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EXPERT COUNCIL ON NGO LAW

FIRST ANNUAL REPORT

Conditions of Establishment of Non-Governmental Organisations

MEMBERS OF THE EXPERT COUNCIL ON NGO LAW

President (appointed by the Plenary of the Conference of INGOs):

Cyril Ritchie, who was instrumental in the writing of the original Council of Europe Guidelines on the functioning of NGOs in Europe, and represented the Conference of INGOs to the expert committee drafting the Committee of Ministers Recommendation – CM/Rec(2007) 14 – on the legal status of NGOs in Europe. Ritchie was from 2000-2008 President of the NGO Grouping on Civil Society and Democracy in Europe and its predecessors.

Ritchie resides in Geneva.

Coordinator (appointed by the Bureau of the Conference of INGOs):

Jeremy McBride, an English barrister who is Chair of Interights and who was instrumental in drafting both the Council of Europe « Fundamental Principles on NGOs in Europe » and CM/Rec(2007) 14.

McBride resides in Strasbourg

Members (appointed by the Bureau of the Conference of INGOs):

Dragan Golubović, from Serbia, a Senior Legal Advisor with the European Centre for Non-profit Law, advising governments, Parliaments, judges, lawyers and NGOs on legal framework for NGOs. He collaborates with the Council of Europe, UNDP and OSCE on projects relating to freedom of association.

Golubović resides in Budapest.

Mihaela Preslavska*,* a Bulgarian NGO activist and lawyer who is responsible for governance and accountability standards in the International Planned Parenthood Federation European Network, a pan-European body covering over 40 countries.

Preslavska resides in Brussels.

Eric Svanidze**,** a lawyer from Georgia heavily engaged in NGO issues. Svanidze also served on the expert committee drafting Recommendation CM/Rec(2007) 14. Svanidze is a member of the European Committee for the Prevention of Torture.

Svanidze resides in Tbilisi.

In addition, a member of the Secretariat General of the Council of Europe attends the meetings of the Expert Council; and the Expert Council may itself appoint ad hoc members who are specialised on specific issues under examination.

For the 2008 thematic study on the conditions for the establishment of NGOs, two *ad hoc* members were appointed :

Mariarosa Cutillo, Italy

Marc Leyenberger, France

I INTRODUCTION

1. The EXPERT COUNCIL is the culmination of a long period and a long process of involvement of the Council of Europe and of INGOs in identifying issues concerning the legal personality of NGOs ; and of creating the environment and the conditions for the reaffirmation and the strengthening of the legal status of NGOs. Allied to this concern has been the awareness that laws are only as good as their implementation. Therefore the manifold daily and ongoing work of NGOs to benefit and defend citizens must have the understanding – indeed the tacit support – of public authorities and institutions.

2. The EXPERT COUNCIL is therefore working in the context of the relevant articles of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, of the European Social Charter, of the Framework Convention for the Protection of National Minorities, of the Convention on the Participation of Foreigners in Public Life at local Level. We can also proudly trace our origins to the 1986 European Convention on the Recognition of the Legal Personality of International NGOs.

3. Throughout the 1990s the involvement of the Council of Europe in recognising and affirming the status and validity of NGOs passed through the stages of the formulation of the "Guidelines on the functioning of NGOs in Europe " and the "Fundamental Principles on the Status of NGOs in Europe". Two current members of the Expert Council were at the core of the writing of those texts. And three current members participated fully in the subsequent – and crucial – stage, namely the elaboration of the Council of Europe document that ultimately became Recommendation CM/Rec(2007)14 of the Committee of Ministers, entitled "Recommendation to member states on the legal status of NGOs in Europe" ("Recommendation CM/Rec(2007)14"). This text represents a genuine advance in comprehension of the value of the activities of NGOs, and is a fundamental context for the work of the Expert Council.

4. The EXPERT COUNCIL is an emanation of the will and initiative of NGOs, and illustrates the vitality of intergovernmental/ nongovernmental cooperation. It also marks the growing role of the NGOs of those countries that only became member states of the Council of Europe after 1989. The initiative came from the Warsaw Regional NGO Congress of March 2006, which proposed “the creation of an expert council to evaluate the conformity of national NGO and other relevant legislation and its application with Council of Europe standards and European practice”. This engagement has been confirmed and supported by the Kyiv Regional Congress of November 2007.

5. I pay tribute to the constant attention and impulse given at all stages by the Secretariat of the Council of Europe, notably the Directorate General of Political Affairs (now entitled Directorate General of Democracy and Political Affairs). This particular intergovernmental/nongovernmental cooperation is outstanding.

6. The Conference of International NGOs of the Council of Europe has placed great hopes in the EXPERT COUNCIL ON NGO LAW, by conferring on us the mandate "to contribute to the creation of an enabling environment for NGOs throughout Europe by examining national NGO law *and its implementation* and

promoting its compatibility with Council of Europe standards and European good practice"[1]. That the President of the Expert Council is appointed by the Plenary of the Conference is a political signal on the importance of the "enabling environment for NGOs throughout Europe" which resonates with the Council of Europe 2005 Warsaw Summit statement that "democracy and good governance can only be achieved through the active involvement of citizens and civil society". Competent and responsible NGOs are a principal vehicle for manifesting and deepening that "active involvement"; they must therefore have the legal and societal recognition and conditions that enable them to make their "essential contribution to the development and realisation of democracy and human rights"[2]. As can be seen, the expectations upon the EXPERT COUNCIL are indeed great. May I in this context thank the President of the Conference of INGOs, Annelise Oeschger, for her constant encouragement, leadership and determination in bringing the EXPERT COUNCIL into existence. The President has set the "expectation level" high and I thank her for that.

7. It is evident that the path will not be continually smooth. Creating an enabling environment for NGOs is probably a low priority for many parliaments, for many governments, for many national or local public authorities and bureaucrats. Parliamentarians and governmental officials are certainly in many countries far from absorbing the significance – and the importance for the quality of their own work – of CM/Rec(2007)14's injunction (in paragraph 76) to "ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives *and decisions*"[3].

8. These are challenges that relate directly to the EXPERT COUNCIL's mandate, for the "enabling environment for NGOs" that we shall seek to foster should make it possible to promote the model legislative texts and the optimum implementing mechanisms that will favour this "dialogue and consultation" with parliaments and governments. The mandate from the Conference of INGOs is specific in stating that the EXPERT COUNCIL "Monitors the legal and regulatory framework in European countries, as well as the administrative and judicial practices in them, which affect the status and operation of NGOs". And even more specifically "The EXPERT COUNCIL pursues a thematic approach with regard to all European countries" and "may prepare reports on problems occurring in a particular country".

9. For our exercise in 2008 we chose the theme CONDITIONS OF ESTABLISHMENT OF NGOs, a subject which is alluded to in 34 of the Articles of CM/Rec(2007)14. We distributed a questionnaire already in February, and although the responses were of different quality, our distinguished Coordinator Jeremy Mc Bride has been able to distil a valuable Thematic Overview that forms the essence of this first report to the Conference of INGOs. The distillation also enabled us to identify six countries on which we have done specific analyses to illustrate the problems, challenges, and hopefully forward steps that could be taken. These six countries are (alphabetically) Azerbaijan, Belarus, France, Italy, Russia, Slovakia. These six Country Studies form the third section.

[1] Emphasis added.
[2] The quotation is from CM/Rec(2007)14.
[3] Emphasis added.

10. It is worthwhile mentioning that the six country studies were submitted to the relevant national authorities for comments prior to their incorporation in the final version of our report. Appropriate comments have consequently been incorporated in the present report. The contributions are available on request from the Secretariat.

11. I thank all the Expert Council members for their assiduous work and positive cooperation. All members are committed to doing honour to the mandate entrusted to us by the Conference of International NGOs of the Council of Europe.

Cyril Ritchie,
President,
Expert Council on NGO Law

II THEMATIC OVERVIEW

12. The thematic overview concerning the establishment of NGOs is in two parts. The first reviews the scope of international standards applicable to their establishment, notably in the European Convention on Human Rights ("the European Convention") as elaborated in the rulings of the European Court of Human Rights ("the European Court"). In the second part the responses to a questionnaire concerned with national law and practice concerning establishment are analysed. The former reveals that fairly clear requirements are now in place, while the latter shows that full compliance with them is not yet universal.

A Applicable standards

13. The ability to establish NGOs is underpinned by the guarantee of the right to freedom of association afforded by Article 11 of the European Convention and many other international legal instruments[4].

14. It is also reinforced by numerous other commitments made by States, notably Committee of Ministers Recommendation (2007)14 and the Declaration of the Committee of Ministers of the Council of Europe on action to improve the protection of human rights defenders and promote their activities[5].

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[4] In particular Article 22 of the International Covenant on Civil and Political Rights, Article 5(d)(ix) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 1-3 of the Convention on the Elimination of All Forms of Discrimination against Women, Article 15 of the Convention on the Rights of the Child, Articles 26 and 40 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 29 of the Convention on the Rights of Persons with Disabilities Articles 1, 2 (4,5) and 3 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Article 15 of the Convention relating to the Status of Refugees, Article 15 of the Convention relating to the Status of Stateless Persons and the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations. There are also guarantees concerned specifically with trade unions such as Article 8 of the International Covenant on Economic, Social and Cultural Rights, Article 5 of the European Social Charter, Article 5 of the Revised Charter and the Convention Concerning Freedom of Association and Protection of the Right to Organise of the International Labour Organisation (ILO Convention No 87).

[5] Adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies. See also Article 20 of the Universal Declaration of Human Rights, the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) (GA Res 53/144, 9 December 1998), UN Basic Principles on the Independence of the Judiciary, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Paras 9.3 and 10.3, and undertakings made at several OSCE meetings, namely, Vienna in 1989 (Questions relating to Security in Europe, paras 13.3, 13.6 and 21), Copenhagen (paras 10, 10.1-10.4, 11, 11.2, 32.2, 32.6 and 33) and Budapest (Chapter VIII, para 18), Council of Europe Recommendation R(94)12 'On the Independence, Efficiency and Role of Judges' and the European Charter on the Statute for Judges. Recommendation CM/Rec(2007)14 was preceded by the Council of Europe's Fundamental Principles on the Status of Non-governmental Organisations in Europe of the Council of Europe ("Fundamental Principles") which were noted by the decision of the Deputies at their 837th meeting on 16 April 2003

Choice of legal status

15. In order to come within these guarantees an NGO that is membership-based must not simply be a gathering formed with the object of pursuing certain aims but must also have a degree of stability as regards its existence and thus have some kind of institutional structure to which the persons comprising it can really be regarded as belonging[6].

16. In many instances membership-based NGOs will be bodies with a formal status - namely, one with legal personality - and this will also be what the founders of most of them want. Nevertheless the international guarantees are not limited to such bodies but also apply to groupings of an informal character so long as they have, or are meant to have, more than a fleeting existence. The possibility of establishing informal entities is a necessary consequence of the general freedom of those associating to determine the basis on which they do so. It is thus not open to a State to require that freedom of association only be exercised by the establishment of an entity with legal personality[7].

17. However, the freedom to establish informal entities does not preclude the possibility that certain institutional forms may be required where either that is seen as essential for the pursuit of pursuing certain activities (such as a trade union or a religious organisation) or that is a prerequisite to certain benefits (such as tax privileges) being enjoyed by an NGO[8] - in practice this is likely to be essential for the establishment of most non-membership-based NGOs - but such a requirement should not create any difficulties regarding the pursuit of an NGO's objectives[9].

18. In particular the fact an NGO's objectives might be seen as "political" should not necessitate it seeking the status of a political party where this is separately provided for under a country's law. Thus the European Court found a violation of Article 11 of the European Convention where the NGO in *Zhechev v Bulgaria*[10] was refused registration because some of its aims – 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.

19. The European Court, in considering whether 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

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[6] Appl No 8317/78, *McFeeley v United Kingdom*, 20 DR 44 (1980).

[7] This is explicitly recognised in paragraph 3 of Recommendation CM/Rec(2007)14.

[8] This is acknowledged in paragraph 60 of Recommendation CM/Rec(2007)14. However, note the stipulation in paragraph 39 that 'Decisions on qualification for financial or other benefits to be accorded to an NGO should be taken separately from those concerned with its acquisition of legal personality and preferably by a different body'.

[9] *Cf* the conclusion in the Chamber judgment in *Gorzelik and Others v Poland*, no 44158/98, 20 December 2001 that the need to use a procedure not designed for the purpose of being recognized as belonging to a national minority had not had any consequences for the applicants' rights under Article 11 (para 63). This issue was not addressed in the Grand Chamber judgment of 17 February 2004. See also Appl No 8652/79 *X v Austria*, 26 DR 89 (1981) in which the need for an alternative form of legal organisation for religious communities was not pursued because their apparent exclusion from being registered under the associations law was not actually treated, in principle, as an obstacle to the registration of religious organisations as associations.

[10] No 57045/00, 21 June 2007.

"pressing social need" and whether it was proportionate to the aims sought to be achieved. It held that:

"55. 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.

56. If associations in Bulgaria could, when registered as such, participate in elections and accede to power, as was the case in *Gorzelik and Others* ..., it might be necessary to require some of them to register as political parties, so as to make them subject to, for instance, stricter rules concerning party financing, public control and transparency ... However, under Bulgarian law, as it stood at the material time and as it stands at present, associations may not participate in national, local or European elections ... There is therefore 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, as noted above, the exact meaning of that term under Bulgarian law appears to be quite vague. 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, such as for instance the rule that a political party cannot be formed by less than fifty enfranchised citizens ..., 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 ...

57. The Court therefore considers that alleged "political" character of the association's aims was also not a sufficient ground to refuse its registration.

Possible founders

20. The ability to form and join associations is something that Article 11 of the European Convention provides as being open to "everyone" within a State's jurisdiction and the scope for imposing limitations on this capacity is quite limited. "Everyone" certainly means legal as well as natural persons as association is not one of the rights or freedoms that are capable of being exercised only by human beings[11]. The only exception in this regard would be public bodies since these are a part of the State which is bound to secure freedom of association rather than beneficiaries of this right.

21. The unqualified nature of the formulation in all instruments means that the freedom should be exercisable by children as much as by adults, without needing to rely on the specific guarantee in respect of the former in the Convention on the

[11] This is recognised by paragraph 16 of Recommendation CM/Rec(2007)14.

Rights of the Child. Nevertheless this would not preclude the adoption of protective measures to ensure that they are not exploited or exposed to moral and related dangers, so long as the total exclusion of the ability to associate did not result[12]. Such measures, insofar as they are proportionate and meet the requirements of legal certainty, could be justified as a restriction on their freedom pursuant to provisions such as Article 11(2). However, in judging the appropriateness of any such measures account would have to be taken of the need stipulated by the Convention on the Rights of the Child to respect 'the evolving capacities of the child'[13] which would mean that the effect of any restrictions that might be adopted would undoubtedly have to be diminished as those affected grow older[14].

22. The inclusive nature of "everyone" would also mean that freedom of association can, in principle, be exercised by people who are not actually citizens of the country concerned (whether they are citizens of another country or stateless persons)[15]. Although Article 16 of the European Convention does accept the possibility of some restrictions being imposed on the political activity of those who are not citizens and this is defined to cover freedom of association, such restrictions ought to be compatible with the Convention's overall objectives of political democracy, freedom and the rule of law and they ought not to be disproportionate.

23. It might, therefore, be possible to justify the exclusion of persons who are not citizens from membership of national political parties but it would certainly be harder to do so where the body was concerned only with local or non-party issues, particularly if those affected were established residents there.

24. There is also likely to be a reluctance to accept restrictions as being justified under Article 16 where they relate to persons from a country with which the one imposing them has close political and institutional links[16].

25. Moreover restrictions on non-citizens forming or joining NGOs with no political objectives - such as those concerned with sport and culture - could hardly be defended by invoking Article 16[17].

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[12] See the recommendation of the Committee on the Rights of the Child that Belarus 'guarantee to all children the full implementation of the rights to … freedom of association' (CRC/C/15/Add.180, 13 June 2002, para 34), that Georgia 'amend its legislation to ensure that youth are allowed to join political parties and that they fully enjoy their right to freedom of association' (CRC/C/15/Add.124, 28 June 2000, para 31). See also its concern that in Turkey 'persons under 18 cannot form associations' (CRC/C/15/Add.152, 9 July 2001, para 37).

[13] Article 5. This is acknowledged in paragraph 45 of the Explanatory Memorandum to Recommendation CM/Rec(2007)14.

[14] Restrictions on the ability of persons who are mentally ill or incapacitated could undoubtedly be justified on a similar basis but a failure when applying them to take due account of the capacities of those affected would breach the principle of proportionality.

[15] Paragraph 16 of Recommendation CM/Rec(2007)14 lists non-nationals as potential founders of an NGO.

[16] See *Piermont v France*, nos 15773/89 and 15774/89, 27 April 1995 where Article 16 was not accepted as justifying restrictions on the exercise of freedom of expression by someone from another European Union member State and who was also a Member of the European Parliament. It is at least arguable that a similar approach would be appropriate where the country imposing the restriction and the country of those affected are both members of the Council of Europe.

[17] See *Moscow Branch of the Salvation Army v Russia*, no 72881/01, 5 October 2006, in which, following refusal of re-registration of the applicant because of its "foreign origin", the European Court found there to be no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as

26. A person's imprisonment is likely to be a constraint on his or her ability to take a full part in the activities of an NGO but this should not generally be an obstacle to his or her becoming a founder of one. Certainly it would be very difficult to demonstrate that a restriction on freedom of association which went beyond the inevitable impracticality of attending meetings was something really needed for the purposes of confinement and that is the test by which the impact of a deprivation of liberty on other human rights must be judged[18].

27. Nevertheless it is possible that some limits could be imposed on a person's exercise of freedom of association as a penalty for certain conduct, provided that a legitimate aim for them could be demonstrated and that they were sufficiently carefully drawn to avoid being challenged for a lack of proportionality.

28. Thus one of the penalties imposed on a Belgian newspaper editor who had collaborated with the German occupying authorities during the Second World War was a prohibition for life on involvement in the administration, management or direction of a professional or non-profit making association or the leadership of a political association. The principle of such a penalty was not specifically dealt with by the former European Commission of Human Rights ("the European Commission") in *De Becker v Belgium* but it did consider other such indefinite restrictions affecting the applicant's freedom of expression could not be justified in so far as they covered non-political matters; the scope of the restriction was simply too broad[19].

29. It is evident that the European Court will require very cogent justification for such restrictions on the exercise of freedom of association and it is unlikely that they would be seen as acceptable where their scope did not correspond to the

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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. In the case of refugees and stateless persons there is an obligation with respect to freedom of association that is probably narrower than that under the general guarantees in that it requires that those who are lawfully in the country concerned be given the most favourable treatment accorded to a foreign national in the same circumstances but only as regards 'non-political and non-profit-making associations and trade unions'; Convention relating to the Status of Refugees, Article 15 and Convention relating to the Status of Stateless Persons, Article 13. However, the minimum standards in the instruments concerned would not prevent refugees and stateless persons, as much as any foreign nationals, from enjoying the less-restricted freedom conferred by the general guarantees.

[18] See *Golder v United Kingdom*, no 4451/70, 21 February 1975 and *Hirst v United Kingdom (No 2)*, no 74025/01, 6 October 2005 [GC]. The observation in the dissenting opinion of Judge Gölcüklü in *Djavit An v Turkey*, no 20652/92, 20 February 2003 that 'a person in police custody or detention pending trial cannot claim to be the victim of the infringement of … his freedom of association' (para 17) in the context of obstacles to attending meetings in a part of Cyprus ought to be regarded as an over-simplification of the position of such a person.

[19] The issue never went before the European Court as the applicant applied to have the case struck off after the restrictions on his civil and political rights had been withdrawn and the law permitting such penalties had been modified so that they would apply only for fixed periods determined according to the seriousness of the offence. In these circumstances it was not surprising that the Commission did not object to the case being struck off. *Cf* the upholding by the European Commission in Appl No 6573/74 *X v The Netherlands*, 1 DR 87 (1974) of a ban, albeit permanent, which affected only participation in public life (including the right to vote) for those who had been convicted of 'uncitizenlike' conduct during the Second World War.

nature of the offence giving rise to them or they lasted for an undue length of time[20].

Number of founders

30. There is no indication in case law or other practice in respect of treaties guaranteeing freedom of association as to the acceptability of imposing a minimum number of founders before an NGO can established. However, Recommendation CM/Rec(2007)14, while stating that 'Two or more persons should be able to establish a membership-based NGO', does accept the possibility that a higher number might be required

"where legal personality is to be acquired, but this number should not be set at a level that discourages the establishment of an NGO'[21].

This qualification took account of the fact that higher numbers were in fact required in the law of some of the States involved in the adoption of the Fundamental Principles.

31. However, while a certain threshold might be appropriate where the entity then became eligible for certain exceptional benefits, it seems questionable whether a requirement of more than two – even where legal personality is being acquired – is a restriction that is really compatible with freedom of association, especially since incorporation in a commercial context can often be undertaken by an individual and

[20] The ban on the founders and managers of three political parties from holding similar office in any other political body was an important consideration in the finding in both *United Communist Party of Turkey and Others v Turkey*, no 19392/92, 30 January 1998, *Socialist Party and Others v Turkey*, no 21237/93, 25 May 1998 and *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, nos 22723/93, 22724/93, 22725/93, 9 April 2002 that their dissolution was disproportionate and thus a violation of Article 11. Equally, where a dissolution was upheld, such a ban on five of the party's leaders but none on its other 152 MPs was the basis for a finding that this measure was not disproportionate in *Refah Partisi (The Welfare Party) and Others v Turkey*, nos 41340/98, 41342/98, 41343/98, 31 July 2001 (Chamber) and 13 February 2003 (Grand Chamber). Furthermore in *Sadak and Others v. Turkey (No 2)*, nos 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002, *Kavakci v Turkey*, no. 71907/01, *Sılay v Turkey*, no. 8691/02 and *Ilıcak v Turkey*, no. 15394/02, 5 April 2007 the forfeiture of parliamentary seats following the dissolution of the applicant's party was found to violate Article 3 of Protocol No 1. See also the European Court's condemnation in *Labita v Italy*, no 26772/95, 6 April 2000 [GC] of a comparable ban involving the disenfranchisement for two years of a suspected Mafioso because it had been imposed only after his acquittal of the offences which had initially led to his being placed under a special supervisory regime; it would have accepted a temporary suspension of voting rights where there was evidence of Mafia membership. However, see the previous footnote for the upholding of a permanent ban in very special circumstances. Apart from improper activities of a 'political' nature, the most likely justification for a restriction on this aspect of freedom of association would be some form of financial misconduct by the person concerned; this would probably support limitations on his or her becoming an office-holder in an association where this involved financial responsibility but it is doubtful if this would justify anything more extensive than that. Paragraph 30 of Recommendation CM/Rec(2007)14 reflects this approach in providing that "Persons can be disqualified from forming NGOs with legal personality following a conviction for an offence that has demonstrated that they are unfit to form one. Such a disqualification should be proportionate in scope and duration".

[21] Paragraph 17.

no particular case other than control has been identified as the rationale for insisting upon it[22].

Establishing NGOs abroad

32. Although in practice most of the NGOs which are formed or joined are likely to be in the State where the persons concerned reside or are present, the freedom guaranteed by Article 11 would also extend to the creation and membership of NGOs in other countries[23] and this could be restricted by reference only to the same considerations that govern regulation.

Admissible objectives

33. Apart from the instruments concerned with trade unions or devoted to particular groups of person, no substantive limitations are expressly placed on the type of objectives that might be pursued by NGOs. However, while none of the guarantees are framed in absolute terms, the starting point with respect to objectives is actually quite clear; an NGO should be able to pursue any activity which individuals alone are able to pursue since a grouping of individuals with the same objective does not thereby make that objective inherently objectionable. Indeed to accept the latter view would be to negate the very concept of freedom of association as a means for like-minded persons to come together. So it follows from this that, so long as the activities or objects are lawful, then it should be possible for an NGO to be formed to undertake or pursue them[24].

34. Any limits imposed on the permissible objectives of an NGO must correspond to a "pressing social need" as otherwise a refusal of legal personality by reference to them will not be regarded as being for reasons that are relevant and sufficient[25].

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[22] See also the concern of the European Court in *Zhechev v Bulgaria,* no 57045/00, 21 June 2007 that precluding an NGO with "political" objectives from acquiring legal personality other than as a political party would entail complying with a requirement to have fifty founders which could prove insurmountable.

[23] See *Cyprus v Turkey*, no 25781/94 10 May 2001 [GC] (in which it was not established that there had been attempts to prevent Turkish Cypriots living in northern Cyprus from establishing associations with Greek Cypriots in the southern part of Cyprus) and *Djavit An v Turkey*, no 20652/92, 20 February 2003 and *Adali v Turkey*, no 38187/97, 31 March 2005 (in which a violation of Article 11 was found because the applicants had respectively been refused permission to cross from northern to southern Cyprus to attend bi-communal meetings and to attend a meeting organised by a radio station).

[24] See the recognition by the European Court that 'the fact that their activities form part of a collective exercise of freedom of association in itself entitles political parties to seek the protection of Articles 10 *and* 11 of the Convention'; *United Communist Party of Turkey and Others v Turkey*, no 19392/92, 30 January 1998, para 43 (emphasis added).

[25] See *Koretskyy and Others v Ukraine*, 40269/02, 3 April 2008 in which the European 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. Furthermore, it did not see why the managing bodies of such associations (as opposed to a separate legal entity established for this purpose) were prohibited from carrying out everyday administrative activities, even if such activities are essentially of an economic character. Moreover, as regards a territorial limitation on the activities of associations with local status, the Court did not discern any threat to the system of State registration of associations in local associations having their branch offices in other cities and towns of Ukraine, especially given the burdensome requirement for associations wishing to have pan-Ukrainian status to set up local branches in the majority of the twenty-five regions of Ukraine.

