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BRINGING THE LAW AND PRACTICE RELATING TO NGOS IN THE REPUBLIC OF AZERBAIJAN INTO COMPLIANCE WITH EUROPEAN STANDARDS

This report has been prepared in co-operation with the Council of Europe Expert Council on NGO Law of the Conference of INGOs, under the European Union and Council of Europe joint project “Civil Society Dialogue in Azerbaijan”. Launched in March 2016, the project aims to promote civil society dialogue in Azerbaijan through the improvement of the national NGO legislation and its practice in line with the European standards. Additionally, the project also aims to raise the capacities of relevant national authorities and local civil society organisations in order to bolster prospects for consultation and co-operation.

The purpose of this report is to propose recommendations, which will contribute to the efforts of the Azerbaijani authorities in bringing the law and practice of the Republic of Azerbaijan into compliance with European Standards.

The report has been produced by external consultants selected by the Council of Europe. The information and views set out herein are those of the authors and can in no way be taken to reflect the official opinion of the European Union or the Council of Europe. Neither the European Union nor the Council of Europe guarantee the accuracy of the data included in this report and they may not be held responsible for the use which may be made of the information contained therein.

Table of Contents

A. Introduction.....	4
B. Problematic aspects of NGO law and practice	7
C. A way forward.....	17
D. Implementation	34

A. Introduction

1. This report is concerned with how the legislation relating to non-governmental organisations (“NGOs”) in the Republic of Azerbaijan might be amended so as to bring it , as well as its implementation, into conformity with European standards. It has been prepared at the request of the Council of Europe.
2. The legislation of particular concern for the establishment and operation of NGOs in the Republic of Azerbaijan is comprised of both primary and secondary measures.
3. The former measures are the Civil Code, the Law of the Republic of Azerbaijan “On Non-Governmental Organisations (Public Associations and Funds)” (“the NGO Law”), the Law of the Republic of Azerbaijan "On State Registration and State Register of Legal Entities" (“the Registration Law”), the Law of the Republic of Azerbaijan "On Grants" (“the Law on Grants”), the Code of Administrative Offences and the Tax Code.
4. The latter ones are the Decree of the President of the Republic of Azerbaijan On Implementation of the Law of the Republic of Azerbaijan "On making changes and amendments to some legislative acts of the Republic of Azerbaijan" (“the first 2009 Decree”)¹, the Decree of the President of the Republic of Azerbaijan "On making changes and amendments to some decrees of the President of the Republic of Azerbaijan in connection with implementation of the Law of the Republic of Azerbaijan #842-IIIQD" (“the second 2009 Decree”)², the Decree of the President of the Republic of Azerbaijan “concerning implementation of “single-window” procedure with regard to provision of grants by foreign donors on the territory of the Republic of Azerbaijan” (“the 2016 Decree”)³, the Collegium Decision of the Ministry of Justice on approval of “the Rules of Studying the Activities of Non-governmental Organizations, Branches or Representative Offices of Foreign Non-governmental Organizations”⁴ and various Decisions of the Cabinet of Ministers⁵.
5. Various aspects of the primary legislation cited above have been the subject of subsequent amendments, whether by some of the measures also referred to or by other

¹ Adopted on 27 August 2009.

² Adopted on 21 December 2009.

³ No 1083, adopted on 21 October 2016.

⁴ The Rules of Studying the Activities of Non-governmental Organizations, Branches or Representative Offices of Foreign Non-governmental Organizations; issued on 28 December 2015.

⁵ Decision No. 201 of 25 December 2009 (“the financial reporting Rule”), Decision No. 43 of 16 March 2011 (On approval of rules for state registration and rules related to the preparation for negotiations with foreign non-governmental organisations and representations in Azerbaijan Republic), Decision No. 216 of 5 June 2015 (“Rules on registration of grant agreements (decisions)”), Decision No. 336 of 21 October 2015 (“the rules on submission of information about amount of donation received by NGOs as well as by branches or representations of NGOs of foreign states and about the donor”), Decision No. 337 of 21 October 2015 (“the rules on registration of service contracts on provision of services or implementation of work by NGOs, as well as by branches or representations of foreign NGOs from foreign sources”) and Decision No. 339 of 22 October 2015 (“Rules on obtaining the right to provide grants in the territory of the Republic of Azerbaijan by foreign donors”).

ones. These amendments were made in 2009⁶, 2013⁷, 2014⁸, 2015⁹ and 2016¹⁰. In addition, two of the 2015 Cabinet Decisions – those on the rules on registration of grants and the rules on obtaining the right to provide grants in the territory of the Republic of Azerbaijan by foreign donors – were both substantially amended respectively on 11 January 2017¹¹ and on 24 January 2017¹².

6. The relevant European standards are to be found in the European Convention on Human Rights (“the European Convention”), the case law of the European Court of Human Rights (“the European Court”), the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”)¹³, the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations¹⁴, 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”)¹⁵, Recommendations and Resolutions of the Parliamentary Assembly of the Council of Europe¹⁶, Fundamental Principles on the Status of Non-governmental Organisations in Europe¹⁷, the Joint Guidelines of the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on Freedom of Association¹⁸ and the Opinions adopted by the Venice Commission concerning Freedom of Association¹⁹.

⁶ Effected by the Law of the Republic of Azerbaijan 'On making changes and amendments to some legislative acts of the Republic of Azerbaijan', which entered into force on 1 September 2009

⁷ Principally by the Law of the Republic of Azerbaijan “On amendments to the Law of the Republic of Azerbaijan "On Non-Governmental organizations (public associations and foundations)” and the Law of the Republic of Azerbaijan "On Non-Governmental organizations (public associations and foundations) which were respectively signed by the President of the Republic of Azerbaijan on 15 February 2013 and 17 December 2013. However, relevant amendments were also made to the Code of Administrative Offences on 14 May 2013 and to the Registration Law on 17 December 2013.

⁸ Namely, the Law of the Republic of Azerbaijan “On amendments to the Law of the Republic of Azerbaijan "On Non-Governmental organizations (public associations and foundations)” and certain amendments introduced into the Law on Grants, which were both signed by the President of the Republic of Azerbaijan on 14 November 2014.

⁹ The Registration Law was amended by the Law on Amendments to the “Registration Law” № 1352-IVQD on 6 October 2015. A new Code on Administrative Offences was also adopted in 2015 but the provisions concerning NGOs were unchanged.

¹⁰ Article 465 of the Code on Administrative Offences was amended by Law No. 173-VQD on 4 March 2016; see fn. 73 below.

¹¹ Cabinet of Ministers Decision No. 4 amending Cabinet of Ministers Decision No. 216 of 5 June 2015.

¹² Cabinet Decision No. 12 amending Cabinet Decision No. 339 of 22 October 2015.

¹³ Azerbaijan acceded to this on 23 March 2000.

¹⁴ Azerbaijan has not ratified this Convention. However, pursuant to Recommendation CM/Rec(2007)14, any requirement for foreign NGOs to obtain approval to operate should be consistent with the general requirements for the registration of an NGO.

¹⁵ Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers’ Deputies. The Committee of Ministers reaffirmed that this Recommendation “sets out the minimum standards for the protection of NGOs” in its reply to “How can inappropriate restrictions on NGO activities in Europe be prevented?” – Parliamentary Assembly Recommendation 2086 (2016), which it adopted on 16 November 2016 at the 1271st meeting of the Ministers’ Deputies.

¹⁶ See, e.g., Resolution 2096 (2016), *How can inappropriate restrictions on NGO activities in Europe be prevented?*, 28 January 2016 and Recommendation 2086 (2016), *How can inappropriate restrictions on NGO activities in Europe be prevented?*, 28 January 2016.

¹⁷ Adopted on 13 November 2002.

¹⁸ CDL-AD(2014)046, adopted by the Commission at its 101st Plenary Session (Venice, 12-13 December 2014).

¹⁹ For the most recent compilation, see Compilation of Venice Commission Opinions concerning Freedom of Association (revised July 2014), CDL-PI(2014)004.

7. The most essential aspects of all these standards recognise that NGOs are voluntary self-governing bodies or organisations – i.e., not subject to direction by public authorities - established by natural or legal persons to pursue the essentially non-profit-making objectives of their founders or members. Their objectives and the means employed to pursue them should be consistent with the requirements of a democratic society but the presumption should be that this is the case. In particular, they 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. It is for those establishing or belonging to NGOs to choose their composition and sphere of operation and whether they should be informal bodies or ones with legal personality. Furthermore, the legal and fiscal framework applicable to them should encourage and facilitate both their establishment and continued operation. Moreover, acts or omissions by public authorities affecting them should be subject to administrative review and be open to effective challenge in an independent and impartial court with full jurisdiction.
8. It should be noted that the formal terms in which the right to freedom of association is guaranteed by Article 58 of the Constitution of the Republic of Azerbaijan, particularly when read with the prohibition of discrimination in Article 25, is entirely compatible with the right to freedom of association under Article 11 of the European Convention since it is a right guaranteed to all individuals, citizens and non-citizens equally²⁰.
9. The present report first reviews the various aspects of the legislation relating to NGOs in the Republic of Azerbaijan - together with its application in practice – that have been found not to be in compliance with European standards. Then, drawing upon the rulings of the European Court and the good practice seen in various Council of Europe member states, it suggests ways in which particular changes to the legislation could lead to such compliance being achieved.
10. The discussion that follows is concerned only with the legislation in force at the time of writing²¹. The various changes made to rules on registering grant agreements and the provision of grants by foreign donors in January 2017 have slightly mitigated certain problematic aspects of the regulatory framework²² but many others remain.

²⁰ The stipulation in Article 69 of the Constitution that foreign citizens and stateless persons may have their freedom of association limited, if provided so in national laws or international agreements binding upon Azerbaijan and that the rights and liberties of foreign citizens living or temporarily staying in the Republic of Azerbaijan may only be restricted according to international legal standards and laws of the Azerbaijan Republic would not, on their face, run counter to the qualification by Article 16 of the European Convention on the right under Article 11.

²¹ 23 February 2017.

²² The more significant changes are noted at relevant points in the footnotes.

