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OPINION ON FEDERAL LAW OF 23 MAY 2015 #129-FZ "ON INTRODUCTION OF AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF THE RUSSIAN FEDERATION" (LAW ON "UNDESIRABLE" ORGANISATIONS)

Opinion prepared by Mr Jeremy McBride

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Foreword

The Expert Council on NGO Law, a principal organ of the Conference of INGOs of the Council of Europe, has had as a major focus during its nearly eight years of existence, on the promotion of an enabling environment for NGOs throughout Europe. The European Convention on Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights state and expound the rights and freedoms to which every European citizen may justly aspire. These same rights and freedoms are equally fully applicable to citizens' associations, commonly known as Non-governmental Organisations (NGOs).

For many years, the Conference of INGOs has closely followed developments in Russian NGO legislation. The Expert Council on NGO Law prepared in 2013 an opinion on the "foreign agents' law" (OING Conf/Exp (2013) 1) and presented it at a round table organised in Moscow in October 2013. In December 2014, the Expert Council analysed the amendments which in 2015, led to the law on "undesirable" organisations (OING Conf/Exp(2014)3. The enclosed Opinion builds on the insight in Russian NGO legislation which the Expert Council on NGO Law acquired over the years.

The Expert Council mandated Jeremy McBride to draft the Opinion.

The present Opinion by the Expert Council on NGO Law deals with Amendments made in 2015 to certain legislative acts of the Russian Federation, which are grouped around the new - and startling - concept that some NGOs are "undesirable", or conduct "undesirable" activities. The power to deem activities "undesirable" is vested in the General Prosecutor of the Russian Federation or his deputies, in co-ordination with a federal executive power body. The criteria for this process, the access of the public to information on the process, and the means of redress of injustice or abuse within the process fall short of the standards of European law and jurisprudence as established over years by the Convention and the Court.

The Opinion demonstrates these shortcomings through sound legal analysis of the Russian Federation texts, with multiple references to the Convention and Court case law. It is but a short step to conclude that the underlying objective of these recent Amendments is much more to curtail freedom of opinion and of expression than to protect the constitutional order or the security of the state. As with individual citizens, NGOs and associations have the fundamental right to peacefully disagree with governmental policies, and to peacefully express their opinions, without being muzzled by the authorities - the very authorities who should be accountable to their citizens for protecting and promoting citizens' liberties. Indeed, the question arises: what might be next?

The Expert Council on NGO Law expresses the hope and expectation that the present Opinion will be taken into account by the authorities of the Russian Federation with a view to rescinding the essence of the Amendments in question, being one step towards reversing the shrinkage of civil society space. We seek to share our analyses and conclusions with Russian authorities and civil society as well as with other relevant bodies of the Council of Europe and other international organizations committed to advancing citizens' fundamental freedoms.

Cyril Ritchie, President, Expert Council on NGO Law
November 2015

Introduction

1. This opinion is concerned with the amendments to legislation effected by the Federal Law of 23 May 2015 #129-FZ "On Introduction of Amendment to Certain Legislative Acts of the Russian Federation" ('the Federal Law'). In particular, it is concerned with the compatibility of the provisions in the Federal Law with European standards, notably the European Convention on Human Rights ('the European Convention') and Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe ('Recommendation CM/Rec(2007)14')

2. The Federal Law – which is one of a series of recent laws that have made changes to the legislation governing non-governmental organisations[1] - is comprised of five Articles which, in order, amend various provisions in the Criminal Code, Federal Law # 114-FZ "On the Procedure of Exit from the Russian Federation and Entry into the Russian Federation" of 15 August 1996 ('the Exit and Entry Procedure Law'), the Criminal Procedure Code of the Russian Federation ('the Criminal Procedure Code'), the Code of the Russian Federation on Administrative Offences ('the Administrative Offences Code' and the Federal Law # 272-FZ "On Sanctions for Individuals Violating Human Rights and Freedoms of the Citizen of the Russian Federation" ('the Sanctions Law').

3. The opinion first considers the concept of, and the procedures for, recognising as "undesirable" the activities of an organisation as this is the foundation on which all the amendments are based. It then examines the amendments made in the order that they are set out in the Federal Law, before making an overall assessment of the Federal Law.