35. Furthermore, although an NGO cannot be formed to pursue specifically unlawful objectives, it should be borne in mind, when determining what conduct is unlawful in this context[26], that the permitted restrictions on internationally guaranteed rights and freedoms must also not be exceeded and thus make it impossible for an NGO to be established to pursue objects that are entirely legitimate. No blank cheque is thus given to States that would allow them to make unlawful anything to which they object[27].

36. Even where a particular activity is rendered unlawful without meeting the objection that this is through an improper use of State power, this characterisation does not necessarily mean that the activity cannot still in some way shape the objectives of a would-be NGO. Certainly it is, in principle, perfectly proper for a body to be established to pursue a change in the law[28], so long as the intention is to do this only by lawful means. Recognition of this can be seen in *X v United Kingdom*[29] in which it was found that the scope of certain offences concerned with

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[26] See, e.g., Appl No 23892/94, *A C R E P v Portugal*, 83 DR 57 (1995), in which an association claiming prerogatives normally within the exclusive domain of States and intending to carry out its activity under a previous (monarchical) constitution without regard to the one now in force was found by the European Commission to have an aim that could not be considered compatible with Portuguese public policy.

[27] Thus in *Sidiropoulos and Others v Greece*, no 26695/95, 10 July 1998, the European Court was not persuaded that the upholding of a country's cultural traditions and historical and cultural symbols fell within one of the legitimate aims listed in Article 11(2) and so a restriction having this purpose would not be justified. However, it accepted that the restriction imposed in that case could also be regarded as being intended to protect national security and to prevent disorder in view of the alleged intention of the association concerned to dispute Greek identity in Macedonia and to undermine Greek territorial integrity (paras 37-39). The Court also observed that 'even supposing that the founders of an association like the one in the instant case assert a minority consciousness, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 and the Charter of Paris for a New Europe of 21 November 1990 – which Greece had signed – allow them to form associations to protect their cultural and spiritual heritage' (para 44). This underlines the need for the parameters of what is lawful to take account of international proclamations as to the legitimacy of certain objectives for particular types of organisation; e.g., the development, discussion and advocacy of human rights ideas (Article 7 of the UN Declaration on Human Rights Defenders and para 10.3 of the Document of the Copenhagen Meeting), the protection of the environment (Aarhus Convention, Article 3(4)) and the safeguarding of judicial independence (principle 9 of the UN Basic Principles on the Independence of the Judiciary, and principle IV of the Council of Europe Recommendation R(94)12 'On the Independence, Efficiency and Role of Judges'). See also *Zhechev v Bulgaria*, no 57045/00, 21 June 2007 in which the European Court held, in finding the refusal to register an association was in violation of Article 11, that it did not seem that the proposed "abolition" or "opening" of the border between "the former Yugoslav Republic of Macedonia" and Bulgaria, found to be contrary to Article 2 § 2 of the Constitution of 1991, could jeopardise in any conceivable way those countries' territorial integrity or national security. Firstly, it does not appear that it truly amounted to a request for territorial changes. Secondly, even if it was so, the mere fact that an organisation demands such changes cannot automatically justify interferences with its members' freedoms of association and assembly" (para 48). Furthermore see *Zvozskov et al v Belarus*, communication no 1039/2001, Views of the UN Human Rights Committee, 17 October 2006, in which it was held that there had been a violation of Article 22 of the International Covenant on Civil and Political Rights where no argument was advanced as to why it would be *necessary* ... to condition the registration of an association on a limitation of the scope of its activities to the exclusive representation and defence of the rights of its own members" (para 7.4).

[28] Apart from the case law to be discussed, this possibility is implicit in the right to participate in rule-making recognized in Article 7 of the Aarhus Convention and the right to participate in public affairs recognized in Article 8 of the UN Declaration on Human Rights Defenders. It is also expressly recognized in paragraph 12 of Recommendation CM/Rec(2007)14.

[29] Appl No 7525/76, 11 DR 117 (1978).

homosexual relations was not such as to prevent the advocacy of reform of the criminal law[30]. On the other hand an NGO which wanted to promote the use of cannabis in Finland where such use was at the time a crime was seen as crossing the line between promoting a change in the law and promoting a breach of it were raised with respect to an NGO since it could be regarded as amounting to no more than a conspiracy to commit this very crime and thus could be seen as going well beyond advocacy of change[31].

37. The protection for the ability to propose changes in the established position can even extend to, and include, the very nature of the existing constitutional structure of a State. Thus in *The Socialist Party and Others v Turkey*[32] the European Court was prepared simply to accept that objection could be taken to the applicant party's proposal for a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis - because this would change the existing constitutional arrangements. Its reluctance to find such an objective inadmissible stemmed from the importance to be attached to political pluralism in applying the European Convention (and indeed other international human rights guarantees). On this basis it concluded that the fact that

> "such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself[33].

38. It is thus generally impossible to immunise matters from change through according them constitutional status[34].

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[30] Furthermore the European Commission emphasised that the material submitted to it did not support a claim that the mere existence of an '"explicit association" in groups, clubs or societies by homosexuals could be illegal' (*ibid*, p 131) and thus demonstrated how limited is the scope for using criminal offences to restrict the objectives of associations; the fact that certain conduct can legitimately be criminalised does not mean that there cannot be some form of grouping of persons linked with that conduct, so long as the aim is not to promote it.

[31] Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997). However, the principal concern was the detrimental consequences for health of what was being promoted and thus the case should be seen more as involving an inadmissible objective.

[32] No 21237/93, 25 May 1998.

[33] Para 47. This ruling reinforced the European Court's earlier refusal in *United Communist Party of Turkey and Others v Turkey*, 19392/92, 30 January 1998 to accept that the dissolution of a political party could be justified solely by reference to the assertion that the party's constitution and programme called Turkey's constitutional order into question; such a restriction on freedom of association had still to be shown in the particular circumstances of the case to be necessary in a democratic society. A similar stance was also taken in *Freedom and Democracy Party (ÖZDEP) v Turkey*, no 23885/94, 8 December 1999, *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, nos 22723/93, 22724/93, 22725/93, 9 April 2002, *Selim Sadak and Others v Turkey*, nos 25144/94, 26149/95, 26150/95, 11 June 2002, *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, no 25141/94, 10 December 2002 and *Socialist Party of Turkey (STP) and Others v Turkey*, no 21237/93, 12 November 2003.

[34] In finding a violation of Article 11 in *Sidiropoulos and Others v Greece*, 26695/95,10 July 1998, the European Court observed that the refusal of registration to an association had been based only on a mere suspicion that the applicants intended to undermine Greece's territorial integrity but it seems unlikely that the advocacy of a boundary change is something that could in itself be seen as objectionable; this is, after all, a matter about which States are prepared to negotiate and the real concern must, therefore, be with the manner in which such a change is promoted. The absence of anything more than a suspicion in that case

39. However, there is an important qualification on the freedom to campaign for change in the legal and constitutional basis of the State in that both the means used and the proposed change itself must not actually be anti-democratic. This qualification is both a corollary of the requirement that restrictions on freedoms such as that of association must be necessary in a democratic society and a reflection of the unambiguous stipulation in Article 17 of the European Convention that nothing in that instrument is to be interpreted as implying 'any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' set forth in it[35].

40. This qualification on the freedom to advocate change was made clear by the European Court in *Refah Partisi (The Welfare Party) and Others v Turkey*[36] and has been endorsed in Recommendation CM/Rec(2007)14[37].

41. The European Court concluded in the *Refah Partisi* case that the qualification had been breached where the applicants' objective was anti-secular and thus anti-democratic, in that they had advocated setting up a plurality of legal systems, the introduction of discrimination between individuals on the ground of their religious beliefs and the operation of different religious rules for each religious community, in which Sharia would be the applicable law for the Muslim majority of the country and/or the ordinary law.

42. On the other hand the refusal to register a political party which advocated a policy of breaking the legal continuity with totalitarian regimes was found by the European Court to be contrary to Article 11 in *Linkov v Czech Republic*[38] because this policy was not one that could have undermined the democratic regime in the country and because the party had not urged or sought to justify the use of force for political ends[39].

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was particularly emphasized by Judges Costa, Zupančič and Kovler in their concurring opinion in *Gorzelik and Others v Poland*, no 44158/98, 17 February 2004 [GC] when explaining that the refusal to register a 'minority' association in that case was not directed against the ability of its members to associate but against their acquiring an electoral advantage.

[35] There are provisions to similar effect in the International Covenant (Article 5(1)) and the UN Declaration on Human Rights Defenders (Article 19). See also the deep concern of the UN Human Rights Committee at the tendency in the Republic of Congo 'of political groups and associations to resort to violent means of expression and to set up paramilitary structures that encourage ethnic hatred and incite discrimination and hostility… [calling upon the State party] to impose on all actors and political forces rules of conduct and behaviour that are compatible with human rights, democracy and the rule of law'; CCPR/C/79/Add.118, 25 April 2000, para 18.

[36] 13 February 2003, para 98, reiterating such a statement in para 47 of the previous ruling by a Chamber on 31 July 2001. Such a statement is also to be found in cases such as *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, nos 22723/93, 22724/93, 22725/93, 9 April 2002, para 49, *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, no 25141/94, 10 December 2002, para 46 and *Socialist Party of Turkey (STP) and Others v Turkey*, no 21237/93, 12 November 2003, para 38.

[37] Paragraph 11.

[38] No 10504/03, 7 December 2006.

[39] See also *Partidul Communistilor (Nepeceristi) and Ungureanu v Romania*, no 46626/99, 3 February 2005 (in which the programme and constitution of a new communist party refused registration was not shown to be contrary to the country's constitutional and legal order and to fundamental principles of democracy), *Zhechev v Bulgaria*, no 57045/00, 21 June 2007 (in which policies of repealing that Constitution, reinstating the Constitution of 1879, and restoring the ancient coat of arms and the monarchy were found not to be incompatible with fundamental democratic principles. It was also noted that, as in *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, nos 22723/93, 22724/93,

43. The insistence on the means being democratic entails a process that respects political pluralism and in particular one that does not involve recourse to violence. However, it is not generally going to be self-evident that the objectives of an NGO are necessarily anti-democratic[40] and thus inherently objectionable.

44. Certainly the case law of the European Court shows that over-simplistic conclusions can be drawn too readily about the possible threat posed by an NGO's stated objectives, especially where the latter use terms or concepts which are open

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22725/93,9 April 2002 and *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*, no 59489/00, 20 October 2005, it did not appear that the association had any real chance of bringing about changes which would not meet with the approval of everyone on the political stage) and *Bekir-Ousta and Others v Greece*, no 35151/05, 11 October 2007 (the European Court considered that spreading the idea that there was an ethnic minority living in the country - even assuming that this had been the true aim of the association - did not alone amount to a threat to democratic society, especially as there was nothing in its articles of association suggesting that its members advocated the use of violence or anti-democratic or anti-constitutional methods). *Cf Artyomov v Russia* (dec.), no 17582/05, 7 December 2005 (in which a bar on political parties having an affiliation with a certain ethnic group was considered acceptable but, in so doing, the European Court placed emphasis on the fact that this bar did not apply to other forms of public association) and *Kalifatstaat v Germany* (dec.), no 13828/04, 11 December 2006 (in which the European Court did not object to the dissolution of an association whose object was the restoration of the caliphate and the creation of an Islamic State founded on Sharia Law and whose members by their statements and conduct had not ruled out the use of force in order to attain its objectives).

[40] Including anything that undermines internationally guaranteed rights and freedoms. It would also include anything anti-pluralist; a societal model which introduced 'into all legal relationships a distinction between individuals grounded on religion [which] would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement … cannot be considered compatible with the Convention system …Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned ... Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs'; *Refah Partisi (The Welfare Party) and Others v Turkey*, nos 41340/98, 41342/98, 41343/98, 31 July 2001, para 70 and endorsed in the Grand Chamber judgment of 13 February 2003 at para 119. It would also include the introduction of Sharia (Islamic law) as the ordinary law since this was a regime 'which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts' *ibid*, para 72). Furthermore, bearing in mind that 'pluralism, tolerance and broadmindedness are hallmarks of a "democratic society" … [and that] democracy does not simply mean that the views of the majority must always prevail; a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'; *Gorzelik and Others v Poland*, no 44158/98, 17 February 2004 [GC], para 90. However, 'the State's duty of neutrality and impartiality … is incompatible with any power on the State's part to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group'; *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, 13 December 2001, para 123.

to a pejorative construction but that is not their only possible meaning or where the NGO had not yet started to carry out its activities[41].

45. Article 17 of the European Convention would also afford a justification for prohibiting the establishment of an NGO which aims to promote racism or anti-Semitism[42].

Acquisition of legal personality

46. The essence of freedom of association is the pursuit of the common objectives of a group of persons (natural or legal). This may be achievable through the individual legal capacities of those persons but in practice the objectives may be best pursued through the body concerned having a distinct legal personality from those persons who seek to establish or belong to it.

47. Although in some countries the acquisition of legal personality can be the automatic consequence of forming an association and thus not be subject to any further formalities[43], it is in principle compatible with freedom of association to insist that an entity go through some form of recognition or registration process before such legal personality is achieved[44].

48. Such a personality will certainly entail certain basic legal capacities and possibly some others essential for the pursuit of its objectives but it certainly does not follow that NGOs should enjoy all the rights which might prove useful for the pursuit of them. Moreover the fact that some of these additional rights are conferred on certain types of NGOs is not inherently objectionable so long as the principle of non-discrimination is respected.

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[41] See *United Communist Party of Turkey and Others v Turkey*, 19392/92, 30 January 1998 (name and reference in programme about Kurds as a 'nation', 'people' and 'citizens'), *The Socialist Party and Others v Turkey*, no 21237/93, 25 May 1998 (references to self-determination of the Kurdish nation), *Sidiropoulos and Others v Greece*, 10 July 1998 (suspicions about real intentions of founders), *Freedom and Democracy Party (ÖZDEP) v Turkey*, no 23885/94, 8 December 1999 (reference to independence and freedom for the Kurdish peoples), *Partidul Communistilor (Nepeceristi) and Ungureanu v Romania*, no 46626/99, 3 February 2005 (programme and constitution of a new communist party not contrary to fundamental principles of democracy), *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, 13 December 2001 (supposed risk to national security and territorial integrity), *Democracy and Change Party and Others v Turkey*, nos. 39210/98 and 39974/98, 26 April 2005 (supposed aim of creating minorities to the detriment of territorial integrity and Turkish national unity, thereby encouraging separatism and the division of the Turkish nation), *Emek Partisi and Senol v Turkey*, no 39434/98, 31 May 2005 (on pretext of promoting the development of the Kurdish language, the aim was to create minorities, to the detriment of the territorial integrity and national unity of the Turkish State, thus promoting separatism and the division of the Turkish nation), *IPSD and Others v Turkey*, no 35832/97, 25 October 2005 (an analysis in the memorandum of association of the country's economic and social situation and criticism of Government policy in that area taken as undermining the principle of the indivisible unity of the nation and insulted the Turkish State), *Tüm Haber Sen an Çinar v Turkey*, no 28602/95, 21 February 2006 and *Demir and Baykara v Turkey*, no 34503/97, 21 November 2006 (trade union activities by civil servants), *Bekir-Ousta and Others v Greece*, no 35151/05, 11 October 2007 (mere suspicion as to the founders' true intentions) and *Bozgan v Romania*, no 35097/02, 11 October 2007 (mere suspicion that the association's intention was to set up parallel structures to the courts which had no basis in its articles of association or its activities)..

[42] *W P and Others v Poland* (dec.), no 42264/98, 2 September 2004.

[43] Unless certain exceptional benefits or capacities are being sought.

[44] It is the nature of the process rather than the term used for it that is significant.

49. Given the likely importance of legal personality for the pursuit of common objectives, it is not surprising that the European Court readily accepted in *Sidiropoulos and Others v Greece* that the refusal to register the applicants' association – with the result that it was denied legal personality – was an interference with freedom of association. In its view

"The refusal deprived the applicants of any possibility of jointly or individually pursuing the aims they had laid down in the association's memorandum of association and of thus exercising the right in question"[45].

50. The fundamental importance of legal personality being granted for NGOs was further underlined by the European Court when it went on to state that

"The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning"[46].

51. It is essential, therefore, that the option of acquiring legal personality be available to those who wish to establish an NGO unless it can clearly be demonstrated that the lack of such personality will not impede the pursuit of its activities[47], with the latter being potentially of particular significance while an

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[45] 10 July 1998, para 31.

[46] *Ibid*, para 40. This view was reaffirmed by a Chamber of the European Court in *Gorzelik and Others v Poland*, no 44158/98, 20 December 2001, para 55 and by the Grand Chamber in its judgment of 17 February 2004, para 88, with the latter also stating that 'forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights' (para 93). Similar considerations to those underpinning the essential importance of legal personality established in *Gorzelik* and *Sidiropoulos* led the European Court to find in *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, 13 December 2001 that the failure to recognise the applicant church was an interference with freedom of religion; 'not being recognised, the applicant church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practice their religion and, not having legal personality, it is not entitled to judicial protection of its assets' (para 105). However, having taken Article 11 into account in finding a violation of Article 9, the Court considered that it was unnecessary to deal separately with the denial of recognition as a violation of freedom of association. The issue of recognition had previously been left open by the European Commission in Appl No 14223/88, *Lavisse v France*, 70 DR 218 (1991), Appl No 23892/94, *A C R E P v Portugal*, 83 DR 57 (1995), Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997), Appl No 18874/91, *X v Switzerland*, 76 DR 44 (1994) and Appl No 28973/95, *Basisan for 'Liga Apararii Drepturilor Omului Din Romania' v Romania*, 91 DR 29 (1997), having decided instead to address the issue of whether any interference with Article 11 was justified. The need to accord appropriate recognition to bodies promoting environmental protection is also stipulated in Article 3(4) of the Aarhus Convention but the provision in para 43 of the Document of the OSCE Moscow Meeting, 1991 that recognition should be 'according to existing national practices' (para 9) is potentially less exacting than the duty identified by the European Court.

[47] Certainly, although the ability to form a legal entity is clearly fundamental, there could still be situations where the inability to do so will not be regarded as a violation of Article 11. Thus the European Commission did point out in Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997) that an unregistered association in Finland 'could engage in certain activities, just as it can possess funds through its members' and this led it to question whether the inability to register had prevented it from pursuing its objectives' (p 69). Furthermore in Appl 8652/79, *X v Austria*, 26 DR 89 (1981) it found that 'the practice even of a non-recognised religion is fully guaranteed in Austria … independently from any form of registration' (p. 93) and in both Appl No 18874/91, *X v Switzerland*, 76 DR 44 (1994) and Appl Nos 29221/95 and 29225/95, *Stankov and United Macedonian Organisation 'Ilinden' v Bulgaria*, 94 DR 68 (1998) it considered that the refusal of registration of an association would not be a violation of Article 11 if the association is able to perform its activities without registration; in the former the association was found not to have proved that it could not exercise its functions but in the latter the ability to function was used to support the competence

application for recognition is being processed[48]. This personality should, of course, be clearly distinct from that of any or all of its members and officers and thus they should not be personally liable for its debts and other obligations[49].

52. The formulation of the law governing the requirements to be fulfilled in order to acquire legal personality must be sufficiently "foreseeable" for the persons concerned and not grant an excessively wide margin of discretion to the authorities in deciding whether a particular NGO may be registered[50]. Recommendation

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of an unregistered body to submit a complaint under Article 11. See also *Artyomov v Russia* (dec.), no 17582/05, 7 December 2006 in which it was found that legal status or activities of the public movement "Russian All-National Union", which took the decision to re-organise itself into a political party under the same name, had not been affected by the refusal to register that party because it would have promoted the interests of a particular ethnic group, the Russians, since it had lawfully existed since 1998 and its activities or membership had not been restricted in any way. Only political parties were prevented from having an affiliation with a certain ethnic group and thus the European Court concluded that the authorities had not prevented the applicant from forming an association to express and promote the specific aims embraced by it but from creating a legal entity which, following its registration, would have become entitled to stand for election. *Cf* the finding in *Moscow Branch of the Salvation Army v Russia*, 72881/01, 5 October 2006 and *Kimlya, Sultanov and Church of Scientology of Nizhnekamsk v. Russia* (dec.), nos. 76836/01 and 32782/03, 9 June 2005 that a loss of legal entity status following a refusal of re-registration meant that the applicants could not exercise, in community with their fellow believers, many rights that the law only grants to registered religious organisations. Furthermore see the concern of the UN Human Rights Committee that in Uzbekistan 'The legal requirement for registration, subject to the fulfilment of certain conditions, provided for in article 26 of the Constitution and the Public Associations in the Republic of Uzbekistan Act of 1991 operates as a restriction on the activities of non-governmental organisations. The State party should take the necessary steps to enable the national non-governmental human rights organisations to function effectively'; CCPR/CO/71/UZB, 26 April 2001, para 22.

[48] See the urging by the UN Human Rights Committee that legislation in Azerbaijan 'should clarify the status of associations, non-governmental organisations and political parties in the period between the request for registration and the final decision; such status should be consistent with articles 19, 22 and 25 of the Covenant'; CCPR/CO/73/AZE, 12 November 2001, para 23. See also the European Court's conclusion in *Ramazanova and Others v Azerbaijan*, no 44363/02, 1 February 2007 that delayed registration meant "that, even assuming that theoretically the association had a right to exist pending the state registration, the domestic law effectively restricted the association's ability to function properly without the legal entity status. It could not, *inter alia*, receive any "grants" or financial donations which constituted one of the main sources of financing of non-governmental organisations in Azerbaijan (see Article 3 of the Law *On Grant*). Without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence. It is therefore apparent that, lacking the status of a legal entity, the association's legal capacity was not identical to that of state-registered non-governmental organisations" (para 57).

[49] This is recognised in paragraphs 26 and 75 of Recommendation CM/Rec(2007)14, although this does preclude them being held liable for their personal misconduct such as misuse of powers as an officer of the association (paragraph 75) and their acts may be evidence of the actual objectives of an association.

[50] *Koretskyy and Others v Ukraine*, no 40269/02, 3 April 2008, which concerned the stipulation in section 16 of the Associations of Citizens Act that "the registration of an association may be refused if its articles of association or other documents submitted for the registration contravene the legislation of Ukraine". In the European Court's view the Act did not specify whether that provision refers only the substantive incompatibility of the aim and activities of an association with the requirements of the law, in particular with regard to the grounds for the restrictions on the establishment and activities of associations contained in section 4 of the same Act, or also to the textual incompatibility of the articles of association with the relevant legal provisions. Given the changes to the text of the articles of the applicants' association on which the authorities were insisting, the Court noted that the provision at issue allowed a particularly broad interpretation and could be read as prohibiting any departure from the relevant domestic regulations of

CM/Rec(2007)14 also requires that the process involved in acquiring legal personality should be "easy to understand and satisfy"[51].

53. Legal personality can, however, be refused where the applicants fail to comply with a legal requirement that is compatible with the European Convention[52]. However, other than in those situations in which the objectives and activities of an association are properly found to be contrary to the constitution or the law[53], there are likely to be only a limited number of circumstances in which a refusal of recognition or registration might be justified. They would certainly include such a refusal in cases where the proposed name of the association belonged to that of another body or could be confused with it or was in some other way damaging to it[54] or could in some way be genuinely regarded as misleading to the public[55].

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associations' activities. In such a situation, the judicial review procedure available to the applicants could not prevent arbitrary refusals of registration.

[51] Paragraph 29.

[52] *W P and Others v Poland* (dec.), no 42264/98, 2 September 2004, in which the applicants had failed to comply with the requirement that persons intending to form an association whose activity will be directly related to defence or State security or the protection of public order shall agree the scope of such activity with the Minister of Defence or the Minister of Internal Affairs respectively.

[53] Although the European Court accepted in *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, 13 December 2001 that a refusal of recognition could have had the legitimate aim of protecting public order and public safety, the consequence for the applicant church's freedom of religion – an ability to organise itself or operate, as well as intimidation – could not be regarded as proportionate to it.

[54] As regards the former, see Appl No 18874/91, *X v Switzerland*, 76 DR 44 (1994) (in which it was found that a refusal of registration under the national designation – as opposed to an absolute refusal - could be regarded as necessary in a democratic society for the prevention of disorder and the protection of the rights and freedoms of others where a third person might confuse the applicant association's name with that of a chamber of commerce and another body responsible for bilateral trade relations between Switzerland and Australia; the body 'lacked the necessary integration into national foreign trade policy' (p 49)) and Appl No 28973/95, *Basisan for 'Liga Apararii Drepturilor Omului Din Romania' v Romania*, 91 DR 29 (1997) (in which the only difference between the name of the applicant association and the already existing 'League for the Defence of Human Rights' was the addition of 'in Romania' and the European Commission considered that, having regard to the possibility of confusion, the refusal of registration could be viewed as unreasonable). An instance of both considerations can be seen in *Apeh Uldozotteinek Szovetsege, Ivanyi, Roth and Szerdahelyi v Hungary* (dec.), no 32367/96 31 August 1999, in which the Court did not consider there to be an excessive interference with freedom of association in the refusal of a request for a registration by an association whose name in English was the Alliance of APEH's Persecutees (APEH being the abbreviated name of the Hungarian Tax Authority) when there was no obstacle to the formation and registration of an association to promote taxpayers' interests other than the choice of a name that implied a risk of confusion and that was defamatory; it is, however, questionable whether anyone might have imagined a body with such a name was an official one and the ready acceptance of the defamation objection is possibly at odds with the protection given to value judgements under Article 10. The body concerned need not be one that is already recognized or registered as the freedom of association of those belonging to an association without legal personality could also be harmed by the usurpation of its name.