B. Problematic aspects of NGO law and practice

11. The contexts in which aspects of law and practice in the Republic of Azerbaijan relating to NGOs have been viewed as failing to comply with European standards are quite wide-ranging. They comprise, in particular, judgments of the European Court²³, resolutions of the Parliamentary Assembly of the Council of Europe²⁴, observations made by the Council of Europe's Commissioner for Human Rights²⁵, opinions of the Venice Commission²⁶, a statement by the European Union²⁷ and country studies by the Expert Council on NGO Law of the Council of Europe's Conference on International Non-governmental Organisations²⁸.
12. The aspects of the law and practice relating to NGOs whose compliance with European standards has been considered problematic by these different bodies are broadly consistent, although those addressed by them have not always been the same ones.
13. The issues of concern – with the relevant standards as they have been elaborated in particular in Recommendation CM/Rec(2007)14 being noted in the footnotes - relate to:
 - *the permitted activities and objects*²⁹, namely,

²³ As regards unjustified delays in registration (*Ramazanova and Others v. Azerbaijan*, no. 44363/02, 1 January 2007, *Nasibovo v. Azerbaijan*, no. 4307/04, 18 October 2007, *Ismayilov v. Azerbaijan*, no. 4439/04, 17 January 2008 and *Aliyev and Others v. Azerbaijan*, no. 28736/05, 18 December 2008. The following similar applications were struck out after a request was made to withdraw them following the registration of the NGOs concerned: *Asadov and Others v. Azerbaijan*, no. 138/03, 26 October 2006, *Mustafayev v. Azerbaijan*, no. 14712/05, 9 November 2006, *Suleymanova v. Azerbaijan*, no. 26241/05, 18 January 2007 and *Aliadze v Azerbaijan* (dec.), 2733/05, 20 September 2007) and arbitrary dissolution (*Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009 and *Islam-Ittihad Association and Others v. Azerbaijan*, no. 5548/05, 13 November 2014). In addition in *Rasul Jafarov v. Azerbaijan*, no. 69981/14, 17 March 2016 observed that “the legislative environment regarding the operation of non-governmental, non-commercial organisations, including the regulation of matters relating to their State registration, funding and reporting requirements, has grown increasingly harsh and restrictive” (at para. 120).

²⁴ Resolution 1917 (2013), *The honouring of obligations and commitments by Azerbaijan*, 23 January 2013 and Resolution 2062 (2015), *The functioning of democratic institutions in Azerbaijan*, 23 June 2015.

²⁵ *Observations on the human rights situation in Azerbaijan Freedom of expression, freedom of association, freedom of peaceful assembly* (CommDH(2011)33, 29 September 2011); *Azerbaijan: greater freedom of expression and assembly urgently required* (27 May 2013); *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his visit to Azerbaijan from 22 to 24 May 2013* (CommDH(2013) 14, 6 August 2013); and *Freedom of expression, assembly and association deteriorating in Azerbaijan* (23 April 2014).

²⁶ *Opinion on the Compatibility with Human Rights Standards of the Legislation on Non-Governmental Organisations of the Republic of Azerbaijan* (CDL-AD(2011)035), adopted at its plenary session on 14-15 October 2011 and *Opinion on the Law on non-governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan* (CDL-AD(2014)043), adopted at its plenary session on 12-13 December 2014.

²⁷ European Union, *Statement by the spokespersons of EU High Representative Catherine Ashton and Commissioner Štefan Füle on the enactment of amendments to the legislation on non-governmental organisations in Azerbaijan*, 140212/01, 12 February 2014

²⁸ *Opinion on amendments in 2009 to the NGO law in Azerbaijan and their application* (OING Conf/Exp (2011) 2, September 2011) and *Opinion on the NGO law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application* (OING Conf/Exp (2014) 1, September 2014).

²⁹ Recommendation CM/Rec(2007)14 provides: “11. NGOs 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. 12. NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the

- the preclusion of any aims and activities that are considered to be in violation of territorial integrity however peaceful³⁰,
- the vagueness of the preclusion of NGOs established under the NGO Law from carrying out the functions of political parties, trade unions, religious associations and local self-government and its consequent effective restriction on their pursuit of objectives that might have a political or religious character or dimension to just those entities that have been founded specifically as political parties or religious associations³¹,
- the prohibition on provisions in statutes that allow the NGOs concerned “to usurp the powers of state and local self-governments, and to envisage state control and inspection functions”³² since this not only lacks precision but fails to recognise the legitimacy of undertaking activities and pursuing objectives that might be entwined with those of public authorities³³,
- the bar on supporting a particular candidate or party in an election or a referendum even though the NGO concerned is transparent in declaring its motivation³⁴,
- the need to choose the sphere of activities (national, regional or local) at the time of establishment³⁵,
- the failure of the bar on using the names of state agencies to make any allowance for their use by NGOs which have a satirical or critical objective without being misleading³⁶,
- the breadth of the prohibition on using the names of “distinguished people” of Azerbaijan without the consent of a “close relative”³⁷, and
- the bar on NGOs and the branches and representations of foreign NGOs carrying out activities pursuant to changes in their statutes prior to their registration being updated³⁸;

position taken is in accord with government policy or requires a change in the law. 13. NGOs 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. Any such support should also be subject to legislation on the funding of elections and political parties. 35. Any evaluation of the acceptability of the objectives of NGOs seeking legal personality should be well informed and respectful of the notion of political pluralism. It should not be driven by prejudices”. One problematic issue relating to the permitted activities of NGOs – namely, the bar in Article 22.4 of the NGO Law on their involvement in any “professional religious activity without any definition of what such activity entails (led to the finding of a violation of Article 11 of the European Convention in *Islam-Ittihad Association and Others v. Azerbaijan*, no. 5548/05, 13 November 2014) – can be regarded as being resolved by the adoption of such a definition through an amendment to Article 4.1 of the law “on freedom of religious conscience” by law No. 162-IVQD on 10 June 2011. The effect of the amendment is to define professional religious activity as “activity focusing on religious instruction and religious education, satisfying spiritual needs of religious believers, proselytism, performance of religious rites, conceptions of sermons, administrative and organizational management of religious organizations”, which if properly applied should not preclude NGO activities that are in other respects concerned with religious issues.

³⁰ Article 2.3 of the NGO Law.

³¹ Article 1.4 of the NGO Law.

³² Article 13.3 of the NGO Law.

³³ This is recognised, e.g., Articles 2-4 and 6-9 of the Aarhus Convention, the Preamble to Recommendation CM/Rec(2007)14 and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (UN G.A. Res. 53/144).

³⁴ This is the effect of the stipulation in Article 2.4 of the NGO Law that an NGO “may not provide financial and other material assistance to political parties ...”.

³⁵ Article 6 of the NGO Law.

³⁶ Article 3.1 of the NGO Law.

³⁷ *Ibid.*

- *the inadequate support for informal entities*³⁹, namely,
 - the strict 30 day deadline for submitting the constituent documents after the passing of a resolution on establishing the NGO concerned without any consequent benefit for it in terms of the lawfulness of its objectives not then being open to question⁴⁰;
- *a restriction on being a founder*⁴¹, namely,
 - the denial of this capacity to aliens and stateless persons who do not have the right to permanent residence in the Republic of Azerbaijan⁴²;
- *a restriction on establishment*⁴³, namely,
 - the requirement for foundations to have an authorised capital of at least 10,000 AZN⁴⁴;
- *the process of registration*⁴⁵, namely,
 - the non-observance of the prohibitions on asking applicants to submit additional documents⁴⁶ and on taking account of the expediency or the capability of the applicant NGO to pursue the aims set in its statute⁴⁷,

³⁸ Article 9.3 of the Registration Law. Although the view that there is a need for any change to be registered may, of course, be a matter of interpretation but a subsequent finding that one was required will entail liability under the Code of Administrative Offences; Article 9.4 of the Registration Law.

³⁹ Recommendation CM/Rec(2007)14 provides: “3. NGOs can be either informal bodies or organisations or ones which have legal personality”.

⁴⁰ Article 15 of the NGO Law.

⁴¹ Recommendation CM/Rec(2007)14 provides: “16. Any person, be it legal or natural, national or non-national, or group of such persons, should be free to establish an NGO and, in the case of non-membership-based NGOs, should be able to do so by way of gift or bequest”.

⁴² Article 9.1-1 of the NGO Law.

⁴³ Recommendation CM/Rec(2007)14 provides: “8. The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation”.

⁴⁴ Article 12.1(1) of the NGO Law. As of 23 February 2017 1 AZN = 0.544 EUR under the official exchange rate but in practice the rate is less favourable when purchasing Euros.

⁴⁵ Recommendation CM/Rec(2007)14 provides: “28. The rules governing the acquisition of legal personality should, where this is not an automatic consequence of the establishment of an NGO, be objectively framed and should not be subject to the exercise of a free discretion by the relevant authority. 29. The rules for acquiring legal personality should be widely published and the process involved should be easy to understand and satisfy. 31. Applications in respect of membership-based NGOs should only entail the filing of their statutes, their addresses and the names of their founders, directors, officers and legal representatives. In the case of non-membership-based NGOs there can also be a requirement of proof that the financial means to accomplish their objectives are available. 34. Legal personality should only be refused where there has been a failure to submit all the clearly prescribed documents required, a name has been used that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person in the state concerned or there is an objective in the statutes which is clearly inconsistent with the requirements of a democratic society. 35. Any evaluation of the acceptability of the objectives of NGOs seeking legal personality should be well informed and respectful of the notion of political pluralism. It should not be driven by prejudices. 36. The body responsible for granting legal personality should act independently and impartially in its decision making. Such a body should have sufficient, appropriately qualified staff for the performance of its functions. 37. A reasonable time limit should be prescribed for taking a decision to grant or refuse legal personality. 38. All decisions should be communicated to the applicant and any refusal should include written reasons and be subject to appeal to an independent and impartial court”.

⁴⁶ Article 11(4) of the Registration Law.

⁴⁷ Article 11(2) of the Registration Law.

