



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



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**OPINION OF THE COMMISSIONER FOR HUMAN RIGHTS**

**ON THE LEGISLATION OF THE RUSSIAN FEDERATION**  
**ON NON-COMMERCIAL ORGANISATIONS**  
**IN LIGHT OF COUNCIL OF EUROPE STANDARDS**

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## Introduction

1. Human rights defenders are among the main actors contributing to the effective observance and full enjoyment of human rights in Council of Europe member states. Their protection and the development of an enabling environment for their activities are at the core of the mandate of the Commissioner for Human Rights.
2. In February 2008, the Committee of Ministers adopted a Declaration on Council of Europe action to improve the protection of human rights defenders and promote their activities.<sup>1</sup> In particular, it called on Council of Europe member states to “create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the European Convention on Human Rights”<sup>2</sup> and “to take effective measures to protect, promote and respect human rights defenders and ensure respect for their activities”.<sup>3</sup>
3. The Declaration has also emphasised the role of the Commissioner for Human Rights, who is invited to “continue[...] to meet with a broad range of defenders during his country visits and to report publicly on the situation of human rights defenders”<sup>4</sup> and to “intervene[...], in the manner the Commissioner deems appropriate, with the competent authorities, in order to assist them in looking for solutions, in accordance with their obligations, to the problems which human rights defenders may face, especially in serious situations, where there is a need for urgent action”.<sup>5</sup>
4. During his visit to Moscow in October 2012, the Commissioner raised concerns with his official interlocutors related to the adoption of legislative amendments on non-commercial organisations performing the function of “foreign agents” and of amendments to the Criminal and Criminal Procedure Code of the Russian Federation concerning the definition of high treason. He had an opportunity to further discuss those issues with the members of the Russian delegation to the Parliamentary Assembly of the Council of Europe during its January 2013 session. The Commissioner’s visit to the Russian Federation took place in April 2013, after a series of comprehensive checks of NGOs had been initiated by the Prosecutor’s Office and other authorities. The Commissioner expressed his concerns about the above-mentioned legislative provisions and their implementation, in particular, in view of the very broad and vague definition of political activity in the Law. He reiterated the need for non-governmental organisations to function in an environment conducive to their work.<sup>6</sup>
5. The Russian Federation has a vibrant civil society consisting of more than 220,000 non-commercial organisations (hereinafter referred to as NCOs).<sup>7</sup> During his visits to the Russian Federation in October 2012 and April 2013, the Commissioner was told by his interlocutors in the government at regional and federal levels that they regard civil society

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<sup>1</sup> The Russian Federation was one of the eleven countries represented in the Group of Specialists on Human Rights Defenders, which has largely contributed to the drafting of this Declaration.

<sup>2</sup> Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, adopted by the Committee of Ministers on 6 February 2008 at the 1017<sup>th</sup> meeting of the Ministers’ Deputies, § 2.i.

<sup>3</sup> *Ibid*, §2.ii.

<sup>4</sup> *Ibid*, §4.ii.

<sup>5</sup> *Ibid*, §4.iii.

<sup>6</sup> See [Press release](#) on the visit to the Russian Federation.

<sup>7</sup> For the purposes of this document, the concepts “non-governmental organisation” (NGO) and “non-commercial organisation” (NCO) and “non-profit organisation” are used interchangeably.

organisations as important and valuable partners and appreciate their contribution to decision-making processes in different spheres. Many of these organisations are members of various consultative and advisory bodies to the federal, regional and local authorities, such as the Council on Human Rights and Civil Society Development under the President of the Russian Federation, Public Chambers and councils, and advisory and working groups attached to ministries and other governmental institutions. Civil society organisations, mainly those involved in human rights advocacy, play an important role in the public monitoring commissions, which according to the 2008 Federal Law “On Public Oversight of Respect for Human Rights in Places of Forced Detention and on Assistance to Inmates of Places of Forced Detention” perform the public watchdog function within the law enforcement and penal correction systems.

6. The national legislative framework regulating activities of non-commercial organisations in the Russian Federation is fairly complex. The two laws which are of particular relevance to the activities of non-commercial organisations and the issues under discussion in this Opinion are the Federal Law No 82-FZ “On Public Associations” of 19 May 1995 (as amended) and Federal Law No. 7-FZ “On Non-Commercial Organisations” of 12 January 1996 (as amended). Other key legislative provisions applicable to the functioning of the civil society sector could be found in the Constitution of the Russian Federation; Civil Code; Criminal Code; Code of Administrative Penalties; Tax Code; Federal Law No 135-FZ “On Charitable Activities and Charitable Organisations”; Federal Law No 95-FZ “On Free of Charge Assistance”; Federal Law No 54-FZ “On Assemblies, Meetings, Demonstrations, Marches and Picketing”; Federal Law No 275-FZ “On the Procedure of Establishment and Use of Endowments of Non-commercial Organisations”. The regulatory framework currently in force also includes legislation enacted in 2012, which will be discussed in more detail in the present Opinion. Other relevant documents include: Resolution of the Government of the Russian Federation No 212 “On measures aimed at implementing certain provisions of the federal laws regulating activities of non-commercial organisations” of 15 April 2006; Resolution of the Government of the Russian Federation No 485 “Regarding the list of international organisations whose grants (free aid) obtained by Russian organisations shall be tax exempt and shall be accounted for as taxable income of taxpayers – recipients of such grants” of 28 June 2008; and Decree of the Ministry of Justice of Russia No 222 “On the Procedure of State Control of NCO Activity (including spending of resources)” of 22 June 2006.
7. The aim of the present Opinion is not to undertake an exhaustive analysis of the Russian legislation regulating activities of non-governmental organisations. Its objective is rather to follow up on the Commissioner’s previous discussions with the Russian authorities, where he expressed certain concerns, and to summarise and clarify his perspective on the legislative provisions in force in light of Council of Europe standards. While the Opinion focuses exclusively on the situation in the Russian Federation, the analysis of the issues would certainly apply in other contexts, where similar provisions and restrictions exist or are under consideration. Therefore, this Opinion is part of the Commissioner’s general efforts to ensure the best possible conditions for the work of human rights defenders in the Council of Europe area.

## **I. Background information on domestic legislation regulating the activities of NCOs**

8. In January 2006, new legislative amendments (Federal Law No. 18-FZ of 10 January 2006 on Introducing Amendments to Certain Legislative Acts of the Russian Federation)

were enacted in Russia concerning the non-governmental sector.<sup>8</sup> They introduced additional registration and reporting requirements on Russian NCOs and foreign NCOs operating in Russia, as well as new powers for governmental bodies to oversee their activities. This legislation raised concern among local and international experts and organisations<sup>9</sup>, because it allowed for broad interpretation and could be applied in a restrictive manner, leaving excessive room for government officials to exercise discretion in determining whom to target when enforcing these rules.<sup>10</sup> Following the adoption of this Law, foreign and international NCOs operating in Russia were obliged to undergo a re-registration in Russia. Due to issues arising with regard to their re-registration, several international human rights organisations – Human Rights Watch, Amnesty International, Medecins Sans Frontières – had to temporarily suspend their activities in Russia as part of this process. Overall, 70 000 were unable to obtain the re-registration within a two-year period.<sup>11</sup>

9. The legislation subsequently underwent further changes, which initially made the environment more conducive to the functioning of NGOs. Most notably, in July 2009, Parliament approved amendments simplifying the reporting and registration requirements for NCOs. In 2010, the legislation was amended to introduce the category of “socially oriented organisations”<sup>12</sup> (hereinafter referred to as SOOs), i.e. those engaged in activities such as charitable work, the provision of free-of-charge legal aid and the protection of human rights. Such organisations are eligible to receive financial support from the government.
10. Furthermore, in December 2010, the legislation was amended in order to enable NCOs to receive tax benefits. According to legislative amendments introduced in November 2011, an extraordinary inspection of NCOs could be carried out by an authorised agency, following a request by the election commission to verify information about the donations to political parties.<sup>13</sup>

### **1.1 Federal Law No. 82-FZ “On Public Associations”**

11. The Russian Federation recognises various organisational forms of non-commercial entities. This particular law deals with a specific sub-category of NCOs called “public associations”<sup>14</sup> which consist of public organisations, mass movements, public foundations, public institutions and several other forms. Approximately 50% of registered non-commercial organisations in Russia are public associations.