[55] See *Gorzelik and Others v Poland*, no 44158/98, 17 February 2004, in which it was accepted that an application by the 'Union of People of Silesian nationality' could be rejected because its memorandum of association referred to it as being an 'organisation of a national minority' which was a concept found in the parliamentary elections law governing participation in the distribution of seats and thus gave the misleading impression that the association and its members would enjoy certain 'electoral privileges to which they were not entitled' (para 103). It was significant that such doubts could have been dispelled by only a slight change in the association's memorandum of association and without having any harmful consequences for its existence as an association or preventing the achievement of its objectives. In such circumstances the restriction could hardly be regarded as disproportionate to the legitimate aim being pursued. In the

Certainly, no matter how well-intentioned, the process of approval should not generally be used to impose constraints on the ability of associations to draw up their own rules, to administer their own affairs or to make links with other bodies as these are essential elements of freedom of association. Any interference with that freedom would be admissible only if it was capable of being justified under the limitation clause, such as the imposition of requirements that are necessary to preclude unjustified discrimination or to protect the legitimate interests of members[56].

54. The formal requirements considered appropriate by Recommendation CM/Rec(2007)14 are simple and straightforward, namely:

> 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.
>
> 32. Legal personality for membership-based NGOs should only be sought after a resolution approving this step has been passed by a meeting to which all the members had been invited.
>
> 33. Fees can be charged for an application for legal personality but they should not be set at a level that discourages applications.

55. An application for legal personality in which alleged irregularities appear should not be rejected without first informing the applicants of them or giving them an opportunity to remedy them[57]. This should not, however, be used as a device to delay a grant of legal personality and there may, therefore, have to be a limit on the number of times documents can be returned for rectification[58].

Chamber judgment the requirement of a slight change in the association's name as a condition for registration was also considered unobjectionable but this issue was not specifically addressed in the Grand Chamber. Only the grounds cited above, together with the failure to submit 'all clearly prescribed documents' are recognised in paragraph 34 of Recommendation CM/Rec(2007)14.

[56] Appl No 10550/83, *Cheall v United Kingdom*, 42 DR 178 (1985) in which it was considered that the State could protect an individual against exclusion or expulsion from a trade union where the membership rules 'were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship such as job loss because of a closed shop [i.e. where union membership was obligatory]' (p186). *Cf Associated Society of Locomotive Engineers & Firemen (ASLEF) v United Kingdom*, no 11002/05, 27 February 2007, in which it was held that a bar on expelling a member for advocating views incompatible with those of the applicant trade union was a violation of the latter's freedom of association.

[57] See *Bozgan v Romania*, no 35097/02, 11 October 2007, in which the European Court considered that requiring an applicant to start the registration procedure again from scratch was to impose too heavy a burden, especially as the law provided for him to remedy any irregularities as part of the initial application process. See also *Church of Scientology Moscow v Russia*, no 18147/02, 5 April 2007 in which there was held to be bad faith in a refusal of re-registration where there had been a failure to specify what document or information had been missing when refusing to process four applications for re-registration on account of the applicant's alleged failure to submit a complete set of documents.

[58] There was none in *Ramazanova and Others v Azerbaijan*, no 44363/02, 1 February 2007, in which the Ministry of Justice was found to have arbitrarily prolonged the whole registration procedure without issuing a final decision by continuously finding new deficiencies in the registration documents and returning them to the founders for rectification. The absence of sufficient protection was also found by the European Court in *Ismayilov v Azerbaijan*, no. 4439/04, 17 January 2008.

56. A requirement to enclose original documents with an application will be regarded as unjustified in the absence of any obligation to return them[59].

57. No specific deadline for dealing with an application for legal personality is prescribed in international instruments but the European Court has found significant delays in doing so to be contrary to Article 11 of the European Convention because it resulted in the prolonged inability of the NGO concerned to acquire the status of a legal entity, was in breach of the time-limits prescribed by national law and there was insufficient protection against arbitrary delays in the handling of applications [60]. Recommendation CM/Rec(2007)14 provides that a" reasonable time limit should be prescribed for taking a decision to grant or refuse legal personality"[61].

58. It is also stipulated in Recommendation CM/Rec(2007)14 that:

"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.

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."

59. The importance of judicial review procedure to prevent arbitrary refusals of registration has been underlined by the European Court in *Koretskyy and Others v Ukraine*[62]and the absence of reasons for a refusal will necessarily result in the conclusion that there is no relevant and sufficient basis for it[63].

60. In addition, given the potential significance of such decisions for associations and those forming them, the possibility of bringing a legal challenge to a refusal must be something that can be speedily pursued. If these conditions are not met

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[59] *Church of Scientology Moscow v Russia*, 18147/02, 5 April 2007.

[60] See *Ramazanova and Others v Azerbaijan*, no 44363/02, 1 February 2007 (a delay of almost four years in the association's registration was found attributable to the Ministry of Justice's failure to respond in a timely manner where each time the registration documents were returned to the applicants, they rectified the deficiencies noted in the Ministry's letters and re-submitted a new registration request in a prompt manner (usually within less than one month after receiving the Ministry's comments) but the Ministry delayed the response to each of the applicants' registration requests for several months despite a statutory deadline of 10 days. Furthermore the law did not specify a limit on the number of times the Ministry could return documents to the founders “with no action taken”, thus enabling it, in addition to arbitrary delays in the examination of each separate registration request, to arbitrarily prolong the whole registration procedure without issuing a final decision by continuously finding new deficiencies in the registration documents and returning them to the founders for rectification) and *Ismayilov v Azerbaijan*, no. 4439/04, 17 January 2008 (in which an application for registration was similarly treated).

[61] Paragraph 37. A useful point of comparison in judging what is reasonable might be the time taken to register corporations or businesses. These also have objectives which need to be checked and in most countries these can still be registered in a matter of days rather than of months. There is, therefore, no clear need for a significantly longer period to be needed for the process of recognising or registering an NGO.

[62] No 40269/02, 3 April 2008, in which it was frustrated by the breadth of the language used in the legislation governing applications for legal personality.

[63] The absence of an explanation for restrictions on permitted activities was significant in the conclusion that they were not justified in the *Koretskyy* case. See also the friendly settlement of the petition about the unreasoned refusal to register a religious association in Appl No 28626/95, *Khristiansko Sdruzhenie ‘Svideteli Na Iehova’ (Christian Association Jehovah’s Witnesses) v Bulgaria*. 92 DR 44 (1998), pursuant to which the association would be registered.

then it is likely that there will be not only a violation of the right to freedom of association but also, in many instances, violations of the rights to a fair hearing and to an effective remedy[64].

61. A requirement that existing NGOs must seek a renewal of its status as a legal entity following a change in law governing them is not in itself contrary to Article 11 of the European Convention. Nevertheless this provision will be breached where the authorities do not act in good faith in dealing with an application for renewal[65].

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[64] See, e.g., *Apeh Uldozotteinek Szovetsege, Ivanyi, Roth and Szerdahelyi v Hungary*, no 32367/96, 5 October 2000, where Article 6(1) was held applicable to non-contentious court registration proceedings and a violation was found because of the failure to provide the applicants with the intervening prosecution authority's submissions and the consequent failure to respect the 'equality of arms' principle. Although registration was treated as a matter of public law in Hungary, the national classification of proceedings is never decisive as to whether a 'civil right or obligation' is involved for the purpose of making Article 6 applicable. In the European Court's view it followed from the fact that the association could obtain its legal existence only through registration that 'an unregistered association constitutes only a group of individuals whose position in any civil-law dealings with third parties is very different from that of a legal entity. For the applicants, it was consequently the applicant association's very capacity to become a subject of civil rights and obligations under Hungarian law that was at stake in the registration proceedings' (para 36) and thus these were concerned with its civil rights and obligations. In *Sidiropoulos and Others v Greece*, no 26695/95, 10 July 1998 there was unfairness regarding the evidence on which registration was refused but, as the Court considered that Article 11 was to be seen in the light of Article 6, it was thus not necessary to address the fair hearing issue separately. However, while civil rights and obligations would be affected by a refusal of recognition or registration in the case of most associations, this provision appears to be inapplicable in the case of a political party as the right involved in the registration process will be seen as primarily a 'political' one; see *Vatan (People's Democratic Party) v Russia* (dec.), no 47978/99, 21 March 2002, which concerned the suspension of the applicant party's activities for six months. Nevertheless such a party, as well as any association, should also have an effective remedy to challenge a refusal of registration considered improper in order to meet the requirements of Article 13. The 'civil rights' qualification does not apply to the fair hearing guarantee in Article 14 of the International Covenant on Civil and Political Rights and paragraph 10 of Recommendation CM/Rec(2007)14 stipulates that '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' and this would include all decisions affecting registration or the grant of legal personality.

[65] See *Moscow Branch of the Salvation Army v Russia*, no 72881/01, 5 October 2006 (following refusal because of the branch's "foreign origin" and its internal structure and religious activities, the European Court firstly found there to be 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. Secondly it found that, although organised using army ranks and the wearing of uniforms, it could not seriously be maintained that the branch advocated a violent change of constitutional foundations or undermined the integrity or security of the State. Thirdly it found that findings that the branch had contravened any Russian law or pursued objectives other than those listed in its articles of association lacked evidentiary basis and was arbitrary) and *Church of Scientology Moscow v Russia*, no 18147/02, 5 April 2007 (in which there had been a failure to specify what document or information had been missing when refusing to process four applications for re-registration on account of the applicant's alleged failure to submit a complete set of documents. Furthermore a court's ruling that the applicant had not submitted originals of certain documents was held to have had no foundation in domestic law and such a requirement would have been excessively difficult, even impossible, given that there was no obligation to return them. In any event the originals were in the authorities' possession. In addition there was a failure to explain why a book submitted had not contained sufficient information on the basic creed tenets and practices of Scientology, the failure to secure re-registration within the prescribed time limit had been a direct consequence of the arbitrary rejection of earlier applications and the requirement to submit a certain document had been unlawful).

Moreover Recommendation CM/Rec(2007)14 provides that "NGOs should not be required to renew their legal personality on a periodic basis"[66].

62. The obligation to grant legal personality to NGOs where this is sought relates only to ones actually being established within the country of the State concerned and does not appear to extend to recognising the personality of NGOs established elsewhere, although a failure to do so could have implications for the association rights of persons in that State as well as the property and fair hearing rights of any NGO whose personality is not recognised.

63. However, there is also a quite distinct obligation under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations. Under this convention a State party is generally obliged to recognize the legal personality of an NGO, foundation or other private institution established under the law of another State party[67], but only where the body concerned has a non-profit making aim of international utility and is carrying on its activities in at least two States and its statutory office, management and control is in the territory of a State party[68]. However, provision is made for 'restrictions, limitations or special procedures governing the exercise of the rights arising out of the legal capacity' to be recognised when these are 'required by essential public interest'[69]. Furthermore there is provision for excluding the application of the Convention in respect of an NGO if the body invoking it

"by its object, its purpose or the activity which it actually exercises:

a contravenes national security, public safety, or is detrimental to the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others; or

b jeopardises relations with another State or the maintenance of international peace and security."

64. Nonetheless it would be very surprising if either of these possibilities could legitimately be given a broader construction than that seen in the earlier discussion of acceptable objectives for NGOs. It should also be noted that the legitimacy of international human rights NGOs operating within individual countries is increasingly being recognised[70].

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[66] Paragraph 41.

[67] The proof of such personality is generally to be through presentation of the body's memorandum and articles of association or other basis constitutional instruments, although there is provision for this to be dispensed with under an optional system of publicity; Article 3.

[68] The State parties are Austria, Belgium, Cyprus, France, Greece, Portugal, Slovenia, Switzerland, "the former Yugoslav Republic of Macedonia" and the United Kingdom.

[69] Article 2(2).

[70] See the UN Declaration on Human Rights Defenders and see also the especial concern of the UN Human Rights Committee in respect of Vietnam 'about obstacles placed in the path of national and international non-governmental organisations and special rapporteurs whose task is to investigate allegations of human rights violations in the territory of the State party'; CCPR/CO/75/VNM, 5 August 2002, para 20. Paragraph 45 of Recommendation CM/Rec(2007)14 provides that the establishment of a new entity should not be required of a foreign NGO before it can operate and principle 38 of the Fundamental Principles encourages ratification of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations.

65. Furthermore Recommendation CM/Rec(2007)14 provides that foreign NGOs can be required to obtain approval in a manner consistent with its provisions in order to operate in the host country[71].

66. It remains to be seen whether the European Court will recognise that the ability of an NGO to establish branches which do not have a distinct legal capacity from it is an inherent aspect of the internal organisational capacity secured by the right to freedom of association and thus - as paragraph 42 of Recommendation CM/Rec(2007)14 provides - not requiring any official authorisation. However, it has noted that in at least some countries branches are automatically subject to registration requirements than can be as problematic as those governing the acquisition of legal personality by the parent NGO[72].

B Review of national practice

67. In the preparation of its first thematic study a questionnaire on the issue of establishment was sent to NGOs in all member states of the Council of Europe and Belarus. This questionnaire was directed to a broad range of issues relating to the establishment of an NGO, whether formal or informal in terms of its legal status[73].

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[71] Paragraph 45.

[72] See the observation of the European Court in *Koretskyy and Others v Ukraine*, 40269/02, 3 April about the burdensome requirement for associations wishing to have pan-Ukrainian status to set up local branches in the majority of the twenty-five regions of Ukraine.

[73] The questions asked were as follows:

1. To establish NGOs in your country or for them to undertake any activities, is there a specific requirement to first be registered/acquire legal personality?
2. If there is such a requirement, what (if any) possibility is there for more informal groupings or associations of individuals
   a) To be established?
   b) To undertake activities?
3. Where NGOs either must or can be registered/acquire legal personality
   a) What documents and information must be submitted for this purpose?
   b) What procedure must be followed?
   c) What (if any) fees are payable?
4. Are any persons (such as children, convicted persons, non-nationals and corporate bodies) disqualified from
   a) Seeking registration or legal personality for an NGO?
   b) Joining in establishing a more informal grouping or association?
5. Where NGOs either must or can be registered/acquire legal personality
   a) Is there a formal deadline for taking decisions on registration or grant of legal status?
   b) Are there notable instances of this period being exceeded?
   c) If there is no specific deadline, what is the normal period for such a decision to be taken?
6. If registration/legal personality is refused
   a) Are there grounds specified in the law for the refusal?
   b) Is there a requirement for the relevant authority to substantiate a refusal?
7. What are the opportunities or procedures (if any) to correct an application for registration/legal personality where the relevant authority considers it not to have satisfied the requirements of the law?
8. To what extent is the relevant authority for registration/grant of legal personality independent of government control or influence?
9. If registration or legal personality is refused
   a) Is it possible for decisions to be challenged in the courts?
   b) Is it frequent for such challenges
      i. to be brought

Although the response was not comprehensive, there were replies in respect of 35 of the 48 jurisdictions concerned. However, not all questions were answered by all respondents.

68. This response only provides an overview of the position in the countries in respect of which the questionnaire was answered and certainly does not provide a deep enough appreciation of how formal rules work in practice. Moreover the accuracy of all the information provided by the respondents cannot be confirmed and there may be some inconsistency in the responses summarised, although every effort has been made to resolve this.

69. However, a number of broad conclusions emerged from responses received and these can be seen in the summary of the principal responses set out in the following sub-sections. Some are echoed in the more in-depth analyses of the situation in certain countries that were subsequently made.

Operation of informal groupings

70. There are countries where the operation of informal groupings is inhibited both as a matter of law and practice and where there are no imminent proposals for reform.

71. Thus in ten countries there is a requirement that NGOs be registered or acquire legal personality before they can undertake any activities[74]. In one of them the requirement will be removed pursuant to a new law that is in the process of being adopted[75], while the position is under review in another[76]. Moreover in three of the countries concerned some exceptions to the fulfilment of the requirement of being registered or acquiring legal personality were said to be tolerated in practice[77].

72. In two of the countries where registration or the acquisition of legal personality appears to be the only option for establishing an NGO this is the automatic consequence of having done so; i.e., there is no need for any formal intervention by a state body[78].

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ii. to succeed?

10. Is there any requirement to seek the renewal of registration/grant of legal personality on a periodic basis?
11. What other areas of concern are there in your country about the establishment of NGOs or their registration/acquisition of legal personality?
12. What areas of concern are there in your country about the legal position of NGOs generally?

[74] Azerbaijan, Belarus, Bosnia and Herzegovina, Hungary, Montenegro, Serbia, Slovakia, Sweden, Switzerland and "the former Yugoslav Republic of Macedonia". The response in respect of Bosnia and Herzegovina appears to reflect the uncertain position on the point in the Federation as there is no mandatory registration requirement either at state level or in the Republic of Srpska but no details were provided.

[75] Serbia.

[76] Slovakia.

[77] Azerbaijan (mostly in the human rights defence field organisations are "allowed" to operate without registration but under a recognised name or abbreviation and to receive donations of awarded grants through personal accounts where donors find this acceptable), Montenegro (NGO networks are informally established) and Serbia.

[78] Sweden and Switzerland. However, although there is no need to register in Sweden, an organisation number is needed from taxation authority in order to use the bank giro service - essential for economic

73. On the other hand, in at least eighteen countries there appears to be no requirement for NGOs to be registered or acquire legal personality before they can undertake any activities, albeit that the scope for undertaking activities might be constrained in them by the absence of legal personality [79].

Capacity to form NGOs

74. The disqualification of some persons from being eligible to form NGOs does not seem in some cases to be consistent with the right to freedom of association under Article 11 of the European Convention.

75. Thus, although in eleven countries there are no restrictions as to who can seek registration or legal personality for an NGO[80], fourteen countries have an age restriction, varying from a requirement that the persons be at least fifteen[81], sixteen[82] or eighteen years old[83].

76. Furthermore in three countries the possibility of establishing NGOs is limited to natural or physical persons[84].

77. Moreover, while in two countries there are no restrictions for foreigners establishing NGOs[85], many countries do have restrictions in respect of persons who are not citizens. These vary from a requirement that such persons be

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transactions - which requires showing its statutes and a report from the inaugural meeting where it is stated who is authorised to sign documents for the NGO.

[79] Albania, Belgium ((but without legal personality it cannot conclude a contract or open a bank account and its members are personally responsible for its undertakings), Denmark (if the NGO has employees registration with tax authorities is required but this is only a matter of notification), Finland (but lacking legal capacity it cannot acquire property in its own name, be a member of another association. The executive committee cannot act in a way that binds the other members and responsibility is attached to the members participating in the operations giving rise to it), France (members of groups of persons will be personally responsible for its actions), Georgia, Germany (but liability falls on all members and there were unspecified tax problems), Greece, Iceland, Italy (but necessary to obtain public funding), Latvia (but needed to rent premises, undertake economic activities, organise public events involving liabilities and relations to third parties), Luxembourg (but rarely done because of the disadvantages of not having legal personality), Norway(only needed if involved in activities requiring a legal entity such as an employer or a receiver of public grants apart from those for activities related to children/youth/culture or it intends to open a bank account in its name), Poland (these bodies are created by notification subject to power of prohibition exercisable within 30 days; they must have 3 founders, have an aim, territory of activity and headquarters with possessions resulting from membership fees and no business activities), Romania (but not common and there would be problems interacting with public authorities and banks), Russia, Spain, Turkey, Ukraine (but it does involve notification) and United Kingdom.

[80] Azerbaijan, Denmark, Georgia, Iceland, Latvia, Montenegro, Norway, Spain (but children must be represented by their parents or legal guardian), Sweden, Switzerland and "the former Yugoslav Republic of Macedonia".

[81] Finland.

[82] Romania.

[83] Albania, Armenia, Bosnia and Herzegovina, Croatia France, Germany, Greece, Italy, Luxembourg Poland, Russia, Serbia, Slovakia, Turkey and United Kingdom. In Belgium there is no restriction but parents are held responsible for the acts of children.

[84] Italy, Poland and Serbia.

[85] Albania and Bulgaria.

resident[86], through the need for them being in a minority[87] to their participation as a founder necessitating that the international organisation type has to be used[88].

78. In the case of one country non-citizens are excluded from certain types of association[89], in another they cannot be founders where a decision has been made that their continued presence in the country is undesirable[90] and in yet another they cannot be illegal immigrants[91].

79. One country does not allow non-citizens to be founders at all[92] and in another they are excluded if they are not citizens of the European Union[93].

80. Certain countries have restrictions on persons disqualified from public service[94], persons on the list of money launderers or of those financing terrorism[95], persons charged with criminal offences pending the investigation[96], persons in prison[97] and persons in legal prohibition[98]. Some countries have prohibitions applying to convicted persons[99], persons convicted of certain crimes during a five-year period after completion of sentence[100], persons with a certain criminal record[101] or persons whose conviction includes a loss of civil rights for a specified period[102].

Requirements for registration or acquiring legal personality

81. The numbers of founders required for an NGO to be registered or to acquire legal personality was not specifically requested in the questionnaire but details were given by a number of respondents. The figures ranged from three[103] through five[104], seven[105], ten[106] to twenty or twenty-one members[107].

82. The possible documents and information that might be required for registration/acquisition of legal personality cover a wide range of matters, with only some points being common to the overwhelming majority of countries, namely

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[86] Bosnia and Herzegovina and France. *Cf* in respect of France the analysis in para 236 below.
[87] "the former Yugoslav Republic of Macedonia".
[88] Belarus.
[89] Finland (foreigners must be resident in order to belong to associations whose purpose is to have influence on government).
[90] Russia.
[91] France.
[92] Serbia.
[93] Italy.
[94] Italy.
[95] Russia.
[96] Serbia.
[97] Russia and Ukraine.
[98] Greece.
[99] Greece, Luxembourg and Russia.
[100] Serbia.
[101] France.
[102] Belgium.
[103] Armenia, Belgium, Croatia, Finland and Romania.
[104] Georgia and "the former Yugoslav Republic of Macedonia".
[105] Bulgaria and Germany.
[106] Belarus (for local - i.e., city - organisation but no details given for national or international ones), Hungary and Serbia.
[107] Greece.

- an application or letter of interest[108];
- the protocol of establishment or the minutes of the founding meeting[109] or the date of the confirmation of its charter[110];
- the decision to initiate registration proceedings[111];
- the list and personal details of the founders[112];
- the object of its activity[113]
- the statutes[114];
- an explanatory report on the activities carried out or to be carried out[115];
- a notice with the NGO's name, municipality of residence and address[116], telephone number[117] and email address[118];
- the decision on the establishment of the management bodies[119] or the protocols of members' and board meetings[120];
- the decision appointing certain office-holders and representatives[121];
- the members of its board or those with authority to represent association[122], as well as sample signatures of representatives[123]
- a "no jail bird" declaration for board leaders[124];

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[108] Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Finland, Georgia, Germany, Italy, Latvia, Montenegro, Poland, Romania, Russia, Serbia and Ukraine.
[109] Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, France, Germany, Latvia, Montenegro, Norway, Poland, Russia, Serbia, Spain, “the former Yugoslav Republic of Macedonia” and Ukraine.
[110] Georgia.
[111] Croatia, "the former Yugoslav Republic of Macedonia” (must be authenticated) and Serbia.
[112] Albania, Armenia, Azerbaijan, Belgium (not for an AISBL), Croatia, Georgia, Greece, Hungary, Luxembourg, Serbia, Turkey and Ukraine. Usually this entailed providing a copy of each person's identity card.
[113] Albania, France, Georgia and Serbia.
[114] Albania, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Finland, France, Georgia, Greece, Hungary, Italy, Latvia, Luxembourg, Montenegro, Norway, Poland, Romania, Russia, Serbia, Slovakia, Spain, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine and United Kingdom.
[115] Italy and “the former Yugoslav Republic of Macedonia”.
[116] Finland, Georgia, France, Norway, Poland, Romania (certificates for owner or tenant status), Russia, Serbia and Turkey.
[117] France and Russia.
[118] Russia.
[119] Serbia.
[120] Albania and Georgia.
[121] Bosnia and Herzegovina (the president, other persons in the bodies of the organisation and the giving of authorisation for representing and advocating), Croatia (the president's consent to govern the NGO was needed) and Ukraine.
[122] Albania, Belgium (including details of foreign members with copies of their passports and their social security numbers), Croatia, Finland, France, Georgia, Germany, Italy, Latvia, Luxembourg, Poland, Russia, Serbia and “the former Yugoslav Republic of Macedonia”.
[123] Poland.
[124] Hungary.

- proof of the NGO's patrimony[125] or a report on its economic/financial situation with relevant documentation regarding end-use, size and value of real property and of movable capital assets[126];
- the budgets and balance sheets approved in the previous three years or in the period preceding the application if it has already worked as a non-officially recognised body[127];
- an indication of the number of members if it is an association[128];
- the fees payable by members[129];
- approval or permission of the authorised body of the public administration for undertaking certain activities when that is prescribed by special law as a condition for registration of the association[130];
- proof issued by the Ministry of Justice regarding the availability for the denomination of the association[131] or approval to use personal name of a citizen or of a symbolism protected by law[132];
- a declaration that the NGO's purposes are not against the law[133];
- a completed form for publication in official journal[134]; and
- an extract from the register confirming the NGO's legal status where its founder is a foreign juridical person[135].

83. The need to notarise the documents that are to be submitted was specified in the case of two countries[136] and one country required a deposit of money[137].

84. The detailed information needed in some instances in order to secure registration or legal personality does not seem to correspond to any significant fiscal advantages that might provide an appropriate justification for the burden thereby imposed.

85. The procedure invariably entailed submission to the relevant authority, with one respondent emphasising that submission in the country's capital was the only option[138].

