CONFERENCE OF INGOs
OF THE COUNCIL OF EUROPE

CONFERENCE DES OING DU
CONSEIL DE L'EUROPE

OING Conf/Exp (2011) 1

January 2011

EXPERT COUNCIL ON NGO LAW

THIRD ANNUAL REPORT

Sanctions and Liability in Respect of NGOs

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. He was from 2000-2008 President of the NGO Grouping on Civil Society and Democracy in Europe and its predecessors. Mr Ritchie resides in Geneva.

Co-ordinator (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 the Status of NGOs in Europe" and CM/Rec(2007) 14. He is Vice-Chair of the European Union's Fundamental Rights Agency. Mr McBride resides in Strasbourg.

Members appointed by the Bureau of the Conference of INGOs:

Dragan Golubovic, from Serbia, a Senior Legal Advisor with the European Centre for Not-for-Profit Law. He collaborates with the Council of Europe, UNDP and OSCE on projects relating to freedom of association. Mr Golubovic resides in Budapest.

Mihaela Preslavska, a Bulgarian lawyer involved for many years with the NGO sector, both nationally and internationally, with an expertise in promoting good governance and accountability standards . Ms Preslavska resides in Brussels.

Eric Svanidze, a lawyer from Georgia heavily engaged in NGO issues. Mr Svanidze also served on the expert committee drafting Recommendation CM/Rec(2007) 14 and is a former member of the European Committee for the Prevention of Torture. Mr 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 2010 thematic study on the internal governance of NGOs, one ad hoc member was appointed:

Serkan Cenkiz, a human rights lawyer and part time lecturer from Turkey. He is a member of the executive board of the human rights centre of the Turkish Bar Association. Mr Cengiz resides in İzmir.

INDEX

I INTRODUCTION

1. One of the proudest statements of the Council of Europe is that it is the principal long-standing European institution promoting the essential values of democracy, human rights and the rule of law. This heritage is inestimable, and it of course needs constant attention, defence and promotion.

2. Within the Council of Europe, the four pillars of the 'Quadrilogue' - Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities, Conference of International NGOs - each contribute to defending and developing these values. Each of these institutions has its specific mandate, its specific competences, its specific constituency, its specific outlook. They mutually reinforce each other in working to achieve the goals and purposes of the Council of Europe.

3. The Conference of INGOs makes multifaceted and in-depth contributions to sustaining and expanding democracy, human rights and the rule of law. One of its most innovative initiatives is the creation in 2008 of the Expert Council on NGO Law, whose 2010 Report follows. The Expert Council's mandate covers the three 'value areas' just cited. Its work contributes to creating an enabling environment for civil society, to strengthening civil society, and to expanding civil society as a responsible actor in promoting sound, just and sustainable civic policies and practices throughout Europe.

4. The role and responsibilities of the Conference of INGOs and of its Expert Council on NGO Law can thus be expected to grow and flourish, contributing inherently to the necessary reform of the Council of Europe, so that it itself may grow and flourish, to the benefit of the citizens of Europe and in response to their needs.

5. Since its inception in 2008, the Expert Council on NGO Law has had as its principal activity to prepare an annual report: the first on CONDITIONS FOR THE ESTABLISHMENT OF NGOs; the second on INTERNAL GOVERNANCE OF NGOS; the third - the present one - on SANCTIONS AND LIABILITY IN RESPECT OF NGOs. Each of these themes finds multiple echoes and references in the fundamental document to which the Expert Council constantly refers and which it constantly promotes: Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe" ('Recommendation CM/Rec(2007)14'). This well-constructed document does credit to the vision of the Committee of Ministers and the member states they represent, recognizing and fostering as it does 'the essential contribution made by NGOs to the development and realization of democracy and human rights'.

