-Governmental Organisatons: Review of Developments in Standards, Mechanisms and Case Law 2015-2017*, paras, 25-34. Recommendation No. 8.: "Countries should apply focused and proportionate measures, in line with the risk based approach, to such non-profit organisations to protect them from terrorist financing abuse, including: (a) by terrorist organisations posing as legitimate entities; (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations. In addition to narrowing the scope of NGOs deemed vulnerable to terrorism financing, the Interpretative Note outlines general principles which Member States need to observe in pursuit of preventing the abuse of NGOs/NPOs for terrorism financing

[73] Thus, NGOs could be required to maintain information on: (1) the purpose and objectives of their stated activities; and (2) the identity of the person(s) who own, control or direct their activities, including senior officers, board members and trustees. This information could be publicly available either directly from NGOs or through appropriate authorities, In addition, NGOs could be required to issue *annual* financial statements that provide detailed breakdowns of incomes and expenditures. Finally, NGOs could be required to maintain, for a period of at least five years, records of domestic and international transactions that are sufficiently detailed to verify that funds have been received and spent in a manner consistent with the purpose and objectives of the organisation, and could be required to make these available to competent authorities upon appropriate authority. Where appropriate, records of charitable activities and financial operations by NGOs could also be made available to the public. However, specific licensing or registration requirements for counter terrorist financing purposes are *not* necessary; for example in some countries, NGOs are already registered with tax authorities and monitored in the context of qualifying for favourable tax treatment (such as tax credits or tax exemptions). Explanatory Note to Recommendation No. 8, pp. 55-56.

[74] See Expert Council, *Opinion on the Hungarian draft NGO Transparency |Law*: "according to the MONEYVAL Mutual Assessment Report of Hungary, Hungary rated the terrorism financing risks related to the NGO sector as low. However, the report concluded that Hungary has not undertaken a formal domestic review nor risk assessment specific to the NGOs sector, as required by FATF Recommendation 8 which will allow the government to determine if (some) NGOs are at risk of being misused for terrorism financing" (par. 40). See *Anti-money laundering and counter-terrorist financing measures Hungary*, Fifth Round Mutual Evaluation Report, September 2016, MONEYVAL(2016)13; *Resolution of the Parliamentary Assembly of the Council of Europe* 2162 (2017), par. 6.1; and Expert Council *Non-Governmental Organisations: Review of Development in Standards, Mechanism and Case Law*, paras. 29-34.

[75] Explanatory Note to Recommendation No. 8, p. 55. UN Human Rights Council, Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, paras 22-26.

75. As regards *national security*, according to the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*:

> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

These principles further state that:

> (b) In particular a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest (Principle 2).[76]

76. Similarly, the UN Human Right Committee, in reference to Article 22 of the ICCPR to which Article 11 of the ECHR is closely modelled, has found that at instances where national security and protection of public order are invoked as a reason to restrict the right to association, it is incumbent on the State party to demonstrate the *precise nature* of the threat. [77]. The Committee further elaborated that:

> the mere existence of reasonable and objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purpose.[78]

77. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted that justification on the grounds of *state sovereignty* violates international norms and standards related to freedom of association. Indeed, national sovereignty as the legitimate ground for interference is notably missing from Article 11(2) of the ECHR and Article 22(2) of the ICCPR, and seems incompatible with obligations arising from human rights international treaties. In the Special Rapporteur's view, such justification cannot reasonably be included under "the interests of national security or public safety" or even "public order". Rather, "affirming that national security is threatened when an association receives funding from foreign source is not

[76] U.N. Doc. E/CN.4/1996/39 (1996), at http://hrlibrary.umn.edu/instree/johannesburg.html

[77] *Mr. Jeong- Eun Lee v. Republic of Korea*, U.N. Human Rights Committee, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005), at http://hrlibrary.umn.edu/undocs/1119-2002.html See also UN Human Rights Council, *Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, paras 27-34.

[78] Expert Council: *Opinion on the Hungarian draft NGO Transprancy Law***,** par. 34.

only spurious and distorted, but also in contradiction with international human rights law".[79]

78. Given the foregoing, there can be little doubt that international instruments pertinent to freedom of association afford full protection to NGOs-recipients of foreign funding - and that this protection pertains to financial as well as other reporting and disclosure requirements imposed on those NGOs on various grounds (transparency, counter-terrorism and anti-money laundering, national security, and national sovereignty).[80] Depending on circumstances, these measures can give rise to the issue of *legitimacy*, necessity and *proportionality*.[81]

79. This would especially be the case if: there was no evidence of serious criminality or wrongdoing by NGOs that are recipients of foreign funding which might justify the introduction of new measures; there was no evidence that the current framework was ill-equipped to ensure an effective oversight of those NGOs, or that their oversight could not be achieved with less intrusive measures;[82] and there was lack of proper public consultations on the proposed measures.[83]

80. Demonstrating the necessity and proportionality of those measures would be a particularly a high threshold to reach if the statements and actions of public officials reveal bias[84] and real political goals the government seeks to accomplish with those measures,[85] or if those measures are clearly intended to further foment widespread public mistrust of "foreigners".[86]

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[79] UN Human Rights Council, *Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, A/HRC/23/39, 2013, par. 30.

[80] See also *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards*, CommDH (2013)15, 15 July 2013.

[81] Venice Commission, *Opinion on the Russian NGOs Foreign Agent Law*, paras. 87, 89, 92; Expert Council, *Opinion on the Russian NGOs Foreign Agent Law*; *Opinion on the Hungarian draft NGO Transparency Law*, paras. 30, 77. See also PACE, Resolution 2162 (2017): *Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University*"; *Statement by the President of the Conference of INGOs and the President of the Expert Council on NGO Law on non-governmental organisations labelled as foreign agents in Hungary*, 7 March 2017, at https://goo.gl/DdGEvx.

[82] Expert Council: *Opinion on the Hungarian draft NGO Transparency Law*, par. 27.