4. This opinion is based upon an unofficial translation of the Federal Law into English.

[1] See the following opinions of the European Commission for Democracy through Law (Venice Commission): *Opinion on the law on political parties of the Russian Federation*, CDL-AD(2012)003, 20 March 2012; *Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation*, CDL-AD(2012)016, 16 June 2012; and *Opinion on Federal Law n. 121-fz on non-commercial organisations ("law on foreign agents"), on Federal Laws n. 18-fz and n. 147-fz and on Federal Law n. 190-fz on making amendments to the criminal code ("law on treason") of the Russian Federation*, CDL-AD(2014)025, 27 June 2014. See also the *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 and the Expert Council on NGO Law's *Opinion on 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*, OING Conf/Exp (2013) 1, August 2013.

"Undesirable" activities

5. The introduction of the term "undesirable" in relation to the activities of organisations is effected by the provision made in Article 5 of the Federal Law for an entirely new Article 3[1] in the Sanctions Law.

6. This provides first that:

> The activities of a foreign or international nongovernmental organization that threaten the foundation of the constitutional order of the Russian Federation, the country's defense capability, or the security of the state, may be deemed undesirable on the territory of the Russian Federation[2]

and secondly that

> The activities of a foreign or international nongovernmental organization shall be recognized as undesirable on the territory of the Russian Federation from the date of publication of information about it in the manner prescribed by this Article[3].

7. The power to so recognise an organisation's activities is entrusted to the General Prosecutor of the Russian Federation or his deputies

> in coordination with the federal executive power body exercising the functions of formulation and implementation of state policy and normative legal regulation in the sphere of international relations of the Russian Federation

and there is also provision for the repeal of any recognition decision on the same basis[4].

8. In addition, there is provision for the federal executive power body just mentioned to enter an organisation whose activities have been recognised as "undesirable" to include or exclude it from the "List of foreign and international nongovernmental organisations whose activities are so recognised"[5]. This List is to be made public

> in the Internet information and telecommunication network on the official website of the federal executive power body exercising functions on the development and implementation of state policy and normative legal regulation in the sphere of registration of not-for-profit organizations, and publishing the List in the nationwide Russian periodical determined by the Government of the Russian Federation[6].

9. There is no specific procedure provided for maintaining the List – which ought to be done in a manner that complies with the standards required for data collection and retention under Article 8 of the European Convention[7] - but the new Article 3[1]

[2] Paragraph 1.
[3] Paragraph 2.
[4] Paragraphs 4 and 5.
[5] Paragraph 6.
[6] Paragraph 7.
[7] See *Shimovolos v. Russia*, no. 30194/09, 21 June 2011, at paras. 69-70.

provides that this is to be determined by the previously mentioned federal executive power body[8].

10. Several issues relevant to the compatibility of these provisions with European standards arise, namely, the basis for determining whether or not activities are "undesirable", the limitation of the applicability of any such recognition of activities to just those of "foreign or international nongovernmental organisations" and the manner in which a recognition decision is taken. However, the issue of whether or not particular rights and freedoms are actually likely to be infringed by the exercise of the deeming power will be considered only in the context of the specific provisions dealing with the consequences once such a decision is taken.

11. As regards the first issue, there will be a need to be able to demonstrate that there is actually a justifiable basis for concluding that particular activities are "undesirable".

12. The new Article 3^1 specifies three discrete sorts of activities that would justify that appellation, namely, those that threaten the foundation of the constitutional order or the country's defence capability or the security of the state.

13. These are all legitimate aims for the imposition of restrictions on rights and freedoms under the European Convention. However, as the case law of the European Court of Human Rights ('the European Court') has made clear, it is the specific application of measures for such reasons that will determine whether the resulting restrictions on rights and freedoms under the European Convention are actually admissible.

14. Thus, action against organisations on the basis that their objectives are to bring about changes to the constitutional structure of a State will generally be unjustified[9] unless this would result in an outcome which is contrary to the fundamentals of democracy[10]. Moreover, any restrictions purportedly imposed in the interests of national security must be supported in the specific case by reasons that are "relevant and sufficient" and not be based on mere suppositions about the organisation concerned[11]. This would be equally so where threats to defence capacity are alleged[12]. In the absence of such substantiation the deeming of the activities of the organisation concerned as "undesirable" would not only violate its right to pursue them under provisions of the European Convention such as Articles 9, 10 and 11 but would have implications for the exercise of these rights (and others[13]) of both those working for the organisation and those who wish to participate in or support its activities.