- the presumption that a purpose is unlawful, the use of minor, careless mistakes or inaccuracies as a basis for refusing an application or for concluding that it includes “false information”⁴⁸,
 - the repeated requests for corrections to applications for registration circumvent the requirements that a decision on registration should generally be taken within 40 working days and that the checking of compliance with the requirements should be done within 30 days⁴⁹ and the general delay in decision-making,
 - the failure to issue a certificate of registration within 10 days in the absence of a formal decision on registration⁵⁰,
 - the failure of letters of refusal to indicate the legal basis for the refusal or to make a correct reference to the applicable legal provisions⁵¹ and
 - the lack of effective control by the courts;
- *obstacles to the functioning of NGOs*⁵², namely,
 - the requirement that there be a contract of volunteering between them and their volunteers regardless of the nature of the activities being undertaken⁵³ and
 - the requirement that the deputy heads of NGOs established by foreigners or stateless persons, as well as by foreign legal entities, be Azerbaijani citizens⁵⁴;
 - *an uncertainty as to the basis on which funding can be received*⁵⁵, namely,
 - the prohibition on any donations being either directly or indirectly accepted in return for the provision, proposal or promise of any material or other gifts, privilege or discount to the person providing it or any other person⁵⁶ since this leaves it unclear as to whether donations provided in support for a specific activity or project are thereby prohibited;
 - *the restrictions on the sources of finance*⁵⁷, namely,

⁴⁸ The Code of Administrative Offences has since 2012 subjected the provision of “false information” – an undefined term – in the registration process to a penalty of 4000 AZN; now in Article 403 of the New Code of Administrative Offences.

⁴⁹ As required by Article 8.2 of the Registration Law.

⁵⁰ As required by Article 8.5 of the Registration Law.

⁵¹ Article 8.4 of the Registration Law provides that the decision shall be “in a written form, pointing out reasons for rejection, as well as provisions and paragraphs of legislation that have been violated in preparation of foundation documents”.

⁵² Recommendation CM/Rec(2007)14 provides: “8. The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation.49. NGOs should not be subject to any specific limitation on non-nationals being on their management or staff”.

⁵³ Article 11 of the NGO Law. While a contract can be appropriate for NGOs that provide services, it is not necessarily so where other activities are involved.

⁵⁴ Article 7.5 of the NGO Law.

⁵⁵ Recommendation CM/Rec(2007)14 provides: “8. The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation”.

⁵⁶ Article 24-1.2 of the NGO Law.

⁵⁷ Recommendation CM/Rec(2007)14 provides: “50. 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”.

- the requirement that donations provided to NGOs and to branches and representations of foreign NGOs can only be by citizens of the Republic of Azerbaijan or legal persons registered there⁵⁸, as well as by branches or representations of foreign legal persons registered in Azerbaijan and not being aimed at profit⁵⁹, with such branches and representations only being able to act as donor after obtaining the right to give a grant for which a positive opinion by the Ministry of Finance as to its financial-economic expediency is required⁶⁰ but for which no criteria as to its determination - other than that Government is already addressing the needs in the area covered by the grant⁶¹ - are specified, thereby significantly restricting, if not eliminating, the possibility of receiving donations from foreign sources;
- *other controls over finances*⁶², namely,
 - the need for grant funds (including sub-grants, other forms of assistance and amendments to grants) to be registered with the Ministry of Justice before any transactions can be undertaken with them (including their withdrawal from a bank)⁶³ and in the case of those from foreign donors the submission of the request for this must be made within 30 days of concluding the grant agreement and a decision on registration will take into account whether grant’s intended field is also covered by other grants given by State institutions⁶⁴,
 - the need for any contract by which an NGO undertakes to provide services or fulfil works for foreign funding to be registered before any

⁵⁸ In addition to NGOs, the term “legal person” covers international organisations and foreign governments.

⁵⁹ Article 24-1 of the NGO Law.

⁶⁰ Article 2.5 of the Law on Grants and Cabinet of Ministers Decision No. 339. This requirement applies for “each individual grant agreement”; Article 2.1 of Decision No. 339. The ban on signing grant contracts with a foreign donor before the right to provide grants had been obtained was, however, removed by the amendments to Decision No. 339 in January 2017. These amendments also merged the donor registration and grant registration processes and reduced both the deadline for the Ministry of Finance to give its opinion from 15 to 7 days and the scope for extending the deadline also from 15 to 7 days.

⁶¹ Article 3.3 of Cabinet of Ministers Decision No. 339.

⁶² Recommendation CM/Rec(2007)14 provides: “8. The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation”.

⁶³ Articles 4.4, 4.4-1, 4.4-2 and 4.5 of the Law on Grants. This requirement also applies to individuals and thus will affect NGOs that are only legalised and thus do not have bank accounts.

⁶⁴ Cabinet of Ministers Decision No. 216 of 5 June 2015. The process of grant registration has been improved both by the extension of the deadline for making applications from 15 to 30 days, the dropping of requirements to submit proof of submission of the annual financial report to the Ministry of Finance, the opinion of the Ministry of Finance on financial-economic expediency, copies of the donor’s registration documents, a power of attorney and notarised copies of any translations (all effected by the amendments to Cabinet of Ministers Decision No. 216 in January 2017) and by the merger of the donor registration process with it, the dropping of the need to obtain the Ministry of Finance’s opinion as to its financial-economic expediency prior to making an application, the introduction of a one-day deadline for checking if the application package is complete and the dropping of requirements for a donor’s registration documents to be submitted and for translated documents to be notarised (all effected by the amendments to Cabinet of Ministers Decision No. 339 in January 2017). The amendments to Cabinet of Ministers Decision No. 216 in January 2017 also introduced the possibility of registering grant agreements as service agreements, where their subject “is to provide services and works”, for which the process is somewhat less onerous (see the following bullet point).

financial transactions involving it can be undertaken⁶⁵, with the failure to submit a copy of each contract (which need to be notarised⁶⁶) to the Ministry of Justice resulting in liability to a fine ranging from 1,000 to 7,000 AZN⁶⁷,

- the prohibition on making or accepting any donation greater than 200 AZN without having presented a copy of a signed agreement on the donation (and thus the identity of the donor) to the Ministry of Justice for registration (which is discretionary) with non-compliance entailing fines that range from 250 to 10,000 AZN⁶⁸,
- the requirement to submit information about the amount of any donations accepted by an NGO and the identity of the donors to the Ministry of Justice within 15 days of receipt⁶⁹ and also to the Ministry of Finance⁷⁰, with failure to comply with this obligation resulting in a fines ranging from 1,500 to 8,000⁷¹,
- the requirement that donated money must normally be 'by a transfer to the bank account' of the NGO concerned⁷² (which precludes anonymity and adversely affects NGOs without bank accounts) unless their primary aim is charity⁷³ but then their receipt of cash payments in excess of the 200 AZN limit will attract fines of ranging from 250 to 7,000 AZN⁷⁴ and
- the inability of an NGO to use or withdraw any donation transferred to its bank account if it has not been entered into the registry of the Ministry of Justice⁷⁵ – which may be refused on the basis that false or insufficient

⁶⁵ Article 24-2.1 of the NGO Law and Cabinet of Ministers Decision No. 337 of 21 October 2015. Registration can be refused will be determined by whether the applicant NGO has submitted its annual financial report to the Ministry of Finance, there is information that it does not observe the Law on fighting corruption, Law on fight against legalization of financial means or other property obtained by criminal ways and against financing terrorism and the Law on fighting terrorism and whether its statute corresponds to the legal requirements; Article 3.1 of Cabinet of Ministers Decision No. 337.

⁶⁶ Where concluded in another country the contract and any attachments must be translated and apostilled.

⁶⁷ Under Article 432.1 of the Code of Administrative Offences, the fines for not submitting grant contract/decision for registration are 1,000-2,000 AZN for individuals (natural persons), 1,500-2,500 AZN for responsible officials and 5,000-7,000 AZN for legal entities (both donors and recipients).

⁶⁸ Under Article 466.1 of the Code of Administrative Offences, the fines for making cash donations to political parties or NGOs (including branches or representative offices of foreign NGOs) are 250-500 AZN for individuals, 750-1,500 AZN for officials and 3,500-7,000 AZN for legal entities. In addition, under Article 466.2 the fines for receiving such donations are 1,000-2,000 AZN for officials and 7,000-10,000 AZN for the legal entities concerned.

⁶⁹ Article 24-1.5 of the NGO Law and Article 1.2 of Cabinet of Ministers Decision No. 336 of 21 October 2015.

⁷⁰ Article 6 of Cabinet of Ministers Decision No. 336 of 21 October 2015.

⁷¹ Article 465 of the Code of Administrative Offences the fines for officials are 1,500-3,000 AZN for officials and 5,000-8,000 for NGOs. In addition, Article 432.2 provides that the receipt by NGOs (and political parties and religious organisations) of any financial or other material assistance without having a grant contract/decision can result in a fine (2,500-5,000 AZN for officials and 8,000 - 15,000 AZN for legal entities 8,000-15,000 AZN) together with the confiscation of the “financial means and objects that were the object of the wrongdoing”). This article is explicitly inapplicable to donations as (narrowly) defined by the NGO Law on NGOs (and similar provisions in the laws on political parties and on religious freedom) and so could be imposed in the case of non-registered ones.

⁷² Article 24-1 of the NGO Law and Article 1.3 of Cabinet of Ministers Decision No. 336 of 21 October 2015.

⁷³ However, no special status for charitable NGOs is provided in the legislation, creating uncertainty as to when this exemption might be applicable. Moreover, it is unclear whether the cash payment of 200 AZN can be repeated or must be a one-time donation. As a result, the exemption cannot be regarded as a workable one.

⁷⁴ Under Article 466.1 of the Code of Administrative Offences, the fines are 250-500 AZN for individuals, 750-1,500 AZN for officials and 1,500-7,000 for the NGOs themselves.

⁷⁵ Article 5 of Cabinet of Ministers Decision No. 336 of 21 October 2015.