6. 'Recommendation CM/Rec(2007)14 needs to be much better known and implemented. The Expert Council on NGO Law may rightly be expected to work ever-more closely with other organs and units of the Council of Europe to "broadcast" the Recommendation and to give advice and opinions on its effective implementation. It may also be anticipated that the Expert Council will more often have consultative involvement when NGO legislation is in the drafting or revision process in all countries of Europe, such that the ensuing legislative texts and decrees relating to NGOs will more nearly conform to the wise advice and standards contained in 'Recommendation CM/Rec(2007)14.

7. The Expert Council 2010 Report was prepared on the basis of replies to a questionnaire distributed widely to national and international NGOs throughout Europe, and on analyses conducted by Expert Council members. The Report is another thorough contribution to achieving an enabling environment for NGOs, and to better comprehension by public authorities of the needs, aspirations and functioning of NGOs as they go about their daily task of improving the human condition. For the preparation of the Report I deeply thank the members of the Expert Council, whose intensive research and analysis was only rivalled by their ongoing commitment. Particular thanks go to the Co-ordinator, Jeremy McBride, erudite legal scholar and principal author of the main chapters of the Report.

8. I draw particular attention to a new feature in this year's Report, namely the Annex entitled DEVELOPMENTS IN STANDARDS AND CASE LAW. This text contains information and commentary that will be of great value to NGOs and to governmental authorities as they seek to interpret and implement Council of Europe standards relevant to NGOs and to the broader civil society. Furthermore, the Annex signals, inter alia, that the European Court of Human Rights has in October 2009 for the first time made reference to 'Recommendation CM/Rec(2007)14. In the same context, the Court specifically underlined the importance of civil society in the democratic process.

9. I commend the 2010 Report to the attentive study of the Conference of INGOs, of the other partners of the Council of Europe Quadrilogue, and of the Council's sister intergovernmental organisations. I commend it equally for action by individual NGOs and individual governments. May it serve as a basis for strengthening the inter-relationships among governments and NGOs, for the greater good of society.

Cyril Ritchie
President, Expert Council on NGO Law
September 2010

II THEMATIC OVERVIEW

10. The thematic overview concerning sanctions and liability in respect of NGOs is in two parts. The first reviews the scope of international standards applicable to this issue, 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') - and Recommendation CM/Rec(2007)14. In the second part the responses to a questionnaire concerned with national law and practice regarding sanctions and liability are analysed. The former establishes significant limitations on the extent of the sanctions and liability that can be imposed on NGOs and those who act on their behalf, while the latter discloses that full compliance with these limitations is still not achieved throughout Europe.

A Applicable standards

11. 'Liability' and 'sanctions' are understood for the purpose of this analysis to comprise respectively any obligation or responsibility arising under the civil law and any criminal or administrative penalties (including not only monetary payments, suspension of activities and proscription or dissolution of an organisation but also confiscation of property and disqualifications from office whether by appointment or election[1]).

12. The imposition of sanctions and liability on NGOs and on those who direct, work for or belong to them is not an issue specifically addressed in any of the treaties that guarantee freedom of association or otherwise underpin the operation of NGOs. It is, however, the subject of a number of provisions in Recommendation CM/Rec(2007)14.

13. In addition the duty to accord legal personality to NGOs - established in the case law of the European Court and the United Nations Human Rights Committee ('the Human Rights Committee')[2] and also provided for in the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations[3] - necessarily sets limits on the imposition of liability and sanctions in respect of the activities of NGOs on persons other than the NGOs themselves. Furthermore limits on the use and nature of sanctions flow not only from the protection afforded by the right to freedom of association but also from both the whole range of human rights guaranteed at the European and universal level and the

[1] However, it would not include the description of an NGO as a terrorist organisation without some further implementing action being addressed to it; see *Segi and Others v. 15 States of the European Union* (dec.), nos. 6422/02 and 9916/02, 23 May 2002 in which the applicants were not regarded as victims of any violation of the European Convention.