<sup>8</sup> At the time of adoption of this legislation, President Putin, as well as other governmental officials, justified the necessity of amending the legislation by referring to the need to block foreign-funded NCOs from carrying out what amounts to political activity. As President Putin stated during his working meeting with then Chairman of the State Duma Boris Gryzlov on 25 November 2005 : “Whether these organisations want it or not, they become an instrument in the hands of foreign states that use them to achieve their own political objectives” ([http://archive.kremlin.ru/appears/2005/11/25/1707\\_type63374type63378\\_98077.shtml](http://archive.kremlin.ru/appears/2005/11/25/1707_type63374type63378_98077.shtml)).

<sup>9</sup> A provisional opinion on amendments to federal laws of the Russian Federation regarding non-profit organisations and public associations was prepared by J. Tymen van der Ploeg, Professor of Private Law Faculty of Law, Vrije Universiteit Amsterdam - The Netherlands in co-operation with the Secretariat General of the Council of Europe (DGI – DGII) and made public in December 2005.

<sup>10</sup> For more information, see NCO Law Monitor: Russia, ICNL (<http://www.icnl.org/research/monitor/russia.pdf>)

<sup>11</sup> “Kak menyalas’ sistema kontrol’a za NKO v Rossii”, Kommersant daily, № 117 (4902), 28 June 2012

<sup>12</sup> According to the Law, socially oriented organisations are non-commercial organisations involved in activities aimed at solving social problems and promoting civil society development.

<sup>13</sup> Article 4.2 of the Federal Law No 7-FZ “On Non-Commercial Organisations” as amended by the Federal Law of 16 November 2011 No 317-FZ “On introducing changes to Article 32 of the Federal Law “On non-commercial organisations””.

<sup>14</sup> A public association is a membership-based organisation of individuals who associate on the basis of common interests and goals stipulated in the organisation's charter.

12. According to Article 27, all forms of public associations may participate in advocacy and lobbying activities. They may also engage in election campaigns, subject to federal election laws.
13. Articles 29 and 38 of the Law require the public associations to submit information about the funding and property they receive from foreign and international organisations and foreign persons to the registration authority. Repeated failure to submit such information in a timely manner could lead to the termination of the activities of the organisation as a legal entity, subject to judicial ruling.

**1.2 Federal Law No. 7-FZ “On Non-Commercial Organisations” (hereinafter referred to as the Law on NCOs)**

14. The Civil Code and the Law on NCOs establish the primary legal framework and define a variety of NCO forms, such as public organisations, foundations, institutions, and non-commercial partnerships. The main requirement is that independently of its organisational form, a non-commercial organisation should not have the generation of profit as its primary objective and does not distribute any such profit among its members.<sup>15</sup>
15. Prior to the legislative amendments introduced in 2006, one important distinction between the Law on NCOs and the Law on Public Associations, especially as regards the establishment and acquisition of legal personality, was the following: pursuant to the former, non-commercial organisations were only subject to a simple and speedy notification procedure, whereas the latter law stipulated that public associations needed to register. Following the 2006 amendments, all organisations covered by both laws are subject to a complex registration procedure.<sup>16</sup> The Ministry of Justice of the Russian Federation has announced that, as of 4 July 2013, in order to obtain registration, non-commercial organisations will be required to submit the same documents as those required from any other legal personality.<sup>17</sup>
16. Article 32 of the Law on NCOs requires NCOs to report on their use of funds and other assets received from both foreign and local sources. Repeated failure to submit such information in a timely manner could lead to the termination of the activities of the organisation as a legal entity, subject to a judicial ruling.

**1.3 Federal Law No. 121-FZ “On Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of the Activities of the Non-Commercial Organisations Performing the Functions of Foreign Agents” (hereinafter “the Law on Foreign Agents”)**

17. The Law on Foreign Agents entered into force on 21 November 2012 and introduced changes to the Law on Public Associations and Law on NCOs, as well as to the Criminal Code and Criminal Procedure Code and the Federal Law No 115-FZ “On Combating Legalization (Laundering) of Criminally Gained Income and Financing of Terrorism”. According to legislative provisions introduced by this Law, a non-commercial organisation performing the functions of foreign agent is a Russian non-commercial organisation “which receives funding and other property from foreign states, their governmental bodies, international and foreign organisations, foreign citizens, persons without citizenship or persons authorised by them, and/or Russian legal entities receiving funding

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<sup>15</sup> Civil Code of the Russian Federation, Article 50 (1).

<sup>16</sup> OING Conf/EXP (2009)1, Expert Council on NGO Law, First Annual Report, Conditions of Establishment of Non-Governmental Organisations, January 2009, § 261.

<sup>17</sup> <http://minjust.ru/node/5213>

and other property from said sources [...], and which engages, including in the interest of foreign sources, in political activities carried out on the territory of the Russian Federation”<sup>18</sup>. Such organisations are required to apply for registration in a Register of non-commercial organisations performing the functions of a foreign agent and to mention in the materials published and/or distributed by them that they have been published and/or distributed by a non-commercial organisation performing the functions of a foreign agent.<sup>19</sup>

18. Pursuant to the Law on Foreign Agents, an NCO is considered to carry out political activity, if, regardless of its statutory goals and purposes stated in its founding documents, it participates (including through financing) in organising and implementing political actions aimed at influencing decision-making by state bodies intended for the change of state policy pursued by them, as well as in the shaping of public opinion for the aforementioned purposes.<sup>20</sup>
19. The activities in the following shall be excluded from the scope of “political activity”: science, culture, arts, health protection, disease prevention and protection of citizens’ health, social support and protection of citizens, protection of motherhood and childhood, social support of people with disabilities, promotion of a healthy lifestyle, physical well-being and sports, protection of plant and animal life, charitable activities, and activities in the sphere of promotion of charity and volunteerism.<sup>21</sup>
20. The new legislative amendments introduce an additional administrative burden for those NCOs which fall under the category of foreign agents (such as separate accounts for funds accumulated from local and foreign sources; biannual activity reports; quarterly reports on spending funds; annual audit report, etc). They have also introduced administrative sanctions and criminal penalties for “malevolent” non-compliance with the provisions of the Law (up to two years of imprisonment).
21. Any law that regulates NGOs should aim to enable their exercise of freedom of association and have that as its result. It should not aim to thwart their creation and activities – or lead to that in fact.<sup>22</sup> As has been stated by the Commissioner on several occasions, both during his meetings in Moscow and elsewhere in Russia, as well as in Strasbourg with the Russian delegation to the Parliamentary Assembly of the Council of Europe, the two main issues of concern with regard to these legislative amendments were the use of the term foreign agent (*inostranniy agent*) and the ambiguous definition of political activity in the Law.
22. The Commissioner took note that from the outset the Law did not clearly and unequivocally exclude human rights advocacy from the notion of “political activity”. However, during his meetings in the Russian Federal Assembly in October 2012, the Commissioner’s interlocutors assured him that the law would not be applied in a way that would put any additional burden on the daily work of the organisations engaged in the protection of human rights. Regrettably, the implementation of this law appears to prove otherwise.