86. This authority involved is often a ministry, whether the provincial body of the Ministry of Internal Affairs[139] the Ministry of Justice[140], the Ministry of Public

[125] Romania (bank account balance, expertise for assets, etc).
[126] Italy.
[127] Italy.
[128] Italy.
[129] Germany (has to be in statute) and Norway.
[130] Croatia.
[131] Romania.
[132] Russia.
[133] Greece.
[134] France.
[135] Russia.
[136] Azerbaijan and Germany.
[137] “the former Yugoslav Republic of Macedonia” (5,000 EUR in denars but only for foundations)
[138] Azerbaijan.
[139] France (the Prefecture), Italy and Slovakia.

Administration and Local Self Government[141] or one that is not specifically identified[142].

87. In some instances it is a specific register of associations[143], in another it is the Authority of Justification[144] and in others it is the tax department[145].

88. In eight countries the authority for registration or granting legal personality is a court (or a body under its jurisdiction)[146], while in one it apparently varies according to type of association but no details were given[147]. In the case of one country the body was not specified[148].

89. Only five countries have no fee for the purpose of registration or acquiring legal personality[149],

90. In the countries where a fee is payable, the level differs quite considerably, ranging from less than 10 EUR[150], through amounts such as 10 EUR[151], 12 EUR[152], 15 EUR[153], 18.26 EUR plus VAT and the cost of publication of details in the official journal[154], 20-25 EUR[155], 39.06 EUR[156], 50 EUR[157], 54 EUR[158], 60 EUR[159], 75-100 EUR[160], 125 EUR[161] to 150 EUR[162].

91. There is a variable fee system in one country, depending on whether the NGO is established at the national or international level[163], another only charges

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[140] Armenia, Azerbaijan, Belarus (in the case of republican and international NGOs; it is the municipality for local ones), Belgium (in the case of an AISBL), Bosnia and Herzegovina and Croatia (Register of Associations).
[141] Serbia .
[142] Montenegro.
[143] Finland, Latvia, Luxembourg, Norway (body under Ministry of Trade and Industry), Spain (regional or national), Russia and Turkey.
[144] Ukraine.
[145] Georgia and Germany (only if tax exemption is being sought).
[146] Albania, Belgium (in the case of an Association Sans But Lucratif ("ASBL")), Bulgaria, Germany (registry in district or county court), Greece, Hungary, Poland, Romania and "the former Yugoslav Republic of Macedonia" (Central Registry Office).
[147] Slovakia.
[148] Croatia.
[149] Albania, Hungary, Montenegro (except for the cost of the lawyer doing the registration work), Norway and "the former Yugoslav Republic of Macedonia".
[150] Azerbaijan (11 AZN).
[151] Croatia and Latvia.
[152] Ukraine (85 UAH).
[153] Italy.
[154] Luxembourg; the cost for the official journal is 2 EUR per page of the statute.
[155] Armenia and Georgia.
[156] France.
[157] Romania.
[158] Russia (2000 RUR).
[159] Finland (unless a preliminary check is made when it is only 15 EUR) and Serbia.
[160] Belgium (this includes the cost of publication in the official journal) and Germany (this seems to include the cost of a notary).
[161] Poland.
[162] Bosnia and Herzegovina.
[163] Belarus but no specific details were provided.

half the fee for political parties and their branches[164] and in two countries certain types of NGO are entirely exempt from paying the fee[165].

92. In respect of one country the cost of registration was not specified[166] and in the case of another it was stated that court fees are minimal but the need to use a lawyer makes total cost of the process in the region of 1,500-2,000 EUR[167].

Deadline for determining application for registration or legal personality

93. The time-frame for reaching decisions on registration or the grant of legal personality does not always have appropriate safeguards against prevarication and abuse.

94. Of the countries that have a formal process of registration or granting legal personality to NGOs, nine countries have a formal deadline[168].

95. There is, however, a considerable variation in the period prescribed. The shortest period is three days[169] and the longest is one hundred and twenty days with the apparent possibility of an additional sixty days for responding to comments[170]. In ascending order the other deadlines are: ten days with the possibility of prolongation to sixty days where all requisite documents not submitted[171]; fifteen days[172]; fifteen to thirty days[173]; twenty-one days[174]; thirty days[175]; thirty days with the possibility of a further eight days to deal with clarifications of questions asked [176]; forty working days with the possibility of a further twenty working days to deal with clarifications of questions asked[177]; and three months[178]. The deadline was not specified in the case of two of the countries that have one[179].

96. Apart from the instance cited, it is not clear whether the days in the various deadlines listed are regular or working days.

97. The deadlines were said to be observed in six countries[180] but in one of them this appears to be done in an abusive way so that decision-making is excessively prolonged[181].

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[164] Russia (1000 RUR).
[165] Belarus (youth public associations) and Croatia (founders).
[166] Spain.
[167] Greece.
[168] Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Romania, Russia, Serbia and Slovakia
[169] Georgia and Ukraine.
[170] Italy..
[171] Montenegro.
[172] Albania.
[173] Serbia (the answers of the two respondents differed).
[174] Armenia.
[175] Latvia, Russia (for public associations but only 14 for other non-commercial organisations) and "the former Yugoslav Republic of Macedonia".
[176] Croatia.
[177] Azerbaijan.
[178] Poland.
[179] Romania and Slovakia.
[180] Azerbaijan, Bosnia and Herzegovina (except where there was a lack of documentation within the application), Georgia, Latvia (usually done within 10-15 days rather than the 30 allowed), Poland, Russia (many instances of it being exceeded).

98. However, observance is effectively enforced in two others in which there is either a presumption of acceptance if the deadline reached without decision[182] or registration becomes effective after passing of the deadline if request is submitted with all necessary and valid documents and proofs[183]. It is not clear whether these formulations are in substance the same; the latter would seem to leave open the possibility of a supposed registration being challenged.

99. In one country there is a presumption of denial if not decided within deadline, thereby allowing for an appeal before a court against that decision[184].

100. There were considered to be instances of the deadline being exceeded in the case of four countries[185] but no details were given in the case of one of them[186].

101. In ten countries there is no deadline[187] but in one of these there is a presumption of refusal where there is no decision within two months so that judicial proceedings can then be brought[188] and the issue is not relevant in two others where there is no process or legal personality is acquired automatically[189].

102. Where there is no deadline the period normally taken to get a decision also varied considerably. It ranges from two to three days (although publication in the official journal from which legal personality becomes effective could then take several months[190]) to between six and twelve months[191]. The other periods specified were: five to ten days[192]; between one week and a month[193], some weeks[194]; thirty days[195]; one month[196] or more[197]; sixty days[198]; and six months[199].

103. In the case of one country it varies according to type of organisation involved[200].

104. In another the period was given as the rather vague "time taken to complete paperwork"[201] and in yet another it was not known[202].

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[181] Azerbaijan (the practice is to return applications just before the deadline for corrections so that the process has to start all over again and this can be repeated several times)
[182] Italy.
[183] Croatia.
[184] Serbia.
[185] Armenia, Belarus (it depends on the kind of organisation), Romania (the average time was said by one respondent to be a month) and Slovakia.
[186] Armenia.
[187] Finland, France, Germany, Greece, Hungary, Luxembourg, Norway, Spain, Switzerland (as regards bodies required to be entered on the Commercial Register) and United Kingdom.
[188] France.
[189] Denmark and Sweden.
[190] Luxembourg.
[191] Greece.
[192] France.
[193] Bulgaria.
[194] Germany.
[195] Slovakia.
[196] Norway.
[197] Spain.
[198] Bosnia and Herzegovina.
[199] Finland.
[200] Belgium (a few days for an ASBL - it depends on the appearance of the official journal as it is otherwise a formality - and several weeks for an Association Internationale Sans But Lucratif (AISBL)).
[201] United Kingdom.

Refusal and reasoning

105. Some countries do not specify any grounds for refusing registration or the grant of legal personality and/or do not require such a decision to be reasoned.

106. Furthermore not all the grounds recognised as the basis for refusing registration or the grant of legal personality seem to be drawn with sufficient precision and may thus not be applied in a manner consistent with the right to freedom of association or the promotion of civil society.

107. The grounds specified included:

- non-conformity with the constitution[203] or the law[204];
- threatening the stability of the country[205];
- being racist or anti-Semitic[206];
- being anti-republican[207];
- being against territorial integrity[208];
- being against public morals[209];
- having "undemocratic structures"[210]
- not being founded for a non-profit purpose[211];
- having a name that does not differ clearly from one already registered[212] or one that injures morality or the national and religious feelings of citizens[213];

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[202] Switzerland (as regards bodies required to be entered on the Commercial Register).

[203] Bosnia and Herzegovina, Croatia, France, Serbia (in particular paramilitary or secret organisation, violent destruction of public order, destruction of territorial integrity, violation of guaranteed rights and liberties of others, incitement of national, racial, religious or other intolerance and hatred) and Russia.

[204] Belgium, Croatia, Finland (this also covers proper behaviour), France, Germany, Greece, Russia, Spain and “the former Yugoslav Republic of Macedonia”.

[205] Ukraine.

[206] France.

[207] France.

[208] France.

[209] France.

[210] Germany.

[211] Finland.

[212] Finland, Latvia and Russia.

[213] Russia. In this regard see Moscow Helsinki Group's 2007 annual report, entitled 'Discrimination based on sexual orientation and gender identity in Russia' regarding the refusal of registration to two non-governmental sexual minority organisations – “Raduzhnyi Dom” (Rainbow House, Tyumen). The Federal Registration Service initially ruled that the organisation’s activity related to propaganda of non-traditional sexual orientation may undermine the security of the Russian society and state due to the following circumstances: Disruption of the society’s spiritual values; Disruption of sovereignty and territorial integrity of the Russian Federation due to the decreasing number of its population. In a further refusal it supplemented these reasons with new “arguments”, namely, that the officials considered that “propaganda of non-traditional sexual orientation ... attempts on state-protected family and marriage institutes, which may lead to the incitement of social and religious hatred and hostility”. They also saw a serious contravention of the registration procedure not allowing them to register the non-governmental organisation in the fact that in the set of the presented constituent documents “the Statute pages do not have numbers” leading them to be named “unreliable information in the presented documents”.

- lacking financial and administrative soundness[214];
- failing to comply with the registration procedure[215] or to resubmit within given time limit all the necessary and valid documents[216]; and
- having someone as a founder who was not entitled so to act[217].

108. In addition in one country where registration is a formality it was stated that the NGO's name (i.e., to see if it is already in use) and its objects can be controlled but that this was done in a summary fashion[218].

109. Although negative decisions with respect to registration and the grant of legal personality have to be reasoned in the case of eighteen countries[219], such a requirement is not specifically mentioned in law of one country[220] and does not exist in the case of four others[221].

Scope for correcting an application

110. However, twelve countries have some possibility of correcting documents during the registration process[222].

111. The time allowed for this purpose ranges from two[223] to sixty days[224], with other periods specified being a week[225], between fifteen and thirty days[226], twenty days[227] and thirty days[228]. For one country it was reported that a "reasonable" term would be specified for corrections by the decision-maker but it was also stated that the "term is foreseen in the law"[229].

112. In the case of five countries no time-frame for corrections is specified[230], in another there is no limit to the possibility of changing and resubmitting an

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[214] Italy.
[215] Finland, Georgia, Germany, Greece, Latvia and Poland.
[216] Croatia, Montenegro, Norway, Serbia, "the former Yugoslav Republic of Macedonia", Russia, Spain and Ukraine.
[217] Russia.
[218] Luxembourg (foundations and associations with a public interest objective - i.e., philanthropic, religious, scientific, artistic, educational, social, sporting and touristic - do require grand-ducal approval by the Minister of Justice).
[219] Azerbaijan, Bosnia and Herzegovina, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Montenegro (specifying how to provide the missing documentation), Norway (specifying the missing documentation), Poland, Romania, Russia, Serbia, Slovakia, Spain and "the former Yugoslav Republic of Macedonia".
[220] Croatia.
[221] Armenia, Belarus, Georgia and "the former Yugoslav Republic of Macedonia".
[222] Albania, Armenia, Azerbaijan, Belgium, Croatia, Finland (if not rejected immediately), Georgia, Norway (to supply missing documentation), Romania, Serbia, Ukraine and United Kingdom.
[223] Georgia and Slovakia.
[224] Italy.
[225] Romania.
[226] Croatia.
[227] Azerbaijan.
[228] "the former Yugoslav Republic of Macedonia".
[229] Albania.
[230] Belgium, Serbia, Slovakia, Ukraine and United Kingdom.

application until it is in accordance with the law[231] and no details were given in the case of three of them[232].

113. For two countries the making of corrections is not possible where the problem was that the aims and activities of the NGO were contradictory to the law[233].

114. In one country the possibility of making corrections is frustrated by applications being returned with insufficient time to meet the deadline for clarification, thus necessitating the submission of fresh applications and leading to a process that could last several years[234].

115. In one country the only possibility of making corrections involves going to court[235] and in seven others it can only be done by submitting a new application[236].

Independence of decision-maker and judicial control

116. Although independence may not be an essential quality for the body deciding on registration or the grant of legal personality, the scope for improper pressures seems evident in some cases and these do not seem to be being corrected through the exercise of judicial control.

117. Thus, where there is a process of registration or granting legal personality, the body concerned was said to be independent in the case of five countries. The reason given for it being independent was that it is a court or operated within one[237] or because the only requirements governing its activities are in the law[238].

118. There was less certainty in respect of five countries for which respondents said the body was formally independent[239], generally independent[240], almost independent[241], independent as a matter of law but not in practice[242] or independent to a reasonable extent (a court)[243].

119. It was not considered to be independent in fifteen countries[244]. Furthermore in another one for which the issue was not addressed the body is probably not independent[245].

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[231] Latvia.
[232] Armenia. Finland and Norway.
[233] Belgium and Bosnia and Herzegovina.
[234] Azerbaijan.
[235] Belarus.
[236] Germany, Greece, Hungary, Luxembourg (only where name has to be changed in the statutes), Poland, Russia and Spain.
[237] Germany, Greece and Poland.
[238] Finland and Russia.
[239] Croatia.
[240] Albania.
[241] Romania.
[242] Armenia.
[243] "the former Yugoslav Republic of Macedonia".
[244] Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, France, Georgia, Italy, Luxembourg (Ministry of Justice), Montenegro, Norway (a government body), Serbia, Slovakia, Spain, Switzerland and United Kingdom.
[245] Latvia (register under supervision of Ministry of Justice).

120. The issue was not considered relevant in the case of one country, possibly because the body concerned is a court[246] and it was also not addressed in another one where the body is also a court[247].

121. Where there is a process of registration or granting legal personality, the possibility of negative decisions being challenged in the courts existed in twenty-seven countries[248] but in two of these an administrative appeal was required first[249].

122. The issue was not considered relevant in respect of one country because the NGO will be registered if it submits the required information[250].

123. The respondent for one country stated that it is frequent for challenges to decisions to be brought and to succeed[251] whereas that for another reported that it is not frequent for them to be brought but that it is frequent for them to succeed[252].

124. However the respondents for ten countries considered that it is not frequent for challenges to be brought or to succeed[253] and two stated that there were not many since most applications succeeded[254].

125. In the case of one country it was just stated that success is possible and instanced a case resolved favourably before being considered by the European Court[255].

126. The respondents for six countries reported that there are not many applications and that it was unknown whether they succeeded[256], whereas neither the frequency nor the success of challenges was known in the case of five countries[257].

Need for renewal of registration/grant of legal personality

127. There is no requirement to renew registration or the grant of legal personality on a periodic basis in the overwhelming majority of countries[258] but three of them indicated that this would be required in the event of a new law on associations being adopted[259].

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[246] Hungary.
[247] Bulgaria.
[248] Albania, Armenia, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Croatia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Spain, Switzerland (as regards bodies required to be entered on the Commercial Register) "the former Yugoslav Republic of Macedonia", Ukraine and United Kingdom.
[249] Croatia and Finland.
[250] Norway
[251] Switzerland (as regards bodies required to be entered on the Commercial Register).
[252] Hungary.
[253] Armenia Belarus, Croatia, Finland, France, Georgia, Italy, Montenegro, Poland and Russia .
[254] Germany and Greece.
[255] Azerbaijan
[256] Albania, Belgium, Latvia, Luxembourg, Romania and Spain.
[257] Serbia, Slovakia, "the former Yugoslav Republic of Macedonia", Ukraine and United Kingdom.
[258] Belarus, Belgium, Bosnia and Herzegovina, Croatia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Montenegro, Norway, Poland, Romania, Russia, Serbia (but changes to seat and statute must be notified), Slovakia, Spain, Switzerland (as regards bodies required to be entered on the Commercial Register), "the former Yugoslav Republic of Macedonia" and United Kingdom.
[259] Belarus, Montenegro and Slovakia.

128. There was, however, a divergence of view in the case of the respondents from one country as regards the existence of a need to renew registration or legal personality [260].

129. Furthermore the respondents for another two countries pointed out that amendments to statutes do need approval[261], whereas notification was only needed for changes to the seat and the statute in the case of a third country[262] and for changes to the board and the statute in the case of two others[263]. It is, of course, likely that others have similar requirements but these were not specifically within the scope of the question.

Other matters of concern about registration/grant of legal personality

130. The concerns raised by respondents on issues other than those covered by the questionnaire related to both the content of the law and the process involved in dealing with registration and the grant of legal personality.

131. In the case of one country there is concern about the failure to give a higher priority to reform of the law[264].

132. In two others there is concern about the minimum number of members to found an NGO[265], although it was not clear why it should be seen as problematic in the case of one of them where only three persons are required[266].There is also concern about the prohibition in one country on including in the denomination of associations any words which are specific to public institutions and authorities[267].

133. However, the respondent from one country suggested that the law there is too liberal, leading to an explosion of NGO registration, with business companies, coffee shops and kindergartens being registered[268].

134. The process was seen by some as too complicated and too expensive[269] and, undoubtedly linked to this, there is concern about the lack of money to pay a lawyer's services when seeking registration or legal personality[270].

135. There was also concern in respect of one country about the bureaucracy of the courts and the difficulties faced in registration by those not coming from the capital city, as well as the lack of familiarity by decision-makers with the issues faced by civil party and their corruption and the lack of a consistent practice as regards both registration and dissolution[271].

136. Nonetheless the problems with the process are in some instances seen as attributable to NGOs themselves, with it being observed that they need to know the

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[260] Armenia.
[261] Greece and Italy.
[262] Serbia.
[263] Germany and Norway.
[264] Serbia.
[265] Armenia and Serbia (at least 10 are required).
[266] Armenia.
[267] Romania.
[268] Montenegro.
[269] Poland.
[270] Russia.
[271] Albania.

procedure[272] and that they suffer from weak information awareness and legal illiteracy on possible organisational forms[273] and have insufficient experience[274].

137. Concern was expressed in respect of one country about delays due to lack of manpower[275], of another about the different bodies involved depending on the type of organisation[276] and of a third about the unequal treatment of applicants, with those dealing with sensitive issues facing unjustified delays[277].

138. There is also concern in one country about more control being exercised by the tax authority than the register of associations as regards general democratic rules in NGOs[278] and in another about the need to present the constitutive act and statute in authentic form[279].

139. The position was seen as having improved in one country since a change in the law two years ago but it was also noted that some unspecified improvements were still needed[280].

[272] Spain.
[273] Russia.
[274] Poland.
[275] Poland.
[276] Belarus.
[277] Azerbaijan.
[278] Germany.
[279] Romania.
[280] Turkey.

III COUNTRY CASES

A. Azerbaijan

Introduction

140. Article 58 of the Constitution guarantees the right to freedom of association, providing that everyone has the right to found and belong to an organisation, as well as a political party, trade union or other social community. Pursuant to this the Civil Code recognises various forms of non-commercial organisations and in particular public associations and foundations[281].

141. The formation of public associations and foundations is regulated by the Law on Non-governmental Organisations (NGOs) of 2000 ("the NGO law")[282] and the Law on the State Register of Legal Entities of 2003("the Registration Law").

142. There are no current official statistics as to how many NGOs exist but various estimates suggest that there are over 2,500 of them. They are predominantly public associations and it is estimated that there are some 1,300 associations that have no official status as there is no provision in the legislation for an informal grouping to exist, even if some of those that exist are tolerated in practice rather than threatened with action being taken against them. NGOs can only pursue their objectives if they are registered or, in the case of public associations only, go through the process of legalisation by notification. The very name of the latter process gives, of course, the impression that their pursuit of activities in common will not be lawful without at least doing this, notwithstanding that the activities concerned are inherently lawful if pursued by one individual and their collective pursuit should not in itself render them unlawful. The government has indicated that notification on the establishment of NGOs is not very common in practice.

143. Acquiring legal personality is in fact what most seeking to establish NGOs want as this confers some tax exemptions and enables a bank account to be opened[283]. It also enables grants to be sought, although in some instances NGOs without official status are able to get these through ones that do have legal personality. However, many of the NGOs that actually want official status experience problems in obtaining it.

144. The majority of NGOs currently operate in the capital – a consequence in part of the need to go there to get established – some have recently been emerging in other parts of the country.

145. Provision is also made for international NGOs in Article 6 as bodies whose activities cover Azerbaijan and 'at least one more foreign state'. This is a status that can be used by NGOs established abroad.

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[281] Others inlude schools, universities and clubs.

[282] This does not apply to political parties, trade unions, religious unions, local self-government organisations and various associations specified in other Laws.

[283] Article 13(3) of the Registration Law provides that: "The certificate on state registration or abstract of the state register shall be the main documents for preparation of a seal, stamp, letterheads and trademark of the company, opening of a bank account and registration in the relevant executive power bodies of the Azerbaijan Republic, and no additional documents be requested for the above

Founders

146. The NGO Law provides for NGOs, whether public associations or foundations, to be established "upon the initiative of several individuals"[284]. Although no number of founders is specified, this does not appear in practice to be an obstacle to the creation of NGOs.

147. The founders of NGOs can be legal and physical persons but the NGO Law excludes persons under eighteen from establishing them[285].

148. The constitutional right to form associations, unlike many other individual rights in the Constitution, is not restricted to citizens but the NGO Law requires that foreign citizens and stateless persons be 'legally sojourning in the Republic of Azerbaijan'.

Permitted activities and objects

149. Article 5 of the NGO Law provides that NGOs "may be established for fundamental reasons, or in order to achieve certain objectives" but public associations are more specifically defined in Article 2 as voluntary, not-for-profit organisations created by persons "having common interests, for purposes defined in charter documents of such organisation". Foundations, on the other hand, are defined as being "aimed at social, charitable, cultural, educational and other public activities". In practice, these different formulations do not seem to be of any significance.

150. NGOs cannot, however, be founded and act for purposes prohibited by Azerbaijan's Constitution and laws[286].

151. Furthermore they cannot participate in presidential, parliamentary and municipal elections of the Azerbaijan Republic and may not provide financial and other material assistance to political parties. NGOs may observe presidential, parliamentary and municipal elections in accordance with the legislation of the Azerbaijan Republic[287]. A non-governmental organisation may, however, come up with proposals for the improvement of legal and regulatory acts, according to the rules provided by the laws of the Azerbaijan Republic and by its own statute[288].

152. NGOs may be granted a status that is national (all-Azerbaijan), regional (i.e., two or more administrative-territorial units) or local (i.e., one administrative-territorial unit)[289], thereby restricting the scope of their operations to the area concerned. Although this is apparently a matter of choice by them and some may certainly wish to restrict the scope of their activities to a particular area, it is not clear from the law why it is essential that this needs to be specifically prescribed. Such a designation might be appropriate if this were to be the basis for allocating financial or other support to a public association's activities but there is no provision to this effect in the NGO Law. Moreover insistence on requiring an NGO

[284] Article 2.
[285] Article 9. The restriction is reduced to sixteen in the case of youth associations.
[286] Article 2(3).
[287] An exclusion from this possibility in the case of NGOs that received grants or other types of financing from foreign individuals and legal entities, as well as from Azeri legal entities with more than 30% foreign share in their charter capital, was withdrawn by an amendment to the NGO Law just before the parliamentary elections in 2005.
[288] Article 2(4).
[289] Article 6.

to make a formal choice about the sphere of its activities at the establishment stage means that any expansion or contraction will necessarily require a change both in the NGO's statute and the terms on which it is registered. This is likely to undermine the ability of NGOs to respond quickly to fresh opportunities and changing situations.

153. Most of what is stipulated in the NGO Law as to what should be contained in the statute of an NGO is entirely appropriate. However, it is questionable whether there is a need for this document to contain an NGO's 'subsidiary branches and representative offices' as these may change from time to time; it is unduly formalistic for the amending process to have to be used on each occasion there is any change regarding such branches and offices, particularly as a notification requirement would fulfil any legitimate public interest in knowing about their existence.

Legalisation

154. As has already been noted, the NGO Law envisages two possible conditions that can be enjoyed by public associations; either they become legal entities as a result of being registered or their activities are subject to 'legalisation' as a result of 'notification'. It is questionable whether this is a process that should be required simply to legitimise the pursuit of activities which would be lawful if carried out by individuals acting alone.

155. The requirements for notification involve the submission to the 'relevant executive authority' of the constituent records signed by the association's leadership. This must be done within 30 days of the passing of the resolution on establishing the association and the document legalising it must be sent out or handed over on the day on which these records are received[290]. As such the requirements do not appear to be particularly onerous but this process leaves unclear what real advantage is served by the act of notification.

156. Certainly the legalising document could hardly be conclusive that the objectives of the association are compatible with the Constitution and other laws so that there would be no guarantee that pursuing them would not give rise to the risk of prosecution. Furthermore no tax advantages seem to accrue to the legalised association as this benefit conferred by the NGO Law is construed as applying only to registered associations. Moreover, while notification may be a useful source of information for the authorities, there seems to be no need to set a deadline for when it can occur if it is a process intended to help associations.