- information is considered to have been submitted – and then without first obtaining permission to do so from the Ministry of Justice⁷⁶;
- *the arrangements for registering the branches and representations of foreign NGOs⁷⁷*, namely,
 - the breadth of the criteria governing the agreement that must first be concluded by the Ministry of Justice with the NGO concerned⁷⁸,
 - the absence of any proper time-frame or clear process for reaching such an agreement that would allow the process of registration under the Registration Law then to be pursued,
 - the inconsistency of the requirement for any such agreement with the stipulation in Recommendation CM/Rec(2007)14 that the granting of approval for foreign NGOs to operate should be determined in a manner consistent with the provisions governing the acquisition of legal personality by domestic NGOs⁷⁹ and
 - the requirement that the term of validity of any such agreement be indicated in it so that they cannot be of indefinite duration⁸⁰;
 - *obstacles to the functioning of the branches and representations of foreign NGOs⁸¹*, namely,
 - the requirements that the legal representative of foreign NGOs have permanent residence in Azerbaijan⁸² (which makes it difficult for a non-citizen to fulfil this role since permanent residence is only issued to foreigners and stateless persons after at least two years' temporary residence⁸³) and the deputy heads be Azerbaijani citizens⁸⁴,
 - the bar on more than one branch or representation being established⁸⁵ and
 - the requirement that a branch or representation be liquidated where the foreign NGO concerned unites, joins with another one or divides itself and its organisational-legal form changes⁸⁶;
 - *the reporting requirements⁸⁷*, namely, as regards

⁷⁶ Article 1.5 of Cabinet of Ministers Decision No. 336 of 21 October 2015.

⁷⁷ Recommendation CM/Rec(2007)14 provides: “45. Without prejudice to applicability of the articles laid down in Convention No. 124 for those states that have ratified that convention, foreign NGOs can be required to obtain approval, in a manner consistent with the provisions of paragraphs 28 to 31 and 33 to 39 above, to operate in the host country. They should not have to establish a new and separate entity for this purpose. Approval to operate can only be withdrawn in the event of bankruptcy, prolonged inactivity or serious misconduct”.

⁷⁸ As specified in Article 3 of Cabinet of Ministers Decision No. 43 of 16 March 2011.

⁷⁹ Paragraph 45.

⁸⁰ Article 12.3 of the NGO Law.

⁸¹ Recommendation CM/Rec(2007)14 provides: “8. The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation”.

⁸² Article 5.4.4-1 of the Registration Law.

⁸³ Pursuant to Article 52.1 of the Migration Code of the Republic of Azerbaijan.

⁸⁴ Article 7.5 of the NGO Law.

⁸⁵ Article 7.1-1 of NGO Law.

⁸⁶ Article 19.7 of the NGO Law.

⁸⁷ Recommendation CM/Rec(2007)14 provides: “62. NGOs which have been granted any form of public support can be required each year to submit reports on their accounts and an overview of their activities to a designated

- any change to an NGO’s factual address in addition to its legal one⁸⁸,
 - changes in the number of an NGO’s members⁸⁹,
 - the register of members when taking part in grant competitions⁹⁰,
 - the establishment of a branch or representative office within ten days of this occurring⁹¹,
 - the name, surname, citizenship and place of residence of the chief of party of the branches and representations of foreign NGOs and his or her deputy, as well as the terms of their contracts⁹²,
 - the provision of an annual financial statement⁹³ - notwithstanding that no public support is received and that the NGO concerned is not a legal entity and regardless of its size and level of activity – which entails the completion of four forms (on the NGO's financial state, the results of financial action, changes in real assets or capital and the process of funds)⁹⁴ with a penalty of up to 2,000 AZN for non-compliance⁹⁵;
- *the imprecision of certain other requirements*⁹⁶, namely,
- the absence of any indication as to how the obligations of NGOs to “ensure transparency of their activity” and to “carry out actions defined by the relevant legislation for” the prevention of corruption violations, as well as the legalisation of money or other property acquired through crime, and financing of terrorism⁹⁷ are to be fulfilled, thereby leaving plenty of scope for arbitrary interference by the authorities;
- *aspects of supervision*⁹⁸, namely,

supervising body. 63. NGOs which have been granted any form of public support can be required to make known the proportion of their funds used for fundraising and administration. 64. 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. 65. NGOs which have been granted any form of public support can be required to have their accounts audited by an institution or person independent of their management”.

⁸⁸ Article 14.1.2 of the Registration Law. Also under Article 579 of the Code of Administrative Offences an NGO functioning on the basis of changes not reported to the registry can lead to fines of up to 2,000 AZN for officials and 2,500-3,000 AZN for legal entities.

⁸⁹ Article 14.2.3 of the Registration Law.

⁹⁰ A practice of the Ministry of Justice in connection with competitions organised by the Council on State Support to NGOs.

⁹¹ Article 12.3-1 of the Registration Law.

⁹² Article 14.2.4 of the Registration Law.

⁹³ Article 29.4 of the NGO Law. This is in addition to the pre-existing requirement to submit reports to the tax authorities.

⁹⁴ Pursuant to Cabinet of Ministers Decision No. 201 of 25 December 2009.

⁹⁵ Article 5.2 of Cabinet of Ministers Decision No. 201 provides for a notice giving 30 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.

⁹⁶ Recommendation CM/Rec(2007)14 provides: “8. The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation”.

⁹⁷ Under Article 29.5 of the NGO Law.

⁹⁸ Recommendation CM/Rec(2007)14 provides: 67. The activities of NGOs should be presumed to be lawful in the absence of contrary evidence. 68. NGOs can be required to submit their books, records and activities to inspection by a supervising agency where there has been a failure to comply with reporting requirements or where there are

- the possibility of examining the conformity of the activity of NGOs (as well as of the branches or representations of foreign NGOs) not only with the legislation of the Republic of Azerbaijan but also with their statutes⁹⁹ notwithstanding that the latter is essentially a matter for their members, and the width of the understanding given to such activity¹⁰⁰,
 - the ability to carry out an on-site examination in the office of the inspected NGO, to interview with its representatives and to question NGO representatives without a court order¹⁰¹,
 - the lack of clarity in the formulation of the offence administrative offence that will be committed by individuals and legal entities who “create obstacles” to any examination for this purpose¹⁰²,
 - the power for the Ministry of Justice to give written notice directing the elimination of a violation of requirements not specifically prescribed by law¹⁰³ and
 - the deadline of 30 days for complying with both a requirement to bring a statute into line with the legislation where a discrepancy has been found in this regard¹⁰⁴ and with a written notice to eliminate any violation found during inspection¹⁰⁵ notwithstanding that an amendment to an NGO’s statutes – essential in the first case and possibly necessary in the second one - may not be practicable within such a period;
- *the powers to suspend an NGO’s activities*¹⁰⁶, namely,
- where there has been a violation of the rights of the members regardless of the nature of the violation concerned and of the wishes of the members, including those whose rights have been violated¹⁰⁷,
 - where it has failed to rectify violations after having been subjected to administrative liability for previously having failed to rectify them when these were indicated in a warning or notice given by the Ministry of Justice regardless of the nature of the violations concerned¹⁰⁸ and

reasonable grounds to suspect that serious breaches of the law have occurred or are imminent. 69. NGOs should not be subject to search and seizure without objective grounds for taking such measures and appropriate judicial authorization”.

⁹⁹ Article 30-1.1 of the NGO Law.

¹⁰⁰ The Collegium Decision of 28 December 2015 defines the term “studying activities” as covering “All measures defined by the Rules and implemented by the Main Department on Registration and Notary of the Ministry of Justice of the Republic of Azerbaijan, as well as regional departments of justice within the defined territorial jurisdiction” (Article 1.2.2)

¹⁰¹ Article 5 of the Rules established by the Collegium Decision of 28 December 2015.

¹⁰² Article 30-1.3 of the NGO Law.

¹⁰³ Article 31.2 of the NGO Law.

¹⁰⁴ Pursuant to Article 16.3 of the NGO Law.

¹⁰⁵ Pursuant to Article 31 of the NGO Law.

¹⁰⁶ Recommendation CM/Rec(2007)14 provides: “72. In most instances, the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of legal personality) should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality”.

¹⁰⁷ Articles 10.5 and 31.3.3 of the NGO Law.

¹⁰⁸ Article 31.3.2 of the NGO Law.

- where the entity concerned “prevents the elimination of the situation which caused the application of an emergency situation”¹⁰⁹ even though there is no provision dealing with such a situation;
- *the power of liquidation*¹¹⁰, namely,
 - where an NGO or the branch or representation of a foreign NGO has been given more than two notices or directions on the elimination of violations¹¹¹ regardless of whether the violations concerned entail “serious misconduct”¹¹²;
- *a limitation on judicial control*¹¹³, namely,
 - the relevant body of executive power of the entity concerned cannot appeal against a suspension where this based on a violation of the rights of members¹¹⁴, notwithstanding that the position of those belonging to the executive body will be affected by the suspension; and
- *the range and level of the penalties for non-compliance with requirements*¹¹⁵, namely,
 - not just those already noted but also a considerable number of new ones established in 2013¹¹⁶ that make it increasingly improbable that the operation of an NGO will not fall foul of what - given their level - are criminal penalties for the purpose of Article 6 of the European Convention.

¹⁰⁹ Article 31.3.1 of the NGO Law.

¹¹⁰ Recommendation CM/Rec(2007)14 provides: “74. The termination of an NGO or, in the case of a foreign NGO, the withdrawal of its approval to operate should only be ordered by a court where there is compelling evidence that the grounds specified in paragraphs 44 and 45 above have been met. Such an order should be subject to prompt appeal”.

¹¹¹ Article 31.4 of the NGO Law.

¹¹² The standard prescribed in paragraphs 44, 45 and 74 of Recommendation CM/Rec(2007)14.

¹¹³ Recommendation CM/Rec(2007)14 provides: “10. Acts or omissions by public authorities affecting an NGO should be subject to administrative review and be open to challenge by the NGO in an independent and impartial court with full jurisdiction”.

¹¹⁴ Article 31.6 of the NGO Law. In such cases only “the members” of the NGO concerned can appeal and this term is not defined for this purpose.

¹¹⁵ Recommendation CM/Rec(2007)14 provides: “72. In most instances, the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of legal personality) should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality”.

¹¹⁶ In respect of various failures (i.e., to submit information necessary for the state registry of legal entities; to adjust the constituent documents of NGOs and foreign NGOs to legislation; to maintain a registry of members; to conclude contracts with volunteers; to direct income from commercial activity to statutory purposes; to eliminate any deficiencies identified in a notification by the Ministry of Justice relevant state body; and to answer requests for information and documents from the relevant state body) and also operating in contradiction to an NGO’s objects, conducting of any activity related to the changes made to constituent documents where such changes have still to be registered, creating obstacles for investigating compliance of the activity of NGOs and the branches and representations of foreign NGOs with the legislation, and failure, as well as for submitting false information; and operating branches or representations of foreign NGOs without registration. The penalties are fines ranging from 1,000-2,000 AZN for officials to 2,500-3,000 AZN for the NGOs, except in respect of Article 582 of the Code of Administrative Offences - operating branches or representations of foreign NGOs without registration - for which the fines are 1,000-2,000 AZN for individuals, 2,000-3,000 AZN for officials and 5,000-8,000 AZN for the NGOs.