[2] This case law applies only to membership-based NGOs as it derives from the right to freedom of association but Recommendation CM/Rec(2007)14 applies to both membership- and non-membership-based NGOs.

[3] CETS No. 124. This applies to both membership- and non-membership-based NGOs.

numerous commitments to improve the protection of human rights defenders and to promote their activities[4].

Liability

14. The position regarding who can be made subject to liability in respect of an NGO's activities turns principally on whether or not the NGO concerned has legal personality.

15. As Recommendation CM/Rec(2007)14 makes clear, those who establish NGOs should be free to choose between constituting them as informal bodies or as organisations with legal personality[5]. This freedom of choice is also recognised by the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention'), as its provisions apply to 'groups' as well as associations and organisations[6]. However, although some NGOs can undoubtedly function effectively without legal personality, the possibility of opting for a body with legal personality must also exist since the European Court and the United Nations Human Rights Committee have both recognised that a denial of legal personality will invariably impede the pursuit of the aims set for an organisation by those establishing it and thus be in violation of the right to freedom of association[7].

16. The need to grant legal personality is also implicit in the duty to accord appropriate recognition to bodies promoting environmental protection stipulated in the Aarhus Convention[8]. Furthermore the legal personality of an NGO established in other state parties must also be recognised by those states that are party to the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations[9].

---

[4] Notably 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) (G.A. Res. 53/144, 9 December 1998), the Declaration of the Committee of Ministers of the Council of Europe (adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies), 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.

[5] Para. 3.

[6] Article 2(3).

[7] See, e.g., *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998, para 31; *Gorzelik and Others v. Poland* [GC], no. 44158/98, 17 February 2004, para 88 and 93; and *Malakhovsky and Pikul v. Belarus*, no. 1207/2003, 26 July 2005 (UNHRC), para. 7.2. The provision in para 43 of the Document of the OSCE Moscow Meeting, 1991 that recognition should be 'according to existing national practices' is potentially less exacting than the duty recognised in these cases.

[8] Article 3(4).

[9] Subject to the power to exclude the application of this duty with regard to an NGOs which 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

17. The elaboration of the duty to accord legal personality identified in the case law of the European Court and the UN Human Rights Committee has, however, been concerned only with its enabling aspects in terms of the general ability to pursue the objectives of the NGOs concerned, as well as to bring and defend legal proceedings[10] and to receive grants[11]. There has thus not been any case where the enjoyment of legal personality has been seen as significant by reference to the imposition of any form of liability.

18. Nonetheless, although the case law only focuses on the capacities that flow from having legal personality and the treaty provisions dealing with recognition of legal personality also do not specify what this entails, it is well-established as a general principle of law that the acquisition of such personality will constitute the non-natural entity concerned[12] as one that is distinct from others as regards obligations (as well as rights) under the law[13].

19. The fact that this general principle is only partially reaffirmed in the first sentence of paragraph 75 of Recommendation CM/Rec(2007)14 - 'The officers, directors and staff of an NGO with legal personality should not be personally liable for its debts, liabilities and obligations' - should not, however, be taken as implying that it would generally be acceptable for others, and in particular those establishing or belonging to an NGO, to be capable of incurring such liability in respect of the activities of the NGO concerned. The enjoyment of legal personality by an NGO should normally mean that its debts, liabilities and other obligations under the civil law are enforceable only against it and not against any other person (natural or legal) whatever the connection between them[14].

20. However, an NGO's legal personality cannot preclude other persons (natural or legal) incurring liability for actions that can properly be regarded as their own, even if carried out while acting for or on behalf of the NGO concerned.

21. Thus paragraph 75 of Recommendation CM/Rec(2007)14 makes it clear that the officers, directors and staff of an NGO 'can be made liable to the NGO, third parties or all of them for professional misconduct or neglect of duties'. This sets, of course, a high threshold for them incurring any liability and it is thus likely to be an exceptional occurrence.