<sup>18</sup> Article 2.2) of the Law on Foreign Agents.

<sup>19</sup> Articles 2.3)a and 2.4) of the Law on Foreign Agents.

<sup>20</sup> Article 2.2) of the Law on Foreign Agents

<sup>21</sup> *Ibid.*

<sup>22</sup> CDL-AD(2013)017, Venice Commission, Standards on Non-Governmental Organisations and Free Association”, 28 March 2013, § 42.

**1.4 Federal Law N 190-FZ “On introducing amendments to the Criminal Code of the Russian Federation and to Article 151 of the Criminal Procedure Code of the Russian Federation” (hereinafter referred to as the Law on Treason)**

23. The Law on Treason entered into force on 14 November 2012. Treason is defined in the law as the “transfer of classified information to the foreign state, international or foreign organisation or their representatives by Russian national, who was entrusted with such information or gained knowledge of it through his/her service, work or study and in other cases provided by the Russian law, or the provision of financial, material and technical, consultative or any other assistance to foreign states, international or foreign organisations or their representatives that is aimed against the security of the Russian Federation”.<sup>23</sup>
24. At present, the Commissioner is not aware of any instances where this law has been applied against non-commercial organisations involved in providing assistance, information or advice to representatives of international organisations. However, he finds that the language used in the law is excessively vague and broad, and could lend itself to selective interpretation and undue restrictions on the exercise of the right to freedom of expression (Article 10 of the ECHR). In addition, the law raises issues under Article 9.4 of the UN Declaration on Human Rights Defenders, which states that “[...] in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms”.

**1.5 Federal Law N 272-FZ “On measures for affecting persons implicated in violation of basic human rights and freedoms, rights and freedoms of the citizens of the Russian Federation”**

25. The Law (also known as the “Dima Yakovlev Law”)<sup>24</sup> entered into force on 1 January 2013 and was widely regarded as a response to the adoption by the Congress of the United States of America of the “Magnitsky Law”.<sup>25</sup> The widespread attention received by the “Dima Yakovlev Law” in Russian society essentially related to its provisions prohibiting the adoption of Russian orphans by USA citizens. However, the law is also relevant to the present opinion because of its provisions relating to the activities of non-commercial organisations.
26. In particular, the Law provides for the suspension of activities and seizure of assets of NCOs carrying out political activities or implementing other activities constituting a “threat to the interests of the Russian Federation” and receiving funds from the US citizens or organisations (Section 3.1).<sup>26</sup> Once a non-commercial organisation whose activities have

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<sup>23</sup> Article 1.2) of the Law on Treason.

<sup>24</sup>The law was informally named after Dima Yakovlev, a Russian toddler who was adopted by a US citizen. Less than three months after he arrived in the US, Dima died while he was strapped into his adoptive father's car and left alone for nine hours, as his father forgot to bring him to day-care service. Following trial, his adoptive parent was acquitted for involuntary manslaughter. This case has been widely discussed in the Russian media. Following the accident, Russian federal prosecutors opened an investigation into the boy's death, and Russian authorities called to restrict or end the adoption of Russian children by Americans.

<sup>25</sup> The Magnitsky Law was passed by the U.S. Congress in November–December 2012 and signed into law by President Obama on 14 December, 2012. The main intention of the law was to punish Russian officials who were thought to be responsible for the death of Sergei Magnitsky, - a Russian lawyer who had died in a Moscow pre-trial remand facility allegedly after being subjected to ill-treatment, - by prohibiting their entrance to the United States and use of their banking system. The Obama administration made public a list of 18 individuals affected by the Act in April 2013.

<sup>26</sup> There is no separate definition of the term “political activity” in this Law, so presumably the definition given in the Law on Foreign Agents will apply. The current Russian legislation does not appear to have a clear

been suspended under this law stops receiving funding from US sources or ceases any activities causing a threat to the interests of the Russian Federation, the organisation can resume its activities following a decision of the authorised federal entity (Section 3.4). Citizens with dual Russian and USA citizenship are prohibited from membership or participation in the management of Russian NGOs or registered offices of foreign NGOs that participate in political activities on the territory of the Russian Federation (Section 3.2).

27. Currently, the Commissioner is not aware of any instance of direct application of the above-mentioned provisions vis-à-vis a non-commercial organisation in Russia. Nevertheless, he has concerns as to how the provisions will apply in practice, as they could impose undue restrictions on the exercise of the right to freedom of association and assembly. Furthermore, the explicit exclusion of the holders of dual Russian and USA nationality<sup>27</sup> from participating in the management of non-governmental organisations is questionable from the point of view of guarantees provided by Article 11 of the European Convention on Human Rights (which envisages that everyone within a State's jurisdiction has the right to freedom of association).

## II. The applicable standards

28. The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereinafter referred to as UN Declaration on Human Rights Defenders), adopted by the General Assembly resolution 53/144 (A/RES/53/144) on 8 March 1999, is the main international instrument which codifies the international standards that protect the activity of human rights defenders worldwide. It specifies how the rights contained in the major human rights instruments, including the right to freedom of expression, association and assembly, apply to defenders. It also provides for the state's duty to protect human rights defenders against any violence, retaliation and intimidation as a consequence of their human rights work.
29. The CoE Committee of Ministers Declaration on human rights defenders, inter alia, called on member states to "ensure that their legislation, in particular on freedom of association, peaceful assembly and expression, is in conformity with internationally recognised human rights standards..."<sup>28</sup>
30. Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe states that "NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and should be subject to the administrative, civil and criminal law obligations and sanctions generally applicable to those legal persons" and that "The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation".<sup>29</sup>

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definition of what constitutes a "threat to the interests of the Russian Federation", leaving open a possibility for a broad interpretation of this provision.

<sup>27</sup> Russian legislation allows dual citizenship. Cf. Federal Law of 31 May 2002 No 62-FZ "On citizenship of the Russian Federation", Section 6 "Dual citizenship".

<sup>28</sup> Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, adopted by the Committee of Ministers on 6 February 2008 at the 1017<sup>th</sup> meeting of the Ministers' Deputies, § 2.vi.

<sup>29</sup> Adopted by the Committee of Ministers on 10 October 2007 at the 1006<sup>th</sup> meeting of the Ministers' Deputies, §§ 7 and 8.