15. In all instances, rigorous scrutiny of decisions applying the designation of an organisation's activities as constituting one or more of the threats specified in the Federal Law will be applied by the European Court. As a result, it will be imperative

[8] Paragraph 8.
[9] See, e.g., *United Communist Party of Turkey and Others v. Turkey* [GC], no. 19392/92, 30 January 1998, paras. 55-58.
[10] See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 3 February 2003, paras. 96-100.
[11] See, e.g., *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998, para. 45 and *Bozgan v. Romania*, no. 35097/02, 11 October 2007, paras. 22-30.
[12] See, e.g., *M C v. Fedral Republic of Germany* (dec.), no. 13079/87, 6 March 1989 and *Steel and Others v. United Kingdom*, no. 24838/94, 23 September 1998, para. 110.
[13] Such as the right to property under Article 1 of Protocol No. 1.

that those taking such decisions must actually be able to substantiate the reasons for having done so and do this by reference not only to more than suspicion but also in a manner that establishes a clear causal link between specific activities and the particular threat apprehended.

16. The second issue of compatibility that arises - the limitation of recognition decisions to "foreign or international nongovernmental organisations" - is potentially problematic in two respects.

17. In the first place, part of this very term – "non-governmental" - is one that has not previously been used in existing legislation, which refers instead to "non-commercial organisations". While international provisions tend to understand a non-governmental organisation as one that is non-commercial or non-profit-making[14], the use of the term in the Russian non-legislative context tends only to be concerned with distinguishing certain entities as ones in which state authorities are not involved. It is thus possible that the organisations that will become subject to the various provisions introduced by the Federal Law will be both commercial and non-commercial ones. The lack of certainty in this regard could thus lead to the conclusion that any restrictions imposed on particular rights and freedoms would not fulfil the requirement under the European Convention of being "in accordance with law" or "prescribed by law" and thereby inadmissible on that basis alone[15].

18. A second, more fundamental difficulty is that the restriction of the recognition of "undesirable" activities to those of non-governmental organisations that are "foreign or international" could entail differential treatment between nationals and non-nationals that is not justifiable.

19. In this connection the following extract from a judgment of the European Court, which deals with a measure that authorised the detention of foreign nationals suspected of involvement of terrorism who could not be deported, is particularly pertinent:

> 186. The Government's third ground of challenge to the House of Lords' decision was directed principally at the approach taken towards the comparison between non-national and national suspected terrorists. The Court, however, considers that the House of Lords was correct in holding that the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.
>
> 187. Finally, the Government advanced two arguments which the applicants claimed had not been relied on before the national courts. Certainly, there does not appear to be any reference to them in the national courts' judgments or in the open material which has been put before the Court. In these circumstances, even assuming that the principle of subsidiarity does not

[14] Thus paragraph 1 of Recommendation CM/Rec(2007)14 provides that "For the purpose of this recommendation, NGOs are voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members".

[15] See, e.g., *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002, paras. 117-129.

> prevent the Court from examining new grounds, it would require persuasive evidence in support of them.
>
> 188. The first of the allegedly new arguments was that it was legitimate for the State, in confining the measures to non-nationals, to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists. However, the Government have not placed before the Court any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al-Qaeda. In this respect the Court notes that the system of control orders, put in place by the Prevention of Terrorism Act 2005, does not discriminate between national and non-national suspects.
>
> 189. The second allegedly new ground relied on by the Government was that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals. In this connection, again the Court has not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment was unjustified. Indeed, the Court notes that the national courts, including SIAC, which saw both the open and the closed material, were not convinced that the threat from non-nationals was more serious than that from nationals.
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> 190. In conclusion, therefore, the Court, like the House of Lords, and contrary to the Government's contention, finds that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals[16].

20. As the extract from the judgment just cited indicates, threats to national security – to which the provisions in the Federal Law are partly directed – are just as likely to emanate from national organisations as foreign or international ones. Indeed, insofar as the cases determined by the Court in respect of Russia are a guide, it would seem more probable that some threats to national security might actually come from nationals[17].

21. It is not known upon what basis foreign or international organisations were singled out for the measures found in the Federal Law but, insofar as they give rise to differential treatment that affects the rights and freedoms of non-nationals under the European Convention, there would need to be a rational and objective justification for this occurring. In the absence of that being adduced, there would then be a violation of the right or freedom concerned when taken with Article 14 of the European Convention.

22. The third concern relating to compatibility with European standards with regard to the deeming of activities as "undesirable" relates to the procedure whereby this is to be done.