[83] The lack of public consultations preceding the enactment of the *Hungarian NGO Transparency Law* has been duly noted in the respective opinions of the Venice Commission and the Expert Council. The Venice Commission has pointed out in this respect that it is "aware that in Hungary the rules applicable to the legislative process differ depending on the author of the draft Law and that drafts submitted by members of Parliament, unlike those submitted by the Government or the President of the Republic, do not require an obligatory public consultation. However, a public consultation for drafts submitted by members of Parliament is not explicitly ruled out either". Venice Commission, *Opinion on the Hungarian draft NGO Transparency Law*, par. 26. Expert Council,: *Opinion on the Hungarian draft NGO Transparency Law*, par. 8.

[84] It has been noted in this respect that that the comment provided in the Explanatory Memorandum to the *Hungarian NGO Transparency Law* might give rise to doubts as to whether the draft Law is based on the erroneous and harmful assumption that receiving foreign funding necessarily equals representing "foreign" interests that are inevitably ill-intentioned and at odds with Hungarian public interest. See Venice Commission, *Opinion on the Hungarian draft NGO Transparency Law* par. 40.

[85] Letter to the Speaker of the National Assembly of Hungary by Mr Nils Muižnieks, Commissioner for Human Rights, HR/NM/021-2017, 26 April 2017. Venice Commission, *Opinion on the Hungarian draft NGO*

81. In addition, those measures can give rise to the issue of prohibition of *discrimination* if they unduly discriminate against NGOs-recipients of foreign funding as compared to NGOs which are being funded from other legitimate sources, and if they do not pertain to private businesses – and indeed to all NGOs-recipients of foreign funding.[87]

C. Reporting on activities

82. As has been stated, the principle of equal treatment of NGOs does not preclude differential treatment of certain NGOs insofar as it is based on objective criteria, rather than subjective viewpoints and beliefs (*supra*, par. 35.). Thus, it is common for NGOs having public benefit/charitable status or receiving public funds and other material support to be subject to additional reporting requirements.[88] These may entail an obligation of a charity to submit and publish its annual *activity report*, or in case of a NGO-recipient of public funds, a narrative and financial *project* report.[89] The requirement for a greater transparency in these instances can be perceived as the legitimate *quid pro quo*, given additional benefits afforded to those NGOs, provided it meets the *proportionality* test. This would require among others that the size of the organisation and its annual financial turnover is duly taken into account before introducing additional reporting requirements.[90]

Transparency Law, paras. 22-24**.** Expert Council, *Opinion on the Hugarian draft NGO Transparency Law*, paras. 5-7, 65.

[86] See Venice Commission, *Opinion on the Russian NGOs Foreign Agent Law*: "…The Russian authorities give no explanation or even an indication of the necessity of imposing the qualification 'foreign agent" on these NCOs. They only declared that the term "foreign agent" has lost the negative connotation it had in the past. The Constitutional Court also assessed in its judgment on the constitutionality of the Law that 'any attempt to find, based on stereotypes of the Soviet era that have effectively lost their meaning under modern conditions, any negative connotation in the phrase foreign agent' would be devoid of any constitutional and legal basis'. The Venice Commission however is of the opinion that this assessment on the constitutional and legal meaning of the term "foreign agent" does not refute the evidence produced by the above mentioned opinion poll that, in fact, the term still has a very negative connotation in large sections of the population and can therefore be a threat to the free exercise of the activities of these non-commercial organisations. Moreover, even without the specific Russian historical context, the term "foreign agent" always has a negative connotation as it suggests that the organisation acts "on behalf and in the interests of the foreign source" and not in the interest of the Russian society" (par. 55.). See also the Commissioner of Human Rights written observations to the European Court in the proceedings relating to *Ecodefence and others v. Russia* (no. 9988/13) and 48 other applications concerning the Russian Foreign Agent Law, paras. 8, 33-35.

[87] Venice Commission, *Opinion on the Russian NGOs Foreign Agent Law*, paras. 90-93. Expert Council, *Opnionon on the Russian NGOs Foreign Agent Law*, par. 76; *Opinion on the Hungarian draft NGO Transparency Law,* paras. 46-52.

[88] http://www.efc.be/legal_profile

[89] For example, Bosnia and Herzegovina, Croatia, Poland, and Serbia.

[90] For example, in the United Kingdom different activity report obligations apply to charities exceeding the prescribed monetary thresholds. https://www.gov.uk/government/publications/charity-reporting-and-accounting-the-essentials-cc15b/charity-reporting-and-accounting-the-essentials#specific-reporting-requirements-for-different-types-of-charity. See also Art. 23 of the Polish Law on Public Benefit Organisations and Volunteer Work.

83. In addition, conditions for granting charitable status as well as any form of public support should be governed by "clear and objective criteria,[91] should not unduly discriminate against some NGOs, and should not impair their freedom of speech, including engaging in issues deemed political".[92]

84. Given the foregoing, a measure which requires NGOs engaging volunteers in their activities to file with public authority an *annual report* on *volunteer activities*, irrespective of the nature of those activities and sources of funding (public or otherwise), gives rise to the issue of *proportionality*,[93] irrespective of whether a NGO has acquired public benefit or charitable status.

85. Likewise, a measure which requires NGOs to file with the public authority a *final report* on any project involving volunteers, irrespective of the source of project funding, gives rise to the issue of *proportionality*.[94]

86. Furthermore, it would seem that a general requirement for NGOs to submit their annual activity reports, in additional to financial statements, would give rise to the issue of both *legitimacy* and *proportionality*, in particular if NGOs do not enjoy tax or other benefits and are not recipients of public funding.[95]

87. However, such a requirement might nevertheless be justified in case of a NGO which is entrusted certain public prerogatives, which engages in social service provision the nature of which justifies greater oversight, which engages particularly vulnerable categories of volunteers in its activities, or which targets particularly vulnerably categories of beneficiaries, provided such a requirement is also deemed *proportionate*.

88. On the other hand, an obligation imposed on a "NGO-foreign agent" to submit its activity report every six months, rather than annually, gives rise to the issues of *proportionality* and *prohibition of discrimination*.