C. A way forward

The legislation relating to the establishment and operation of NGOs - exacerbated by the manner of its implementation - has in very many respects strayed far from fulfilling the requirements of European standards.

14. Apart from the many provisions that are substantively problematic, there are also those that suffer from a lack of clarity in their formulation and so fail to meet the requirement that the regulatory framework governing the establishment and operation of NGOs should be sufficiently precise and foreseeable.
15. Moreover, certain aspects of the obligations imposed on NGOs - even though there is nothing inadmissible in the objectives being pursued – are unduly burdensome, whether because they fail to take account of the capacity to fulfil them, they duplicate other similar ones and allow for excessive intrusion in the activities and operation of NGOs.
16. In order to change this remarkably difficult environment for NGOs and establish a regime for them that is much more supportive of the essential contribution that they can make both to the development and realisation of democracy and human rights and to the cultural life and social well-being of democratic societies, there will be *a need for the legislation as a whole to be substantially revised*.
17. At a technical level, this revision will need to *ensure that vague and undefined concepts are eliminated*.
18. However, *the main changes will have to be more substantive and should comprise the following:*

Objects and activities

- *the legislation should simply provide that NGOs can pursue all activities that are not contrary to the Constitution and the law. While there might be special laws dealing with political parties and religious organisations, attracting particular rights or capacities appropriate to such entities, NGOs should not be barred from pursuing issues of a political or religious nature. Moreover, it should be made clear that discussing and pursuing constitutional and legal change is not impermissible so long as this conforms to democratic principles;*

For example, the Federation of Bosnia and Herzegovina law on associations and foundations¹¹⁷ provides in Article 3 that

¹¹⁷ 20 September 2002.

Associations and foundations shall independently determine their goals and activities, in compliance with the Constitution and the law.

The goals and activities of an association or foundation may not be contrary to the constitutional order of Bosnia and Herzegovina or the Federation of Bosnia and Herzegovina (hereinafter referred to as Federation), or directed at its violent destruction, nor may they be aimed at disseminating ethnic, racial, religious or any other hatred or discrimination prohibited by the Constitution and the law.

The goals and activities of an association or foundation shall not include engagement in pre-election campaigns of political parties and candidates, fundraising for political parties and their candidates and financing of candidates and political parties.

Moreover, Section 1 of the Finnish Associations Act¹¹⁸ provides that:

An association may be founded for the common realisation of a non-profit purpose. The purpose may not be contrary to law or proper behaviour

Furthermore, Article 3 of the Law on Citizen Associations and Foundations of “the former Yugoslav Republic of Macedonia”¹¹⁹ provides that:

The citizen associations and foundations may not perform political activities or use their property and assets for implementation of the goals of political parties.

A political activity in the sense of paragraph 1 of this article is understood to be direct participation in an electoral campaign, or fund raising for an electoral campaign and financing political parties

and Article 1 of the Polish Law on Associations¹²⁰ provides that:

1. Polish citizens realize their right to associate according to the Constitution of the Republic of Poland and the legal order as defined by statute.
2. The right to associate may be restricted by other laws only when it is necessary to protect national security or public order, or to protect public health, morality or the rights and freedoms of other person.
3. Associations have the right to voice their opinions on public issues.

Some more specific limitations might be provided where an NGO receives some financial benefits from the State - such as exemptions from certain taxes – but this will still not preclude activity that has a broadly political dimension, albeit of a non-party kind. This can be seen, for example, in the definition of activity “the good and interest of the public” in Article 2.6 of the Albanian Law on Non-Profit Organisations¹²¹ as meaning:

any activity that supports and develops spiritual and other humanitarian values for the individual and society, protects human life or health, secures and realizes public and social services, help and support in cases of disasters, protects the environment and develops culture and education about it, supports and develops cultural and historical values and traditions, science, education, physical and spiritual education, helps in the development of good habits and democratic values as well as any other aspect in the good and interest of the public.

and also in the definition of charitable purposes in Section 3(1) of the United Kingdom’s Charities Act 2011 as encompassing:

¹¹⁸ No. 503 of 26 May 1989.

¹¹⁹ No. 07-2630/1, 25 June 1998.

¹²⁰ 7 April 1989.

¹²¹ No. 8788 of 7 May 2001.

- (a) the prevention or relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the advancement of health or the saving of lives;
- (e) the advancement of citizenship or community development;
- (f) the advancement of the arts, culture, heritage or science;
- (g) the advancement of amateur sport;
- (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- (i) the advancement of environmental protection or improvement;
- (j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (k) the advancement of animal welfare;
- (l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;

- *those establishing NGOs should not be under any constraint to adopt a particular sphere of action and they should also be free to choose their names so long as those names do not objectively mislead as to the NGOs' nature or status;*

Thus, the sphere of action of NGOs is generally left to them to determine as can be seen in Article 2(1) of the Bulgarian Law for Non-Profit Corporate Bodies¹²²

The non-profit corporate bodies shall freely determine their goals and can identify themselves as organisations carrying out activities to the public or private benefit. The determination shall be made by the statutes, the constituting act or amendments in them.

and this necessarily means that they are not required to specify any geographical limitations on their activities but they are, of course, free to do so if they consider it appropriate.

At the same time the restrictions on the choice of names open to NGOs tend to be quite limited. Thus, for example, Articles 8 and 9 of the Federation of Bosnia and Herzegovina law on associations and foundations provide that:

The name and the logo of an association or foundation must be clearly distinguishable from name and the logo of other associations and foundations.

The bodies competent for managing the registry book of associations and a registry book of foundations may not enter under the same name two or more associations or two or more foundations.

If two or more associations or foundations submit applications for entry into the registry under the same name, the application that was submitted first shall be approved.

When such entry into the registry has already been conducted, the body competent for registration shall issue a decision ordering subsequently registered association or foundation to change its name within 30 days

and Article 7 (2) of the Bulgarian Law for Non-Profit Corporate Bodies provides that:

The name must not be misleading and must not infringe the good morals.

¹²² Prom. SG. 81/6 Oct 2000.

There may, however, be some limits on using specific terms that are closely identified with particular public entities, such as those in Article 10 of the Federation of Bosnia and Herzegovina law on associations and foundations, which states that:

It shall be forbidden to use the following terms as a part of the name of an association or foundation:

1. Bosnia and Herzegovina - unless approved by the competent authority of Bosnia and Herzegovina;
2. Federation - unless approved by the federal administrative authority which supervises the legality of the association or foundation's activities;
3. The name of a canton - unless approved by the cantonal administrative authority whose competence encompasses the area of activities of the association or foundation;
4. The name of a city and municipality - unless approved by the mayor or municipality's competent official.

Informal entities

- *there should be explicit recognition in the law that the absence of registration does not mean an association is an unlawful body but is simply one that has no legal personality discrete from that of its members. Moreover, “legalisation” should be an option and not a requirement since it confers no legal rights;*

This approach is reflected in the official definition of an unincorporated association in the United Kingdom:

An ‘unincorporated association’ is an organisation set up through an agreement between a group of people who come together for a reason other than to make a profit (for example, a voluntary group or a sports club).

You don't need to register an unincorporated association, and it doesn't cost anything to set one up.

Individual members are personally responsible for any debts and contractual obligations¹²³.

as well as in legislative provisions such as Sections 58 and 59 of the Finnish Associations Act:

Section 58

Liability for obligations

An association that is not entered in the register may not acquire rights or undertake obligations, nor sue or be sued in its own name.

Liability for an obligation caused by an act on behalf of an unregistered association rests with the persons who took part in the act or decided on it personally and jointly and severally. Other members of the association shall not be personally liable for such obligation.

Section 59

Acting on behalf of an association

In a case concerning an unregistered association before a court of law or other authority, the chairperson of the association or of its executive committee or other person attending to its affairs may act on behalf of the association. A communication meant for the association may also be served upon such person.

An action to have an unregistered association terminated may be brought against one or more members of the association or of its executive committee. The action must be brought before the court of the municipality where the defendant or one of defendants is domiciled.

¹²³ <https://www.gov.uk/unincorporated-associations>.

In other respects, unregistered associations shall mutatis mutandis be governed by the provisions of sections 15, 10, 11, 43, 44, 60 and 62.

and Article 4 of the Serbian Law on Associations:

Entry in the Association Register shall be made on a voluntary basis.
The association shall acquire the status of a legal entity at the date of its entry in the Register.

In addition, a slightly more elaborate arrangement for informal entities can be seen in the Polish Law on Associations:

Article 40.

1. A simple association is a simplified form of association, and it does not have the status of a legal person.
2. At least 3 persons who wish to found a simple association adopt regulations for the association. The regulations must particularly specify the name of the simple association, its goals, territory, its kinds of activities, its seat, and representative.
3. In writing, the founders notify the supervising agency that is appropriate for the seat about the founding a simple association. The notice must include the data mentioned in section 2 above.

Article 41.

1. The registry court, on a motion from the supervising agency or the public prosecutor, may forbid the founding of a simple association if the association does not fulfil the conditions specified in Article 16, section 2, of the present law¹²⁴.
2. If the activities of a simple association are not forbidden within 30 days from the day the supervising agency receives notice of the association's founding, the association may start its activities.

Article 42.

1. A simple association may not
 - 1) create local branches;
 - 2) enter unions of associations;
 - 3) include legal persons;
 - 4) conduct economic activity;
 - 5) accept donations, legacies or inheritances, receive public grants or use public support.
2. A simple association gains financial means for its activities from member contributions.

Article 43.

- In all the matters not regulated otherwise in the present chapter, regulations of the present law apply as appropriate, with the reservation that
1. the regulations of Articles 9-15, Article 14. Section 2, Articles 17-20, Articles 22-24, Article 30, and Article 32, section 2, do not apply;
 2. whenever the law mentions statute, regulations of a simple association should be understood.