23. The only indication in any of the provisions of the Federal Law as to the procedure whereby decisions are to be taken relates to coordination by the General Prosecutor of the Russian Federation with the federal executive power body exercising the functions of formulation and implementation of state policy and normative legal regulation in the sphere of international relations of the Russian Federation[18]. There is thus no provision requiring the decision-maker to seek the views of the organisation that will actually be affected by a decision to deem its activities as "undesirable", nor that it be given any opportunity to rebut or explain the supposed basis for reaching such a conclusion about its activities. Indeed, from the text of the Federal Law it would seem

[16] *A and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009.
[17] See, e.g., the background to events addressed in cases such as *Baysayeva v. Russia*, no. 74237/01, 5 April 2007 and *Finogenov and Others v. Russia*, no. 18299/03, 20 December 2011.
[18] Paragraphs 4 and 5 of Article 3^1.

that the organisation affected is only likely to learn about a decision deeming its activities "undesirable" when the publication obligation is fulfilled. Furthermore, although there is a provision to revoke decisions, there is no explicit provision for an appeal either to the General Prosecutor or to the courts. The latter may, however, be possible pursuant to Federal Law # 21-FZ, the Administrative Court Proceedings Code of the Russian Federation.

24. The failure to discuss a proposed deeming decision with the organisation concerned is certainly likely to enhance the risk of arbitrary decisions being reached. Yet, given the nature of the consequences flowing from a deeming decision, there does not seem to be any reason to suppose that there would be an urgent need for this to occur without first affording it such an opportunity. Moreover, this seems all the more appropriate in view of the fact that the organisation may well have been carrying out activities in Russia without any objection to them having been raised previously[19] or without any warning being given after they come to be seen as problematic[20]. Furthermore, in view of the broad formulation of the basis for deeming activities "undesirable", it seems unlikely that an appeal to the courts – if available - would in practice be sufficient to prevent arbitrary decision-making[21].

25. In any event, judicial control would only be effective to prevent a violation of rights and freedoms under the European Convention if the court concerned were to have a sufficient basis to assess the reasons for the decision that has been taken. As the European Court has observed:

> 121. … It considers that the requirement of "foreseeability" of the law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to deport an individual on national security grounds. By the nature of things, threats to national security may vary in character and may be unanticipated or difficult to define in advance.
>
> 122. There must, however, be safeguards to ensure that the discretion left to the executive is exercised in accordance with the law and without abuse.
>
> 123. Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information (see the judgments cited in paragraph 119 above).
>
> 124. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary.
>
> Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention[22].

26. There is certainly good reason to be concerned that the courts might not be in a position to scrutinise the basis on which decisions that activities are "undesirable", particularly where the threats relate to national security and defence capability.

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[19] See, e.g., *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, 5 October 2006, at paras. 95-96.
[20] See, e.g., *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009, at paras. 77-78.
[21] See, e.g., *Koretskyy and Others v. Russia*, no. 40269/02, 3 April 2008, at para. 48.
[22] *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002.

27. The deeming of the activities of foreign or international non-governmental organisations as "undesirable" – taken in isolation from the consequences that might flow from this designation – would not necessarily be incompatible with European standards. However, it is clear that the framework provided for the taking of such decisions makes it much more probable that those consequences would be considered incompatible with those standards.

Article 1

28. This provision introduces into the Criminal Code an entirely new Article 284[1], which creates an offence of

> directing of activities on the territory of the Russian Federation of a foreign or international nongovernmental organization, in respect of which the decision on the undesirability of its activities on the territory of the Russian Federation … has been made, or participation in such activity, by a person who has been subject to administrative responsibility for committing an analogous administrative offense two times within one year

29. An exemption from liability is, however, provided in the case of

> A person who has voluntarily terminated his or her participation in the activity of the foreign or international nongovernmental organization, in respect of which the decision on the undesirability of its activities on the territory of the Russian Federation has been made …unless his or her actions contain a different corpus delicti.

30. The penalties prescribed for the commission of this offence are substantial:

> a fine from three hundred thousand to five hundred thousand rubles or in the amount of the salary or other income of the offender for a period from two to three years, or by compulsory work for up to three hundred and sixty hours, or by forced labor for up to five years with or without restriction of liberty for up to two years, or by deprivation of liberty from two to six years with or without deprivation of the right to occupy certain positions or engage in certain activities for up to ten years**.**

31. The offence that has been created relates to the directing of the activities of an organisation in respect of which there has been a decision deeming its activities "undesirable". Such an offence is potentially problematic in four respects.

32. Firstly, as has already been noted, without appropriate substantiation for the deeming decision there is the potential for this to be incompatible with rights and freedoms under the European Convention[23]. In such circumstances, the imposition of criminal liability for the direction of those activities would itself entail a violation of the relevant right or freedom.

33. Secondly, even if there is some basis for substantiating the deeming decision, the nature of the penalties have the potential to make action that might otherwise be a legitimate measure to restrict a right or freedom under the European Convention to be viewed as disproportionate by the European Court and thus not necessary in a democratic society[24].