157. The strict 30 day deadline running from establishment only serves to strengthen the impression that a public association which is neither registered nor legalized through notification is inherently unlawful. It would be much more satisfactory for there to 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.

Registration

158. The NGO Law does not contain detailed provisions on the registration process but prescribes by Article 16 that the process laid down in the Registration Law is applicable.

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[290] Article 1.

159. A fee of 11 AZN (9.24 USD) is payable[291].

160. The requirements in Article 13 of the NGO Law for the content of the statute of an NGO are limited and appropriate[292], as are the requirements in the Registration Law for documents to be submitted when applying for registration[293]. However, it appears to be a common practice of the registering department to ask the applicants to submit additional documentation, which is not prescribed by the law in force[294]- the most common examples being copies of passports and the employment history records of the founders – notwithstanding that this is prohibited by the Registration Law[295].

161. A notarized copy of the constituent document is required for public associations. Nonetheless there is a useful practice of requiring copies rather than the originals of identification cards.

162. Some NGOs have been refused registration by a decision of the Collegium of the Ministry of Justice, while in other cases it was the Head of the Department of Registration of Legal Entities - a division of the Ministry of Justice - who took the decision. This is a matter that is possibly governed by unpublished internal instructions and so is thus not entirely clear who actually holds the authority for deciding upon registration.

163. The criteria for refusing registration are, according to Article 17 of the NGO Law and Article 11 of the Registration Law, threefold: (a) use of a name of a public association already in existence; (b) documentation that contradicts the Constitution and provisions in the NGO Law and other laws; and (c) false information in the documentation. All of these are ostensibly justified.

164. However, according the Registration Law, information about registered entities should be published monthly in the media by the registering authority.[296] This doesn't happen and one of the consequences of this is to make it difficult for

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[291] No fee is payable by "legal entities, representations or affiliates of foreign legal entities" seeking registration; Article 4(4).

[292] In the case of an association they are its name and address, the objectives of operation and method of management, the rights and responsibilities of members, the conditions and rules for joining and leaving the membership, the sources for its income, the rules for adoption of the statute and for making changes and additions to it and the rules for its liquidation and for the use of its property in case of liquidation. In the case of a foundation they are its name with the word "foundation" in it, its address, its objectives, its bodies, including Custody Board, as well as rules for establishment of those bodies, the rules for appointment and dismissal of its officials and the future of its property in case of liquidation.

[293] Article 5 requires the names, patronymic, places of residence, serial number and date of issue of the IDs (or registration number in the case of a legal entity) of the founders and the following documents: the statute, the record of paying the fee, a notarised copy of the registration certificate and statute of any founder that is a legal entity, a document indicating the information on the name, patronymic and place of residence of the legal representative which verifies his/her responsibilities for representation, as well as a notarised copy of his/her signature, and confirmation of the legal address of the NGO to be registered. In the case of foreign NGOs Article 6 also requires the submission of the statue approved by the foreign legal entity establishing a representation or affiliate, or its authorized representative, the decision establishing this, a document verifying the NGO's registration, the original or notarized copy of the letter of attorney provided by the NGO and the original or notarised copy of the decision on appointing the head of its representation or affiliate.

[294] Nor are they matters required to be included in the Register pursuant to Article 14.

[295] Article 11(4).

[296] Articles 8(4) and 18(2).

new NGOs to check whether the name they chose is not already registered, which forms one of the legal reasons for denying of the registration.

165. Moreover, in connection with the second ground for refusal, respect for freedom of association requires that there be a presumption that whatever individuals collectively propose to do will be lawful unless it is clearly evident that there is a constitutional or legal defect in the statutes. Unfortunately present practice in evaluating the statutes of public associations seems to take quite the opposite approach as there is considerable reliance on apprehension as to what might be done.

166. The existence of minor careless mistakes or inaccuracies is often used to conclude that there is false information in the application for registration.

167. It also appears that the question of expediency or the capability of the applicant NGO to pursue the aims set in its statute is taken into account while deliberating on registering or denying registration even though there is no provision for this in the law and indeed the Registration Law specifically provides that refusal of registration on account of the inexpediency of their establishment is not be allowed[297].

168. Article 8 of the Registration Law provides that a decision on registration should generally be taken within 40 working days, although it is also provided that the checking of compliance with the requirements should be done within 30 days, with the possibility in "exceptional cases" of prolonging this period by a further 30 days for further investigation. This is much longer than the 10 days provided for in the earlier law but it is not of significance in practice, in part because of the repeated requests for corrections but also because of the failure either to give any formal decision - NGOs simply never receive any communication from the Ministry – or the deadline is not observed in practice.

169. The absence of a formal decision ought, according to the Registration Law, to lead to the NGO concerned being "considered to be registered" and give rise to an obligation to issue the certificate of registration within 10 days[298] but this does not seem to happen in practice.

170. The recognition in Article 8 of the possibility of rectifying applications which have been found to be defective ought to be welcome but it often happens that repeatedly new corrections are requested when it is specifically required that all shortcomings in the application and its supporting documents that require correction should be requested at once[299].

171. The 20 day time-limit for the correction of applications specified in the Registration Law seems inappropriate – not least because of the practical difficulties posed by the current centralised decision-making process – and it would be enough to rely on the 10 day limit for determining an application once the corrected application has been received[300].

172. Delay is clearly being used as a device to frustrate legitimate freedom of association and, where decisions are actually given, the period from application to

[297] Article 11(2).
[298] Article 8(5).
[299] Article 8(3).
[300] In Article 8(4).

grant or refusal can range from 2 – 3 months up to 1-2 years. This illegitimate approach to the determination of applications for registration was found by the European Court in *Ramazanova and Others v Azerbaijan*[301] to be a violation of Article 11 of the Convention. It stated that:

"the Ministry delayed its response to each registration request by several months. In particular, the response to the applicants' third registration request of 2 October 2001 was delayed by more than nine months, whereas the law clearly required it to be issued within 5 days. The response to the fourth registration request was delayed by approximately six months. In such circumstances, the Court cannot but conclude that the Ministry violated the procedural time-limits" (para 64).

Furthermore it rejected Government's argument that the delays were caused by the Ministry's heavy workload, holding that:

"It is the duty of the Contracting State to organise its domestic state-registration system and take necessary remedial measures so as to allow the relevant authorities to comply with the time-limits imposed by its own law and to avoid any unreasonable delays in this respect" (para 65).

Judicial control

173. The Court also found in the *Ramazanova* case that the law did not afford sufficient protection against such delays. In particular it noted that:

"the law did not establish with sufficient precision the consequences of the Ministry's failure to take action within the statutory time-limits. In particular, the law did not provide for an automatic registration of a legal entity or any other legal consequences in the event the Ministry failed to take any action in a timely manner, thus effectively defeating the very object of the procedural deadlines" (para 66)[302].

174. The latter problem was formally addressed in the NGO Law adopted in 2000 but, as has already been noted, it does not seem to have made any practical difference to the situation.

175. The requirement that the refusal of registration be reasoned is welcome[303]. However, there seem to be instances in which letters of refusal fail to indicate the legal bases for refusal of the registration. In others there is a failure to make a correct reference to law or the provisions of law are interpreted incorrectly.

176. The provision of a clear right of appeal against any refusal[304] ought to be a useful safeguard but the courts are not able and willing to compel observance of the requirements of the Constitution and the legislation, or indeed the international agreements to which the Azerbaijan Republic is a party – including the European Convention - which the Registration Law specifies form part of the legislation on

[301] *No 44363/02, 1 February 2007.*
[302] A similar violation was found by the European Court in *Ismayilov v Azerbaijan*, no 4439/04, 17 January 2008. See also *Ismayilov v Azerbaijan* (dec.), 6285/03, 7 June 2007, where another such application was struck out after the applicant had died.
[303] Article 17(2) provides that the decision shall "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".
[304] Article 11(5).

registration[305]. They thus leave officials to interpret and apply the law as they wish without fear of challenge.

Conclusion

177. Although the threat or commencement of proceedings before the European Court has resulted in the grant of registration to some NGOs[306], there is a determined reluctance on the part of the authorities to embrace, let alone encourage, the establishment of independent NGOs seen in the manner in which legislation that might in many respects seem appropriate for regulating the establishment of NGOs is actually being applied.

B. France

Introduction

178. In compliance with international standards and with the Constitution, freedom of association in France is absolute, provided that its purpose is not unlawful or contrary to legislation and morality and does not infringe territorial integrity or the republican form of government[307].

General approach

179. There are four basic requirements for setting up an association:

- a contractual agreement,
- between two (at least) or more persons,
- to permanently share their knowledge or activities,
- for a purpose other than profit-sharing[308].

180. The spirit of French law is based on the concept of contract, which means a compulsory agreement between several persons acting freely, with full knowledge of the facts, without their consent being invalidated by error**,** deceit or violence (deception, fraud). No one may be declared a member of an association without his or her consent.

181. Protective measures in this respect are provided by the general rules governing contracts: minors not regarded as of full age may enter into a contract "to the extent determined by law" with the express or tacit permission of their parents, although they may not take steps for the administration of property, which might cause damage to the family property and persons of full age are subject to the rules of ordinary contract law. Protected adults (within judicial care under legal guardianship) are subject to the normal law of contract.

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[305] Article 3.

[306] See *Asadov and Others v Azerbaijan*, no 138/03, 26 October 2006, *Mustafeyev v Azerbaijan* (dec.), no 14712/05, 9 November 2006, *Suleymanova v Azerbaijan* (dec.), no 26241/05, 18 January 2007 and *Aliadze v Azerbaijan* (dec.), 2733/05, 20 September 2007, in all of which applications complaining of a violation of Article 11 of the European Convention were struck out following the NGOs concerned being registered.

[307] Law of 01.01.1901 Section 3.

[308] Law of 01.07.1901 Section 1.

182. A contract must be concluded between at least two persons; one-person associations do not exist in France. The law does not establish a maximum number of members of an association.

183. Under French law and in accordance with its spirit, there can be an association only if the members permanently share their knowledge or activities. Commitment to an association is essential.

184. The agreement may take the form of regular and effective participation, or merely ad hoc participation, in achieving the purpose of the association, whether in physical, material, intellectual or purely moral terms. The mere fact of paying an annual membership fee does not constitute the required "contribution forming the contract of association"; real commitment to the association is required.

185. The membership fee is not a contribution comparable to donation of property or for consideration. It is only a source of funding.

186. In return for their contribution, those concerned receive the status of members recognised as contributors, with the rights attendant on it.

187. The law also demands that the sharing of knowledge or activities be permanent. The association must be a permanent group, whereas coming together to conclude a contract is only a momentary act. The concept of permanence therefore suggests the ideas of structure, organisation and subjection to a contract, irrespective of the duration.

188. The third legal element constituting an association is the purpose. The absolute requirement is that the parties to the contract must pursue a purpose other than profit-sharing.

189. Apart from this requirement, the parties are entirely free to decide on their purpose, whether it be individual or for the benefit of others. The association can of course carry out commercial operations but the purpose cannot be profit-sharing.

190. A major principle of French law which applies to contracts also applies to associations: the principle of strict equality between members. It is not included in the definition given by Section 1 of the 1901 law but it is established by case law.

191. The members exercise their rights on an equal footing. However, this principle cannot prevent the fact that a number of management duties confer a dominant position on the person who performs them. This position is freely defined under the terms of a mandate established in the contract of association.

192. As the principle of equality is contract-based, the contract itself may introduce restrictions in the form of exceptions.

193. The contract of association is a private-law contract, unconnected with “democracy”, which is a public-law method of government. Thus, freedom to conclude contracts includes the right of the parties to the contract of association to ensure that their grouping functions internally in a democratic manner. The only boundary that should not be crossed is the total lack of participatory rights.

194. An association is neither democratic nor dictatorial; it is what the members want it to be. Those members have the total freedom to define the terms of contract that unites them. It is only when an association asks for governmental approval or recognition as a public utility, that it is obliged to endorse specific statutes which entails compulsory notice in particular on the formalities for election and renewal of governing and representative bodies, as well as the topic of internal delegation of power.

Restrictions on freedom of association

195. Since the enactment of the law of 9 October 1981, foreigners may form an association composed either of foreigners alone or of French nationals, in France, without being required to obtain the prior permission of the Minister of the Interior. No distinction is made between foreigners who are nationals of an EU member country and foreigners who are not.

196. The law entitles associations composed of foreigners residing in France, irrespective of their number, to acquire legal personality by simply declaring the association.

197. Although the legal texts are not specific on this point, there appear to be no restrictions on the possibility of setting up, in France, an association composed of foreigners who do not live in France.

198. Serving military personnel are, however, prohibited from joining or forming a political association since they are serving the State and the nation. They are not prohibited from joining any other associations.

199. Civil servants and public officials are generally entitled to form an association provided that its purpose is not contrary to public officials' statutory obligations or to the exercise of their duties. However, some senior civil servants are required to observe strict neutrality, so this may prevent them from joining certain associations which are contrary to their mandates.

200. In the event of a dispute, the persons concerned can always apply to the courts.

201. Lastly, a person deprived of his or her civic rights may join an association provided that this is not contrary to its articles of association.

Registration and formalities

202. An association is subject to a contract, and therefore to the principle of free will, recognising freedom of choice as to the content of the contract. Consequently, the law does not lay down any particular provisions on the functioning of associations.

203. In principle, the parties are entirely free to draw up the articles of association. The various models (even those supplied by the administrative authorities) can only offer suggestions, and do not necessarily match the needs of the association being set up.

204. However, in order for a contract to be valid, there must be a minimal text, which may be confined to the references required for publication in the Official Journal: the exact title, the purpose of the association and the address of the registered office.

205. The persons concluding the contract are free to decide on all matters concerning the functioning of the association.

206. It is not mandatory to register an association in France. However, to obtain legal personality, which confers rights, it is compulsory to register the association with the *préfecture* or the *sous-préfécture* of the registered address and to publish its establishment in the Official Journal.

207. Publication entails a fee, currently about 40 EUR but there are no other costs attendant on registration, which takes place within a reasonable time, ranging from 8 to 15 or even 20 days – the usual time required by the administration.

208. If registration is refused, there is always a right of appeal before the administrative courts.

209. Nothing in French law requires a constituent general assembly to be held. The contract is concluded and the association set up as soon as the articles of association are signed.

210. In purely administrative terms, in order to obtain legal personality, the setting up of an association is declared at the *préfecture* or the *sous-préfecture*. One copy of the articles of association, dated and signed by one founding member, must be deposited together with a list of persons holding administrative or management posts (the bureau or administrative board). To obtain legal personality, the establishment of the association should then be published in the Official Journal.

211. To give a full picture, it should be added that in France there are "recognised" associations or charities, which can receive donations and legacies or apply for public funds; they must therefore comply with stricter formalities, which seems normal under the circumstances.

212. Besides the obligation to provide the civil status details of the administrative board members, a report comprising a narrative report and a financial report certified by an auditor should be deposited each year to the Ministry of Interior. Status as a "recognised association", or charity, may be withdrawn by the Minister of Interior if the statutory requirements are not fully met.

213. Lastly, there are foundations which do not operate on a contractual but on a financial basis. Indeed, the founding deed consists in irrevocably allocating goods with the intention of pursuing public interest and non-profit goals. The foundation has an autonomous legal personality from the moment that it is recognised as a public utility. The public interest and the initial donation are the predominant criteria for getting that status, but entails similar obligations to those applied to recognised associations.

C. Italy

Introduction

214. Generally speaking, Italian legislation on NGOs suffers from a lack of coherence as well as of a comprehensive framework, which is particularly evident if reference is made to the legal framework concerning the NGOs working in the field of international development cooperation.

215. Recent attempts carried out by the former Government in 2007 failed to reach the goals highlighted by the Organisation for Cooperation and Development in Europe ("OECD") in its Peer Review of 2004[309].

216. This document clearly requested an in-depth reform of the regime of development cooperation in Italy, through a series of tools and processes and a clearer definition of the subjects – NGOs are priority actors in the programmes of development cooperation as such - who are entitled to implement development cooperation strategies.

217. The legal basis for the revision of the regime concerning NGOs is the Law N. 49 of 1987[310] . With reference to this law, the attempts to cope with the procedures suggested by the OECD were made particularly through the draft Law on the Reform of the Regime of Italian Cooperation with Development Countries, the so called "*Progetto di Legge Sentinelli*", promoted by the former Vice-Minister for Development Cooperation.

218. Meant as a support to NGOs working in this field, the draft law also sought to establish the Agency for Development Cooperation and International Solidarity at the Ministry for Foreign Affairs[311], which should have coordinated in a coherent framework also the programmes implemented by the NGOs to be considered eligible under the provisions of Law N. 49 of 1987.

219. The attempt brought about in 2007 - despite the very good intentions and some outstanding proposals concerning the reorganisation of the regime of development cooperation - has failed with the end of the former Government and will hopefully be resumed by the present executive. In particular, and with reference to the role of NGOs, it failed to further clarify the actors of cooperation and to better underline the specificity of the role of NGO.

220. The draft law is now in a complete stand-by situation due to the change of the Executive and the first signals we have on its future predictably tell that there will be a change of approach to the issue by the new Government, deleting most of its content.

The general legislation foreseen by the Civil Code

221. NGOs respond to the norms in the Civil Code on Associations and Foundations[312], according to which associations and foundations must be established through a public memorandum[313].

222. The memorandum of association must contain: the name of the body, the estate and the headquarters as well as the structure and the governance of the association. As for the associations, the memorandum must indicate duties and rights of the members as well as the admission procedures[314].

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[309] Italy (2004), DAC Peer Review. On the one hand the Peer Review states the necessity of a revised cooperation strategy for Italy, also through the decentralisation of procedures stressing the role of Non Governmental Organisations. On the other hand it stresses the lack of a major policy role to be played by the NGO Community in addressing the general strategy of cooperation in Italy.
[310] Law N. 49 of 26 February 1987, Official Gazette N. 23 of 28 February 1987.
[311] Article1(1)(f).
[312] The Italian Civil Code. Book I: On the family and persons.
[313] Article 14.
[314] Article 16.

The memorandum of association and the statutes can also include provisions on termination of the body concerned.

223. Under Article 18 the administrators are considered liable according to their mandate: an administrator who has not participated in the act that has caused damage can be considered as liable, unless he did not know about the possible damage and dissented from the act concerned[315].

224. The assembly of associations must be convened once a year[316] for the approval of the financial reports. In other cases, it can be convened under request of one tenth of the members or if a necessity arises. If the administrators do not convene this can be done by the President of the Tribunal. The decisions of the assembly are to be taken with a majority vote while the decisions that modify the statutes and the memorandum, the presence of the three quarters of the members has to be ensured and the vote in favour of the majority of the participants. In order to decide to end an association, the vote in favour of the three fourths of the members is require[317].

225. If an association is terminated, the estate is put into liquidation according to the provisions of the memorandum or of the statutes[318]. If there is no provision concerning this, the winding up is decided by a public authority.

Registration

226. The Civil Code provides for the establishment of a public Register of bodies corporates in every province[319]. The Register shall contain: the date of the memorandum of association, the date of decree of recognition, the name, the purpose, the estate, the duration, the head office, the personal details of the administrators with their tasks. Registration can be requested also *ex officio.*

227. The Register must also include all the modifications of the memorandum of association, after the approval of the governmental authority as well as all the other changes in the above information[320].

228. More detailed procedures are established by the Law 266 of 11 August 1991, on Voluntary Service Associations[321] and the Law N.383 of 7 December 2000 on Social Promotion Associations.

229. Italian NGOs may actually respond to the prerequisites of the Law on Voluntary Service Associations of 1991, which is the framework of reference for all the private subjects that are based on and promote Voluntary Service as an activity performed in a non-profit and spontaneous way, on a personal basis and for solidarity purposes. The qualification as volunteer is incompatible with any other form of employment relationship with the organisation.

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[315] Article 19; Limitazioni del potere di rappresentanza
[316] Article 20.
[317] Article 21.
[318] Articles 30 and 31.
[319] Article 33.
[320] Article 34.
[321] Law N. 266 of 11 August 1991, Voluntary Service Associations, Official Gazette N.196 of 22 August 1991

230. NGOs can be registered as Voluntary Service Associations as far as they comply with the requests of Article 2 of the Law and as far as they mainly recruit volunteers on a non profit basis[322]. Personnel can be recruited within these organisations if it contributes and supports the regular functioning of the organisation and its capacity to meaningfully manage projects and solidarity actions.

231. As for the economic resources for the functioning of the NGOs complying with Law 266, they are to be collected through: (a) contributions by supporters and partners; (b) contributions from private subjects; (c) public financing; (d) contributions from international organisations for the specific activities carried out by the organisation; (e) donations and legacies; and (f) reimbursements coming from specific contracts with public authorities[323].

232. Voluntary Service associations and therefore NGOs adhering to this regime need to be registered with their own territorial authorities, they therefore need to be formally included in the Regional or Provincial (for autonomous Provinces) registers[324].

233. Local Authorities have the right to define all the criteria for admission as well as to reject applications to become Voluntary Service Associations. Registration is a *sine qua non* condition for having access to public contributions, for signing conventions with public authorities and for enjoying fiscal benefits[325].

234. The cancellation from public registers is stated by the public authority with an act based on formal grounds justifying the rejection[326]. The Association to which registration has been denied, has the right to appeal to the regional administrative tribunal within 30 days from the date of the communication.

235. The Voluntary Service associations are exempted from paying stamp and register duties as well as well as from the duties on revenues of juridical entities (IRPEG) and for the local duties on revenues (ILOR) provided that their use for institutional purposes of the Association is explicitly stated[327].

236. The Law establishes the National Observatory for Voluntary Service which is chaired by the Minister for Welfare and Social Affairs and in which representatives from Voluntary Service organisations and from federations of Voluntary Service organisations participate.

237. On the basis of the registers, the Observatory, which is established on a permanent basis, has the following tasks: (a) assess and update the list of organisations, as well as spreading and building awareness on their activities; (b) promote research and studies in Italy and abroad; (c) promote Voluntary Service*;* (d) approve pilot projects promoted by Voluntary Service organisations favouring the implementation of innovative methodologies; (e) offer support and skills for IT projects and databases in the areas covered by the Law; (f) publish a biannual report on Voluntary Service and on the

[322] Article 3.
[323] Article 5.
[324] Article 6(1),
[325] Article 6(2) and Article 7.
[326] Article 5(4).
[327] Article 8.

implementation of the legal framework concerning Voluntary Service organisations at the national and regional level; (g) support, also in cooperation with the regions, training and update activities for services to be provided by the organisations covered by the Law; (h) publish a periodical bulletin for spreading information and promote other initiatives on Voluntary Service; and (j) promote, on a three-year basis, the national conference on Voluntary Service[328].

238. The above activities are to be financially supported through a specific fund established at the Cabinet of the Prime Minister[329] .

239. As far as it is relevant for NGOs, this Law needs to be related also to the provisions of Law N.383 of 7 December 2000[330], concerning the regime of associations for social promotion.

240. The Law considers the associations within this category as the ones promoting social utility activities in favour of members or of third parties and establishes the National Observatory on Associations for Social Promotion that has a number of tasks, parallel to the ones performed by the Observatory on the Associations of Voluntary Service with which it has to coordinate.

241. In general, the registration of NGOs in the above categories might be very helpful particularly when it comes to promoting and supporting activities at the local (regional or provincial) level as well as for local activities of fund raising.

The legislation under the regime of Italian development cooperation

242. The most relevant document for NGOs under the Italian Legislation can be considered the Law of 26 February 1987[331], which considers NGO as actors in the specific area of development cooperation.

243. Article 1 of the Law quotes “private actors” as qualified subjects for the implementation of cooperation programmes to be developed by the competent institutions (mainly the Italian Ministry for Foreign Affairs), making explicit that the development cooperation policy as developed on a three-year basis includes the support to the implementation of projects and programmes carried out by NGOs to be considered eligible by the Ministry for Foreign Affairs, under a specific procedure developed by the Ministry itself.

244. The procedure implies the assessment of the prerequisites to manage development projects, as well as the capacity to deal with such projects under the administrative point of view. The Law also gives space to the participation of NGOs in the Consultative Committee for Development Cooperation allowing for the participation of 5 experts from NGOs as recognised by the Ministry for Foreign Affairs[332]. Up to now the number of NGOs, according to the list published by the Ministry, includes 226 Associations to be considered as eligible NGOs under Law 49.

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[328] Article 12, para 1.
[329] Article 12, para 2.
[330] Official Gazzette N.300 of 27th December 2000
[331] Law N.49 of 26 February 1987, in Official gazette N.23 of 28 February 1987.
[332] Article 8(1)(f).

245. The procedure for the eligibility of NGOs for the activities of development cooperation under Law N. 49, is governed by Articles 28 and 29 that respectively deal with eligibility of NGOs and the effects of the eligibility procedure itself.

246. The NGOs working in the field of development cooperation are recognised as eligible under decree of the Minister for Foreign Affairs, after prior decision of the Committee for NGOs established by Article 8 of the same Law.

247. Eligibility can be requested for: (a) the implementation of long or medium term development projects in developing countries; (b) the selection, training and employment of civil servants; (c) training of personnel and nationals of developing countries; and (d) awareness-building and education to development activities[333].