31. The provisions of the European Convention on Human Rights (hereinafter referred to as the ECHR) and the case-law of the European Court of Human Rights (hereinafter referred to as the Court) on the rights to freedom of expression and freedom of assembly and association, as well as the right to respect for private and family life, are all relevant to the present analysis. The exercise of the right to freedom of expression (Article 10) and right to the freedoms of assembly and association (Article 11) may be subject to formalities, conditions, restrictions or penalties as are “prescribed by law”, pursue a legitimate aim, and be “necessary in a democratic society”. The ECHR limits the possible restrictions on those rights to the following:
- Article 8 of the ECHR concerning the right to respect for one’s private and family life, one’s home and correspondence, provides in its second paragraph that “there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.
  - Article 10 of the ECHR concerning the right to freedom of expression, which includes, according to paragraph 1, freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. Article 10 (2) describes the scope for restrictions in the following terms: “as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.
  - Article 11 of the ECHR concerning freedom of assembly and association, which provides in its second paragraph that “no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”.
32. In addition, Article 14 of the ECHR contains a prohibition against discrimination, providing that “the enjoyment of the rights and freedoms set forth in the ECHR shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.<sup>30</sup>
33. There are two basic principles concerning the restrictions to the rights guaranteed. The first one is that only the restrictions expressly authorised by the Convention are allowed, and the second one - stated in Article 18 of the ECHR - is that “the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed”.

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<sup>30</sup> In many cases the Court does not determine whether there has been a violation of Article 14 in conjunction with a substantive article where it has first decided that there is a violation of the substantive article. In the *Chassagnou and others v. France* (judgment of 29 April 1999; § 89), the Court found that: “Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case”.

34. According to the well-established case-law of the Court, the expressions “prescribed by law” and “in accordance with the law” in Articles 8 to 11 of the ECHR not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned, and formulated with sufficient precision to enable them – if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequence which a given action may entail.<sup>31</sup> For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.<sup>32</sup> At the same time the Court has established in its judgments that it is not possible to attain absolute rigidity in the framing of laws, and many of them are inevitably couched in terms which, to a greater or lesser extent, are vague. The level of precision required of domestic legislation depends to a considerable degree on the content of the instrument in question and the field it is designed to cover.<sup>33</sup>
35. In its assessment of the standard of “prescribed by law”, the Court takes into account the consistency of domestic case-law in the implementation of a legal provision. The existence of contradictory domestic court decisions in the application of domestic laws has led the Court to conclude in the past that a particular interference was not “prescribed by law”, whereas a uniform and consistent jurisprudence in the interpretation of domestic provisions was considered to allow the applicants to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.
36. The general principles in the Court’s case-law on freedom of association have been established as follows: “The right to form an association is an inherent part of the right set forth in Article 11. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association’s aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions”.<sup>34</sup>
37. In its case-law the Court reiterated that the exceptions to freedom of association are to be construed strictly and that only convincing and compelling reasons can justify restrictions on that freedom. “Any interference must correspond to a “pressing social need”; thus, the notion “necessary” does not have the flexibility of such expressions as “useful” or “desirable”.<sup>35</sup> “In determining whether a necessity within the meaning of 11§2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.<sup>36</sup>

<sup>31</sup> *Maestri v Italy*, Grand Chamber judgment of 17 February 2004, § 30.

<sup>32</sup> *Hasan and Chaush v Bulgaria*, Grand Chamber judgment of 26 October 2000, § 84.

<sup>33</sup> *Hashman and Harrup v the United Kingdom*, Grand Chamber judgment of 25 November 1999, § 31.

<sup>34</sup> *Sidiropoulos and Others v Greece*, judgment of 10 July 1998, § 40.

<sup>35</sup> *Gorzelik and Others v. Poland*, Grand Chamber judgment of 17 February 2004, § 95

<sup>36</sup> *Sidiropoulos and Others v Greece*, § 40.

38. The general principles concerning the necessity of an interference with freedom of expression were summarised in *Stoll v Switzerland*<sup>37</sup> as follows: “[...] Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which... must, however, be construed strictly, and the need for any restrictions must be established convincingly...”
39. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.<sup>38</sup>
40. In addition, the Commissioner wishes to underline that the notion of the rule of law itself is built on the following principles: 1) Legality, including a transparent, accountable and democratic process for enacting law; 2) Legal certainty; 3) Prohibition of arbitrariness; 4) Access to justice before independent and impartial courts, including judicial review of administrative acts; 5) Respect for human rights; and 6) Non-discrimination and equality before the law.<sup>39</sup>
41. The principle of legal certainty is essential to the confidence in the judicial system and the rule of law. To achieve this confidence, the state must make the text of the law easily accessible. It also has a duty to respect and apply, in a foreseeable and consistent manner, the laws it has enacted. Foreseeability means that the law must where possible be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct.<sup>40</sup> Retroactivity also goes against the principle of legal certainty: at least in criminal law (Article 7 ECHR), since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests.<sup>41</sup> In addition, Parliament shall not be allowed to override fundamental rights by ambiguous laws. This offers essential legal protection of the individual vis-à-vis the state and its organs and agents.<sup>42</sup>

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<sup>37</sup> Grand Chamber judgment of 10 December 2007, § 101. See also *Mouvement raëlien suisse v. Switzerland*, Grand Chamber judgment of 13 July 2012, § 48.

<sup>38</sup> *United Communist Party of Turkey and Others v. Turkey*, Grand Chamber judgment of 30 January 1998, § 47; *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, judgment of 20 October 2005, §§ 61-62.

<sup>39</sup> CDL-AD(2011)003 rev, European Commission for Democracy Through Law (Venice Commission), Report on the rule of law, adopted by the Venice Commission at its 86<sup>th</sup> plenary session (Venice, 25-26 March 2011), § 41.

<sup>40</sup> *Ibid.*, § 44.

<sup>41</sup> *Ibid.*, § 44.

<sup>42</sup> *Ibid.*, § 47.

### III. Observations on the implementation of the legislation

42. Since the beginning of March 2013, a series of inspections of non-commercial organisations began to be carried out by the Prosecutor General's Office, with the participation of representatives of other federal structures.<sup>43</sup> The exact number of NCOs undergoing checks is difficult to estimate, partly because not all of them have chosen to state publicly that they have been inspected. According to *Openinform* media, by 30 April 2013 at least 270 NCOs from 57 Russian regions had been inspected.
43. During his visit to the Russian Federation in April 2013, the Commissioner received contradictory information as to the purpose of the inspections. In some cases reference was made to the need to ensure compliance with anti-extremism legislation; in others the need to establish which organisations are carrying out "political activities", in order to ensure the implementation of the Law on Foreign Agents; in other circumstances it was said that the purpose was to verify compliance with the legislation in general.
44. The Commissioner has also received conflicting accounts about whether these inspections were ordinary (planned) or extraordinary. According to the legislation in force at the time of the inspections, the only ground for an extraordinary inspection of an NCO could have been a request from the election commission to verify information about the donations to political parties.<sup>44</sup> While most of the Commissioner's official interlocutors indicated that the inspections were of the planned type, many of the organisations which were subject to such inspections claimed that they were not on the list of the organisations where an inspection was planned for 2013.<sup>45</sup> Moreover, in some cases, the organisation had just undergone a planned inspection by the Ministry of Justice, when the Prosecutor's Office announced that it would be subject to yet another inspection.<sup>46</sup>
45. As of 24 June 2013, at least 64 NGOs have been affected by the measures undertaken to enforce the Law on Foreign Agents. At least 7 administrative cases were brought to court against NGOs for alleged failure to apply for registration in a Register of organisations performing the function of foreign agents. Seventeen NGOs had received notices of violation of the Law on Foreign Agents from the prosecutor's office. At least 40 NGOs were given official warnings to abstain from violating the Law on Foreign Agents, meaning that the affected NGOs should seek registration in the above-mentioned Register, if they pursue their statutory activities (which in the meantime had been qualified as being "political").
46. Although the Law on Foreign Agents exempts "protection of plant and animal life" from the definition of "political activity", at least 14 environmental groups have received official

<sup>43</sup> The governmental bodies, whose representatives were to a various degree involved in carrying out inspections, included the Ministry of Justice, Tax Inspection, Centre for Combatting Extremism of the Ministry of Interior, Federal Migration Service, Federal Security Service, Fire-Fighting Service and Sanitary-epidemiological Service.