[23] See paras. 13-15 above.

[24] *See, e.g., Skalka v. Poland, no. 43425/98, 27 May 2003, at paras. 41-43 and Gün* and Others v. Turkey, no. 8029/07, 18 June 2013, at paras. 82-84.

34. Thirdly, given that there seems to be no provision for specifically notifying an organisation that its activities have been deemed "undesirable", the imposition of any liability for the offence should only be possible once the decision has been published as otherwise there would be a violation of the prohibition of retrospective criminal liability in Article 7 of the European Convention[25]. Such a restriction is not, however, evident from the text of Article 1, as liability arises in respect of directing or participating in activities simply where the relevant decision "has been made".

35. Fourthly, there are grounds to be concerned as to whether the terms "directing" and "participating" are sufficiently precise to satisfy the foreseeability requirement for an offence to avoid being contrary to the prohibition on retrospective criminal liability just noted[26]. Certainly "directing" could cover both high level management such as the decision to hold a meeting and much lower level activities such as supervising those who are present at the gathering concerned. At the same time, while "participating" is undoubtedly clear where the activities are exclusively organised, it is less so when the organisation concerned is only one of the bodies responsible for the activity concerned. Thus, a person might take part in the activity only because he or she has been approached to do so by an organisation whose activities have not been deemed "undesirable" and may not appreciate that an organisation whose activities have been so deemed is also involved it. Such a person might be able to evade liability by relying upon the exemption for voluntary termination but that would only be of assistance if he or she was even aware that the organisation subject to a deeming decision was involved in the activity concerned.

Article 2

36. This provision adds to the grounds in the Exit and Entry Procedure Law for refusing permission to a foreign citizen or a stateless person to enter the Russian Federation, namely, if he or she

> participates in the activities of a foreign or international nongovernmental organization, in respect of which the decision on the undesirability of its activities on the territory of the Russian Federation has been made

37. There is no right under the Convention or its Protocols for a foreign citizen or a stateless person to enter the territory of a Contracting State. However, a decision pursuant to this power to bar someone who was lawfully resident in Russia from returning there following a trip abroad would be treated by the European Court as an expulsion[27] and thus bring into play the right under Article 1 of Protocol No. 7

> 1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and

[25] See *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, para. 140.
[26] *Ibid.*
[27] See *Nolan v. Russia*, no. 2512/04, 12 February 2009, at para. 112.

> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

38. Such an expulsion would also lead to a potential infringement of the right to respect for private and family life under Article 8 of the European Convention which also requires these procedural safeguards to be observed[28].

39. Undoubtedly a decision taken under Article 2 would rely upon the exception in paragraph 2 of Article 1 in Protocol No. 7 with respect to the need for the rights set out in paragraph 1 to be *first* fulfilled. Nonetheless, those right would still have to be fulfilled *after* the decision and, although a wide margin of appreciation is to be accorded to the national authorities where national security is involved (and this is relevant to at least two of the grounds for finding activities to be "undesirable"), the European Court has made it clear that

> even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention (see Al-Nashif, cited above, §§ 123-24)[29].

40. This requires at the very least the provision to the person affected of an outline knowledge of the facts which had served as a basis for the assessment that there was a threat posed by the activities of the organisation concerned so that he or she could present his or her case adequately.

41. Moreover, the reviewing body would actually need to carry out an inquiry into the facts relied upon for the deeming decision – on which a refusal of entry would be based – that there was a specific threat posed by the activities of the organisation to which the person being refused entry was linked. In addition, that body could not put a burden of disproving the allegations about those activities on the person concerned. In the absence of this there would be no adequate protection against arbitrariness[30].

42. The present provision does not provide or exclude the possibility that there would be a failure to comply with the foregoing requirements but the concern already noted about the effectiveness of the exercise of judicial control over the deeming decision[31] is also relevant here.

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[28] See, e.g., *Nolan v. Russia*, no. 2512/04, 12 February 2009 and *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010

[29] *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010, para. 29.

[30] *Ibid*., at paras. 31-34 and 49-50.

[31] See para. 26 above.

43. A further consideration about the refusal of entry relates to the fact that it will be based solely upon having participated in the activities of the organisation concerned. As already noted, the notion of participation is not entirely clear but, more importantly in the present context, it does not involve any distinction between the levels of participation involved. As a result, this provision could be used against someone who was heavily engaged in the organisation's activities or just went to one of its meetings out of interest but did not actually support the aims being pursued. In the absence of due account being taken of the person's actual level of participation, there is certainly a risk that an expulsion decision would be regarded by the European Court as disproportionate and thus not necessary in a democratic society, entailing a violation of Article 8 of the European Convention[32].