Residence/nationality requirements

- *restrictions regarding permanent residence or nationality for, respectively founders and deputy heads of NGOs and the branches and representations of foreign NGOs should be deleted as inconsistent with the right of everyone to freedom of association;*

Thus, for example, there may be no reference to nationality or residence in connection with the formation or operation of NGOs, as in Article 4.1 of the Republic of Lithuania Law of Associations¹²⁵:

¹²⁴ Namely, "The registry court issues a decision on registering an association after concluding that its statute complies with the law and that the founding members meet the requirements specified in the present law".

¹²⁵ No. IX-1969, 22 January 2004.

Competent natural persons who have reached 18 years of age and (or) legal persons, having concluded a memorandum of association, may form an association. The minimum number of founders of an association shall be three

or there can be explicit recognition for non-nationals to be able to do so, as in Article 4 of the Albanian Law on Non-Profit Organisations:

Every natural or juridical, local or foreign person has the right to establish a non-profit organization, to be a member of it or to take part in its management organs or in the administrative personnel of the non-profit organization

and Article 5 of the Bulgarian Law for Non-Profit Corporate Bodies:

Founders of a non-profit corporate body can be Bulgarian and foreign corporate body and able individuals

However, there can sometimes also be a requirement for some founders to be resident in the country concerned, as in Article 10 of the Serbian Law on Associations:

An association may be established by at least three (3) founders with at least one (1) of the founders being required to have his permanent place of residence or head office on the territory of the Republic of Serbia.

Capital requirements

- *no specified level of capital should be required in order to establish a foundation since such a requirement inhibits rather than facilitates their establishment;*

Although some laws relating to the establishment of foundations do prescribe a minimum amount of funds as a prerequisite for doing so, such as Article 21.4 of the Federation of Bosnia and Herzegovina law on associations and foundations which specifies that:

The memorandum of incorporation of a foundation shall include:

4. Monetary or other forms of assets deposited by the founder that may not be below 2.000,00 KM;

other laws leave the amount to the discretion of the founders, such as Article 16 of the Albanian Law on Non-Profit Organisations:

In the case of a foundation, the establishment act shall show the nature, source and value of the property necessary to fulfill the aim and field of activity of the foundation

and Article 4(2)(i) of the Czech Republic's Act on Public Benefit Corporations¹²⁶:

the value and description of the assets endowed by individual Founders; in the case of a non-monetary endowment, the specification of the property object and its evaluation rendered by an authorized expert.

¹²⁶ Act No. 248/1995 Coll. Of 28 September 1995.

The registration process

- *the process of registration should be an online one and take effect automatically so long as model provisions for the statute are used, although there should be a feedback mechanism to require a change of name that is already in use or is otherwise misleading and to require the deletion of objects that are clearly contrary to the Constitution and the law;*

Such processes are, for example, being used to register NGOs as non-profit associations in Estonia¹²⁷ and as companies limited by guarantee in the United Kingdom¹²⁸. Such processes can be facilitated by the existence of model provisions for the statute, leaving only the objects and activities to be defined by the founders.

- *the development of NGOs should be assisted by an assumption that changes to their statutes are lawful, with control over their legality being left to the exercise of supervisory powers;*

This is not something to be prescribed in the legislation but to be inculcated in the training of all those involved in making an assessment about the lawfulness of the objects and activities of a proposed NGO. However, as already noted, paragraph 35 of Recommendation CM/Rec(2007)14 provides that:

Any evaluation of the acceptability of the objectives of NGOs seeking legal personality should be well informed and respectful of the notion of political pluralism. It should not be driven by prejudices.

Moreover, as the European Court has observed, the existence of concealed objectives and intentions different from those proclaimed in a statute can only be verified through comparing the objectives of an association with its actions¹²⁹ and the words used in a statute must not be taken out of their context¹³⁰.

Volunteers

- *the requirement that contracts be concluded with volunteers should be modified so as to ensure that specific contracts take account of the nature of the activities to be undertaken and of the particular needs and circumstances of the NGOs concerned;*

¹²⁷ See https://www.eesti.ee/eng/ettevotte_registreerimine.

¹²⁸ See <https://www.gov.uk/limited-company-formation/register-your-company>.

¹²⁹ See, e.g., *United Communist Party of Turkey and Others v. Turkey* [GC], no. 19392/92, 30 January 1998, at para. 58.

¹³⁰ See, e.g., *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, 8 December 1999, at para. 41.

Agreements by NGOs with volunteers are increasingly recognised as valuable for both parties since these not only help volunteers to understand their rights, role and responsibilities and they can also assist NGOs to manage an often vital resource while guarding against risks that might arise from their reliance on it.

However, there is no general approach in Europe as to whether such agreements should be binding or as to what they should contain¹³¹. The latter should be left to NGOs to define so that account can be taken of their specific circumstances and the form of the volunteering involved.

Finance

- *it should be clarified that donations can be given for the fulfilment of a specific purpose;*

This is not just a matter of clarifying the effect of the current legislative provisions since it should be possible for a donation to support the fulfilment of a specific purpose. While a donation could justifiably not be regarded as something given – whether in the form of finance, property, goods or services – in return for the receipt of specific goods or services¹³², it is a term that is generally regarded as covering both a contribution to the general achievement of the objects and activities of an NGO and of a particular object or activity.

Whether or not a donation should be for a particular purpose is for the donor to determine but the NGO should also be free to decide whether to accept a donation that is subject to restrictions.

- *there should be no requirement that donations be made by means of a bank transfer. However, cash donations above a specified limit might be subject to some form of reporting or disclosure obligation, particularly where there is a legitimate basis for suspecting some form of impropriety;*

There is no general practice of adopting a legislative requirement that limits the amount that someone might give to an NGO in the form of cash, thereby requiring donations above that amount to be made by bank transfer.

However, a requirement that a receipt is given may be a condition for obtaining any available tax relief on the donation. Moreover, concerns about terrorist financing, money-laundering and corruption mean that it is not inappropriate for there to be requirements about declaring or disclosing cash received in order to

¹³¹ See, e.g., Katerina Hadzi-Miceva, ‘Comparative Analysis of European Legal Systems and Practices Regarding Volunteering’, *International Journal of Not-for-profit Law*, 9(3), 37–58 (2006) and European Commission, *Volunteering in the European Union*, (2010).

¹³² Their value may, however, be relevant when determining whether something is a “donation” for tax purposes; see, e.g., <https://www.gov.uk/guidance/gift-aid-what-donations-charities-and-cascs-can-claim-on>.

promote greater transparency and accountability of the funds concerned and this will have implications for the recording of cash donations received¹³³

- *there should be no obligation to disclose the identity of donors in the absence of a court order based on compelling evidence that donations were either the fruit of criminal conduct or to be used for a criminal purpose;*

As paragraph 116 of the Explanatory Memorandum to Recommendation CM/Rec(2007)14 indicates:

Obligations to report should be tempered by other obligations relating to the right to life and security of beneficiaries and to respect for private life and to confidentiality. In particular a donor's desire to remain anonymous should be respected. However, the need to respect private life and for confidentiality are not absolute and should not be an obstacle to the investigation of criminal offences (e.g., in connection with money-laundering). Nonetheless any interference with respect for private life and confidentiality should observe the principles of necessity and proportionality.

European states do not generally require the automatic disclosure of the identity of donors. Moreover, the European Court has held that the enforced disclosure of information will be in violation of Article 8 of the European Convention, notwithstanding that this has the legitimate aims of protecting the economic well-being of the country or preventing disorder or crime, where there inadequate procedural safeguards and the extent of the disclosure involved was disproportionate¹³⁴. There would, therefore, be a need to have well-founded grounds as to the impropriety of a donation before there could be compulsion to identify its donor. This would not, of course, preclude a requirement for the identity of a donor to be disclosed for the purpose of obtaining tax relief on a donation or in order to clear customs where goods are involved.

- *restrictions on the receipt of foreign financing should be limited to just the laws generally applicable to customs, foreign exchange, money laundering and terrorism and those on the funding of elections and political parties;*

As Recommendation CM/Rec(2007)14 makes clear, there should be no general restrictions on the receipt of funding from outside the country where an NGO is established, although the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties must still be observed. This standard is reflected in the general absence of provisions dealing with foreign sources of funding in legislation dealing specifically with NGOs in the majority of the members of the Council of Europe; any controls that exist in legislation apply to all funding from such sources and not any specifically provided to NGOs. Nonetheless, the approach required by Recommendation CM/Rec(2007)14 can also be seen in the general stipulation in Article 38.2 of the Albanian Law on Non-Profit Organisations that:

¹³³ See, e.g., Financial Action Task Force, *Combating the Abuse of Non-Profit Organisations (Recommendation No. 8)*, (2015), paras. 67 and 68.

¹³⁴ See, e.g., *Vinci Construction and GTM Génie Civil and Services v. France*, no. 37971/97, 2 April 2015 and *Brito Ferrinho Bexiga Villa-Nova v. Portugal*, no. 69436/10, 1 December 2015.

Financial or material assistance given for illegal purposes or which is obtained through illegal sources is not allowed.

At the same time the particular needs of the branches and representations of foreign NGOs are well-understood in the formulation of Article 66 of the Serbian Law on Associations, which provides that:

A foreign association's representative office may bring into the country from abroad the financial means for the representative office's operation and implementation of its program in accordance with the provisions of the law regulating foreign currency transactions.

Upon settling all matured tax and other liabilities in the Republic of Serbia, the foreign association's representative office may take out of the country the unspent financial means mentioned in paragraph 1 hereof in accordance with the provisions of the law governing foreign currency transactions.

The foreign association's representative office may temporarily import items and equipment required for its activities and may take them out of the Republic of Serbia in line with the customs regulations and the regulations on foreign trade operations.

- *the requirement to register – and thus effectively approve - grants or service contracts should be withdrawn and any necessary authorization for activities under service contracts should occur through the licensing arrangements generally applicable to those activities;*

European states do not generally impose any requirement for the receipt by NGOs of grants and the conclusion by them of service contracts to be registered or otherwise approved. A need to register grants is inconsistent with the inadmissibility of a general obligation to identify donors discussed above. Furthermore, the need to register service contracts is inconsistent with paragraph 14 of Recommendation CM/Rec(2007)14, which provides that:

NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorisation being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned.

since it introduces a licensing or regulatory requirement that is not generally applicable to the activities concerned.