248. Eligibility can be given for one or more of the areas of activity for NGOs foreseen in the Law and is to be granted on the basis of the following requirements[334]:

(a) the NGO must be established according to articles 14, 36 and 39 of the Italian Code of Civil Law[335];

(b) the institutional aim of the organisation must be development cooperation in favour of third world countries

(c) the activity of the NGO must be non-profit activity and all the revenues and financial incomes of the NGO must be devoted to its institutional non profit aim;

(d) the NGO must not have any subordinated relationship with profit organisations, neither must it be in any way linked to the interests of public or private profit entities, Italian or foreign

(e) the NGO must provide adequate guarantees on the implementation of the foreseen activities, through adequate staff and personnel in Italy and abroad;

(f) the NGOs must report its experience and operational capacity, established for at least three years in the areas for which eligibility is requested;

(g) the NGOs accept periodical controls and checks by the Ministry through the Directorate for Development Cooperation for the updating of eligibility;

(h) the NGOs submit financial reports on the last three years of operation before the request for eligibility; and

(i) the NGOs must present a yearly report on the implementation of its activities.

249. Eligible NGOs are entitled to receive grants for the implementation of development cooperation, covering 70% of the overall amount of the proposed projects, which will then need to be completed through other independent sources of funding. On the other hand NGOs can directly manage overall development programmes entirely financed by the General

[333] Article 28(2).
[334] Article 28(4).
[335] Article14 (1) provides that associations and foundations must be established through a public proceeding, Article 36 deals with associations not registered as juridical subjects and Article 39 deals with aid and charity committees.

Directorate for Development Cooperation[336]. Cooperation activities carried out by NGOs that are eligible under the Law, have to be considered as non-commercial activities and are therefore exempted from the taxation regime that applies to commercial associations[337].

250. Finally, Article 31 of Law N.49 provides for the employment of experts of NGOs in programmes directly promoted by the Ministry.

251. Related to the national regime on development cooperation, regimes on decentralised cooperation promoted by the Local Authorities should be quoted. Decentralised cooperation as an important mean of recognition and work for NGOs is actually stated by Law N.49 itself and further developed by regional laws, provincial and municipal acts that directly put forward activities of international cooperation with developing countries involving the different stakeholders on their own territory.

252. Very often regional laws are even more progressive and structured than the national regime and quite clearly provide for the participation of NGOs in cooperation activities. This is the case, for example, of the Region of Tuscany, of the Region of Veneto, of the Region of Emilia Romagna and of the Autonomous Province of Trento[338].

The taxation regime

253. Under the Legislative Decree N. 460, of 4th December 1997, NGOs can enjoy a regime that sets a comprehensive framework of rules on taxation and exemption from taxes for non-commercial organisations and non-profit organisations of social utility[339].

254. NGOs might, in fact, be recognised as non-profit organisations of social utility ("ONLUS")[340] provided that their statutes explicitly mention their activity as covering one of the following sectors: social and health assistance; charitable services; education; training; non professional sports; protection and promotion of the artistic, historical and environmental heritage; protection of civil rights; scientific research for social purposes.

255. Organisations complying with the regime of the Law must have as their exclusive purpose the achievement of social solidarity and are forbidden to distribute any revenues or financial sources of the organisation to their partners or members.

Development cooperation NGOs can specifically be considered under the Decree as they operate for the welfare of populations in third world countries and for humanitarian activities[341].

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[336] Article 29(2)
[337] Article 29(4).
[338] Region of Veneto, Regional Law N.55 of 16 December 1999; Region of Emilia Romagna N.12 of 24 June 2002; Region of Piemonte, Law N. 67 of 17 August 1995; Region of Tuscany, Law N. 73 of 28 December 2005; Province of Trento , Law on International Cooperation and Solidarity of 15 March 2004.
[339] Official Gazette N.1, 2nd January 1998
[340] Article 10(1).
[341] A mention, with respect to this, needs to be made to the Decree of 21 March 2001 establishing the Agency for non-profit organisations of social utility that is based in Milan and to which also a number of NGOs have regard. The Agency works under the control of the Prime Minister, of the Ministry of Welfare and of Ministry of Finance and has tasks, through which the Ministry for Welfare in particular has tried to

D. The Russian Federation

Introduction

256. The legal framework in the Russian Federation accompanying the civil society development, and the NGO sector in particular, is very dynamic, reflecting the permanent state of reforms in the country over the last decades. The law recognises several forms[342] of non-commercial (not-for-profit) organisations ("NCOs"), some of which are NGOs in the narrow sense as defined in paragraph 1 of the Recommendation CM/Rec(2007)14.

257. The regulatory mechanism of such NCOs is laid down essentially in the Civil Code, the Federal Law No. 7 of 12 January 1996 on Non-Commercial Organisations ("the FLNCO") and the Federal Law No. 82 of 19 May 1995 on Public Associations ("the FLPA"), which, as a special law, goes into further detailed regulation of "public associations"[343] as a sub-category of NCOs[344].

258. A NCO is defined as "one not having profit-making as the main objective of its activity and not distributing the earned profit among the participants", while a public association ("PA") is a "voluntary, self-governing, non-profit formation, set up at the initiative of persons who have united on the basis of a community of interests to achieve common goals"[345].

259. This study focuses its attention on the FLNCO and FLPA, as amended. Political parties and religious organisations are excluded from its scope and are regulated by separate legislative instruments in Russia. The study also limits itself to membership- based organisations, thus excluding non-membership based forms such as foundations for example. Non-Commercial Partnerships under the FLNCO and Public Organisations[346] under the FLPA are both membership-based associations[347] of individuals and/or legal

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rationalise the activities of non-profit organisations: (a) to give a strategic framework and provide control and inspection activities for non-profit organisations as well as for non-commercial subjects; (b) to make proposals on the norms to be implemented for non-profit organisations and for non-commercial subjects; (c) to promote study and research activities; (d) to promote awareness building activities on social issues both for the public opinion and for the associations; (e) to provide for training and qualification of the personnel from the non-profit organisations; (f) to coordinate the collection, update and monitoring of the data and documents concerning the organisations; (g) to promote cultural exchanges on social issues with subjects in third countries; (h) to point out to the relevant authorities possible critical points in the implementation of the relevant laws by the non-profit organisations; (i) to supervise fundraising activities; (j) to supervise the distribution of remaining financial resources and real estate in the event of its termination; and (k) to promote initiatives of integration and debate with the public administration, with a particular focus on Local Authorities. The Agency is made up of 10 members who are nominated by the Prime Minister under request of the Ministry for Welfare, The Ministry of Labour and the Finance Ministry, as well as by the Regions/State Conference.

[342] Public associations, foundations, institutions, non-commercial partnerships, autonomous non-governmental organisations and others (see Articles 6-11 of the FLNCO).

[343] Public associations include several sub-categories of legal forms: public organisations, mass movements, public foundations, public institutions and others (see Article 7 of the FLPA).

[344] See Article 6 of the FLNCO.

[345] See Article 2 of the FLNCO and Article 5 of the FLPA.

[346] The term "public" is used in the law in the sense of "non-governmental", belonging to the civil society.

[347] See Article 8 of the FLNCO and Article 8 of the FLPA.

entities[348], where the legal persons affiliated to Public Organisations must be PAs.

260. The FLNCO and FLPA interlink in a confusing way, as the distinction between the scopes of both laws is not always clear. Within the Russian normative system, the two laws relate to each other as a general law to a special law but inconsistencies in the wording and the structure of both create the impression of sometimes ambiguous regulation. The significant legislative reform of 2006[349] in both laws has aggravated this situation.

261. Prior to the 2006 amendments one important delimitation between these two laws, especially as regards establishment and acquisition of legal personality, used to be that the legal organisational forms under the FLNCO were only subject to a simple and speedy notification procedure where the organisational forms under the FLPA needed to undergo registration. After these amendments all organisations under both laws are subject to a complex registration procedure. The confusion comes also from the high level of fragmentation of the organisational forms[350]. All this obviously raises uncertainty around the establishment of non-profit organisations in the RF.

Informal groupings

262. After the amendments effected by FL 18, the requirements related to establishment and registration are very similar for NCOs and PAs. Both need to apply to registration authorities in order to acquire legal personality but the law does not prevent associations from existing without legal personality[351]. However, this declared freedom stays somewhat unclear in practice since both the FLNCO and FLPA in their provisions regarding registration require that an organisation applies for registration no later than 3 months after its establishment[352]. Therefore, it seems that the choice to register or not cannot be made at any moment of the existence of the organisation. This is opening a debate on the consistency of such a delay with the freedom to decide whether and when to opt for legal personality or to remain with no formal legal status[353]. Another issue requiring attention is the fact that, according to RF's legislation, when an organisation performs its activities without registration,

[348] Hereinafter these two legal forms will be called "associations" in the sense of the Recommendation.
[349] See Federal Law 18 of 10 January 2006 on Introducing Amendments to Certain Legislative Acts of the Russian Federation ("FL 18").
[350] For instance there are several types of foundations/funds – public, private, corporate, governmental etc. - which are regulated by various laws, the FLPA, the FLNCO and other special laws.
[351] For instance, according to Article 3 of the FLPA, defining the content of the right to association, persons are free to set up PAs without the preliminary permission of the government bodies and also have the right to join such associations. Such an established association may get registered or function without state registration and the acquisition of the rights of a legal person. Another example for legitimate establishment without registration is the youth (from 14 years) and children's (from 8 years) organisations; see Article 19 of the FLPA. The registration of youth and children's PAs is feasible only in case of the election of fully capable individuals to the governing bodies of the said associations; see Article 21 of the FLPA.
[352] See Article 13.1 of the FLNCO and Article 21 of the FLPA
[353] See paragraph 3 of the Recommendation CM/Rec(2007)14 and paragraph 24 of its Explanatory Memorandum.

this seriously restricts its rights, which acts as a disincentive to opt for functioning without acquisition of legal personality[354].

263. Nevertheless, there is a possibility for informal groupings to be established, the only general restriction on establishment and operation being the ban on having goals or actions targeting an extremist activity.[355] Although the possibility for informal groupings to get established or to undertake activities does not need to be subject of legal regulation, this is to be welcomed when it contributes positively to their creation and operation. In this sense, the approach of the Russian legislation to confer only explicitly some rights to such groupings, everything else being understood as prohibited[356], appears to be unduly restrictive and against the spirit of existing international standards. For instance, the exclusion by Article 27 of the FLPA of the right to carry out publishing activities for informal groupings is not consistent with the principle derived from Article 10 of the European Convention that everyone, including NGOs with or without legal personality, enjoys the right of freedom of expression[357].

Scope of operation

264. The need to have a defined amount of structural subdivisions in order to be established and carry out activities as a national or interregional organisation, and the limitation of regional and local organisations to a restricted territory[358], create barriers for the choice of level of operation, which are not consistent with Recommendation CM/Rec(2007)14 [359] and appear to be unnecessarily restrictive of the freedom of establishment, as well as of the freedom of the

[354] According to Article 27 of the FLPA and the Civil Code, PAs without legal personality cannot take part in the elaboration of decisions of state authorities and local governments; establish means of mass media and carry out publishing activities; take part in elections and referendums; have bank accounts in their own names, sue and be sued in court or enter into agreements in their own capacity. Similarly, Article 3 of the FLNCO makes it clear that only after acquisition of legal personality through registration can an NCO have separate property in ownership and may in its name acquire and exercise property and non-property rights, perform duties, sue and be sued in court.

[355] According to Article 16 of the FLPA, it shall be forbidden to establish public associations and to allow them to pursue their activities, if their goals or actions are aimed at the performance of an extremist activity.

[356] Article 27 of the FLPA, The Rights of the Public Association:

"For the implementation of its constituent goals, a public association, which is not a legal entity, shall have the right:

- to freely disseminate information about its activity;
- to hold get-togethers, meetings and demonstrations, processions and the picketing;
- to present and protect its rights, the lawful interests of its members and participants in the state authorities, in the local self-government bodies and in public associations;
- *to exercise other powers in the cases, when these powers are directly indicated in the federal laws on specific types of public associations*;
- to come out with initiatives on issues, related to the implementation of their constituent goals, to submit proposals to the state authorities and to the local self-government bodies" (emphasis added).

[357] See paragraph 5 of Recommendation CM/Rec(2007)14 and paragraph 26 of its Explanatory Memorandum.

[358] See Article 14 of the FLPA.

[359] See paragraph 4 of Recommendation CM/Rec(2007)14 and paragraph 25 of its Explanatory Memorandum.

governing body to determine the administrative structure of an organisation[360].

265. An additional source of concern is the stipulation in Article 27 of FLPA that the enjoyment of the rights listed in this same provision by public associations (with or without legal personality), may be restricted by federal laws or international treaties or agreements of the RF where they have been set up by foreign nationals and stateless persons or with their participation.

Founders

266. FLNCO and FLPA contain a series of restrictions regarding the categories of persons eligible to become founders, members or participants in organisations set up under these laws.[361] Some of these restrictions are inconsistent with international standards and best practices. [362] For instance, the total exclusion of foreign nationals or stateless persons declared as persona non grata according to applicable Russian legislation seems to stay out of the scope of the limited authorisation to restrict the political activity of non-nationals allowed under Article 16 of the European Convention. This is the case, for example, when their affiliation with an organisation is completely unrelated with the activities for which the decision on the undesirability of their presence on Russian territory is delivered and especially when such presence is even not necessary as the exercise of some fundamental freedoms should be guaranteed regardless of borders.[363] It will be hard to justify a prohibition on involvement of such persons with an organisation in the field of culture, for instance.[364] In all cases there is inconsistency of such a provision with Recommendation CM/Rec(2007)14 as the scope of the restriction needs to be clearly connected with the activities at stake and its

[360] See paragraph 47 of Recommendation CM/Rec(2007)14 and paragraph 91 of its Explanatory Memorandum and principle 18 of the Fundamental Principles.

[361] According to Article 15 of the FLNCO and Article 19 of the FLPA, the founders of such organisations shall be natural persons and/or legal persons (in the case of PA the affiliated legal persons must also be public associations). However, the wording of both provisions, although very close, is confusing because the FLNCO uses the term "fully capable" while the FLPA talks about natural persons over the legal majority age limit. Foreign nationals and stateless persons legally residing in the RF may also become founders (members, participants). Few categories of subjects may not become founders (participants, members): a foreign national or a stateless person whose stay in the country has been declared as undesirable in compliance with the applicable RF legislation; a person, whose name is listed in compliance with Section 2 of Article 6 of the Federal Law No. 115 on Combating Legalisation (Laundering) of Criminally Gained Proceeds and Financing of Terrorism of 7 August 2001; a public association or a religious organisation whose activities have been terminated in conformity with Article 10 of the Federal Law No. 114 on Countering Extremist Activities of 25 July 2002; a person whose actions have been defined as bearing signs of extremist activity by a court judgement, which has come into effect. The FLPA includes one additional category: a person convicted and incarcerated by a court judgement. Individuals over 14 and over 8 years old may become members or participants in youth and children's PA respectively. Bodies of central or local government may not become founders (members, participants) in PA.

[362] See paragraph 16 of Recommendation CM/Rec(2007)14 and paragraph 44 of its Explanatory Memorandum.

[363] See Article 10 of the European Convention for instance.

[364] See paragraph 22 of Recommendation CM/Rec(2007)14 and paragraph 56 of its Explanatory Memorandum.

duration must always respect the principle of proportionality.[365] This assessment applies equally to the other hypotheses where disqualification from being able to get involved with an NGO is imposed as a consequence of past activities of the person concerned or of having committed certain offences.[366] Additionally, the restriction for persons whose actions were recognised as bearing signs of extremist activity by a court judgement, which has come into effect, seems to be too vague and to create an excessively high level of uncertainty given the country's vaguely worded anti-extremism legislation.

267. There is also incompatibility with international standards in the automatic and total exclusion from founding, joining or participating in PAs for persons convicted and incarcerated based on a court judgement. This is clearly disproportionate in its effect and bears no relationship to the offence resulting in this sentence.[367] The European Court has ruled that control over associations be based on their actual deeds after establishment, which, if unlawful, can lead to dissolution in conformity with the law, while the past activities or alleged intentions of the founders should not play such a controlling role.[368] The above issues are equally running counter to Recommendation CM/Rec(2007)14 as anyone should be able to join an NGO without being subject to unjustifiable restrictions imposed by law, and states should not discriminate between NGOs as to whether their members are deemed "acceptable", in so far as the objectives and the means employed by the organisation are lawful[369].

268. The minimum number of founders required under Article 15, FLNCO and Article 18, FLPA is respectively minimum 1 person, except for some membership-based organisations, and at least 3 natural persons for PA. The number of founders for the different types of organisations can be specified in special laws on those types. This number is consistent with the international standards as it is not set at a level discouraging the actual establishment even if the justification for the need of minimum 3 natural persons for PA is not obvious[370].

Registration procedure

269. Once an organisation is established and chooses to acquire legal personality, there are different aspects of the registration procedure that need further attention.

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[365] See paragraphs 22 and 30 of Recommendation CM/Rec(2007)14 and paragraphs 57 and 69 of its Explanatory Memorandum.

[366] See the restrictions under footnote 428 above.

[367] See paragraphs 22 and 30 of Recommendation CM/Rec(2007)14 and paragraphs 57 and 69 of its Explanatory Memorandum.

[368] See the jurisprudence of the European Court discussed in Part A of the Thematic Overview.

[369] See paragraph 16 of Recommendation CM/Rec(2007)14 and paragraphs 44-46 of its Explanatory Memorandum and principle 15 of the Fundamental Principles and paragraphs 29, 35 and 45 of its Explanatory Memorandum.

[370] See paragraph 17 of Recommendation CM/Rec(2007)14 and paragraph 47 of its Explanatory Memorandum.

270. The law[371] sets the fee for state registration of legal persons at 2000 roubles (about 54 EUR), except for political parties where the fee is 1000 RUR. This level of fee for processing applications for registration cannot be seen as encouraging[372] but what is raising even deeper concerns, is the total cost of registration, including the manifestly needed legal or intermediary assistance, as the procedure is complex and the wording of the applicable laws - ambiguous. According to Vedomosti Newspaper of 21 March 2007[373], getting a new NGO registered is much more expensive than incorporating a commercial legal person, where the difference reaching up to 40 % is related to the extremely high cost of intermediary services to prepare applications properly.

271. In order to obtain the rights of a legal person, the organisations under both FLNCO and FLPA need to undergo registration in conformity with the Federal Law No. 129 on State Registration of Legal Entities and Private Entrepreneurs of 8 August 2001 and in compliance with the procedure established by the special laws[374]. To obtain registration, they need to submit the following documents (sometimes several copies) to the federal body of state registration or a regional agency thereof: an application; the charter/constituent documents[375]; an abstract from the minutes/resolution of the constituent meeting or the general meeting regarding the establishment including approval of the charter/constituent documents and with the indication of the composition of its governing bodies; information regarding the founders; a document confirming payment of the registration fee; information regarding the address of the organisation; documents confirming the legitimacy of the use by an organisation of a name or symbols protected by the Russian Federation's legislation on intellectual property and copyrights. Additionally, PAs need to submit where applicable the minutes of the constituent meetings or of the general meetings of their structural subdivisions (for international, all-Russia and interregional public associations). Again, where applicable, NCOs need to submit an excerpt from the register of foreign legal persons from the respective country of origin or an equivalent legal document certifying the legal status of the founder – a foreign organisation. Although the above requirements are generally compatible with

[371] See Tax Code of the RF, Part Two, Section 8, Chapter 25.3, Article 333.33.

[372] See paragraph 33 of Recommendation CM/Rec(2007)14 and paragraph 74 of its Explanatory Memorandum.

[373] See http://www.vedomosti.ru/newspaper/article.shtml?2007/03/21/122662

[374] Article 13.1 of the FLNCO and Article 21 of the FLPA

[375] Regarding the nature and content of "constituent documents", Article 14 of the FLNCO defines them as: the charter approved by the founders (participants) for some organisational forms or the constituent agreement concluded by their members and the charter approved by them for other types. They must contain the organisation's designation with an indication of the character of its activity and the organisational form, the location of the organisation, the procedure for the management of its activity, the object and objectives of the activity, the data on the branches and representative offices, the rights and duties of the members, the conditions and procedure for joining a membership-based organisation and withdrawing therefrom, the sources of the formation of its property, the procedure for amending the constituent documents, the procedure for using the property in case of liquidation, and any other provisions stipulated by applicable federal laws. The constituent documents of the membership-based types must also contain the conditions of the composition and competence of their governing bodies, of their decision-making procedure, including on the issues to be decided unanimously or by a qualified majority. The constituent documents may also contain any other provisions which are not contrary to the law.

existing international standards, the need to justify by a special authorisation the legitimacy of the use of the word “Russia” in the name for instance, as well as the need to submit data on the branches and representative offices, seems excessive and goes beyond what is envisaged[376].

272. According to Article 13.1, FLNCO and Article 21, FLPA, a decision on state registration of an organisation shall be rendered by a federal body of executive power, an authorised body of state registration or by a regional agency thereof.[377] The granting of a registration results in an entry in the Unified State Register of Legal Entities ("Register") containing information pertaining to establishment, reorganisation and dissolution. Within 30 days for PAs and within 14 working days (if positive decision) or 1 month time (if refusal)[378] for NCOs, the registration body shall render a decision for registration or deny the registration and provide the applicant with a substantiated refusal in writing. Upon making a decision for registration, the registration body transfers all of the relevant information and documentation required for maintaining the Register to the body authorised to make the inscription[379]. The latter shall make an appropriate entry to the Register within the period of 5 working days upon the receipt of the said information and documentation, and shall inform the body which has rendered the decision for registration no later than within 1 business day following the date of the inscription. Within 3 days upon the receipt of this notification from the Register, the registration body shall provide the applicant with a certificate of registration. This overly complicated procedure of communication and transmission of information between different bodies does not appear to be particularly encouraging or easy to understand[380], especially when attempting to predict the overall length of the registration process.

273. The formal deadlines defined for the different stages of the registration procedure lead to a repartition of the process over about 2 months or sometimes more. There is no automatic registration consequent on expiry of the above deadlines, nor is refusal presumed granted. However, a refusal[381] of registration or failure to decide within the prescribed time limit[382] may be appealed to a higher body or a court. The 2 months time period for processing applications cannot be accepted as speedy and reasonable[383] according to the requirements of Recommendation CM/Rec(2007)14, especially as this delay appear to be longer than for commercial legal persons in Russia or when compared with other European countries where

[376] See paragraph 31 of Recommendation CM/Rec(2007)14 and paragraph 70 of its Explanatory Memorandum.
[377] Formerly this was the Federal Registration Service but since May 2008 its powers regarding registration of NCO, PA and some other types of organisations were transferred to the Ministry of Justice by Decree No. 724 of the President of the Russian Federation of 12 May 2008.
[378] Article 23.1 of the FLNCO
[379] This body is the Federal Tax Service.
[380] See paragraphs 8 and 29 of Recommendation CM/Rec(2007)14 and paragraphs 31 and 68 of its Explanatory Memorandum.
[381] Article 23.1 (5) of the FLNCO
[382] Article 23 of the FLPA
[383] See paragraph 37 of Recommendation CM/Rec(2007)14 and paragraph 81 of its Explanatory Memorandum.

this takes days and not weeks or months. According to the law[384], registration of commercial legal persons is performed directly and only by the tax authorities which file documents with the Register within 5 days. Obviously, after state registration of commercial legal persons, other incorporation procedures must be completed, such as registration with the state statistics committee, registration with non-budgetary funds (pension fund, mandatory medical insurance fund and social security fund), production and registration of a company's seal, opening of bank accounts etc. However, even an overall new company's formation takes 2-3 weeks to about 1 month which is half the time it takes for state registration only of a non-commercial organisation. Prior to the legislative reform introduced in 2006 by FL 18, the NCOs that are not PAs, like commercial companies, could register directly with tax authorities in a simpler procedure where a decision was to be issued within 5 days.

274. A clear shortfall of the procedure described above, especially bearing in mind its length, is the lack of possibility to correct an application for registration during the process when the relevant authority considers it has not satisfied certain legal requirements. Currently, even small inconsistencies lead directly to formal refusal of registration. There is no obstacle to resubmit an application following a refusal but the registration fee needs to be paid each time again[385]. This fact, as well as repeated refusals can clearly have a dissuasive effect on some organisations, especially ones of small size and limited resources.

Grounds for refusal

275. Although the relevant laws specify the grounds for refusal of registration[386], some of them can be seen as not acceptable[387]. Only failure to submit in full the required documentation, the existence of an already registered organisation bearing the same name and objectives clearly incompatible with the RF's Constitution or legislation seem in fact justified[388]. Currently most of these grounds are formulated in an unclear, vague and confusing way which grants wide discretion to the registration authorities to decide whether to approve an application for registration and this is not compatible with

[384] Federal Law No. 129 on State Registration of Legal Entities and Private Entrepreneurs of 8 August 2001.

[385] According to Article 23.1 of the FLNCO and Article 23 of the FLPA a refusal of registration shall not be deemed as an impediment for repeated application, provided the shortcomings that caused the refusal have been remedied. A repeated application and rendering a decision in regard to such application shall follow the same procedure as for the first submission.

[386] According to Article 23.1 of the FLNCO and Article 23 of the FLPA, registration may be denied for the following reasons, common for both laws: the constituent documents (charter, constituent agreement) run counter to the Constitution and the legislation of the RF; another organisation bearing the same name has already been registered; the name of an organisation offends public morality, ethnic and religious feelings of citizens; the documentation required for the state registration in conformity with the law has not been submitted in full, or the said documents have not been prepared in a correct way, or have been submitted to a wrong body; a party acting as a founder may not serve as a founder according to the law. Additionally, one more ground for refusal of registration to PAs is stipulated – when it has been discovered that the constituent documents, submitted for registration, contain unreliable information.

[387] See paragraph 34 of Recommendation CM/Rec(2007)14 and paragraph 75 of its Explanatory Memorandum.

[388] See paragraph 34 of Recommendation CM/Rec(2007)14 and paragraph 75 of its Explanatory Memorandum.