<sup>44</sup> According to legislative changes introduced by the Federal Law of 16 November 2011 No 317-FZ "On introducing changes to Article 32 of the Federal Law "On non-commercial organisations".

<sup>45</sup> The list is compiled by the Ministry of Justice.

<sup>46</sup> During his meeting with President Vladimir Putin on 9 July 2013, Prosecutor General Yuri Chaika stated that the Prosecutor's Office had completed the inspections of non-commercial organisations. He described them as planned inspections, which were carried out because no organisation was registered in the Register of the NCOs performing the functions of a foreign agent, as required by the Law on Foreign Agents. The Prosecutor's Office focused their inspections on 215 NCOs, which they believed should have been registered as "foreign agents". 22 of those continued to function and to receive foreign funding. 193 organisations corresponded to the criteria established by the Law on Foreign Agents before its entry into force, but subsequently either suspended their activities, or stopped receiving foreign funding (<http://www.kremlin.ru/news/18562>).

warnings from the prosecutor's office that they might be required to register as "foreign agents," and one environmental advocacy NGO was already ordered to do so.

47. In two cases, official warnings were issued by the prosecutor's office and subsequently revoked. This happened in the case of an NGO providing assistance to individuals with cystic fibrosis and an NGO dealing with the preservation of wildlife.
48. The two issues emerging from the implementation of the Law on Foreign Agents are the use of sanctions (and the choice of sanction) in each particular case and what could be qualified as a retrospective application of the Law. There seems to be a lack of clear, consistent and identifiable criteria that would explain why in some cases it was decided to bring administrative charges against the organisation and its management; while in other cases the organisations were ordered to correct the violation by registering; and yet in other cases it was decided to give an official warning about the necessity to register. It appears that the choice of sanctions to be applied remained at the discretion of a particular local prosecutor's office in charge of carrying out the inspections. Moreover, in many of these cases the decisions about whether the organisation carries out "political activity" were made based on past activities and/or because foreign funding had been received in the past, i.e. before the Law on Foreign Agents was enacted and entered into force.
49. The Commissioner's overall assessment of those inspections is that they were carried out in an unnecessarily intrusive and disproportionate manner.

### **3.1 Definition of "political activity" in the Law and its interpretation**

50. The implementation of the Law on Foreign Agents so far has proved that concerns expressed by many local and international actors about the broad and vague character of the definition of "political activity" used in the law allowing for its arbitrary interpretation were justified.
51. The present wording of the Law on Foreign Agents allows to qualify as "political activity" any engagement by NGOs aimed at influencing public opinion and/or decision-making processes through proposals for changes to policies pursued by governmental bodies. In the Commissioner's view, these activities are a natural and widely-used instrument at the disposal of civil society institutions. As has been underlined in the Code of Good Practice for Civil Participation in the Decision-Making Process<sup>47</sup>, "one of the major concerns of modern democracies is the alienation of citizens from the political process. In this context, [...], civil society constitutes an important element of the democratic process. It provides citizens with an alternative way, alongside those of political parties and lobbies, of channelling different views and securing a variety of interests in the decision-making process". The CoE Committee of Ministers in its CM/Recommendation(2007)14 of October 2007 stated that "governmental and quasi-governmental mechanisms at all levels should ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives and decisions. Such participation should ensure the free expression of the diversity of people's opinions as to the functioning of society"<sup>48</sup>.
52. Based on the results of the inspections to date, the range of activities which were recognised as "political" encompass the following: providing information to the United

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<sup>47</sup> CONF/PLE(2009)CODE1, adopted by the Conference of INGOs at its meeting on 1<sup>st</sup> October 2009, page 3.

<sup>48</sup> Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies, §76.

Nations Committee Against Torture on Russia's compliance with the Convention Against Torture; bringing cases to and litigating before the European Court of Human Rights; advocating on environmental issues, including with state authorities; monitoring human rights violations and raising public awareness on the results of the monitoring; organising seminars, round table discussions and other events to discuss governmental policies and foreign policy; providing state officials with ideas, opinions and recommendations on public interest policy and similar activities. All of these activities fall under the legitimate exercise of the right to freedom of expression.<sup>49</sup>

53. The case-law of the European Court of Human Rights on the role of NGOs in democratic society is clear. As has been noted in several of its judgments, when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press.<sup>50</sup>
54. In *Zhechev v Bulgaria*<sup>51</sup>, the Court noted that: "An organisation may campaign for a change in the legal and constitutional structures of the State if the means used to that end are in every respect legal and democratic and if the change proposed is itself compatible with fundamental democratic principles [...] The mere fact that an organisation demands such changes cannot automatically justify interferences with its members' freedoms of association and assembly." Furthermore, in *Koretskyy and Others v Ukraine*<sup>52</sup>, the Court observed that there had been no explanation for, or even an indication of the necessity of the existing restrictions on the possibility of associations to distribute propaganda and lobby authorities with their ideas and aims, their ability to involve volunteers as members or to carry out publishing activities on their own.
55. The Court has also dealt with the notion of "political" in the above mentioned case of *Zhechev v Bulgaria*, where an NGO was refused registration because some of its stated goals – such as the restoration of the Constitution of 1879 and of the monarchy – were "political goals" within the meaning of Article 12 (2) of the Constitution of 1991 and could hence be pursued solely by a political party. The Court, while considering if it was necessary in a democratic society to prohibit NGOs, unless registered as political parties, from pursuing "political goals", stated that it had to examine whether this ban corresponded to a "pressing social need" and whether it was proportionate to the aims sought to be achieved. The Court pointed out in particular that "the first thing which needs to be noted in this connection is the uncertainty surrounding the term "political", as used in Article 12 § 2 of the Constitution of 1991 and as interpreted by the domestic courts. [...] Against this background [of different interpretations by national courts] and bearing in mind that this term is inherently vague and could be subject to largely diverse interpretations, it is quite conceivable that the Bulgarian courts could label any goals which are in some way related to the normal functioning of a democratic society as "political" and accordingly direct the founders of legal entities wishing to pursue such goals to register them as political parties instead of "ordinary" associations. A classification based on this criterion is therefore liable to produce incoherent results and engender considerable uncertainty among those wishing to apply for registration of such entities".<sup>53</sup>

<sup>49</sup> In *Ezelin v France* (judgment of 26 April 1991, §37), the ECtHR noted that "[...]The protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11".