Article 3

44. This provision amends Article 151 of the Criminal Procedure Code so as to make the provisions in it concerning the preliminary investigations being conducted by both investigators of the public prosecutor's office and the investigators of the body which revealed the crime to be applicable to the offence that has been introduced by the new Article 284[1] in the Criminal Code[33].

45. This provision is not, as such, problematic.

Article 4

46. This provision amends the Administrative Offences Code introducing a new Article 20.33 whereby it establishes a new administrative offence in respect of:

> The activity on the territory of the Russian Federation by a foreign and international nongovernmental organization in respect of which the decision to deem its activity undesirable on the territory of the Russian Federation has been made, or participation in such activity, or the violation of prohibitions provided for by the Federal Law # 272-FZ On Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation of December 28, 2012, if such actions do not contain a penal act

47. The penalties prescribed for this offence are:

> the imposition of an administrative fine on citizens in amount of five to fifteen thousand rubles; on officials, in amount of twenty thousand to fifty thousand rubles; and on legal entities, in amount of fifty thousand to one hundred thousand rubles

48. The offence which has been established by this provision is likely to be characterised as a "criminal" one for the purposes of the European Convention, notwithstanding that it has been established by the Administrative Offences Code rather than the

[32] See, e.g., *Keles v. Germany*, no. 32231/02, 27 October 2005, at para. 59.
[33] See paras. 28-35 above.

Criminal Code, since it is directed to all persons and the penalties are not compensatory but punitive and deterrent in nature[34].

49. The absence of appropriate substantiation for the deeming decision would undoubtedly render any interference with rights and freedoms under the European Convention resulting from a conviction for this offence a violation of the provision concerned. On the other hand, the fact that the penalties are much smaller than those under the Criminal Code may well inhibit at least some convictions for committing this offence from being regarded as disproportionate interferences with those rights and freedoms where the appropriate substantiation is established[35].

50. As with the offence under the Criminal Code, there is some uncertainty as to the conduct likely to give rise to a conviction, notably, as regards the understanding of what participation entails. However, the possibility that convictions will constitute violations of Article 7 of the European Convention is exacerbated by the relevant conduct appearing in many instances to be that covered by the Criminal Code but the further stipulation that there will be an administrative offence only "if such actions do not contain a penal act" which leaves it rather unclear as to what conduct is exactly covered by this offence.

51. In addition the provision creating the administrative offence, there are consequential amendments to other provisions in the Administrative Code as a result of the creation of this new offence but these are not, as such problematic.

Article 5

52. This provision makes various amendments to the Sanctions Law.

53. Firstly, it recasts the first phrase of part 3 of Article 3 so that it now provides that:

> In the event that the activity of a not-for-profit organization (structural unit) is suspended under parts 1 and 2 of this Article, its rights as founder of a mass media organ shall be suspended and it shall be prohibited from organizing and conducting any mass actions and public events and taking part in them, as well as using any bank accounts and deposits for purposes other than settling for business operations and work contracts, compensating for losses caused by its actions, and paying taxes, duties, and fines.

54. The suspension of the organisation's rights as a founder of a mass media organ and the ban on it organising, conducting and participating in any mass actions and public events will entail an interference with the rights to freedom of expression and to peaceful assembly under Articles 10 and 11 of the European Convention. This would not necessarily involve a violation of those rights if there was appropriate substantiation for the deeming decision but it would certainly do so if that substantiation did not exist. However, even if the necessary substantiation did exist, the ban with respect to mass actions and public events is undoubtedly too broad as it

[34] See *Ziliberberg v. Moldova*, no. 61821/00, 1 February 2005, at paras. 27-36 for such of view of offences under another country's Administrative Offences Code.
[35] See para. 33 above.

is not limited to the threats that made the organisation's activities "undesirable" but could cover entirely unrelated and non-threatening ones.

55. As the European Court has indicated

> while past findings of national courts which have screened an association are undoubtedly relevant in the consideration of the dangers that its gatherings may pose, an automatic reliance on the very fact that an organisation has been considered anti-constitutional – and refused registration – cannot suffice to justify under Article 11 § 2 of the Convention a practice of systematic bans on the holding of peaceful assemblies[36].

56. Thus, rather than relying on the "illegal" status of an organisation, there is a need to look at the specific problems that would be posed by the organisation's involvement in the particular mass action or public event, namely, whether there was a real foreseeable risk of violent action or of incitement to violence or any other form of rejection of democratic principles.