Recommendation CM/Rec(2007)14[389]. For instance, when judging if constituent documents are compatible with the RF's Constitution or legislation, too much discretion can be applied as the wording is not sufficiently specific and this opens the door for random implementation.

276. This concern is even stronger since, according to the director of the former registration body[390], inconsistencies in the wording of charters have become a principal reason for refusing registration which runs clearly[391] counter to Recommendation CM/Rec(2007)14 [392]. The ground related to a name "that offends public morality, ethnic and religious feelings" is pointless and vague, giving nearly unlimited arguments to the authorities to refuse registration. The same consideration goes for the grounds where "documents have not been prepared in a correct way" or "contain unreliable information" especially as no further guidance exists as to how these provisions are to be interpreted and much space for suspicion is left which cannot be judged acceptable from a legal certainty standpoint. Where documents have been submitted to a wrong body, an opportunity can be provided to the applicant to submit them to the right body or this can be remedied directly between concerned authorities, instead of including it as a ground for refusal of registration. The same logic applies to the situations where another organisation is already registered with the same name or where documents need to be adapted to be filled in a correct way. In those cases, the need to pay again the registration fee, when resubmitting the application, is not appropriate. The ground regarding party acting as a founder, who may not serve as a founder according to the law, is incompatible with the international standards[393].

Reasons and renewal

277. Although there is a requirement for the registration authorities to substantiate in writing a refusal[394], with the reformulation of the grounds for refusal, result of the legislative reform introduced in 2006 by FL 18, the previous practice of considering only the technical aspects of applications was abandoned and currently the authorities often fail to provide clear and well-founded written

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[389] See paragraph 28 of Recommendation CM/Rec(2007)14 and paragraph 67 of its Explanatory Memorandum.

[390] Все мы немного собственники, Rossiskaya Gazeta, 21 September 2007, at: http://www.rg.ru/2007/09/21/vasiliev.html

[391] See the case of the "Rainbow House" group, refused registration in the Tyumen region in 2006 because according to the registration authorities, their advocacy of "non-traditional sexual orientation" could be considered to undermine "spiritual and cultural values" and the "territorial integrity" and "national security" of Russia - p. 17 of Control and Punishment: Human rights implications of Russian legislation on NGOs, Report by the Moscow Helsinki Group and Human Rights Without Frontiers, February 2008, accessible at: http://www.hrwf.net/pdf/NGO%20report%20for%20publication,%20February%202008.pdf

[392] See paragraph 35 of Recommendation CM/Rec(2007)14 and paragraphs 76-78 of its Explanatory Memorandum.

[393] See paragraphs 20-21 of Provisional opinion of 1 December 2005 on amendments to federal laws of the RF regarding non-profit organisations and public associations 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), accessible at: http://www.coe.int/T/E/Com/Press/News/2005/20051206_opinion.asp#P81_9703

[394] According to Article 23.1 of the FLNCO and Article 23 of the FLPA in case of a refusal, the applicant shall be notified in writing with specific indication of the provisions of the Constitution and the legislation of the RF, which have entailed the refusal.

motivation of their decisions.[395] This can not be considered as consistent with the notion of "reasoned decision" under Recommendation CM/Rec(2007)14[396] Additionally, this is obstructing the scrutiny and the challenging of such decisions to a higher body or to court[397]. Thus, the difficulty to formulate sound appeal arguments and the low success rate[398] can explain the poor use of this legal remedy.

278. Current legislative framework does not require seeking the renewal of registration on a periodic basis although the FL 18 of 2006 imposed certain obligations of this kind to branches and representations of foreign NGOs[399]. However, registration of modifications in the statutes of the organisation can produce an effect similar to the one of re-registration as it needs to follow exactly the same procedure in all cases[400]. Therefore, incompatibilities with Recommendation CM/Rec(2007)14[401] may arise in certain circumstances.

Conclusion

279. When studying Russian legislation, it is necessary to consider the size of the country (more than 80 territorial jurisdictions) and the fact that regional and local legislation may in some aspects go beyond what is provided by the federal laws. This means that full understanding of the applicable legal framework can only be achieved by looking at all relevant legislative layers in order to work out the complexity of the regulation in one particular area of study. In addition to the main legal instruments reviewed above, the Russian NGO sector is subject to a whole series of further regulations (Civil Code, taxation law, laws on local self-government, laws on charitable activities and others) and has to cope with a large range of unremitting reforms in all these areas over the years.

280. In order to produce an enabling and encouraging effect to compensate for the uncertainty stemming from the constant legislative reforms, the NGO related legislation needs to be seriously simplified and built on straightforward bases. Its current content brings clearly a number of incompatibilities with the notion of "flexible regime governing the acquisition of legal personality"[402], "easy to understand and satisfy"[403]. Confusing provisions and terms in the relevant

[395] See p. 16-17 of Control and Punishment: Human rights implications of Russian legislation on NGOs, Report by the Moscow Helsinki Group and Human Rights Without Frontiers, February 2008.
[396] See paragraph 38 of Recommendation CM/Rec(2007)14 and paragraph 82 of its Explanatory Memorandum.
[397] According to Article 23.1 of the FLNCO and Article 23 of the FLPA a refusal of the state registration may be appealed against in a higher body or in a court.
[398] Courts commonly approve registration authorities' decisions when considering appeal cases - see p. 17 of Control and Punishment: Human rights implications of Russian legislation on NGOs, Report by the Moscow Helsinki Group and Human Rights Without Frontiers, February 2008.
[399] See Article 13.2 of the FLNCO.
[400] See Article 32 of the FLNCO and Article 21 of the FLPA.
[401] See paragraphs 41 and 43 of Recommendation CM/Rec(2007)14 and paragraphs 85 and 87 of its Explanatory Memorandum.
[402] See paragraph 8 of Recommendation CM/Rec(2007)14 and paragraph 31 of its Explanatory Memorandum.
[403] See paragraph 29 of Recommendation CM/Rec(2007)14 and paragraph 68 of its Explanatory Memorandum.

laws, their inter-linking and their implementing regulations[404] need to be clarified and aligned. Uniform implementation across the country should be ensured as at present the practices differ[405]. Currently, there is poor guidance by the authorities on establishing and registering an NGO which is contrary to the best practice supported by Recommendation CM/Rec(2007)14[406].

281. It is advised, considering the limited capacity of Russian NGOs to manage the high level of complexity of the legal requirements, to increase government support via a specific service providing support and information on these issues, raising awareness through web pages or other tools showing filled out examples of documents. This initiative should aim at influencing positively and reducing the overwhelming cost of registration. Several concrete areas in the applicable legislation need reconsideration: the freedom to decide whether and when to opt for legal personality and the choice of level of operation together with other issues related to the freedom of establishment; the restrictions on categories of persons eligible to become founders, members or participants; the information and documents to be submitted for registration; the procedure for rendering a decision on registration which will benefit from overall simplification and shortening in time in order to avoid that NGOs are discriminated against in comparison to commercial organisations; the need to introduce the possibility and procedures to correct an application during the registration process[407]; the grounds for denying registration; the need to ensure a reasoned decision on applications allowing for adequate scrutiny and an effective independent accountability mechanism for the acts of the registration authorities; the need to align the procedure for registration of modifications in the statutes to the requirements of Recommendation CM/Rec(2007)14.

E. The Slovak Republic

Types of organisations and their basic features

282. The Slovak Republic is a civil law country with four primary forms of NGOs:

- Associations
- Foundations
- Non-Investment Funds
- Not-for-Profit Organisations Providing Publicly Beneficial Services (NPOs)

283. The following legal instruments govern NGO legal forms: Act No. 83/1990 on Associating of Citizens ("Law on Associations"); Act No. 34/2002 on Foundations and on the Change of Civil Code, as amended ("Law on Foundations"); Act No. 147/1997 on Non-Investment Funds ("Law on Non-

[404] Decree No. 212 "On measures aimed at implementing certain provisions of the federal laws regulating activities of non-commercial organisations" of 15 April 2006. This decree comes with a number of annexes containing the forms for registration and reporting - almost 190 pages altogether.

[405] See p. 16 of Control and Punishment: Human rights implications of Russian legislation on NGOs, Report by the Moscow Helsinki Group and Human Rights Without Frontiers, February 2008.

[406] See paragraph 29 of the Recommendation and paragraph 68 of the Explanatory Memorandum.

[407] Such possibility exists in a number of European countries. Examples are Ukraine, Lithuania, Romania Croatia, Bulgaria, Slovenia, Serbia, Hungary, Germany and others.

Investment Funds"); and Act No. 213/1997 on Non-Profit Organisations Providing Generally Beneficial Services, as amended by Act No. 35/2002 ("Law on NPOs"), respectively.

284. Associations are membership organisations (*universitas personam*) created to pursue private or public interests. The Law on Associations does not apply to political parties, political movements, churches and religious organisations, or to commercial associations and companies of several kinds; all these are regulated by special laws.

285. A foundation is an asset-based organisation (*universitas rerum*) serving one or more public benefit purposes as defined in the law. A foundation may also create and operate a special associated fund without legal personality to support a public benefit purpose, based on an agreement with another person or on its own decision.

286. A non-investment fund ("NI fund") accumulates assets for publicly beneficial purposes, as defined in the law, or for humanitarian assistance benefiting individuals whose lives are at risk or who have suffered from a natural disaster. The NI fund's governing documents should indicate those persons who are eligible to receive benefits from the fund or the geographic region in which benefits will be distributed. Any legal or natural person may establish an NI fund with a minimum founder's contribution of at least 2,000 SKK[408].

287. Not-for-Profit Organisations Providing Publicly Beneficial Services (NPOs) are a special form of NGO under Slovak law that may be established by legal or natural persons or by a government agency to provide public benefit services as defined in the law to the public on equal terms and conditions. NPOs may not use any profit generated to benefit their founders, members of their bodies, or employees. Under the Law on Transformation, the ministries of the Slovak Government and other central administration bodies may select subsidiary governmental organisations to be transformed into NPOs. The NPO can also receive property endowed by other interested parties: employees of the original governmental organisation, medical and social care professionals, and churches and other legal persons active in health care, social care, or humanitarian assistance, either on their own or through a NPO established by them. The rights, obligations and liabilities of the original governmental organisation are then transferred to the new NPO[409].

288. Because of the peculiarity and limited significance of NI funds and NPOs for the purpose of the report, the rest of the report deals with the legal status of associations and foundations only.

Establishment of associations

289. The Law requires at least three "citizens" to establish an association, of which at least one founder must have full business capacity (i.e. be at the age of 18 or over). However, the Constitution grants "everyone" the same rights and privileges under Slovak law as Slovak citizens (except in limited circumstances such as political parties), which permits the conclusion that foreigners can also found an association. Nevertheless, some experts suggest that chances for a successful completion of the registration process

[408] Taken from the United States International Grantmaking Note on Slovakia (www.usig.org).
[409] *Ibid*.

are greater if foreigners establish an association together with (Slovak) citizens. However, it does not seem that there have been any instances in which foreigners have been unable to establish an association without a citizen also being involved.

290. Legal entities (domestic and foreign alike) may only be members rather than founders of an association, subject to one notable exception. Umbrella organisations (i.e., those formed by associations, by virtue of an "agreement of collaboration") may also be granted legal entity status, under the same conditions set out for associations.

291. The establishment of an association is voluntary.

292. An association may be established to pursue any legitimate mutual or public benefit goal. The concept of public benefit is not developed in the framework regulation and law.

293. Associations are banned from being established for military activities or for purposes violating the civil rights of individuals because of their nationality, sex, race, origin, political opinions, or religious affiliation. In addition, associations are prohibited from engaging in functions reserved to the government or public administration and may not be established for purposes for which political parties and political movements are organised according to law. Otherwise, they are not forbidden from supporting or opposing political activities, ideas, or candidates.

294. The Law on Associations defines an association as a "legal person", which suggests that an association may not operate before it is entered into the registry (and thereby acquires legal personality). However, the Constitution provides that international treaties on human rights and basic freedom that were ratified by the Slovak Republic take precedence over domestic laws, provided that they secure a greater extent of constitutional rights and liberties. That permits the conclusion that informal associations are allowed to operate – or at least can successfully challenge a decision to the contrary before domestic courts.

295. In order for an association to be entered into the registry, the Deed on Establishment and two copies of the By-Laws must be furnished with the registry office[410]. The registry office shall notify the applicant within 5 days if the request for registration is incomplete, and shall halt the proceedings until the applicant remedies the request. If the request meets the requirements prescribed in the Law, the registry office shall render its decision within 10 days.

296. An association shall be denied entry into the registry if the revised request for registration is still incomplete, or if the goals of an association are not permitted as discussed above. An association may contest a decision to that

[410] The Deed on Establishment must be signed by the founders of an association, must detail their full names and necessary personal information, and must indicate a person who is authorized to undertake on behalf of the association measures necessary for its registration. The mandatory content of the By-Laws includes: the name of an association, its goals, place of business, the governing body of an association, persons vested with the power to represent an association, rights and responsibilities of its members, organisational units insofar as they will be established and, insofar as they will act in their own name, principles of management.

effect with the Supreme Court within 60 days after it has been served to the legal representative of an association.

297. If the registry office fails to issue a decision on registration within 40 days following the submission of an orderly request, an association shall be presumed to have entered into the registry. However, the practical implications of this presumption are not clear. For example, it is not certain that an association will be able to open a bank account or lease premises on its behalf following the expiration of the 40-day deadline.

298. The Law on Associations provides very little guidance with regard to the internal governance of associations, but instead leaves this issue to be addressed in the by-laws. In particular, the Law does not address the mandatory governing bodies of an association, their respective rights and responsibilities, or standards of diligence.

299. A provision in the Law governing the opening of the general assembly meeting to the public, however, seems to suggest that an association must have a general meeting. The lack of provisions on the mandatory governing structure may pose a problem, particularly in instances where the by-laws envisage the governing board, rather than the general meeting, as the highest body of an association. It does not seem clear what the legal basis for the registry office would be to require necessary changes in the by-laws to that effect, in order for an association to be entered into the registry.

Establishment of foundations

300. Any legal or natural person may establish a foundation. A foreign person may represent a foundation provided it has a permanent residence in Slovakia. Foundations must maintain an endowment of at least SKK 200,000 ($4,500), and the minimal contribution of a founder to the endowment is SKK 20,000 ($450). The minimal endowment and minimal endowed contributions must take the form of funds or real estate.

301. Foundations can only be established to pursue public benefit purposes as defined in the Law on Foundations[411]. Foundations are expressly forbidden from using their assets to support political parties or political movements. However, foundations may engage in general political or lobbying activities, insofar as these activities are compatible with the public benefit purposes for which they have been established.

302. A foundation may engage in activities following the successful completion of the registration process (i.e. acquiring legal entity status), although the Law does not provide any specific sanctions for foundations that violate that requirement. Two copies of the Deed of Establishment must be furnished to the registry office, along with a number of affidavits and statements necessary to secure transfer of real estate and other funds to a foundation.

[411] These purposes include: the development and protection of spiritual and cultural values; humanitarian objectives, including the protection of human rights or health; protection and development of the environment; preservation of natural values; the development of science, learning and sports; and individually targeted humanitarian assistance for individuals or groups who are in mortal danger or who were afflicted by a natural disaster.

303. If the request for registration is incomplete, the registry office shall notify the applicant to that effect within 15 days and shall halt the proceedings until the applicant remedies the request. The registry office shall decide on a request for registration (if not incomplete) within 30 days following its submission. There is no presumption of registration in case the registry office fails to meet the 30-days deadline, and it is unclear what legal remedies an applicant is entitled to in such situations.

304. A foundation will be denied registration if its purpose is not deemed public benefit, or if the revised request for registration is still incomplete. A foundation may contest a decision to that effect with the Supreme Court.

305. The governing structure of a foundation is spelled out in the Law in some detail. The foundation shall have the board of directors as the highest governing body, and the administrator of a foundation. If the property of the foundation exceeds SKK 5,000,000, or if so provided by the governing documents, the foundation shall also have the supervisory board. The governing documents may envisage other governing bodies of the foundation. Members of the governing bodies are obliged to perform their duties in a manner that shall not harm the interests of the foundation, and must not use the property of the foundation to further their private interests. Members of the governing bodies may not be persons that have been finally convicted for committing a premeditated criminal act.

Foreign associations and foundations

306. The Law on Associations does not provide conditions under which foreign associations may operate in Slovakia.

307. A foreign foundation is defined in the Law on Foundations as a legal person with a place of business outside the territory of Slovakia, which is recognized as a foundation under the domestic law of the State in which it has its place of business. A foreign foundation may carry out activities on the territory of Slovakia only through a branch office, under the same conditions prescribed in the Law for the establishment and registration of (domestic) foundations.

Conclusion

308. The framework regulation on foundations is generally in line with international best practices. However, the framework regulation for associations can benefit from further revisions.

309. In particular, the framework regulation should:

- Allow legal persons to be founders of an association;
- Provide basic rules relating to the mandatory governing structure of an association, which will inter alia make clear that the general assembly is the highest body of an association; and
- Regulate conditions under which foreign associations can operate in Slovakia.

F. Belarus

Introduction

310. In principle, in Belarus the right to pursue the essentially non-profit-making objectives by means of voluntary self-governing membership-based NGOs is provided for by the Law on Public Associations of 4 October 1994[412] ("the LPA"). It envisages the only form of them, namely the public association that is defined as a voluntary coalition of citizens[413] united for a joint exercise of their civil, social, cultural and other rights[414].

311. The framework for non-membership-based NGOs is set up by the Regulations on Establishment, Operation and Liquidation of Funds of 1 July 2005 ("the Regulations")[415]. They can exist only in the form of the "fund" that is defined as a non-commercial organisation established on the basis of endowments made either by a physical or legal person[416].

312. Both the LPA and Regulations contain an express and absolute proscription of any activities of this kind outside the organisational forms stipulated[417]. Since 20 December 2005 this general ban has been combined with the criminal responsibility for organising and participating in the activities of a suspended, dissolved or unregistered organisation[418]. The construction given to the Criminal Code allows this crime to be constituted by substantially legitimate actions within just a framework of essentially informal or duly unregistered groupings; there is no need to breach the exhaustive provisions on prohibited objectives that include a forcible change of constitutional order, propaganda of war, social, national, religious and racial hatred[419]. Persons implicated in the respective informal actions can face a fine, up to six months' imprisonment or up to two years of deprivation of liberty. Reportedly there have been a number of instances of those convicted of the offence being imprisoned[420].

313. Apart from its questionable character in terms of proportionality, such rigid exclusion of any informal means of exercising the right in issue raises serious concerns in respect of its compatibility with international standards and best practices developed in respect of the diversity of NGOs activities[421]. Accordingly it

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[412] Its current version has been created by amendments of 19 July 2005 and 8 May 2007. There are separate laws on political parties, religious organisations and trade unions in Belarus.

[413] The right does not apply to legal persons, but extends to foreign citizens and stateless persons (Article 2 of the LPA). Only registered public associations are entitled to establish their unions.

[414] Article 1 of the LPA.

[415] Approved by Decree N302 the President of the Republic of Belarus.

[416] Paragraph 2 of the Regulations. The number of funds registered in Belarus is considerably less than the number of public associations. According to the official statistics by 1 May 2008 there were 64 funds and 2,255 public associations registered in Belarus. <http://www.minjust.by/ru/site_menu/about/struktura/obschestv/registr>, consulted on 25 July 2008.

[417] Article 7 of the LPA.

[418] .Article 193 of the Criminal Code of Belarus.

[419] Article 7 of the LPA, paragraph 2 of the Regulations. For funds there is an additional explicit prohibition of pursuing objectives related to an expression or revelation of political will of citizens.

[420] *Freedom of Association in Belarus and the Legal Status of NGOs in Belarus, 2007*, the analysis by the Assembly of Pro-Democratic NGOs of Belarus ("Analysis"), http://belngo.info/download/freedom_assoc_belarus.pdf, consulted on 25 July 2008.

[421] See paragraph 3 of Recommendation CM/Rec(2007)14 and paragraphs 23-24 of its Explanatory Memorandum.

increases the importance of the procedures for establishing the envisaged organisational forms of NGOs since these could partially remedy the problem if they were flexible and uncomplicated.

314. Notwithstanding the important role attached to NGOs in securing democracy and human rights that has been once more emphasized at the universal level in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[422], the analysis of the Belarusian legislation and of its implementation in practice demonstrates a whole set of limitations aimed at discouraging the establishment and continued operation of public associations aspiring at the promotion of democracy and human rights ideas, the provision of relevant advice and other related activities.

315. Although these are the rights that have been internationally appreciated as necessary for NGOs[423], the Belarusian normative base unjustifiably limits the relevance of these crucial powers of public associations to their members only. This point was one of the main targets of the restrictive application of the framework in question[424].

316. It is noteworthy that the issue of conditioning the registration of an association by a limitation of the scope of its activities to the exclusive representation and defence of the rights of its own members in Belarus has been brought to the attention of the United Nations Human Rights Committee, which found it incompatible with Article 22 of the International Covenant on Civil and Political Rights[425].

317. As to the funds, their activities are also subjected to limitations by means of rigorous rules encircling the scope of permitted activities with the reference to social, charitable, cultural, educational, assistance to a development of sports and physical culture, scientific and other public benefit objectives stated in their statutes[426].

318. Although the norm in question could be interpreted as involving the specific necessary objectives mentioned, it has not led to any positive results in this regard. The overall situation created in respect of evaluation of acceptability of objectives pursued by NGOs in Belarus does not seem to be in compliance with the relevant internationally recognised approach that presupposes an appropriate respect towards the notion of political pluralism and freedom from prejudices[427].

319. On a positive note, there are certain indications of increasing recognition of the significance of NGOs being involved in the field of general human rights protection in Belarus. Their relevant potential started to be used outside the scope

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[422] United Nations General Assembly Resolution A/RES/53/144.

[423] *Ibid*, articles 1.8, 7, Art. 9(3)(c), 9(4). See also Document of the OSCE Moscow Meeting, 1991, para. 43.

[424] *Belyatsky and others v Belarus*, communication 1296/2004, Views of the Human Rights Committee, 24 July 2007, para. 2.2.

[425] *Zvozskov and others v Belarus*, communication 1039/2001, Views of the Human Rights Committee, 17 October 2006, para. 7.4. The most recent version of the LPA and its Article 20, in particular, still contains the same kind of limitation.

[426] Paragraph 2 of the Regulations. See also n 281.

[427] Paragraph 35 of Recommendation CM/Rec(2007)14. See also paragraphs 76-78 of its Explanatory Memorandum.

of the members of public associations. Thus, the recently introduced scheme of public control over penitentiary establishments is based on co-operation with NGOs and the direct participation of their representatives in the activities of monitoring commissions[428].

Requirements for acquiring legal personality

320. In addition to the fundamental limitations already mentioned, there are a number of normative and practical components involved in acquisition of legal personality that considerably hinder an effective establishment of mentioned categories of NGOs in Belarus.

321. Although the provisions on the scope of information and documents required for their registration corresponds to the generally established standards[429], an excessively formalistic reading and disproportionate application of them create difficulties in practice.

322. Thus, the issue of legal or official address of the association has been given an excessive weight by means of putting forward the requirement of using for these purposes premises that have been formally categorized as an office site only. This condition rules out any possibility to register an association or a fund on the addresses of private dwellings and other not authorized premises.

323. The Regulations have also incorporated the relevant direct ground for refusing registration of funds, including the prohibition of sharing offices with other legal entities[430].

324. Besides the formal restriction in question, a recent financial development has made it more difficult for NGOs to comply with it. According to Decree N533 of the President of Belarus, as from 24 April 2008 the absolute majority of non-governmental entities[431] have been required to pay a tenfold increase in the rate charged for premises rented from the state. It has been estimated that

"[i]n the absence of a free real estate market and with total state control over the allocation of space, as well as considerable restrictions on receiving donations and foreign support, such "reforms" will put the existence of many Belarusian NGOs at risk"[432].

325. The LPA provides for local, republican (national) and international associations or their unions[433]. At the same time, there are certain conditions on the representativeness and minimum number of founders (members) that

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[428] See Regulations on the Order of Performing Control by Republican and Local Public Associations over Activities of Organs and Establishments Executing Punishment and other Measures of Criminal Responsibility approved by the Cabinet of Ministers of the Republic of Belarus Resolution № 1220 of 15 September 2006.

[429] See paragraphs 19 and 31 of Recommendation CM/Rec(2007)14. Articles 9, 13-14 of the LPA. Paragraphs 13, 29-33 of the Regulations.

[430] Paragraph 37 of the Regulations.

[431] Except of those granted a special certificate confirming a humanitarian status of the entity from the respective Department of the President's Administration.

[432] The Analysis, p. 4 and p. 8 regarding the practice of application of the point in question. See also the reports on eviction attempts against the Belarusian Helsinki Committee; http://www.hrw.org/english/docs/2007/01/31/belaru15229.htm, consulted on 25 July 2008.

[433] Article 3 of the LPA.

significantly limits the territorial scope of possible activities by complicating a creation of both republican and local associations[434].

326. For establishing the latter, its founders (members) should be not less than ten and represent the majority of administrative entities of the territory on which the association is intending to operate.

327. In the case of republican (national) associations, the requirement is ten founders (members) from the majority of regions of Belarus and the city of Minsk[435], meaning that their total number should be not less than 50.

328. As to funds, the Regulations also envisages three types of them: international, republican and local ones[436].

329. While the representativeness conditions for international and local funds could be regarded as adequate[437], there is the same kind of rigid requisite of establishing branches in at least four regions (oblast) and the city of Minsk in respect of republican (nation-wide) fund. It should be borne in mind that a creation of branches entails almost the analogous range of procedures and difficulties as for corresponding NGOs, including those related to offices and other formalities[438].