<sup>50</sup> See *Vides Aizsardzības Klubs v. Latvia*, judgment of 27 May 2004, § 42; *Animal Defenders International v. The United Kingdom*, judgment of 22 April 2013, §103.

<sup>51</sup> Judgment of 21 June 2007, §§ 47-48.

<sup>52</sup> Judgment of 3 April 2008, § 52.

<sup>53</sup> *Zhechev v Bulgaria*, judgment of 21 June 2007, § 54-55.

56. Furthermore, the Court found that, since under Bulgarian law associations could not participate in elections (which could possibly justify the requirement to get some of them to register as a political party, so as to make them, for instance, subject to stricter rules regulating party financing, public control and transparency), there was no “pressing social need” to require every association deemed by the courts to pursue “political” goals to register as a political party, especially in view of the fact that the meaning of this term was quite vague under Bulgarian law. “That would mean forcing the association to take a legal shape which its founders did not seek. It would also mean subjecting it to a number of additional requirements and restrictions [...], which may in some cases prove an insurmountable obstacle for its founders. Moreover, such an approach runs counter to freedom of association, because, in case it is adopted, the liberty of action which will remain available to the founders of an association may become either non-existent or so reduced as to be of no practical value”.<sup>54</sup> The Court therefore considered that the alleged “political” character of the association’s aims was also not a sufficient ground to refuse its registration.

### **3.2 Use of term “foreign agent” and difference in treatment attributed on the criteria of “foreign funding”**

57. The Law on Foreign Agents requires that organisations involved in “political activity” and receiving “foreign funding” should register in a special Register and would consequently be subject to different requirements and obligations in terms of self-identification and reporting. The use of the term “foreign agent” (*inostranniy agent*) is of particular concern to the organisations affected by the implementation of the Law on Foreign Agents, since it has usually been associated in the Russian historical context with the notion of a “foreign spy” and/or a “traitor” and thus carries with it a connotation of ostracism or stigma. This conclusion is supported by the findings of an opinion poll carried out by the Levada Centre (a Russian institute for sociological surveys) which found that 62% of respondents negatively perceive the term “foreign agent”.<sup>55</sup> Therefore, being labelled as a “foreign agent” signifies that an NGO would not be able to function properly, since other people and - in particular - representatives of the state institutions will certainly be reluctant to co-operate with them, in particular in discussions on possible changes to legislation or public policy.
58. As an illustration of the above-mentioned pattern, the Commissioner was informed of a case during the winter months of 2013 when homeless people were refusing to accept an offer of shelter from representatives of a non-commercial organisation engaged in providing support to people in need, indicating that they were unwilling to accept help from “foreign agents”.
59. As to the funding of the activities of the non-governmental organisations, Article 50 of Recommendation CM/Rec (2007)14 of the Committee of Ministers of the Council of Europe to member states on the legal status of non-governmental organisations in Europe states that “NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties”. Paragraph 50 of the CM Explanatory memorandum to the above-mentioned Recommendation states that “the ability of NGOs to solicit donations in cash or in kind will, notwithstanding the possibility of them also engaging in some economic activity, always be a crucial means for them to raise the funds required in order to pursue their objectives. It is important that the widest range of possible donors can be approached by NGOs. (...) The only limitation on donations

<sup>54</sup> *Ibid*, § 56.

<sup>55</sup> The opinion poll was carried out in September 2012.

coming from outside the country should be the generally applicable law on customs, foreign exchange and money laundering, as well as those on the funding of elections and political parties. Such donations should not be subject to any other form of taxation or to any special reporting obligation”.

60. In *Moscow Branch of the Salvation Army v. Russia*, where the applicant has been refused re-registration because of its “foreign origin”, the Court found there was no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as regards their ability to exercise their right to freedom of religion through participation in the life of organised religious communities and that this ground for legal refusal had no legal foundation.<sup>56</sup>

### **3.3 Inspections of the NGOs and the right to private life**

61. According to the well-established case-law of the European Court of Human Rights, any interference with Article 8 rights will not be considered disproportionate if it is restricted in its application and effect, and is duly attended by safeguards in national law so that the individual is not subject to arbitrary treatment. With regard to NGOs, the general standard is that they should not be subject to search and seizure without objective grounds for taking such measures and appropriate judicial authorisation.<sup>57</sup>
62. As has been already noted above (paragraphs 43 and 44), the reasons and legal grounds for these inspections in many cases were not clearly defined. Inspectors generally requested to be provided with statutory and operational documentation, as well as financial and tax reports and documentation for years 2010-2013. In those cases where the prosecutors were accompanied by representatives of other federal oversight bodies, the scope of documents requested was much broader. In St. Petersburg, for example, inspectors asked to produce documents such as a rat control certificate, results of chest X-rays of NGO employees, rubbish disposal arrangements etc. Consequently, several NGOs have questioned the legality of the inspections and brought their cases to domestic courts.
63. In *Ernst and others v Belgium*<sup>58</sup>, which concerned four journalists whose offices and homes had been searched in connection with the suspicion of disclosure to the press of confidential information by members of the judiciary – the Court, inter alia, examined the issue of the search warrants. It noted, in particular, that they were drafted in wide terms (“search and seize any document or object that might assist the investigation”) and gave no information about the investigation concerned, the premises to be searched or the objects to be seized. Furthermore, the applicants, who had not been accused of any offence, were not informed of the reasons for the searches, thus giving rise to searches which could not be considered proportionate to the legitimate aims.
64. The Court has been reluctant to accept even in the context of preventing terrorism that the wide discretionary powers conferred on the law enforcement agencies are justified, unless the legislation in force provides for sufficient guarantees against arbitrary interference by the public authorities. In *Gillan and Quinton v United Kingdom*<sup>59</sup>, the Court was asked to rule on coercive powers conferred on the police by the anti-terrorism legislation in force. According to the law, police could stop and search anyone, anywhere and without notice, regardless of any reasonable suspicions of wrongdoing, provided that

<sup>56</sup> *Moscow Branch of the Salvation Army v Russia*, judgment of 5 October 2006, §§81-86.

<sup>57</sup> Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers’ Deputies, §69.

<sup>58</sup> Judgment of 15 July 2003, § 116.

<sup>59</sup> Judgment of 12 January 2010.

the uniformed officer considered the activity “expedient for the prevention of acts of terrorism”. The Court considered that the wide discretion conferred by the legislation, both in terms of authorisation of the power to stop and search and its application in practice, had not been curbed by adequate legal safeguards, so as to offer the individual sufficient protection from arbitrary interference.<sup>60</sup> Moreover, in light of the statistical evidence showing the extent to which police officers resorted to the stop and search powers conferred on them by the law, the Court considered that the provision was not sufficiently circumscribed nor subject to adequate legal safeguards against abuse, and therefore did not meet the legality requirement set forth by Article 8.<sup>61</sup>