---

protection of the rights and freedoms of others or (b) jeopardises relations with another State or the maintenance of international peace and security; Article 4.

[10] *Canea Catholic Church v. Greece*, no. 25528/94, 16 December 1997.

[11] *Ramazanova and Others .v. Azerbaijan*, no 44363/02, 1 February 2007.

[12] Commercial ones as much as NGOs.

[13] See, e.g., *Agrotexim v. Greece*, no. 14087/89, 24 October 1995

[14] This was implicitly accepted by the European Court in *Steel and Morris v. United Kingdom* (dec.), no. 68416/01, 22 October 2002, in which the applicants unsuccessfully sought to attribute to an NGO (to which they belonged) rather than to themselves a publication giving rise to liability for defamation; see the following note.

22. Furthermore the active participation of the members of an NGO in the commission of a civil wrong in the pursuit of its objectives could also give rise to liability for them regardless of any liability that the NGO itself would incur for orchestrating the event involved[15].

23. Similarly those clearly shown to have established an NGO in order to deceive others could undoubtedly be held responsible for the losses that they suffer; in such a case the legal personality of the NGO would be regarded as an inadmissible device and not as a shield for the founders.

24. Furthermore, as the Explanatory Memorandum to Recommendation CM/Rec(2007)14 makes clear, the general protection that should exist for persons other than an NGO against incurring liability for its debts, liabilities and obligations does not preclude the possibility of a particular legal system giving those establishing an NGO the freedom to choose to do so in a way that allows liability for them to be incurred by its officers[16]. The existence of such liability would, of course, only be acceptable where there is a genuine freedom to choose this form of NGO.

25. In the case of NGOs without legal personality, the persons who will bear any liability arising for activities carried our on its behalf will be those who carry them out, i.e., the members and supporters of the NGO concerned[17]. Insofar as such an NGO might be regarded as having any staff, these will actually be in an employment relationship with one or more of the members or supporters - depending on the particular circumstances - and this is unlikely to provide them with any protection for acts done by them on behalf of the NGO, although there might be a right of recovery from the employer in respect of liability for acts performed pursuant to the contract of employment.

26. Recommendation CM/Rec(2007)14 stipulates that the scope for any liability that can be imposed on NGOs with legal personality should be restricted to that arising under the law generally applicable to all legal

---

[15] As was seen in *Steel and Morris v. United Kingdom* (dec.), no. 68416/01, 22 October 2002. The applicants - who had been the defendants in a libel action in respect of a factsheet concerning McDonald's - had complained that they were being held responsible for the publication of the defamatory statements simply by virtue of their association with London Greenpeace, without clear evidence of their individual participation in the factsheet's production or distribution. However, the European Court did not accept that they had not suffered any sanction on account of their association with London Greenpeace since the trial judge had found that that the applicants 'caused, procured, authorised, concurred in and approved' publication of the leaflet. This meant that the European Court did not have to address the submission that, in order to avoid liability for publication, they would have had to avoid participation in any protest, action or campaign against McDonald's and avoided attending London Greenpeace meetings but it seems improbable that mere attendance at a meeting would be regarded as a justifiable basis for imposing liability. The fact that London Greenpeace was an NGO without legal personality was not raised or considered in the proceedings

[16] Para. 134, citing the example of informal associations in the Netherlands.

[17] *Cf.* the conclusion in *Fraktion Sozialistischer Gewerkschafter im ÖGB Vorarlberg and 128 of its individual members (Köpruner, Falschlunger and Others) v. Austria* (dec.), no. 12387/86, 13 April 1989 that the imposition of joint criminal liability for a defamatory publication on the members of an association that did not have legal personality was not objectionable since the association could not be susceptible of incurring a liability of its own.

persons[18] and this would undoubtedly also be the effect of international and regional prohibitions on discrimination[19]. While this stipulation is unlikely to be regarded as precluding the use of discrete legal provisions to establish liability for different forms of legal personality, the substance of the liability being imposed should still clearly be of the same character and extent. Furthermore any liability that is imposed should also be entirely compatible with the requirements of the full range of human rights protected by European and universal treaties. For example, the right to freedom of expression would preclude any liability for defamation which extends to value judgments[20] or which results in the imposition of exorbitant awards of damages[21].