89. Imposing additional reporting and disclosure requirements on NGOs engaging in *political activities* has proved highly problematic, given international standards governing the legitimate scope of NGOs activities. As the Exert Council has noted, setting out a legal definition of NGOs political activities is not necessarily problematic in itself, given the qualified nature of the rights protected by Articles 10 and 11 of the Convention. However, this requires careful balancing between the legitimate public goals such a definition would conceivably seek to accomplish and private individual interests.[96]

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[91] Par. 58, *Recommendation CM/Rec(2007).*
[92] Expert Council, *Opinion on the draft Romania NGO Law*, paras. 23, 25-27, 30-34, 39.
[93] Art. 4, 30, 32 of the Serbian Law on Volunteering.
[94] Art. 3, 33 of the Croatian Law on Volunteering.
[95] See, for example, Article 32. Par. 3 of the *Russian Federal Law on Non-commercial organisations* (LNCO), which sets out a general requirement for NGOs to submit an annual activity report, irrespective of the source of funding (which are stipulated in Article 31.3 of the LNCO), with few notable exceptions. The LNCO provides for a broad definition of NGOs (Art. 2.3). See also *supra*, par. 51.
[96] Expert Council, *Opinion on the Russian NGOs Foreign Agents Law*, par. 61.

90. *Recommendation (2007)14* sets out a number of guiding principles in this respect. Thus, NGOs should enjoy the right to freedom of expression and all other universally and regionally guaranteed rights and freedoms applicable to them, should not be subject to direction by public authorities,[97] should be free to pursue their objectives, provided that both the objectives and the means employed are consistent with the requirements of a democratic society, should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law, and should be free to support a particular candidate or party in an election or a referendum, provided that they are transparent in declaring their motivation.[98] Any such support should also be subject to legislation on the funding of elections and political parties.[99]

91. Recognising the role of "pluralism, tolerance and broadmindedness"[100] as well as the role of NGOs in a democratic society, the European Court has developed two principles underpinning freedom of expression. First, subject to legitimate derogations, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive, or as a matter of indifference, but also to those that "offend, shock or disturb the State or any sector of the population".[101] Second, legitimate derogations must be narrowly interpreted and the necessity for any restrictions must be convincingly established[102],—and must not be construed in a fashion which would render rights protected by the ECHR "theoretical and illusory", rather than "practical and effective".[103] With respect to Article 10, the Court affords NGOs the same level of protection which is afforded to other pillars of civil society, the media and journalists.[104]

92. The European Court holds a relationship between Articles 10 and 11 as the one between "lex generalis" and "lex specialis".[105] Notwithstanding its autonomous role and particular sphere of application, therefore, Article 11 is considered in the light of Article 10 given that the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11;[106] this protection is afforded to both political parties[107] and other associations.[108]

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[97] See paras 26-29, 31, Explanatory Memorandum.
[9898] Respectively paragraphs5, 6, 11 and 12.
[99] Paragraph 13. See also paras 34-39, Explanatory Memorandum.
[100] *Handyside v. the United Kingdom*, § 49.
[101] Ibidem.
[102] *Observer and Guardian v. United Kingdom* [P], no. 13585/88, 26 November 1991.
[103] *Sakhnovskiy v. Russia*, (GC) judgment of 2 November 2009, § 99. See also Venice Commission, *Standards on Non-Governmental Organisations and Free Association*, CDL-AD(2013)017, 28 March 2013, par. 42.
[104] See e. g *Vides Aizsardzības Klubs v. Latvia*, no.57829/00, 27 May 2004; *Radio Twist, A.S. v. Slovakia*, no. 62202/00, 19 December 2006.
[105] *Ezelin v. France*, no. 11800/85, 26 April 1991, § 34.
[106] *Christian Democratic People's Party v. Moldova*, no. 28793/02, 2 February 2010.
[107] *United Communist Part of Turkey and Others v. Turkey* [GC], no. 19392/92, 30 January 1998 and *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, judgment of 3 February 2005.

93. Recalling the foregoing principles, the Venice Commission and the Expert Council have both found particularly problematic if the notion of "political activity" does not satisfy the "prescribed by law" requirement, and does not provide a clear-cut answer as to what kind of political activities precisely trigger the application of additional measures, but rather uses vague terms such as "political actions", "state policy", "the shaping of public opinion", and "influence.[109] The application of the otherwise vague concept in practice has given rise to additional concerns.[110]

94. However, given the narrow margin of appreciation with respect to the legitimate interference with freedom of expression as well as the perceived link with freedom of association, even if the notion of political activities is set out in satisfactorily precise terms, imposing additional reporting and disclosure obligations on NGOs on the grounds of "political activities", safe for the regulation governing financing of political parties, would unlikely meet the requirement of *legitimacy*, irrespective of the source of NGOs funding.[111] This also pertains to the notion of *national security*, given the stringent conditions set out in order for national security to be deemed a legitimate interference with freedom of association.[112]

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[108] *Sidiropoulos and Others, v. Greece*, no. 26695/95, 10 July 1998; *Gorzelik and Others v. Poland* [GC], no. 44158/98, 17 February 2004; *Kalifatstaat v. Germany* (dec.), no. 13828/04, 11 December 2006; and *Zhechev v. Bulgaria***,** no. 57045/00, 21 June 2007.

[109] Venice Commission, Opinion on the *Russian NGOs Foreign Agent Law*, paras. 81-82; Expert Council, *Opinion on the Russian NGOs Foreign Agent Law*, paras. 44-50, 55-61; Expert Council, *Regulating Political Activities of Non-Governmental Organisations*, OING Conf/Exp (2014) 2, updated in October 2014, par. 187; *and Expert Council, Conditions of Establishment of Non-Governmental Organisations*, paras. 20-24. *See Zhechev v. Bulgaria,* § 55.

[110] Venice Commission, *Opinion on the Russian NGOs Foreign Agent Law*, paras. 83-84. Expert Council, *Regulating Political Activities of Non-Governmental Organisations*, paras. 190-192. See also the Commissioner of Human Rights written observations to the European Court of Human Rights in the proceedings relating to *Ecodefence and others v. Russia* (no. 9988/13) and 48 other applications concerning the Russian Foreign Agent Law. The Commissioner underscored that the broad definition of "political activity" – which covers legitimate human rights activities – contributed to the law's arbitrary application (par. 21).