57. The freezing of bank accounts and deposits of the organisations concerned regardless of whether their use is connected with the reason for the suspension of the activities of the organisation concerned will entail an interference with the rights to property and to freedom of association under Article 1 of Protocol No. 1 and Article 11 of the European Convention. Again, this would not necessarily involve a violation of those rights if there was appropriate substantiation for the deeming decision but it would certainly do so if that substantiation did not exist.

58. However, even if there is substantiation, such a measure should not last longer than is warranted by the deeming decision[37]. Moreover, the actual application of the exception made for settling for business operations and work contracts, compensating for losses caused by its actions, and paying taxes, duties, and fines[38] could give rise to violations of Article 1 of Protocol No. 1 if there was disproportionate hardship caused to third parties[39].

59. Secondly, in the new Article 3^1 already noted, there is also the stipulation that:

> 3. The recognition of the activities of a foreign or international nongovernmental organization as undesirable on the territory of the Russian Federation entails:
>
> 1) prohibition of the establishment (opening) on the territory of the Russian Federation of structural units of a foreign or international nongovernmental organization and termination, in the order determined by the legislation of the Russian Federation, of the activities of structural units previously created (opened) on the territory of the Russian Federation;
>
> 2) the occurrence of consequences provided for in Article 3^2 of this Federal Law;
>
> 3) prohibition to distribute information materials issued by a foreign or international nongovernmental organization, and/or disseminated thereby, including through the media and/or with the use of the Internet information and telecommunication network, as well as to produce or store them for purposes of distribution;
>
> 4) prohibition for a foreign or international nongovernmental organization whose activities are recognized as undesirable on the territory of the Russian Federation to implement programs (projects) on the territory of the Russian Federation.

[36] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, no. 29221/95, 2 October 2001, at para. 92.
[37] *Raimondo v. Italy*, no. 12954/87, 22 February 1994, at paras. 34-36.
[38] See para. 29.
[39] See *Yildirim v. Italy* (dec.), no. 38602/02, 10 April 2003.

60. The prohibitions for organisations whose activities have been deemed "undesirable" on establishing structural units, on terminating the activities of such units previously created and on implementing programmes on the territory of the Russian Federation all have the potential to infringe the right to freedom of association under Article 11 of both the organisation concerned and of persons within Russia who might wish to be involved with its activities[40], notwithstanding that the ability of organisations established outside a country to operate within it can certainly be subjected to restrictions. Whether or not this results in a violation of Article 11 of the European Convention will turn on whether or not there was appropriate substantiation for the deeming decision. It would certainly do so if that substantiation did not exist but it is unlikely to be seen as problematic by the European Court if there were relevant and sufficient reasons for the deeming decision.

61. The blanket ban on the distribution, dissemination, production (which would presumably cover reproduction) and storage of materials issued by organisations whose activities have been deemed to be "undesirable" will undoubtedly be regarded by the European Court as an unjustified restriction on the freedom of expression of both the organisations and those wishing to read their publications. This is because such a prohibition is being imposed regardless of the content of the materials affected.

62. As the European Court has stated

> 56. …Article 10 does not prohibit prior restraints on publication as such. This is borne out not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court in The Sunday Times (no. 1) (cited above) and in markt intern Verlag GmbH and Klaus Beermann v. Germany (judgment of 20 November 1989, Series A no. 165). On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. This danger also applies to publications other than periodicals that deal with a topical issue.
>
> 57. The Court considers that these principles also apply to the publication of books in general or written texts other than the periodical press[41].

63. In applying that approach to an absolute ban on the importation of publications, the European Court ruled that:

> 62. Such legislation appears to be in direct conflict with the actual wording of paragraph 1 of Article 10 of the Convention, which provides that the rights set forth in that Article are secured "regardless of frontiers". The Government argued that the existence of legislation specifically governing publications of foreign origin was justified, among other things, by the fact that it was impossible to institute proceedings against authors or publishers guilty of prohibited conduct when operating from abroad. The Court does not find that a persuasive argument. Although the exceptional circumstances in 1939, on the eve of the Second World War, might have justified tight control over foreign publications, the argument that a system that discriminated against publications of that sort should continue to remain in force would appear to be untenable. The Court also notes that the head office of the applicant association, which is the publisher of the banned work, is in France.
>
> 63. In the case before it, the Court, like the Conseil d'Etat, considers that the content of the book did not justify, in particular as regards the issues of public safety and public order, so

[40] See, e.g., *Church of Scientology of St Petersburg and Others v. Russia*, no. 47191/06, 2 October 2014 and also paragraph 45 of Recommendation CM/Rec(2007)14.
[41] See *Ekin Association v. France*, no. 39288/98, 17 July 2001

> serious an interference with the applicant association's freedom of expression as that constituted by the ban imposed by the Minister of the Interior. Ultimately, the Court considers that the ban did not meet a pressing social need and was not proportionate to the legitimate aim pursued.
>
> 64. In the light of these considerations and its analysis of the impugned legislation, the Court concludes that the interference arising from section 14 of the Law of 1881, as amended, cannot be regarded as "necessary in a democratic society". There has, therefore, been a violation of Article 10 of the Convention[42].