Foreign NGOs

- *the rules governing the registration of branches and representations of foreign NGOs should not require a separate prior agreement but should be governed by the same requirements applicable to the process for establishing NGOs with legal personality. Furthermore, there should be no limit on the number of such branches and representations;*

This approach - which is required by Recommendation CM/Rec(2007)14 - can be seen, for example, in the Bulgarian Law for Non-Profit Corporate Bodies which provides in Article 38(2) that:

A foreign non-profit corporate body can carry out socially useful activity through its branch in the country under the conditions of this law,

and specifies in Article 52(2) that:

A foreign non-profit corporate body can found a branch in the country if its purposes do not contradict the public order and the law in the Republic of Bulgaria

The only additional requirements for registration of these branches under Article 18(3) are the goals of the foreign non-profit corporate body, the particular goals to be accomplished by the branch and the defining of the branch for carrying out socially useful activity.

A slightly different, but substantively similar, approach can be seen in the following provisions of the Albanian Law on Non-Profit Organisations:

Article 29

The Activity of Foreign Non-profit Organizations

Foreign non-profit organizations have the right to exercise temporary or permanent activities in the Republic of Albania, respecting Albanian legislation and good customs and under the same conditions with those of local non-profit organizations.

For the exercise of their activity in the Republic of Albania, foreign non-profit organizations may establish and register the non-profit organizations, or their branches, according to Albanian law.

Article 30

Permission for Temporary Activity

Except when it is provided otherwise in bilateral or multilateral agreements, foreign non-profit organizations, in order to exercise temporary activity, on their application receive only preliminary permission of the state organ that conducts activity in the same field or in fields similar to the foreign non-profit organizations.

The decision of the respective state organ to issue a temporary license for activity is given no later than one month from the date of submission of the request. Otherwise the approval is considered as given. Refusal of any request can be appealed in court within 30 days of receipt of notice.

Temporary activities that last no longer than 30 consecutive days do not need temporary permission.

Article 31

A Request and Associated Acts for Obtaining Permission for Temporary Activity

Foreign non-profit organizations that intend to exercise temporary activity, besides meeting the other requirements of this law, and receipt of the permission of the respective state organ that exercises activity in the same field or in fields close to that of the foreign non-profit organization, together with the request shall also present the following documents

- a) A document that shows they are a juridical person in their country of origin;
- b) A declaration from the foreign non-profit organization itself that the activity it intends to realize in Albania is in conformity with the purpose for which it was created and with the legislation of that country.

The accompanying acts issued in other countries shall be authentic or certified regularly by the competent organ of the country where the act was issued, translated and notarized in the Albanian language.

Article 32

Documents Necessary for the Registration of a Branch of a Foreign Non-Profit Organization

Foreign non-profit organizations that intend to establish a branch in Albania, in addition to meeting the other requirements of law, also accompany the request for registration with the establishment act and the charter, together with the decision of its competent organ for the opening of a branch in Albania.

Accompanying documents issued in other countries shall be authentic or certified regularly by the competent organ of the country where the act was issued, translated and notarized in the Albanian language.

Article 33

Rights and Duties

In the conduct of their activity, foreign non-profit organizations have all the rights, facilities and legal obligations as if they were local, except when it is otherwise provided by law or international agreement.

and the following ones of the Serbian Law on Associations:

Article 59

For the purposes of this Law, a foreign association shall be any association that has its head office in another state and is established under that state's regulations in order to pursue a shared or general interest or goal and carries out activities that are not geared at making profit as well as any international association or another side or international non-governmental organization which has members that have associated on a voluntary basis in order to pursue a shared or general interest or goal not geared at making profit.

The provisions of the present Law relating to making entry in the Register and the association's activities shall also apply to making entry and activities of the representative office, office and another form of organization of a foreign or international non-governmental non-profit association having its head office on the territory of the Republic of Serbia (hereinafter referred to as a foreign association's representative office) unless otherwise stipulated by the law or an international treaty.

Article 60

Any foreign association's representative office may operate on the territory of the Republic of Serbia upon its entry in the Foreign Associations Register that is kept by the Agency as a duty entrusted to it.

The Register referred to in paragraph 1 hereof shall be kept in written form and as a single central electronic database.

The contents, the method of entry and of keeping the Register mentioned in paragraph 1 hereof shall be regulated in more detail by the Minister.

Article 61

The Agency shall keep the Foreign Associations Register through the Foreign Associations Registrar.

The provisions of the law regulating the registration of business entities shall apply accordingly to the terms and procedure for appointment of the Foreign Associations Registrar as well as to his powers and responsibilities unless otherwise stipulated by this Law.

Article 62

The following shall be entered in the Foreign Associations Register: the foreign association's name and abbreviated name; the state where the foreign association has been established and the head office of that association in that state; the name of the foreign association's form of organization; the address of the head office of the foreign association's representative office in the Republic of Serbia and of its branch offices; the period for which the foreign association's representative office has been established; the given name and the family name of the person authorized to act as agent and represent the foreign association in the Republic of Serbia, his permanent place of residence and personal identification number if he is a citizen of the Republic of Serbia, or temporary place of residence in the Republic of Serbia, the number of his travel document and the state that has issued it if he is a foreign national; the foreign association's goals; a note indicating that the procedure to ban the activities of the foreign association's representative office has been initiated and the ban on the activities of the foreign association's representative office; the number and date of the decision to make an entry, change data and delete (the representative office) from the Foreign Associations Register.

Article 63

Entry in the Foreign Associations Register shall be made based on the application to make such an entry of a foreign association's representative office.

The contents and the format of the application mentioned in paragraph 1 hereof shall be specified by the Minister.

The application for entry shall be accompanied by the following: a photocopy of the document and the certified translation of the document on the association's registration in its home state or a certified photocopy of the certificate (statement) certified by the court of law or a public notary attesting that the association holds, under its home state's law, the status of a body corporate even without entry in the Register and the certified translation of such a certificate (statement); a certified photocopy of the decision and certified translation of the decision of the foreign association's competent body to set up a representative office in the Republic of Serbia; a certified document and certified translation of the home state's document specifying the founders of the association which is about to set up a representative office in the Republic of Serbia; a certified

decision and a certified translation of the decision on the person authorized to act as agent and represent the foreign association's representative office; a certified photocopy of the document on that person's identity and registration of his permanent place of residence or temporary residence in the Republic of Serbia; a photocopy and certified translation of the statute or the relevant document containing data on the head office and the internal organization of the foreign association's representative office on the territory of the Republic of Serbia.

The Foreign Associations Registrar shall issue a decision on entry to be made of the foreign association's representative office to the Foreign Associations Register.

The decision on the entry of a foreign association's representative office in the Foreign Associations Register shall be published in the *Official Journal of the Republic of Serbia* at the cost of such a foreign association.

Article 67

A foreign association's representative office shall have the right to operate freely on the territory of the Republic of Serbia unless its goals and activities are contrary to the Republic of Serbia Constitution, this Law, the international treaties concluded by the Republic of Serbia or to other regulations ...

Reporting and supervision

- *the reporting obligations should be streamlined so that there is not normally a requirement to provide the same information more than once to a number of different public bodies and the level of detail required should take account of the scale of an NGO's income;*

Europe practice does not generally involve a requirement for NGOs to report on their activities unless they are in receipt of some form of public support, such as charitable status, grants and tax exemptions. In addition, compliance with the regulatory or licensing regime applicable to certain activities may entail some reporting obligation.

So far the single-window reporting system which has been developed in Europe and elsewhere to facilitate trade¹³⁵ has not been emulated for the reporting obligations of NGOs. However, doing so would be consistent with the general requirement in European standards that there be an enabling environment for their operation. Moreover, there are instances of account being taken of the extent of an NGO's income in the formulation of reporting requirements to which they are subject, such as the extent of the annual return required of charities in the United Kingdom according to whether their income is above or below GBP 25,000¹³⁶.

- *there should only be a requirement to provide details about an NGO's legal address and there should be no requirement for NGOs with legal personality to provide information about the establishment of branches and representations or about the citizenship, home address and contractual arrangements of any of their staff;*

¹³⁵ See, e.g., the Reporting Formalities Directive (2010/65/EU) and World Customs Organization, *A Survey of Single Window Implementation* (http://www.wcoomd.org/~media/wco/public/global/pdf/topics/research/research-paper-series/17_sw_survey-analysis_choi_en.pdf?la=en).

¹³⁶ See <http://forms.charitycommission.gov.uk/contact-us/update-your-details/complete-your-annual-return/>.

None of these details are required, for example, in the Albanian Law on Non-Profit Organisations, the Federation of Bosnia and Herzegovina law on associations and foundations, the Non-profit Associations Act of Estonia¹³⁷, the Law on Associations and Foundations of the Republic of Srpska¹³⁸, the Finnish Associations Act, the Republic of Lithuania Law of Associations, the Serbian Law on Associations and Slovakia's Law of 27 March 1990 Concerning the Right of Association.

This is also the case with in the Bulgarian Law for Non-Profit Corporate Bodies except that Article 20.7 requires branches of associations to be included in their statutes. Similarly, Article 20.2 of the Polish Law on Associations just requires the supervising agency to be notified as to the seat of any branch that is created.

Article 13(2) of the Romanian Ordinance on Associations and Foundations¹³⁹ requires branches to be registered but it is significant that it also provides that these are distinct legal entities from the NGOs establishing them.

- *there should be no supervision exercised over the compliance of an NGO's activities with its statute or of requirements not specifically prescribed by law and any on-site examination should occur only where there is a well-founded basis for suspecting serious breaches of the law;*

The question of compliance with an NGO's statutes as opposed to the law is essentially a matter for its members or its governing body as is clearly reflected, for example, in Article 28 of the Albanian Law on Non-Profit Organisations:

Disagreements among the members, between them and the decision-making and executive organs or between them and the employees are solved in good faith and in conformity with the charter and rules of the non-profit organization; otherwise the question is resolved by the court

and in Article 15 of Slovakia's Law of 27 March 1990 Concerning the Right of Association:

(1) If a member of an association considers illegal a decision of some of association's bodies, against which, according to the statute, it is not possible to appeal within the association or maintains it as violating the statute, that member may, within 30 days from the day he/she learned about the decision, but not later than 6 months from the decision, request the relevant district court to investigate validity of such an decision.