[111] The issue of potential limits of "political activities" of NGOs which are the recipients of foreign funding has also arisen in *Ireland*. As FRA has reported, while there is no NGO law and no explicit limitation on NGOs being funded internationally, the Electoral Act 1997 prohibits international funding of "third parties" and this might affect NGOs when involved in political activity or political campaigns or election campaigns. FRA, *Challenges facing human rights organisations working on human rights issues in the EU*, par. 2.1.2. This reinforces the significance of a measure being drafted with "sufficient clarity"; Venice Commission, *Opinion on the Russian NGOs Foreign Agent Law*, paras. 77-81 and *Opinion on the Hungarian draft NGO Transparency Law*, note 5; See also *Sunday Times v. United Kingdom* [P], no. 6538/74, 26 April 1979 § 49 and *Silver and Others v. United Kingdom*, no. 5947/72, 25 March 1983, § 88-89.

[112] See Judgment of the Russian Constitutional Court No. 10-P 8 April 2014.which ruled by the majority of votes that the relevant provisions of the Foreign Agents Law, including those on political activities" were in conformity with the Constitution. The Court held that the impugned measures were in the interest of *state sovereignty* and did not unduly discriminate against or impeded the ability of NGOs-"foreign agents" to exercise a critical voice towards the government (Paras. 3.1., 3.2, pp. 24-27, 28, 32, 51-52 of the judgment. See dissenting opinion of Justice Vladimir Yaroslavtsev, pp. 55-74 of the judgment. Expert Council, *Regulating Political Activities of Non-Governmental Organisations*, paras. 190-192.

D. Labelling requirements

95. As has already been seen, the issue of specific labelling requirements imposed has arisen in connection with NGOs-recipients of foreign funding. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has recalled that under international law problematic constraints include *inter alia* stigmatising or delegitimising the work of foreign-funded NGOs by requiring them to be labelled as foreign agents or other pejorative terms.[113]

96. The labelling requirement gives rise to the issue of *legitimacy*, given the exhaustive list of permissible derogations set out in Article 10 and 11, and the European Court's narrow interpretation thereof, which reflects its commitment towards "pluralism, tolerance and broadmindedness".[114] It would be particularly difficult for a Member State to justify such a measure given that neither "political activities" nor "foreign funding" are deemed illegitimate *per se*.[115] The foregoing point is also reflected in Principle 7 of the *Joint Guidelines on Freedom of Association* which provides that states shall not stigmatize NGOs that receive foreign funding.

97. In addition, it has been noted by the Expert Council that the labelling requirement does not observe the guiding principles enshrined in *Recommendation (2007)14* with respect to NGOs freedom of expression, and falls short of recognizing that Article 10 of the ECHR affords protection not only to the *substance* of the ideas and information expressed, but also to the *form* in which they are conveyed.[116]

98. Furthermore, the Venice Commission has noted that the use of the label "organisation receiving support from abroad" and "foreign agents" on all publications and written statements produced by such a NGO does not seem to be *proportionate* and *necessary* with respect to the declared legitimate aim pursued by this measure.[117] It has further noted that the mere fact that a NGO receives foreign funding cannot justify it to be qualified a '"foreign agent".[118]

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[113] UN Human Rights Council, *Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*.

[114] *Handyside v. the United Kingdom* [P], no. 5493/72, 7 December 1976, § 49. Expert Council, *Opinion on the Russian NGOs-Foreign Agent Law*, par. 67.

[115] Expert Council, *Opinion on the Russian NGOs-Foreign Agent Law* par. 67.

[116] Expert Council, *Opinion on the Russian NGOs-Foreign Agent Law* par. 67. *Oberschlick v. Austria (no 1)*, no. 11662/85, 23 May 1991.

[117] Venice Commission, *Opinion on the Hungarian draft NGO Transparency Law*, paras. 55-56. See also Expert Council, *Opinion on the Hungarian draft NGO Transparency, Law*, paras. 53-57.

[118] The Venice Commission has noted 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. This effect goes beyond the aim of transparency which is alleged to be the only aim of the law under consideration". *Opinion on the Russian NGOs Foreign Agent Law*, paras. 60-61. See also Venice Commission, OSCE/,ODIHR *Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organisations and Other Legislative Acts of the Kyrgyz Republic*, par. 47. Due to serious problems with the draft Law exposed in the Joint Opinion, including provision governing the labelling requirement, the draft was subsequently withdrawn from further consideration.

99. Given the foregoing, it is clear that international standards set out quite stringent conditions for labelling requirements to be deemed legitimate interference with freedom of association, irrespective of NGOs source of finding. This was deemed necessary in order to protect NGOs from stigmatisation and harassment and thus ensure an unfettered exercise of freedom of association and expression. Depending on circumstances, such a measure can also give rise to the issues of *privacy* and *prohibition* of *discrimination*.

E. Reporting and disclosure of private data of persons affiliated with NGOs

100. A duty of a NGO to report and disclose private data of persons affiliated with the organisations (*donors, members, volunteers, members of the governing board*) merit separate consideration, given the gradual developments of data protection law (*infra*, 108.-113.).

101. Indeed, a duty of a NGO to report or otherwise disclose private data is subject to double scrutiny, as it is protected by both freedom of association and respect to privacy. As the Expert Council has noted:

> The right to privacy is guaranteed to NGOs and their members. This means that oversight and supervision must be proportionate to the legitimate aims NGOs pursue, should not be invasive, nor should they be more exacting than those applicable to private businesses. It should always be carried out based on the presumption of lawfulness of the NGO and of their activities.[119] .