64. Even though a ban on the dissemination, etc. of material that was clearly linked to the activities deemed "undesirable" would probably be considered justifiable if there was appropriate substantiation for such a deeming decision, the ban imposed by the new Article 3^1 is too broad to be considered an acceptable limitation on the right to freedom of expression.

65. Thirdly, Article 5 of the Federal Law introduces a new Article 3^2 which provides that:

> 1. All credit and non-credit financial organizations shall refuse to carry out operations with funds and other property one of the parties to which is a foreign or international nongovernmental organization included on List of foreign and international nongovernmental organizations whose activities in the territory of the Russian Federation are recognized undesirable.
>
> 2. Credit and non-credit financial organizations shall provide information about the refusal to carry out operations with funds and other property for reasons provided for in part 1 of this Article to the federal executive power body taking measures to counteract the legalization (laundering) of revenue obtained by criminal means and the funding of terrorism, in accordance with the procedure, deadlines and extent established by the Government of the Russian Federation.
>
> 3. The federal executive power body taking measures to counteract the legalization (laundering) of revenue obtained by criminal means and the funding of terrorism shall submit the information received under part 2 of this Article to the Office of the General Prosecutor of the Russian Federation as well as the federal executive power body exercising the functions of formulation and implementation of state policy and normative legal regulation in the sphere of registration of not-for-profit organizations.

66. These provisions entail imposing an absolute bar on financial organisations carrying out operations with funds and property where one of the parties is an organisation whose activities have been deemed to be "undesirable", as well as creating an obligation for the financial organisations to report instances in which they have refused to carry out such operations.

67. The bar on carrying out the operations with funds and property is undoubtedly an infringement of the right to property under Article 1 of Protocol No. 1. It would not give rise to a violation of that provision in any case where there is appropriate substantiation for the deeming decision but would do so if this was lacking.

68. However, this provision seems to be potentially in conflict with the exemption in the rephrased part 3 of Article 3 for organisations whose activities have been deemed to be "undesirable" to use bank accounts and deposits for purposes of settling for business operations and work contracts, compensating for losses caused by its actions, and paying taxes, duties, and fines[43]. If there is a ban on financial organisations

[42] *Ibid.*
[43] See paras. 29 and 58.

carrying out such operations then this exemption would have no operative effect and this would not only be incompatible with the rights of the organisations affected but also of the third parties who had a legitimate expectation of receiving the payments that were due.

69. The consequential provisions on reporting refusals to carry out operations are not, as such, problematic.

Conclusion

70. In many respects the issue of the compatibility with European standards of the provisions in the Federal Law turns on whether there will be appropriate substantiation for any decision deeming the activities of an organisation to be "undesirable". This is rather a matter of application of the provisions concerned than their particular content.

71. Nonetheless, the grounds for deeming activities to be "undesirable" are broad and are prone to arbitrary application in a manner that cannot be remedied through judicial control. Any such arbitrary application would necessarily be incompatible with rights and freedoms under the European Convention. There is, in any event, an element of arbitrariness in the provisions in the Law being directed just to foreign and international organisations, particularly as there are undoubtedly many other measures that could be deployed to tackle activities undertaken by any and every organisation that pose legitimate threats to the country's constitution, defence capability and national security.

72. Moreover, the formulation of the provisions suffers from uncertainty regarding the scope of the term "non-governmental" and the lack of foreseeability as to whether certain conduct will or will not entail criminal responsibility.

73. Furthermore, the absolute ban on dissemination, distribution, production and storage of information material, even though it emanates from the organisations whose activities are deemed to be "undesirable", is far too broad in any case to be compatible with the right to freedom of expression under Article 10 of the European Convention.

74. Finally, particular care will be needed in the application of the power to refuse someone entry to the Russian Federation because of his or her participation in the activities of an organisation whose activities have been deemed "undesirable", not just because of the need to substantiate any such a decision but also because such a refusal could be disproportionate to the level of participation concerned.