(2) The proposal to open the investigation does not have a deferring effect. The court, however, in justifiable cases may suspend the implementation of the challenged decision.

A notable exception to the general lack of concern about compliance by NGOs with their statutes is found in the Federation of Bosnia and Herzegovina law on associations and foundations, which are seen in the provision in Article 51 for a

¹³⁷ RT I 1996, 42, 811.

¹³⁸ Official Gazette, no. 52, 17 October 2001.

¹³⁹ No. 26 of 30 January 2000.

penalty where an NGO exercises activities which do not comply with its statutory goals and activities (see “Penalties” below).

As has already been noted, Recommendation CM/Rec(2007)14 requires that the activities of NGOs should be presumed to be lawful in the absence of contrary evidence (para. 67) and as a consequence specifies in paragraph 68 that NGOs can only be required:

to submit their books, records and activities to inspection by a supervising agency where there has been a failure to comply with reporting requirements or where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent.

- *the deadline for eliminating any violations of the law should, where necessary, allow for any time required to effect a change in the statute of the NGO concerned;*

There is no question that any violations of the law governing the activities of an NGO should be eliminated. However, fixed deadlines for achieving this may not always be practicable, particularly if formal procedures need to be followed in order to effect the necessary changes. There is, therefore, good reason to emulate the more flexible approach to regulatory compliance seen in Article 50 of the Federation of Bosnia and Herzegovina law on associations and foundations, which provides that:

If an association or foundation which performs public competencies does not exercise entrusted activities in accordance with its duties, the competent supervisory administrative body shall notify in writing the management board of the association or foundation to that effect, propose measures to remedy perceived deficiencies and other measures falling within the scope of its competencies and duties.

Suspension of activities

- *the provision for the suspension of an NGO should be deleted and for its liquidation should be limited to instances of serious misconduct;*

The exceptional nature of a power to suspend the activities of an NGO is reflected in the absence of any provision for this in the the Albanian Law on Non-Profit Organisations, the Federation of Bosnia and Herzegovina law on associations and foundations, the Law on Associations and Foundations of the Republic of Srpska, the Bulgarian Law for Non-Profit Corporate Bodies, the Non-profit Associations Act of Estonia, the Republic of Lithuania Law of Associations, the Romanian Ordinance on Associations and Foundations, the Polish Law on Associations, Slovakia’s Law of 27 March 1990 Concerning the Right of Association.

This does not, of course, mean that a specific activity contrary to the law might not (!) be prohibited under some other legislative provision. Moreover, a prohibition on activities may be ordered by a court in connection with proceedings to terminate the NGO, such as under the Article 43(1) of the Finnish

Associations Act which provides for this in connection with legal proceedings for an association's termination and there is a likelihood that the activities relate to the grounds for termination. In addition, there may be powers to take action to protect the funds of charities and public benefit organisations where there has been misconduct or mismanagement in respect of them, such as those under the United Kingdom's Charities Act 2011¹⁴⁰.

Nonetheless, it must be borne in mind that the European Court has emphasised in connection with a temporary ban on a political party's activities that:

only very serious breaches such as those which endanger political pluralism or fundamental democratic principles could justify a ban on the activities of a political party. Since the CDPP's gatherings were entirely peaceful, there were no calls to violent overthrowing of the government or any other acts undermining the principles of pluralism and democracy, it cannot reasonably be said that the measure applied was proportionate to the aim pursued and that it met a "pressing social need".

The temporary nature of the ban is not of decisive importance in considering the proportionality of the measure, since even a temporary ban could reasonably be said to have a "chilling effect" on the party's right to exercise its freedom of expression and to pursue its political goals, the more so since it was imposed on the eve of the local elections¹⁴¹.

and this approach is equally applicable to NGOs.

Penalties

- *the penalties and their amount should be limited*

Such an approach is clearly required by Recommendation CM/Rec(2007)14, paragraph 72 of which provides that:

In most instances, the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of legal personality) should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality.

Furthermore, when account is taken of relative minimum income levels¹⁴², restraint in fixing the level of penalties can be seen, for example, in those provided in Article 51 of the Federation of Bosnia and Herzegovina law on associations and foundations:

A fine for a misdemeanour ranging from 300,00 to 3000,00 KM¹⁴³ shall be imposed on an association or foundation found to have committed any of the following acts:

1. Exercising activities which do not comply with the statutory goals and activities of the association or foundation (Article 3, paragraph 2 and 3, Article 4, paragraph 1 and 2, Article 14 and 22);
2. Failing to use its registered name in legal transactions (Article 7, paragraph 5);

¹⁴⁰ This permits, e.g., the suspension of trustees and the appointment of interim managers.

¹⁴¹ *Christian Democratic People's Party v. Moldova*, no. 28792/02, 14 February 2006.

¹⁴² As to which, see https://en.wikipedia.org/wiki/List_of_minimum_wages_by_country.

¹⁴³ 1 KM = 0.511 EUR (23 February 2017).

3. Failure to notify the Federal Ministry or the cantonal body about the change of data to be entered into the registry, in the course of 30 days after the change of data has occurred (Article 33);
4. Failure to use surplus generated from economic activities in a way prescribed by the laws and the statute.

A fine for a misdemeanour from the first paragraph of this Article ranging from 100 to 1000 KM shall also be imposed against the responsible person in the association or foundation.

The responsible person referred to in paragraph 2 is considered to be the person authorized for representation, or any other person that is directly responsible for the execution of a particular activity.

and in the following provisions of the Law on Citizen Associations and Foundations of “the former Yugoslav Republic of Macedonia”:

Article 73

A citizen association and foundation shall be punished with a fine of 100,000.00 to 200,000.00 denars¹⁴⁴ for a violation if it uses its property and assets in contrary to articles 3 and 7 paragraph 2 of this law.

A security measure of prohibition of performing an activity for a period of one to five years shall also be pronounced against a legal entity for a violation from paragraph 1.

Article 74

A citizen association, association of foreigners and foundation shall be punished with a fine of 20,000.00 to 80,000.00 denars for a violation if:

- it starts to operate before it is entered into the Register (article 6 paragraph 2);
- it does not submit within the foreseen deadline a request to the primary court for entry of changes and supplements to the deed of foundation or statute (article 49 paragraph 1); and
- it does not inform the primary court within 30 days about linking with or membership in a union or international organisation (article 72 paragraph 3).

Article 75

A person who represents the citizen association or foundation shall be punished with a fine of 10,000.00 to 25,000.00 denars for a violation if he does not inform the primary court within 15 days from the day when the circumstances came about regarding termination from article 52 paragraph 2 and article 54 paragraph 2 of this law

as well as in the following ones of the Serbian Law on Associations:

Corporate offence

Article 72

A fine ranging from RSD 300,000 – 900,000¹⁴⁵ shall be levied for any corporate offence on any association if it performs directly a business or another activity in order to make profit unrelated to its statutory goals, or not stipulated by its statute, or if it performs such an activity although the competent body has established that it does not fulfill the conditions for performing such an activity (Article 37, paragraph 2).

A fine ranging from RSD 30,000 - 90,000 shall also be imposed on the responsible person at the mentioned association for the corporate offence mentioned in paragraph 1 hereof.

Petty offences

Article 73

A fine ranging from RSD 50,000 - 500,000 shall be levied on any association for a petty offence:

- 1) if it carries out its activities contrary to the law, its statute or its other internal regulations as well as contrary to the rules of the (con)federation of which it is a member (Article 9);
- 2) if it performs a business or another activity of a larger scope, or of a scope not necessary for achieving the association’s goals (Article 37, paragraph 2, sub-paragraph 3);
- 3) if it does not utilize the assets and properties solely for the purpose of achieving its statutory goals (article 41);
- 4) if the foreign association’s representative office starts up its activities before it is entered in the Register (Article 60, paragraph 1).

A fine ranging from RSD 5,000 – 50,000 shall also be imposed on the responsible person at the association for the petty offence mentioned in paragraph 1 hereof.

¹⁴⁴ I denar = 0.16 EUR (22 February 2017).

¹⁴⁵ I RSD = 0.008 EUR (23 February 2017).

Article 74

A fine ranging from RSD 50,000 - 500,000 shall be levied on an association for a petty offence:

- 1) if it fails to ensure transparency of its activities in the way set out in its statute (Article 5);
- 2) if it fails to use its name or abbreviated name in legal operations in the form entered in the Register (Article 15);
- 3) if it fails to report to the Registrar within fifteen (15) days any change of data that are to be entered in the Register (Article 33, paragraph 1);
- 4) if it fails to make available to the public the report on its activities and on the scope and method of acquiring and using the assets and fails to forward such a report to the provider of assets (Article 38, paragraph 6).

A fine ranging from RSD 5,000 - 50,000 shall also be imposed on the responsible person at the association for the petty offence mentioned in paragraph 1 hereof.

Article 75

A fine ranging from RSD 5,000 - 50,000 shall be levied for a petty offence on any agent of the association unless he informs the Registrar within the prescribed time limit that no decision has been brought to initiate the liquidation procedure or that such a decision has not been made public (Article 54, paragraph 1).

D. Implementation

19. The steps that need to be taken to implement the suggestions in the preceding section are quite extensive and will undoubtedly take some time to complete, particularly since paragraph 77 of Recommendation CM/Rec(2007)14 requires that:

NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation

Such consultation – which should be open, informed and timely – will be essential for the process of revising the legislative provisions to be effective in addressing the problematic aspects.

20. However, before proceeding to the revision of legislative provisions, *effective action is required to ensure that the existing rules governing registration of NGOs seeking legal personality are not subverted by such contra legem practices as the breach of deadlines for registrations, repeated unnecessary demands for correction of registration documents, etc.*

21. This will necessitate not only the training of those involved in the processes relating to registration and supervision – judges as well as administrators - but also a clear indication by the government that NGOs are valued, that the aim of the administration in its dealings with them should be to facilitate their establishment and operation and that the presumption should be in favour of the lawfulness of their activities.

22. Apart from these steps to change the way in which the administration and the courts interact with NGOs and those belonging to or working for them, the most immediate measures that should be adopted to facilitate the operation of NGOs would be to abolish the requirements to register grants and service contracts and to obtain the right to give a grant.

* * *