102. NGOs' right to privacy extends to *all* private persons that are affiliated with the organisation, and not just members. As already noted, *Recommendation 2007(14)* states in this respect that "all reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality".[120]

103. The Explanatory Memorandum to the *Recommendation (2007)14* further clarifies the foregoing principle:

> The obligation to report should be tempered by other obligations relating to the right and security of beneficiaries and to respect for private life and confidentiality. In particular, a donor's desire to remain anonymous should be respected. However, the need to respect private life and confidentiality is not absolute and should not be an obstacle to the investigation of criminal offences (for example, money laundering). Nonetheless, any interference with respect for private life and confidentiality should observe the principles of necessity and proportionality.[121]

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[119] Expert Council, *Opinion on the Hungarian draft NGO Transparency Law*, par. 72.
[120] Paragraph 64.
[121] Paragraph 116. See also Venice Commission, OSCE/ODIHR, *Joint Opinion on the Romania draft NGO Law*, par. 72.

104. As regards criminal offences, the *Additional Protocol to the Convention on the Prevention of Terrorism*, sets out in Article 2 the general conditions governing disclosure of information about members "participating in an association or group for the purpose of terrorism". In addition, the Explanatory Note to the FATF Recommendation No. 8. cites specific instances of reporting and disclosure requirements relating to the prevention of terrorism and money laundering which are deemed to meet conditions set out in the Recommendation

i. Disclosure of members

105. The European Court has ruled that NGOs should not be under a *general obligation* to disclose the names and addresses of their members since this would be incompatible with their right to freedom of association and the right to respect for private life. [122]

106. In light of the European Court's ruling, the Venice Commission has noted that a measure requiring NGOs and branches and representations of foreign NGOs to inform the ministry of justice about the number of their members, which in practice has often amounted to NGOs having to disclose their names and addresses, gives rise to the issue of *proportionality*.[123]

107. In addition, insofar as the Law requires that NGOs keep a record of their members, there has to be clarity as to the conditions under which such a record can be accessed by public authorities as well as the permissible scope of information which is kept in the registry.[124]

108. The European Court has recently dealt with the disclosure of members in *Association "Accept" and Others v. Romania*, in connection with registration of changes in the organisation's statute.[125]

109. As the Expert Council has noted about this ruling:

[122] See *National Association of Teachers in Further and Higher Education v. United Kingdom* (dec), no. 28910/95, 16 April 1998. The former European Commission of Human Rights "accepted that there might be specific circumstances in which a legal requirement of an association to reveal the names of its members to a third party could give rise to an unjustified interference with the rights under Article 11 or other provisions of the Convention" (p 71). However, it was found not to exist in this case – which had to do with an obligation of a union to disclose the names of members who would be involved in industrial action. Such an obligation was considered not likely to impair the union's ability to protect its members, given that the employer was in any event aware of the names of most members through payroll deduction of membership fees and there was nothing inherently secret about membership of a union. See also Expert Council, *Opinion on the NGO Law of the Republic of Azerbaijan in the Light of Amendments Made in 2009 and 2013 and Their Application*s, note 102.

[123] Venice Commission, *Opinion on the Law on nongovernmental organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan*, paras. 70-71.

[124] Expert Council, *Opinion on the NGO Law of the Republic of Azerbaijan in the Light of Amendments Made in 2009 and 2013 and Their Application*s, paras. 89-91.

[125] No. 48301/08, 24 May 2016.

169. No violation of the European Convention was considered to result from either the publication in the register of associations of certain information concerning members or a requirement to present an excerpt from the tax record of some new members–which would show whether or not they had committed acts contrary to tax and customs law and the consequential measures taken against them - when registering amendments to the statute designed to take account of their having joined it. The latter requirement was intended to prevent and tackle tax evasion, ensure the proper administration of taxes and other taxes due to the State and to prevent the commission of fiscal offenses.
170. One of the new members of the association – which was an activist one for the rights of sexual minorities – had claimed to fear for her safety on account of being compelled to have her identity and personal data published in the register and had invoked the right to respect for private life under Article 8, taken alone and in conjunction with the prohibition on discrimination in Article 14. The information relating to members alleged by her to be included in the register comprised the surnames, first names, nationalities, professions, domiciles and numbers and dates of issue of their national identity cards or passports.
171. In connection with her fear, she referred to the degree of intolerance that exists in Romanian society towards these minorities, this intolerance often being manifested in the form of violence. However, as regards the publication of her name, the European Court considered that the applicant did not want to keep it confidential as it had also been published on the association's website. Furthermore, it noted that the legal provisions in force only required the name of a member of an association to be published and not his or her personal data and that was indeed the only information in the register concerning the applicant. The European Court also pointed out that, even supposing other data were published in the register, this could be challenged in the domestic courts.

172. Furthermore, the European Court did not accept that the right to freedom of association had been unduly hampered by the refusal to register the change in the association's statute without the provision of the extract from the tax record of the members concerned. This was because: the formalities for obtaining it were not complex or onerous; the association, despite the rejection of its application to register its new members, had continued to exist and to carry out its activities without any constraint; and the new member – who had been accepted to become one of the association's active members – had not shown in a concrete manner what actions she could not do or would be affected by the lack of recognition by the authorities or third parties of her status within the association.[126]

110. The issue of the duty of NGOs duty to disclose information about their members has also arisen in connection with NGOs assisting refugees.[127]

ii. Volunteers

[126] Expert Council, *Non-Governmental Organisatons: Review of Developments in Standards, Mechanisms and Case Law 2015-2017*.
[127] As FRA has reported in Greece "In January 2016, a Ministerial Decision put all NGOs in Lesbos directly under state control and refused to recognise the operations of independent and unregistered NGOs, effectively criminalising them. NGOs and volunteers helping refugees were asked, starting in February 2016, to fill out forms providing personal details of all their members to the government. FRA, *Challenges facing human rights organisations working on human rights issues in the EU*, pp. 22-24.

111. In some Member States NGOs are under general obligation to disclose information about their volunteers. This entails, among others, providing "information" about the volunteers in annual report on volunteer activities which the host organisation must file,[128] or keeping record of volunteer agreements and duly notifying public authority to that effect.[129]

112. The foregoing requirement gives rise to the issue of *proportionality*, given their general application. In addition, it gives rise to the "*prescribed by law*" issue, given the lack of clarity in the respective measures as to the precise scope of information that a host organisation must disclose.

iii. Representatives and members of the board

113. The duty of a NGO to disclose the necessary information about members of its management board in the public register is likely to fall within the scope of legitimate interference insofar as it pertains to members who have the power of *legal representation* of the organisation. On face value, it seems to meet the test of both *legitimacy* and *proportionality* insofar as the details of the information required are proportionate and do not amount to violation of privacy and private data law.