27. Although provision is made in the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations 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'[22], the fact that this is directed to the exercise of rights means that it is unlikely that this authorises any limitations that could have any bearing on the actual liability of foreign NGOs.

Sanctions

28. The imposition of sanctions (whether administrative or criminal) in respect of an NGO's activities is something that can, in principle and according to the circumstances of the case, be directed to the NGO concerned, those who have founded it and those who direct, work for or belong to it. As with liability, the position of those NGOs with legal personality and those without it differs in that sanctions cannot be imposed on the latter but only on those who are associated with it in some way.

29. The actual administrative and criminal obligations leading to sanctions being imposed on NGOs with legal personality should, as paragraph 7 of Recommendation CM/Rec(2007)14 makes clear, be only the ones generally applicable to other legal persons. This is amplified in paragraphs 14 and 50 of the Recommendation which provide respectively that NGOs should be free to engage in any lawful economic, business or commercial activities 'subject to any licensing or regulatory requirements generally applicable to the activities concerned' and that NGOs should be free to solicit and receive funding 'subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties'.

[18] Para. 7.
[19] Notably Article 26 of the International Covenant on Civil and Political Rights ('the International Covenant') and Article 14 of and Protocol No. 12 to the European Convention.
[20] See *Hrico v. Slovakia*, no. 49418/99, 20 July 2004.
[21] See *Tolstoy Miloslavsky v. United Kingdom*, no. 18139/91, 13 July 1995.
[22] Article 2(2).

30. Apart from non-compliance with laws and regulations of general application, the circumstances most likely to lead to the imposition of sanctions on NGOs with legal personality would be breaches of requirements of particular relevance to legal persons, namely, those concerning their objectives and activities, their formation and management and their compliance with all applicable regulatory schemes[23].

31. However, as with liability under civil law, the grounds for imposing any sanction on an NGO with legal personality must always be compatible with the requirements of the full range of human rights protected by European and universal treaties. This would preclude, for example, the proscription or dissolution of an NGO because of its objectives where the legal prohibition of them was not at all compatible with the right to freedom of association[24] and any prosecution for organising or taking part in a demonstration where that was protected by the right to freedom of assembly[25] or for a publication protected by freedom of expression[26].

32. Furthermore the scope of any offence (whether criminal or administrative) giving rise to a sanction must satisfy the foreseeability standard in order to be regarded as prescribed by law and thus an acceptable limitation on any of the guaranteed rights and freedoms[27].

---

[23] Thus in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan***,** no. 37083/03, 8 October 2009 the European Court considered that alleged attempts to collect money from State organs and commercial organisations in the guise of membership fees, alleged unlawful inspections at various organisations and other alleged illegal acts interfering with the rights of entrepreneurs could have entailed criminal responsibility for an association's managers or members. In this case, however, none of the allegations were ever substantiated.

[24] See, e.g., *United Communist Party of Turkey and Others v. Turkey* [GC], no. 19392/92, 30 January 1998 and *Tüm Haber Sen and Çınar v Tur*key, no. 28602/95, 21 February 2006.

[25] E.g., *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29222/95, 2 October 2001.

[26] E.g., *Vereinigung demokratischer Soldaten Österreichs and Gubi .v. Austria*, no. 15153/89, 19 December 1994.