### 3.4 *The role of the Ministry of Justice*

65. In principle, the Ministry of Justice is the authorised governmental agency vested with power to regulate activities of non-commercial organisations, including their registration, reporting and ensuring due oversight over their activities. In 2011-2012, the Ministry of Justice initiated and carried out 226 extraordinary inspections of NGOs. In 41 cases, such inspections had not been authorised by the Prosecutor’s Office.<sup>62</sup> Nevertheless, its role in the on-going (extra)ordinary inspections was not fully clear. Based on his discussions with various interlocutors in Russia, the Commissioner obtained the impression that the Ministry of Justice played an auxiliary role, while the Prosecutor’s Office has been taking the lead by virtue of the powers vested in it by the Federal Law on the Prosecution Service of the Russian Federation<sup>63</sup> and in fulfilment of its supervisory function in relation to execution of the laws in force.<sup>64</sup> This *de facto* change of roles appears to be partially rooted in legislative provisions which do not clearly delimit the roles and duties between the two institutions with regard to the oversight of NGO activities, but apparently allow those to overlap. This has certainly contributed to the overall confusion with regard to the implementation of the Law on Foreign Agents.
66. In January 2013, a human rights organisation in the Chuvash Republic applied to the Ministry of Justice with a request to register as a “foreign agent”, but was declined. In its commentary on the decision not to include the organisation into the Registry of non-commercial organisations performing the function of a foreign agent, the Ministry of Justice explained its decision by pointing out that the declared goals of the organisation – rooting out the human rights violations on the territory of Chuvash Republic – were fully in line with the human rights principles embodied in the Russian Constitution and legislation in general. The Prosecutor’s Office has subsequently qualified the Ministry of Justice’s decision not to include the above-mentioned organisation in the Register as abuse of authority.<sup>65</sup>
67. On 28 June 2013, the Ministry of Justice announced that the first organisation had been registered in the Register of non-commercial organisations performing the functions of a foreign agent – a non-commercial partnership promoting competition in the member states of the Commonwealth of Independent States.<sup>66</sup>

<sup>60</sup> *Ibid.*, §79.

<sup>61</sup> *Ibid.*, §§ 84-87.

<sup>62</sup> See report by the Ministry of Justice on the state control of the activities of non-commercial organisations and effectiveness of such control, published on 10 June 2012.

<sup>63</sup> See in particular provisions in Section III Chapter 1 of the Federal Law on the Prosecution Service of the Russian Federation.

<sup>64</sup> A more detailed assessment of the supervisory function exercised by the Prosecutor’s Office in the Russian Federation will be included in the Commissioner’s report on the administration of justice and protection of human rights in the justice system in the Russian Federation, which will be published in the upcoming months.

<sup>65</sup> “Minjust privodiat v sootvetstviye s zakonom ob NCO”, *Kommersant* daily, N 115(5146), 4 July 2013 (<http://kommersant.ru/doc/2225624>).

<sup>66</sup> <http://minjust.ru/node/5238>

### 3.5 *The role of the Prosecutor's Office*

68. The Court has generally refused to consider public prosecutors as an independent and impartial tribunal within the meaning of Article 6§1 of the Convention. According to the Court, “the mere fact that the prosecutors acted as guardians of the public interest cannot be regarded as conferring on them a judicial status of independent and impartial actors”.<sup>67</sup> It follows from the case-law of the Court that in principle prosecutors should not have decision-making powers when taking measure concerning “civil rights and obligations”, unless their measures are subject to full judicial review. Such a review is to be done by an independent and impartial tribunal. Since 2009, in three judgments delivered against Russia, the Court looked into the role of public prosecutors in civil proceedings.<sup>68</sup>
69. More generally, in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*<sup>69</sup>, the Court pointed out that national legislation [in this particular case, the NGO Act] contained no detailed rules governing the scope and extent of the power of the Ministry of Justice to intervene in the internal management and activities of associations. Nor did the legislation foresee minimum safeguards concerning, inter alia, the procedure for conducting inspections by the Ministry of the period of time granted to public associations to eliminate any shortcomings detected, which meant that it provided insufficient guarantees against the risk of abuse and arbitrariness.<sup>70</sup>
70. In the Russian judicial system – which is still characterised by “a pronounced prosecutorial bias” as has been expressly stated on several occasions by President Vladimir Putin<sup>71</sup> – the courts tend to support the conclusions reached by prosecutors in relation to the cases under consideration. While the Prosecutor’s Office appears to be vested with the authority to qualify the activities of NCOs as falling under the criteria provided in the Law on Foreign Agents, it is then for the domestic courts to decide whether the application of a particular sanction was justified in a particular case. Therefore, it is of the utmost importance to ensure that the on-going judicial proceedings fully correspond to fair trial requirements as provided for in Article 6 of the ECHR. The reasoning of the Court in the case of *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* could be useful in this regard. As pointed out by the Court in § 79, “[...] while the Ministry of Justice was vested with authority to initiate an action for the dissolution of the Association, it was for the domestic courts to decide whether it was justified to apply this sanction. They were therefore required to provide relevant and sufficient reasons for their decision [...] In the present case, that requirement first and foremost obliged the domestic courts to verify whether the allegations made against the Association by the Ministry of Justice were well-founded. [...] Having heard the parties, the courts relied on the findings of the officials of the Ministry of Justice and accepted them at their face value as constituting true fact, without an independent judicial inquiry”. It is worth considering whether the Supreme Court of the Russian Federation could assist the local courts in fulfilling this function by providing general guidelines as to the consistent, coherent and unified application of the legislation in question.
71. Recommendation CM/Rec (2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system encouraged the public

<sup>67</sup> *Zlínasat, spol. S r.o., v Bulgaria*, judgment of 15 June 2006, § 78.

<sup>68</sup> European Court of Human Rights, Research Division, The role of public prosecutor outside the criminal law field in the case-law of the European Court of Human Rights,

<sup>69</sup> Judgment of 8 October 2009.

<sup>70</sup> *Ibid.*, §64.

<sup>71</sup> See, for example, an article published during the 2012 presidential election campaign in the *Kommersant* daily on 6 February 2012 (<http://www.kommersant.ru/Doc/1866753>); as well as Presidential Address to the Federal Assembly of the Russian Federation on 12 December 2012 (<http://www.kremlin.ru/news/17118>).

prosecutor services, in fulfilling their mission, to establish and, where appropriate, develop co-operation or contacts with ombudspersons or similar institutions, [...] and with representatives of civil society, including non-governmental organisations.<sup>72</sup> In March 2013, the representatives of the Russian Prosecutor General's Office were invited to take part in the special hearing on the inspections of NCOs organised by the Council on Human Rights and Civil Society Development under the President of the Russian Federation. Regrettably, the Prosecutor General's Office did not find it possible to attend this event, which took place on 15 April 2013.<sup>73</sup> In the Commissioner's view, establishing a genuine dialogue with civil society and human rights structures would be the first logical step towards preventing unnecessary interference with the daily work of civil society institutions and imposing insurmountable burdens on their activities.