114. In addition, it would seem that a requirement for charitable/public benefit NGOs to make the names of their board members available in the public register would also meet the test of *legitimacy* and *proportionality*, unless there is credible evidence to believe that displaying that information could put a board member in personal danger.[130]

115. Furthermore, it has been suggested in the Explanatory Note to the FATF Recommendation No. 8. that disclosure of information about members of a NGO's management board can also be justified in case of terrorism and money-laundering, provided it meets the requirements set out in the Recommendation.

116. However, a measure requiring NGOs and branches and representations of foreign NGOs to inform the ministry of justice about the composition of their highest governing body and the term of service of its members was found by the Venice Commission to have given rise to the issue of *proportionality*. The Venice Commission has further noted that an obligation for branches and representations of foreign NGOs to inform the ministry of justice about the term of contract of their managers and deputy managers and provide personal data relating to these individuals gives rise to the issue of *legitimacy*.[131] The latter requirement also gives rise to the issue of prohibition of *discrimination*, given that private businesses are not subject to this duty.

[128] Article 30 of the Serbian Law on Volunteers.
[129] Article 31 of the Montenegrin Law on the Volunteer Work.
[130] https://www.gov.uk/guidance/addresses-and-trustee-names-in-your-charitys-public-details
[131] Venice Commission, *Opinion on the Law on nongovernmental organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan*, paras. 72-74.

117. Similarly, a requirement for a NGO-foreign agent to file with the ministry an information about the composition of its management board every six months gives rise to the issue of both *proportionality* and *prohibition of discrimination* (*supra*, par. 51.).[132]

118. Likewise, the Venice Commission has suggested that a measure requiring NGOs representatives or other persons working on anti-corruption to declare their assets on the same par with state officials or public servants, would give rise to the issue of *legitimacy* and *privacy*, as well as *prohibition of discrimination*.[133]

iv. Disclosure of membership in a NGO

119. A disclosure requirement may also include a duty of a person carrying certain public prerogatives (e.g. judges, public prosecutors) to disclose to the supervisory authority his membership in certain categories of NGOs. The European Court has ruled that such a measure is not problematic in itself, insofar as it complies with international standards governing freedom of association.[134]

120. The Bureau of the Consultative Council of European Judges (CCJE) has recently taken the position that an obligation pursuant to a legislative amendment in Bulgaria for judges to disclose their membership in judges' associations could be regarded as an undue interference with the right to form and freely join such associations, thus having an adverse effect on judicial independence. The Bureau has noted that "proportionate disclosure of such information is justified on grounds of proper administration of justice, such as transparency with regard to judges' independence and impartiality and for the prevention of corruption within the judicial system". It has further noted that disclosure of judges' membership in an association of judges cannot be justified on such or similar grounds, as membership in judges' associations is for judges only, and raises as such no conflicts with the proper administration of justice.[135]

v. Development of private data protection law

121. It is also significant that, as a result of the digital revolution, the right to privacy has evolved so as to encompass a right to the protection of personal data. This development necessitated the introduction of additional international as well as domestic instruments to address data protection. The Council of Europe's *Convention for the Protection of*

[132] Expert Council, *Opinion on the Russian NGOs Foreign Agent Law*, paras. 72.-76.
[133] Venice Commission, OSCE/ODIHR, *Joint Opinion on the Ukraine Draft Laws No. 6674 and No. 6675*, paras. 54-64.
[134] *Maestri v. Italy* [GC], no. 39748/98, 17 February 2004, § 30-31.
[135] Opinion of the Bureau of the Consultative Council of European Judges (CCJE) following the request of the Bulgarian Judges Association to provide an opinion with respect to amendments of 11 August 2017 of the Bulgarian Judicial System Act, CCJE-BU(2017)10, 31 October 2017, par. 14. See also *Report on the State of Democracy, Human Rights and the Rule of Law*, 2018, pp. 59-60; and Expert Council, *Compendium of Council of Europe Practice Relating to the Governmental Organisations*, CONF/EXP(2018)2, 30 June 2018.

Individuals with regard to Automatic Processing of Personal Data was the first binding international instrument in this respect.[136]

122. The right to personal data protection is also enshrined in the EU *Charter of Fundamental Rights*,[137] in addition to the right to private life.[138] The EU and its Member States must comply with the so called "data protection principles". These among others include an obligation of a public authority to obtain personal data only for one or more specified and lawful purposes and not to further process it in any manner incompatible with the stated purposes, and that personal data obtained be adequate, relevant and not excessive in relation to the stated purposes.[139] Therefore, insofar as the donor or other private data disclosure obligation does not serve any *legitimate goal* or is *disproportional* to the legitimate goal it purports to serve, there is no proper legal basis under the data protection law for public authorities to require a NGO to provide private data.

123. Thus, a reasoned opinion of the European Commission—the second step in the infringement procedure—to Hungary for its *Transparency Law* states *inter alia*:

> The Commission had decided to start legal proceedings against Hungary for failing to fulfil its obligations under the Treaty provisions on the free movement of capital, due to provisions in the NGO Law which indirectly discriminate and disproportionately restrict donations from abroad to civil society organisations. In addition to these concerns, the Commission is also of the opinion that Hungary violates the right to freedom of association and the *right to protection of private life and personal data* enshrined in the Charter of Fundamental Rights of the European Union, read in conjunction with the EU Treaty provisions (emphasis ours).[140]

124. The EU *General Data Protection Regulation* 2016/679 (GDPR), which came into force on May 25, 2018, has further strengthened the data protection regime and citizens' control over their private data.[141] Likewise, the EU Directive 2015/849 calls on Member States to align their approach towards legislation targeting *money laundering* and

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[136] The Convention has been signed by all 48 Council of Europe members and ratified by all but Turkey; in addition, Uruguay, Mauritius and Senegal have all ratified the Convention. In 2001, Convention 108 was supplemented with an Additional Protocol regarding the Automatic Processing of Personal Data regarding supervisory authorities and trans-border data flows" (the Additional Protocol).For other pertinent international instruments on data protection see Carly Nyst, *Data Protection Standards for Civil Society Organisations*, ECNL, 2018. pp. 4-7; http://ecnl.org/wp-content/uploads/2018/01/Data-Protection-Standards-for-CSOs.pdf; European Union Agency for Fundamental Rights, Council of Europe, *Handbook on European Data Protection Law*, 2014; https://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf

[137] Article 8 (protection of personal data) of the Charter (200/C 364/01): "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority".