[27] See, e.g., *N F v. Italy*, no. 37119/97, 2 August 2001 and *Maestri v. Italy* [GC], no. 39748/98, 17 February 2004 (in which prohibitions on members of the judiciary belonging to a Masonic lodge were found to be a violation of Article 11 of the European Convention because their terms were not sufficiently clear to allow even persons as well-informed as the applicants to realise that he could face disciplinary action as a result of joining, or remaining a member of, one. Judges Bîrsan, Bonello, Del Tufo, Jungwiert, Loucaides and Stráznická dissented in *Maestri* on the issue of foreseeability) and *Karademirci and Others v. Turkey*, nos 37096/97 and 37101/97, 25 January 2005 (in which the conclusion by a criminal court that the fact of organising a press conference and reading a text aloud amounted to an action that was subject to the same formality as that established for 'leaflets', 'written statements' and 'similar publications' under the Associations Act was considered by the European Court to be an extension of the interpretation of the scope of that law which could not reasonably have been foreseen in the circumstances of the case. As a consequence the conviction of the applicants was held to amount to a violation of Article 10 of the European Convention). The foreseeability standard was also not met in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan***,** no. 37083/03, 8 October 2009 as regards what could be the basis for warnings about an NGO's activities, the circumstances in which dissolution could be applied as a sanction and the scope of a ministry's power of intervention. However, unusually the finding of a violation of Article 11 was not based on this consideration as respect for human rights required the European Court to consider whether the interference was necessary in a democratic society, which it was not (see below).

33. Moreover the proceedings that lead to the imposition of a sanction that is either termed criminal under national law or is regarded as having that character by regional and international tribunals whatever its domestic designation[28] must always comply with the requirements for a fair hearing prescribed in Article 6 of the European Convention and Article 14 of the International Covenant[29].

NGOs

34. As regards the imposition of sanctions on NGOs themselves, the previously cited paragraph 7 of Recommendation CM/Rec(2007)14 also states that those with legal personality should only be subject to the administrative and criminal law sanctions generally applicable to other legal persons. However, of equal importance in this regard is the elaboration in paragraph 72 of the approach to be followed as regards their implementation. Thus it provides that:

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

35. The failure to follow these precepts has been the basis for many successful challenges to the imposition of sanctions on NGOs.

36. Certainly, as stipulated in paragraph 72, consideration should always first be given to whether a legitimate matter of concern to the authorities can be adequately handled through the issue of some form of directions, whether to desist from certain activity or to take specific action. Generally it should only be the subsequent non-compliance with such directions that should lead to the imposition of sanctions and there should be no immediate resort to the institution of administrative or criminal proceedings against the NGO concerned.

37. As all sanctions must observe the principle of proportionality, those of a financial nature ought to take account both of the seriousness of the particular infraction giving rise to it and the impact that the penalty would have on the NGO concerned. In particular a financial penalty that would entail the bankruptcy of the NGO concerned is unlikely to be justifiable except in the case of grave and repeated violations of the law.

---

[28] The determination of what is 'criminal' for the purposes of Article 6 of the European Convention and Article 14 of the International Covenant is a matter for determination by the European Court and the Human Rights Committee respectively; see, e.g., *Bendenoun v. France*, no. 12547/86, 24 February 1994

[29] See, e.g., *Piroğlu and Karakaya v. Turkey*, nos. 36370/02 and 37581/02, 18 March 2008 in which the applicants were found not to have been given the opportunity to defend themselves in person or through a lawyer before the courts which determined their cases when they had been convicted of various offences under the Associations Act.

38. A temporary ban on the activities of an NGO on account of its past conduct would not necessarily be an inadmissible sanction but it is clear from the case law of the European Court that such a ban must be a response to a particularly serious problem and must not be disproportionate in its effect.