### **3.6 Additional observations as to the legislation and its implementation**

72. On 25 June 2013, the Ministry of Justice decided to suspend for a six-month period the activities of the Association Golos, based on the provisions of the Law on NCOs.<sup>74</sup> The decision was taken due to the organisation's failure to register as an organisation performing the functions of a foreign agent. The Commissioner has concerns about this decision, in light of Recommendation CM/Rec(2007)14 of the Committee of Ministers to member States on the legal status of non-governmental organisations in Europe, which provides that "the legal personality of NGOs can only be terminated pursuant to the voluntary act of their members [...] or in the event of bankruptcy, prolonged inactivity or serious misconduct". The same principle has been upheld by the Court in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*.<sup>75</sup> Prolonged suspension of the NGO activities would amount to its *de facto* dissolution, and therefore should apply only in exceptional cases and be proportionate to the offence committed.
73. The Law on Foreign Agents also allows for the application of criminal prosecution and imprisonment for the "malevolent" non-compliance with the provisions of this Law, which in the Commissioner's view, is a severe penalty, and one hardly qualifying as being "necessary in democratic society" and proportionate to the offence of "deliberate non-registration". It also appears that the objections and proposals expressed by the Supreme Court with regard to the new wording of Article 330 of the Criminal Code were not duly taken into account in the final version of the document in question.
74. At the end of March 2013, President Vladimir Putin asked Federal Ombudsman Vladimir Lukin to monitor the on-going inspections of non-commercial organisations, to ensure there were no "excesses" by the officials carrying out spot checks of NGOs, and to inform him about the results.<sup>76</sup> At a meeting with civil society representatives at the Civil20 Summit<sup>77</sup>, President Putin reiterated that it was essential to look into the practical application of legislation in question and to think about ways of improving it, so that the state would not be suspicious about the activity of individual organisations and that no

<sup>72</sup> Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system, adopted by the Committee of Ministers on 19 September 2012 at the 1151<sup>st</sup> meeting of the Ministers' Deputies, § 26.

<sup>73</sup> This event took place on 15 April 2013. For more information, see <http://www.president-sovet.ru/news/4017/>

<sup>74</sup> <http://minjust.ru/node/5231>

<sup>75</sup> See footnote 66.

<sup>76</sup> <http://www.kremlin.ru/news/17766>

<sup>77</sup> The Civil 20 Summit is the concluding event of the Civil Track of Russia's G20 Presidency. Russia is the first presiding country to organize the civil society consultations process in this format, and at such level. Its main goal is to promote fruitful dialogue between global civil society, politicians and decision-makers focusing around the priorities set out in the official G20 agenda for 2013.

one would interfere in their activity. Mr Putin added that the work will be done along these lines, with participation of representatives of civil society.<sup>78</sup>

75. During a meeting on 4 July 2013 between Federal Ombudsman Mr Vladimir Lukin, the Chairman of the Council on Human Rights and Civil Society Development under the President of the Russian Federation, Mr Mikhail Fedotov, and his predecessor Ms Ella Pamfilova, who currently chairs the All-Russian Public Movement “Civil Dignity”, President Vladimir Putin endorsed a proposal for establishing an independent and impartial mechanism for distributing state funding to Russian NCOs.<sup>79</sup> The Commissioner would like to welcome this positive step, which reflects the commitment by the Russian authorities to supporting the functioning of civil society institutions by making available substantial budgetary resources to support their activities. However, non-commercial organisations should also be free to solicit financial support for their activities from other sources, including foreign ones, and by doing so they should not be put in a disadvantaged position compared to others who receive funding only from domestic sources.
76. Legal certainty – and supremacy of the law – implies that the enacted laws are implementable in practice. Therefore, assessing whether the law is implementable in practice before adopting it, as well as checking *a posteriori* whether it may effectively be applied is very important. This means that *ex ante* and *ex post* legislative evaluation have to be considered when addressing the issue of the rule of law.<sup>80</sup> As has been emphasised by the Court in the case of *Demir and Baykara v Turkey*, states also have a positive obligation to protect the right to freedom of assembly and association guaranteed under Article 11 of the Convention: “The Court further reiterates that, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations on the State to secure the effective enjoyment of such rights”.<sup>81</sup>
77. The Commissioner is of the opinion that one year after the new legislative provisions have been enacted, the time has come to conduct an in-depth evaluation of the results of its implementation. He very much appreciates the position recently expressed by the Russian authorities that this should be done in co-operation with civil society organisations and representatives of human rights structures.

<sup>78</sup> <http://www.kremlin.ru/news/18342>

<sup>79</sup> <http://www.kremlin.ru/news/18521>

<sup>80</sup> CDL-AD(2011)003 rev, European Commission for Democracy Through Law (Venice Commission), Report on the rule of law, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), § 51.

<sup>81</sup> Grand Chamber judgment of 12 November 2008, §110.

#### **IV. Conclusions and recommendations**

78. The legislation regulating the activities of NGOs in Russia should be revised, with the aim of establishing a clear, coherent and consistent framework in line with applicable international standards. Reporting and accounting requirements should be the same for all NGOs, regardless of the sources of their income. They should be transparent and coherent and not interfere with NGOs' on-going daily work. There should be no more than one governmental institution dealing with issues such as registration, reporting, regulating and overseeing the work of the NGOs. Other agencies should exercise their supervisory powers only in cases where there are reasonable and objective grounds to believe that the organisation in question has violated its legal obligations; and should do so in consultation with the authorised governmental institution in charge of NGOs.
79. The grounds for an NGO's dissolution should be limited to the three recognised by international standards: bankruptcy; long-term inactivity; and serious misconduct. They should apply equally to all types of NGOs, and be subject to full procedural guarantees. Sanctions - such as suspension of the organisation's activities and/or its dissolution - should be applied only as a last resort when all less restrictive options have been unsuccessful. Any such sanctions should be proportional to the offence committed and meet a pressing social need.
80. Any continuing use of the term "foreign agent" in the legislation and practice in relation to non-governmental organisations would only lead to further stigmatisation of civil society in the Russian Federation and will have a "chilling effect" on its activities. Transparency and accountability of the non-commercial sector cannot and should not be achieved by labelling civil society institutions and by introducing unjustified discriminatory treatment for some of them.
81. The Russian Federation has mature, reputable and efficiently functioning human rights institutions. The relevant human rights structures, most notably those operating at the federal level, have been involved in the dialogue with the authorities since the very beginning, when the draft legislation was still under consideration in the Parliament, and provided important and pertinent suggestions as to the ways to ensure that the legislation in question would not interfere with the basic rights and duties of civil society institutions and would not become an obstacle to their exercise of the important function of a public "watchdog". Human rights institutions have an important contribution to make to the public debate, and key decision-makers should be encouraged to ensure that it is reflected in legislative and administrative decision-making processes. This would certainly contribute to improving the quality of the process as such and of its end results.
82. The notion of "political activity" as defined in the Law on Foreign Agents, the use of the term "foreign agent" and the possibility of applying criminal charges for "malevolent" non-compliance with the Law interfere with the free exercise of the rights to freedom of association and freedom of expression as defined in the case-law of the European Court of Human Rights. These provisions should be fundamentally revised, if not repealed. The same applies to the new definition of treason following the 2012 amendments.
83. The Commissioner calls on the Russian authorities to refrain from any further steps in relation to the application of the Law on Foreign Agents, until the above-mentioned shortcomings have been rectified. Opinions and contributions by the Constitutional Court and the Supreme Court on various aspects of the legislation in question and its implementation would certainly contribute constructively to this revision process. Moreover, the Opinion of the European Commission on Democracy through Law (Venice Commission) on these legislative amendments, which should be available in the next few

months, will further contribute to the discussion of the principles enshrined in the legislation and its correspondence with the European standards.

84. Recently steps have been taken by the Russian authorities to promote the functioning of civil society in Russia, including through financial assistance. The Commissioner would like to urge the government to pursue a genuine dialogue with the representatives of civil society and human rights structures on the issues outlined in the present Opinion. The Commissioner stands ready to continue his dialogue with the authorities on these issues and would like to reiterate his readiness to provide any further support.