[138] Article 7 (respect for private and family life): "Everyone has the right to respect for his or her private and family life, home and communications".

[139] ttps://www.gov.uk/data-protection.

[140] European Commission Press Release 4 October 2017: *European Commission steps up infringement against Hungary on NGO Law*; europa.eu/rapid/press-release_IP-17-3663_en.htm.

[141] Carly Nyst, *Data Protection Standards for Civil Society Organisations*, pp. 5-6.

terrorism financing with FATF recommendations, as well as the EU data protection law and the protection of fundamental rights, as stipulated in the Charter of Fundamental Rights of the European Union.

125. The international instruments therefore have provided additional protection to the right to privacy. Thus, there is a need to balance the scope of NGOs reporting and disclosing obligations against their duties to personal data protection (protection of personal data of donors and supporters, of employees and volunteers, of beneficiaries, etc.). This development has conveniently strengthened NGOs protection against undue interference with their privacy, including private data.[142]

126. Given the foregoing, a law governing access to information of public utility which would put NGOs on equal footing with *public bodies* as regards their respective obligations to disclose information, including that falling within the ambit of private data, would certainly violate international standards governing freedom of association and privacy protection.[143]

F. Sanctions

127. As a rule, rather than an exception, reporting and disclosure requirements for NGOs have been accompanied by harsh administrative and criminal sanctions, including temporary ban and dissolution of an organisation.[144] Depending on circumstances, the

[142] Carly Nyst, *Data Protection Standards for Civil Society" Organisations*, pp. 7, 12.

[143] Article 1 of the *draft amendments to the Serbia Law on Access to Information of Public Utility* envisages changes in Article 3, Par. 1. item 5) of the Law so as to expand the notion of public authorities to a *legal* or natural person that either pursues activities deemed in *general interest* or is entrusted to perform *public authority*, with respect to the information *relating* to those activities or public authority it is entrusted. The draft amendments—or for that matter the current Law—does not provide any further guidance as to the scope and substance of activities deemed in "general interest". The Expert Council has noted that there is a manifest lack of clarity in the draft amendments as to whether the notion of a "legal person pursuing activities deemed in general interest" pertains to associations and other NGOs. In addition, the revised Article 3. Par. 1.item 6) of the draft Law extends the notion of public authority to a *legal person* that is *predominantly* being funded from public sources, except for *political parties* and *religious organizations whose financial oversight* is addressed in separate law. There is no any further explanation in the draft amendments or the Explanatory Memorandum as to what the concept of 'dominant funding' precisely entails. The Expert Council has noted that the implication of this provision for NGOs that are 'dominantly funded' from public resources would be them being subject to a full range of disclosure obligations otherwise pertaining to public authorities, thus giving rise to the issue of prescribed by law, proportionality and discrimination requirements. See Expert Council, *Opinion on the draft amendments to the Serbia Law on Access to Information of Public Utility*, CONF/EXP(2018)1, 18 April 2018, paras. 24-37.

[144] Thus, the *Russian NGOs Foreign Agent Law* levies harsh administrative and criminal penalties for the breach of the reporting and other measures introduced by the Law (Article 32 of the NCO Law as amended, Articles 239(2), 330(1), Criminal Code of the Russia Federation № 63-FZ, 13 July 1996 as amended). Similarly, the *Hungarian NGO Transparency Law* envisages penalties and criminal sanctions for the violation of the Law (Art. 3). Similarly, the *Romanian draft NGO Law* provides that any failure to comply with the requirement to publish a detailed bi-annual financial statement by NGOs engaging in economic activities would lead to the suspension of the NGO's functioning for 30 days and the immediate cessation of its activities—and in case of continuous non-compliant would ultimately lead to the dissolution of an organisation**.** Article 5.2 of *Azerbaijani Cabinet of Ministers Decision* No. 201 provides for a notice giving 30

nature and gravity of sanctions levied for the breach of reporting and disclosure obligations may alone give rise to violation of international standards, or can be one of the contributing factors in the overall deliberation as regards the compatibility of the impugned measure with international standards.[145]

128. The guiding principles enshrined in *Recommendation (2007)14* with respect to sanctions against NGOs is that, in most instances, the appropriate sanction against NGOs for breach of the legal requirements should merely be the requirement to rectify their affairs. Insofar as administrative, civil or criminal penalties are imposed on NGOs and/or any individuals directly responsible, they should be based on the law in force which is otherwise applicable to legal entities, and observe the principle of proportionality (par. 72.).[146]

129. Likewise, the J*oint Guidelines* states that sanctions levied on NGOs should observe the principle of proportionality. This entails that the least intrusive option shall always be chosen, that a restriction shall always be narrowly construed and applied, and shall never completely extinguish the right nor encroach on NGOs essence. In addition, restrictions must be based on the particular circumstances of the case, and no blanket restrictions shall be applied.[147]

130. In elaboration of the foregoing principles the Expert Council has noted that:

> 36. Consideration should always first be given to whether a legitimate matter of concern to the authorities can be adequately handled through the issue of some form of directions, whether to desist from certain activity or to take specific action. Generally it should only be the subsequent non-compliance with such directions that should lead to the imposition of sanctions and there should be no immediate resort to the institution of administrative or criminal proceedings against the NGO concerned.
> 37. As all sanctions must observe the principle of proportionality, those of a financial nature ought to take account both of the seriousness of the particular infraction giving rise to it and the impact that the penalty would have on the NGO concerned. In particular a financial penalty that would entail the bankruptcy of the NGO concerned.[148]

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days to submit financial reports where this has not been done within the deadline. In the event of a failure to do so, Article 462 of the Code of Administrative Offences provides for fines of 300-400 AZN for officials and 1,500-2,000 AZN for legal entities. Furthermore, the failure to present an annual financial statement after the giving of a notice and direction by the Ministry of Justice for its presentation within 30 days where the requirement to do this pursuant to Article 29.4 has not been met will entail further responsibility under the Code of Administrative Offences See among others the Venice Commission, OSCE/ODIHR, *Joint Opinion on the Romanian draft NGO Law*, paras.12-13.; Expert Council, *Opinion on the Romania draft NGO Law*, paras. 63-70; and Expert Council *Opinion on the Russian NGO Foreign Agents Law*, paras. 86-101.