330. Taking into account the restrictive stance pursued vis-à-vis NGO activities and the incorporation of the territorial element in the grounds for refusing the registration[439], these limitations have a considerable hindering potential in this regard.[440] There were occasions of using these conditions as a pretext for interference in activities of NGOs concerned[441].

The registration process

331. The legal texts, special forms, register of respective NGOs are easily accessible. They are available on the special internet-site maintained by the Ministry of Justice of the Republic of Belarus[442].

332. However, due to the real risks of being subjected to disproportionate formalism amounting to the exercise of free discretion by the competent authority[443], the registration procedures are perceived as too complicated and time-

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[434] For international associations the requirement sounds reasonable: not less than ten founders (members) from Belarus and not less than three of them from one or more foreign states, as well as existence of organisational structures of this association on their territory.

[435] There are 6 regions (oblast) in addition to the city of Minsk in Belarus.

[436] Paragraphs 7-11 of the Regulations.

[437] There are no specific requirements in respect of the latter category of funds and the international ones have to have registered branches in Belarus and in one foreign state as a minimum.

[438] It should be mentioned that the number of funds registered in Belarus is considerably less than the number of public associations. According to the official statistics by 1 January 2008 there were 64 funds and 2255 public associations registered in Belarus; http://www.minjust.by/ru/site_menu/about/struktura/obschestv/registr, consulted on 25 July 2008.

[439] Article 15 of the LPA.

[440] See paragraph 17 of Recommendation CM/Rec(2007)14.

[441] See *Belyatsky and others v. Belarus*, para. 2.2. For more recent instances see the Analysis at p. 9.

[442] http://www.minjust.by/ru/site_menu/about/struktura/obschestv/registr, consulted on 25 July 2008.

[443] Paragraph 28 of Recommendation CM/Rec(2007)14. Reportedly respective pretexts can be found in transferring the fees to accounts incorrectly indicated by competent officials, certain inconsistencies in documents, stamps and emblems used *etc. Ibid*. See also *Korneenko and others v. Belarus*, communication 1274/2004, Views of the Human Rights Committee, 31 October 2006.

consuming[444]. It is indicative that the registering authorities are entitled to check on the accuracy of submitted documents.

333. According to the LPA the procedure involves a submission to the competent authority of the set of documents within one month as from a founding assembly. It includes an application for the state registration signed by not less than three members of the governing body of the association or union; two copies of statute adopted in compliance with the law; minutes of founding assembly or conference; proof of payment of fees; countersigned list of founders of the public association[445] indicating detailed information on their names, nationalities, home addresses, occupation, home and office telephones; graphic sketch of organisational structures and their location; same kind of detailed data on elected officials of the association; decision of the highest governing body of the association on appointing not less than three of its members as authorised representatives for the registration procedures or court; document confirming a legal address; proof of payment of fees for announcement of state registration[446].

334. In addition to the analogous list of basic documents and relevant information required for registration of funds, the Regulations envisage a submission of registration certificates of legal entities, when they are among founders and corresponding proofs of meeting the minimum capitalisation requirement in monetary or proprietary forms[447]. For republican and international funds it amounts to approximately 10,500 EUR and for local ones it is 1,050 EUR[448].

335. The existing legal framework envisages both a possibility of correcting documents during the registration process and formal deadlines for its respective stages.

336. The LPA and the Regulations afford the registering authority one month for considering an application and taking a decision.

337. In case of negative outcome or postponing the registration, a decision should be notified within five days to the persons seeking the registration in writing and with reasons indicated[449]. The latter option is envisaged for 'corrigible' contraventions to the legal requirements concerned and provides for granting the initiators another month for remedying the deficiencies[450].

338. There were numerous instances of non-observance of the deadline by the registering authority that occasionally had led to considerable delays for more than 5 months[451]. However, some recent improvements have been reported in this regard[452].

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[444] As indicated by the Belarusian respondent to the questionnaire disseminated by the Expert Council.
[445] Unions are required to submit documents of associations comprising them..
[446] Articles 13 and 14 of the LPA.
[447] Paragraph 32 of the Regulations.
[448] It is worth spelling out that the minimum capitalization requirement is 1000 'basic modules' for the two first and 100 for the third category of organisations (paragraph 15 of the Regulations). The 'basic module' is a variable sum determined by the Cabinet of Ministers of the Republic of Belarus. According to its Resolution № 1446 of 2 November 2007 currently it amounts to 35000 BYR.
[449] Articles 14, 15 of the LPA and paragraph 35, 39 of the Regulations.
[450] Article 15 of the LPA and paragraph 38 of the Regulations.
[451] See *Zvozskov and others v. Belarus*, para. 2.2.
[452] See the Analysis, p. 13.

Grounds for refusal

339. In addition to the substantial proscription of certain objectives and methods,[453] the list of grounds for refusing the registration includes such common procedural elements as non-observance of the determined order of establishment of respective NGOs, non-submission of the required documents, deficiencies related to use of names and failure to remedy defects within the one month period stipulated by a decision on postponement of registration.[454]

340. Besides that, the range of such grounds is significantly expanded by repetitive emphasis on certain points, including, where applicable, conditions of membership, symbols and legal address[455].

341. While the LPA does not provide for the specific legal grounds for disqualification from establishing NGOs[456], it was reported that a previous conviction for informal NGO activities had been used still as a ground for refusing registration of the public association[457].

342. Unlike the LPA, the Regulations have incorporated an even more far reaching ground for disqualification from establishing a fund in that it prohibits this from being done by the members of the governing bodies of public associations (political parties) that have been liquidated by a court decision due to violations of legislation within the preceding three year period[458].

Fees and renewal

343. The restrictive approach towards the organisational forms of NGOs in issue can be deduced from the fact that the registration fee for republican and international public associations or funds that amounts to 260 EUR is 5 times bigger than the same fee for commercial legal entities. Even for local public associations and funds (around 105 EUR) it is 2 times bigger than the latter and contains a discouraging element also[459].

344. There are no legal provisions requiring NGOs to renew their registration at stated intervals. However, the adoption of the amended version of the LPA and the new Regulations in 2005 with the express requirement of adjusting their statutes has created serious difficulties for NGOs obtaining a re-approval of their registration.

The registration authority

345. The state of affairs in respect of establishment of NGOs and their activities in Belarus suggests that one of the serious aspects of the remaining problems relates to the lack of independence and impartiality of the authority responsible for their

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[453] See above.

[454] On international standards see paragraph 34 of Recommendation CM/Rec(2007)14 and paragraph 75 of its Explanatory Memorandum.

[455] Article 15 of the LPA and paragraph 37 of the Regulations.

[456] Except of minimum age requirement that in general is 18 and for youth or children NGOs 16 years (Article 8 of the LPA). There are no age limits expressly mentioned in the Regulations.

[457] See the Analysis, at p. 12.

[458] Paragraph 37 of the Regulations.

[459] According to the annex on registration duties to the Law on State Duties as amended on 26.12.2007, paragraphs 1.1, 3.2, 3.3, 7.1, 7.2 they constitute respectively 25, 10 and 5 'basic modules'. See also the remark at footnote 314 above.

registration and subsequent control. The deficiencies in this regard are not constituted mainly by the fact that it is an administrative body, which in Belarus is the Ministry of Justice and its regional subdivisions[460], but by the problem of not meeting the essential requirement of having an appropriate level of staff.

346. It is axiomatic that the registration body should be comprised of persons suitably qualified and trained for the task expected of them. The set of requirements involves their ability to act independently not only of executives elected or chosen as part of the political process, but also of any other entity whose interests might be affected by the coming into being of a new NGO.[461] Accordingly they would clearly benefit from having their awareness of relevant best practices and international standards raised.

Judicial control

347. In the light of violations of the right to freedom of association established by international monitoring mechanisms and other analogous cases reported[462], the same comment is applicable to the judiciary. Corresponding avenues for challenging such decisions or inaction of registering authorities are expressly provided for in the legislation[463]. Respective courts are regularly, but predominantly vainly engaged in cases of challenging decisions on denying or suspending registration of NGOs, issuing warnings vis-à-vis those established or their liquidation. Indeed, instances of successful challenges, positive outcomes of court procedures leading to a compromise or any other possibility to operate are very exceptional[464].

Conclusion

348. In addition to the piecemeal positive aspects indicated throughout the text there have been some other encouraging developments in the area concerned.[465] However, they have not significantly changed the overall rigid and selectively hostile environment in respect of establishment and effective continued operation of NGOs in Belarus. The analysis of the related legal framework and practice demonstrates that they remain highly controversial and there is a considerable room for improvements in this regard.

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[460] Article 13 of the LPA and paragraph 23 of the Regulations.

[461] See Paragraph 36 of Recommendation CM/Rec(2007)14 and paragraphs 79-80 of its Explanatory Memorandum.

[462] See above.

[463] Article 15 of the LPA and paragraph 40 of the Regulations.

[464] See the Analysis at page 9. As to the Belarusian Helsinki Committee, the most recent judicial procedures were related to its alleged tax evasion reportedly. See the reference at footnote 343.

[465] Since 2006 the procedures have got rid of an additional stage of approval of the registration of NGOs by the Republican Commission on the Registration (Re-Registration) of Civic Organisations. Due to the changes to the Regulations on State Registration and Liquidation (Termination of Activity) of Economic Entities introduced in December 2007 some non-commercial organisations, such as private non-profit entities, associations (i.e. unions of legal entities founded with non-profit purposes), associations of owners, associations of gardeners, consumers' cooperative societies *etc.* can benefit from a declarative mode of submission of documents for registration and acquiring legal personality.

III CONCLUSIONS AND RECOMMENDATIONS

349. It is evident that in many countries in Europe international standards regarding the establishment of NGOs are being observed, either fully or to a very large extent.

350. Nonetheless a number of problems do seem to emerge.

351. Firstly there are countries where the operation of informal groupings is inhibited both as a matter of law and practice and where there are no imminent proposals for reform.

352. Secondly the detailed information needed in some instances in order to secure registration or legal personality - where this is either required or desired - does not seem to correspond to any significant fiscal advantages that might provide an appropriate justification for the burden thereby imposed.

353. Thirdly the disqualification of some persons from being eligible to form NGOs does not seem in some cases to be consistent with the right to freedom of association under Article 11 of the European Convention.

354. Fourthly the time-frame for reaching decisions on registration or the grant of legal personality does not always have appropriate safeguards against prevarication and abuse.

355. Fifthly not all the grounds recognised as the basis for refusing registration or the grant of legal personality seem to be drawn with sufficient precision or to be applied in a manner consistent with the right to freedom of association or the promotion of civil society.

356. Sixthly some countries do not specify any grounds for refusing registration or the grant of legal personality and/or do not require such a decision to be reasoned.

357. Seventhly, although independence may not be an essential quality for the body deciding on registration or the grant of legal personality, the scope for improper pressures seems evident in some cases.

358. Finally many of the problems arise from practice rather than the terms of the applicable law but shortcomings in giving effect to the latter do not seem to be being corrected through the exercise of judicial control.

359. These are all matters which merit continued scrutiny but the following measures seem necessary to begin to remedy the present situation.

360. Firstly legislative restrictions on the establishment of informal groupings should be repealed and their legitimacy should be clearly recognised as a matter of law.

361. Secondly the requirements for securing registration or acquiring legal personality should be simplified both to lighten the burden on those applying and to facilitate the administrative task of determining applications.

362. Thirdly the restrictions on children, convicted persons and non-nationals from being founders of NGOs should be brought into line with the requirements of international standards.

363. Fourthly formal time limits for decision-making should be no more than two or three weeks and steps should be taken to ensure their observance, namely the provision of additional staff and clear consequences for failure to meet them, whether a presumed refusal or positive decision.

364. Fifthly grounds for refusal should be reformulated where they are insufficiently precise and they should be reviewed and modified to ensure their relevance and substantive compatibility with international standards.

365. Sixthly, decision-making with respect to the registration of NGOs or granting them legal personality should be immunised from political influence and those charged with this role should be appropriately trained for the task.

366. Finally, effective and timely judicial control over decisions concerning registration and the grant of legal personality should be assured, with judges and lawyers being trained in the relevant international standards and being confident to rely on them in scrutinising refusals of registration or the grant of legal personality.

ANNEX 1

OING Conf/Exp (2008) 1

Terms of reference

EXPERT COUNCIL ON NGO LAW

Adopted at the meeting of the Conference of INGOs on 22 January 2008

Background

The initiative for the creation of the Expert Council on NGO Law goes back to the first Regional NGO Congress organised by the Conference of INGOs on 24-26 March 2006 in Warsaw which proposed "the creation of an expert council to evaluate the conformity of national NGO and other relevant legislation and its application with Council of Europe standards and European practice. NGOs could pool their resources and co-operate with the Conference of INGOs and the Council of Europe to this effect."

The Expert Council is an initiative by NGOs for NGOs in all Council of Europe member States and Belarus.

The Conference of INGOs decided on 6 October 2006 to take the lead in the creation of the Expert Council.

The Expert Council operates under the authority of the Conference of INGOs of the Council of Europe.

The creation of the Expert Council on NGO Law gives follow-up to both the Warsaw Declaration, adopted at the Third Summit of Heads of State and Government of the Council of Europe member States on 16-17 May 2005, which stated that "democracy and good governance can only be achieved through the active involvement of citizens and civil society", and Recommendation CM/Rec(2007)14 on the legal status of NGOs.

The Expert Council on NGO Law relates to the implementation of project 2006/DGAP/943 "Relations with INGOs" of the Programme of Activities of the Council of Europe.

Mandate

The Expert Council aims to contribute to the creation of an enabling environment for NGOs throughout Europe by examining national NGO law and its implementation and promoting its compatibility with Council of Europe standards and European good practice.

Activities

To achieve its aim, the Expert Council:

- Monitors the legal and regulatory framework in European countries, as well as the administrative and judicial practices in them, which affect the status and operation of NGOs,
- Identifies both matters of concern and examples of good practice,

- Provides advice on how to bring national law and practice into line with Council of Europe standards and European good practice,
- Proposes ways in which Council of Europe standards could be developed,
- Encourages and supports NGOs to work together on issues concerning the NGO legislation and its implementation and
- Reports on its activities, its findings and its proposals with regard to Council of Europe standards and European good practice.

The Expert Council pursues a thematic approach with regard to all European countries. It deals in particular with issues addressed in Recommendation CM/Rec(2007)14 on the legal status of NGOs. When considered appropriate, the Expert Council may prepare reports on problems occurring in a particular country for the attention of the Conference of INGOs.

The Conference of INGOs or groups of NGOs can refer issues to the Expert Council, which can also take up issues on its own initiative. It receives information from NGOs, States, the Council of Europe and other intergovernmental institutions. It can carry out its own research.

The Expert Council complements the Council of Europe's assistance to governments on matters pertaining to NGO legislation such as the provision of legislative expertise and assistance activities on drafting or reforming NGO legislation. It therefore works in liaison with relevant Council of Europe bodies and services.

The Expert Council holds annual meetings and its members co-operate throughout the year by electronic means of communication.

Reporting

The Expert Council presents an annual report to the Conference of INGOs on its work. If need be, it may submit ad hoc reports on matters of particular urgency to the Conference of INGOs. The reports will contain recommendations for action by the Conference of INGOs.

Follow-up

The Conference of INGOs decides on the follow-up to be given to the reports of the Expert Council. It publishes the reports, ensures their dissemination to NGOs and relevant Council of Europe, national and intergovernmental bodies. It monitors the implementation of the Expert Council's recommendations.

Membership

The Expert Council is composed as follows:

- President
- Co-ordinator
- Three members
- Ad hoc members

All members act in their personal capacity.

A representative of the Secretariat General of the Council of Europe attends the meetings of the Expert Council.

Members of the Expert Council have all or most of the following qualifications:

- Legal expertise in NGO law (including the regulatory framework), other relevant laws (such as tax legislation), administrative and judicial practices affecting the status and operation of NGOs and human rights,
- NGO experience at national and international level, including experience in managing a NGO and NGO networks,
- Knowledge of European standards and good practice,
- Experience with the issues at stake in more than one European country,
- Availability and
- Proficiency in English.

The Conference of INGOs appoints the President of the Expert Council for a three-year term. The co-ordinator and the other members are appointed by the Bureau of the Conference of INGOs for a three-year term. The Expert Council appoints ad hoc members who are specialised on issues under examination for a one-year term, renewable.

Financial aspects

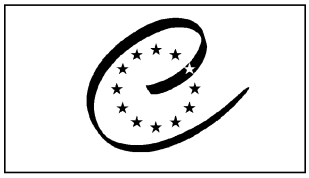
The budget of the Conference of INGOs (which is essentially funded by the Council of Europe) bears the travel and subsistence expenses for all members attending the meetings of the Expert Council and the cost of small expert fees for the written contributions of the members.

The co-ordinator has a consultant contract.

Evaluation

The Expert Council's operation will be reviewed by the Conference of INGOs in its third year of functioning with a view to determining whether the creation of a permanent structure is necessary.

ANNEX 2



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)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members and that this aim may be pursued through the adoption of common rules;

Aware of the essential contribution made by non-governmental organisations (NGOs) to the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies;

Taking into consideration the invaluable contribution also made by NGOs to the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe;

Having regard to the Declaration and Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005);

Noting that the contributions of NGOs are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of changes in law and public policy, the provision of assistance to those in need, the elaboration of technical and professional standards, the monitoring of compliance with existing obligations under national and international law, and on to the provision of a means of personal fulfilment and of pursuing, promoting and defending interests shared with others;

Bearing in mind that the existence of many NGOs is a manifestation of the right of their members to freedom of association under Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and of their host country's adherence to principles of democratic pluralism;

Having regard to Article 5 of the European Social Charter (revised) (ETS No. 163), Articles 3, 7 and 8 of the Framework Convention for the Protection of National Minorities (ETS No. 157) and Article 3 of the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144);

Recognising that the operation of NGOs entails responsibilities as well as rights;

Considering that the best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation;

Taking into consideration the case law of the European Court of Human Rights and the views of United Nations human rights treaty bodies;

Taking into account the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, United Nations General Assembly Resolution A/RES/53/144;

Drawing upon the Fundamental Principles on the Status of Non-Governmental Organisations in Europe;

Having regard to the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS No. 124) (hereinafter Convention No. 124) and to the desirability of enlarging the number of its contracting parties;

Recommends that the governments of member states:

– be guided in their legislation, policies and practice by the minimum standards set out in this recommendation;

– take account of these standards in monitoring the commitments they have made;

– ensure that this recommendation and the accompanying Explanatory Memorandum are translated and disseminated as widely as possible to NGOs and the public in general, as well as to parliamentarians, relevant public authorities and educational institutions, and used for the training of officials.

I. Basic principles

1. For the purpose of this recommendation, NGOs are voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members. They do not include political parties.

2. NGOs encompass bodies or organisations established both by individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based.

3. NGOs can be either informal bodies or organisations or ones which have legal personality.

4. NGOs can be national or international in their composition and sphere of operation.

5. NGOs should enjoy the right to freedom of expression and all other universally and regionally guaranteed rights and freedoms applicable to them.

6. NGOs should not be subject to direction by public authorities.

7. 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.

8. The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation.

9. NGOs should not distribute any profits which might arise from their activities to their members or founders but can use them for the pursuit of their objectives.

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.

II. Objectives

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 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.

14. 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.

15. NGOs should be free to pursue their objectives through membership of associations, federations and confederations of NGOs, whether national or international.

III. Formation and membership

A. Establishment

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.

17. Two or more persons should be able to establish a membership-based NGO but a higher number can be required where legal personality is to be acquired, so long as this number is not set at a level that discourages establishment.

B. Statutes

18. NGOs with legal personality should normally have statutes, comprising the constitutive instrument or instrument of incorporation and, where applicable, any other document setting out the conditions under which they operate.

19. The statutes of an NGO with legal personality should generally specify:

a. its name;

b. its objectives;

c. its powers;

d. the highest governing body;

e. the frequency of meetings of this body;

f. the procedure by which such meetings are to be convened;

g. the way in which this body is to approve financial and other reports;

h. the procedure for changing the statutes and dissolving the organisation or merging it with another NGO.

20. The highest governing body of a membership-based NGO should be the membership and its agreement should be required for any change in the statutes. For other NGOs the highest governing body should be the one specified in the statutes.

C. Membership

21. No person should be required by law or otherwise compelled to join an NGO, other than a body or organisation established by law to regulate a profession in those states which treat such an entity as an NGO.

22. The ability of any person, be it natural or legal, national or non-national, to join membership-based NGOs should not be unduly restricted by law and, subject to the prohibition on unjustified discrimination, should be determined primarily by the statutes of the NGOs concerned.

23. Members of NGOs should be protected from expulsion contrary to their statutes.

24. Persons belonging to an NGO should not be subject to any sanction because of their membership. This should not preclude such membership being found incompatible with a particular position or employment.

25. Membership-based NGOs should be free to allow non-members to participate in their activities.

IV. Legal personality

A. General

26. The legal personality of NGOs should be clearly distinct from that of their members or founders.

27. An NGO created through the merger of two or more NGOs should succeed to their rights and liabilities.

B. Acquisition of legal personality

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.

30. Persons can be disqualified from forming NGOs with legal personality following a conviction for an offence that has demonstrated that they are unfit to form one. Such a disqualification should be proportionate in scope and duration.

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.

32. Legal personality for membership-based NGOs should only be sought after a resolution approving this step has been passed by a meeting to which all the members had been invited.

33. Fees can be charged for an application for legal personality but they should not be set at a level that discourages applications.

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.

39. Decisions on qualification for financial or other benefits to be accorded to an NGO should be taken independently from those concerned with its acquisition of legal personality and preferably by a different body.

40. A record of the grant of legal personality to NGOs, where this is not an automatic consequence of the establishment of an NGO, should be readily accessible to the public.

41. NGOs should not be required to renew their legal personality on a periodic basis.

C. Branches; changes to statutes

42. NGOs should not require any authorisation to establish branches, whether within the country or (subject to paragraph 45 below) abroad.

43. NGOs should not require approval by a public authority for a subsequent change in their statutes, unless this affects their name or objectives. The grant of such approval should be governed by the same process as that for the acquisition of legal personality but such a change should not entail the NGO concerned being required to establish itself as a new entity. There can be a requirement to notify the relevant authority of other amendments to their statutes before these can come into effect.

D. Termination of legal personality

44. The legal personality of NGOs can only be terminated pursuant to the voluntary act of their members – or in the case of non-membership-based NGOs, its governing body – or in the event of bankruptcy, prolonged inactivity or serious misconduct.

E. Foreign NGOs

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.

V. Management

46. The persons responsible for the management of membership-based NGOs should be elected or designated by the highest governing body or by an organ to which it has delegated this task. The management of non-membership-based NGOs should be appointed in accordance with their statutes.

47. NGOs should ensure that their management and decision-making bodies are in accordance with their statutes but they are otherwise free to determine the arrangements for pursuing their objectives. In particular, NGOs should not need any authorisation from a public authority in order to change their internal structure or rules.

48. The appointment, election or replacement of officers, and, subject to paragraphs 22 and 23 above, the admission or exclusion of members should be a matter for the NGOs concerned. Persons may, however, be disqualified from acting as an officer of an NGO following conviction for an offence that has demonstrated that they are unfit for such responsibilities. Such a disqualification should be proportionate in scope and duration.

49. NGOs should not be subject to any specific limitation on non-nationals being on their management or staff.

VI. Fundraising, property and public support

A. Fundraising

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.

B. Property

51. NGOs with legal personality should have access to banking facilities.

52. NGOs with legal personality should be able to sue for the redress of any harm caused to their property.

53. NGOs with legal personality can be required to act on independent advice when selling or acquiring any land, premises or other major assets where they receive any form of public support.

54. NGOs with legal personality should not utilise property acquired on a tax-exempt basis for a non-tax-exempt purpose.

55. NGOs with legal personality can use their property to pay their staff and can also reimburse all staff and volunteers acting on their behalf for reasonable expenses thereby incurred.

56. NGOs with legal personality can designate a successor to receive their property in the event of their termination, but only after their liabilities have been cleared and any rights of donors to repayment have been honoured. However, in the event of no successor being designated or the NGO concerned having recently benefited from public funding or other form of support, it can be required that the property either be transferred to another NGO or legal person that most nearly conforms to its objectives or be applied towards them by the state. Moreover the state can be the successor where

either the objectives or the means used by the NGO to achieve those objectives have been found to be inadmissible.

C. Public support

57. NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits.

58. Any form of public support for NGOs should be governed by clear and objective criteria.

59. The nature and beneficiaries of the activities undertaken by an NGO can be relevant considerations in deciding whether or not to grant it any form of public support.

60. The grant of public support can also be contingent on an NGO falling into a particular category or regime defined by law or having a particular legal form.

61. A material change in the statutes or activities of an NGO can lead to the alteration or termination of any grant of public support.

VII. Accountability

A. Transparency

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 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.

66. Foreign NGOs should be subject to the requirements in paragraphs 62 to 65 above only in respect of their activities in the host country.

B. Supervision

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 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 authorisation.

70. No external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent.

71. NGOs should generally be able to request suspension of any administrative measure taken in respect of them. Refusal of a request for suspension should be subject to prompt judicial challenge.

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.

73. Foreign NGOs should be subject to the provisions in paragraphs 68 to 72 above only in respect of their activities in the host country.

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.

C. Liability

75. The officers, directors and staff of an NGO with legal personality should not be personally liable for its debts, liabilities and obligations. However, they can be made liable to the NGO, third parties or all of them for professional misconduct or neglect of duties.

VIII. Participation in decision making

76. 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. This participation and co-operation should be facilitated by ensuring appropriate disclosure or access to official information.

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