[145] See, for example, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009, § 83.

[146] See also Explanatory Memorandum to *Recommendation (2007)14*, par. 128.

[147] Principle 10.

[148] Expert Council, *Sanctions and Liability with Respect to NGOs*, OING Conf/Exp (2011) 1, Strasbourg, January, 2011, See *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan, no. 37083/03, 8 October 2009*, § 63; *Vona v. Hungary*, no. 35943/10, 9 July 2013, §. 57; and *Christian Democratic People's Party v. Moldova, no. 28793/02*, 14 February 2006.

131. The case law of the European Court also suggests that the gravity of sanctions would not necessarily be a decisive factor in the Court's deliberation as to whether a particular reporting or disclosure measure (or for that matter other interference with NGOs) meets international standards. Rather, depending on circumstances, the Court might as well deem lighter sanctions levied on NGO an interference failing the *proportionality* test. Thus, in *Karaçay v. Turkey* the Court ruled that the sanction imposed on the applicant, although light (warning), did not meet the proportionality test. In this particular instance, the Court ruled violation of freedom of peaceful assembly. However, the principles underpinning the Court's analyses are equally applicable to freedom of association and the other related rights.[149]

Conclusions

132. As the review suggests, the applicable international instruments and case law do not specifically address all the issues surrounding the legitimate scope of NGOs reporting and disclosure obligations. Nevertheless, they do set out the principles underpinning those measures and the legitimate scope of interference. Thus, while individual reporting and disclosure obligations might seem unproblematic on face value, difficulties might arise either from the level of detail required, the burden resulting from the accumulation of requirements and the way in which NGOs reporting and disclosure obligations are portrayed by public authorities

133. Given that any reporting and disclosure requirement for NGOs is deemed an interference with freedom of association, it is incumbent on a Member State to ensure that the frequency and mandatory content of those requirements as well as sanctions levied for the breach of those duties meet international standards, including the exhaustive legitimate grounds for interference, necessity and proportionality.

134. In this respect there are several principles of sound public policy development that can facilitate an overall deliberation as regards compatibility of specific reporting and disclosure measures with international standards. Thus, any legislation impacting on NGOs need to be developed timely, free of political influence, and in transparent manner, and should be adopted through democratic, participatory and transparent process. In addition, there should be presumption in favour of the lawfulness of the establishment of NGOs and of their objectives and activities.

135. The presumption in favour of the lawfulness of the objectives and activities of NGOs would be particularly hard to overcome if: the impugned measure is not based on the prior impact assessment; there is lack of evidence that the current framework is ill-equipped to accomplish the legitimate goals the measure purports to serve; there is lack of evidence of criminality and wrong doing on the side of NGOs; and the public statements of government official reveal the real intention of the impugned measure.

136. The review also suggests that there are stringent conditions attached to invoking terrorism and money laundering as the grounds for imposing reporting and disclosure

[149] *Karaçay v. Turkey, no. 6615/03,* 27 March 2007, § 37.

obligations on NGOs. Those measures will be deemed legitimate only if they are targeted and proportionate, and in line with a risk-based, case by case and flexible approach.

137. Likewise, invoking national security as the ground for imposing reporting and disclosure obligations on NGO needs to meet strict standards. The government would need to demonstrate that those measures are deemed necessary in order to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. Moreover, the precise nature of the foregoing threat would need to be established.

138. On the other hand, transparency and accountability *per se* are not considered to be legitimate grounds for interference with freedom of association. Rather, they may only be invoked as a means to attain the legitimate goals set out in Article 11(2) of the ECHR.

139. As a matter of sound policy, NGOs should be put on equal footing with private businesses with respect to their reporting and disclosure obligations, insofar as the reporting and disclosure obligations of the latter are not themselves excessive. However, this does not mean certain category of NGOs might not be treated differently insofar as a Member State could demonstrate that this is not discriminatory i.e., it is based on objective assessment, pursues a legitimate aim and is proportionate to the achievement of that aim.

140. However, differential treatment of certain NGOs would be particularly difficult to justify if this was on account of their engagement in, e.g., economic or "political" activities, which are entirely legitimate. The same would be the case with NGOs that are recipients of foreign funding, given that NGOs right to seek and utilise resource has been established as an inherent part of freedom of association and that foreign funds are otherwise deemed legitimate source of funding. In addition, differential treatment of certain categories of NGOs would be difficult to justify in the absence of impact assessment, as well as lack of evidence of criminality on the side of those NGOs and proper public consultations.

141. Imposing a duty on certain categories of NGO to disclose private data of persons affiliated with the organisation (donors, members, members of the board, volunteers) has also proved problematic. It has been established that NGOs are not under general obligations to disclose information about their members. The same should pertain to private data of other persons affiliated with NGOs and therefore any measure in this respect would need to meet the requirement for legitimacy and proportionality, in particular. As the review suggests, developments in international law have conveniently strengthened the protection of NGOs against undue interference with their privacy, including the duty to disclose private data.

142. Finally, criminal and administrative sanctions levied on NGOs for breach of their reporting and disclosure duties have also given rise to concerns. Depending on circumstances, the nature and gravity of sanctions may alone give rise to violation of international standards, or can be one of the contributing factors in the overall deliberation as regards the compatibility of the impugned measure with international standards. However, in light of the case law of the European Court, even the lighter sanctions might give rise to violation of international standards.