39. Certainly these requirements were not considered to have been met where activities were banned because authorisation for previous gatherings had not been obtained in accordance with the Assemblies Act; children had been present at those gatherings; and some statements made at them had amounted to calls to public violence[30]. In responding to these grounds the Court indicated, respectively, that (a) it was not convinced that the failure to comply with legislation which otherwise was punishable with an administrative fine of MDL 180-450 (EUR 16-40) could be considered as a relevant and sufficient reason for imposing a temporary ban on the activities of an opposition party, (b) the presence of children was not shown to be the result of any action or policy on the part of the applicant, anyone (including children) could attend gatherings held in a public place, it was a matter of personal choice for the parents to decide whether to allow their children to attend those gatherings and it appeared to be contrary to the parents' and children's freedom of assembly to prevent them from attending such events and (c) it was not persuaded that the singing of a fairly mild student song could reasonably be interpreted as a call to public violence. In finding a violation of Article 11 of the European Convention the European Court reiterated that

> only very serious breaches such as those which endanger political pluralism or fundamental democratic principles could justify a ban on the activities of a political party. Since the CDPP's gatherings were entirely peaceful, there were no calls to violent overthrowing of the government or any other acts undermining the principles of pluralism and democracy, it cannot reasonably be said that the measure applied was proportionate to the aim pursued and that it met a "pressing social need"[31].

40. This case concerned a political party and thus not an NGO for the purpose of Recommendation CM/Rec(2007)14[32] but a similar approach can be expected where the suspension affects the activities of any NGO covered by it, especially those involving the exercise of rights to freedom of assembly, of expression and of conscience and religion of it or of its members and supporters.

41. It may be that a pressing social need for the suspension of an NGO's activities could also exist in circumstances where these did not involve any apparent threat of violent overthrow of the government or to the principles of pluralism and democracy. One instance where this might be justified could be where activities undertaken by the NGO had the potential for serious and probably irrecoverable economic loss to a large number of persons but it is unlikely that a general suspension of activities would be

[30] *Christian Democratic People's Party v. Moldova, n*o. 28793/02, 14 February 2006.
[31] Para. 76.
[32] Para. 1.

justified in such a case – just those that were economic in character – and there would still need to be compelling evidence of the gravity of the risk posed by those activities.

42. A suspension of activities has also been held by the European Court to be pursuing a legitimate aim and not disproportionate where it was directed at the unlawful name adopted for the organisation and did not prevent those establishing it from pursuing their collective interests[33].

43. Where the validity of any requirement that an NGO should desist temporarily from a particular activity is in dispute, it should be possible to apply to have this suspended until the outcome of the relevant proceedings. Certainly there would have to be very grave circumstances for such an application to be denied and it would be essential that any such refusal should itself be subject to prompt judicial challenge. Without the latter safeguard an allegedly 'urgent' suspension of an NGO's activities could be used as a pretext for stopping its pursuit of entirely legitimate ones[34].

44. There may be circumstances where the actual conduct of an NGO would warrant the imposition of an even more serious sanction than the suspension of its activities, namely, its enforced dissolution[35]. Such circumstances are likely to be very rare indeed - described in Paragraph 44 of Recommendation CM/Rec(2007)14 as 'serious misconduct'[36] - and would thus probably cover only situations in which the NGO undertook anti-constitutional activities or repeatedly failed to desist from other illegal conduct after appropriate warnings and opportunities to rectify such failings[37].

---

[33] *Tür Köy Sen v. Turkey* (dec.), no. 45504/04, 13 October 2009; the use of the name' syndicat' was restricted by law to entities with certain powers and the suspension was directed at preventing confusion of the organisation with such entities. Cf the upholding of a refusal to register entities whose names were regarded as conflicting with those of other entities having a special status under the law in *Gorzelik and Others v. Poland* [GC], no. 44158/98 and *X v. Switzerland (dec.)*, no. 18874/91, 12 January 1994.

[34] The general possibility of seeking suspension is underlined in paragraph 71 of Recommendation CM/Rec(2007)14 and the need for judicial control is stipulated in paragraph 10 of the Recommendation as applicable to all acts and omissions by public authorities

[35] The freedom of members to decide whether they wish to continue to associate clearly entitles them to decide to dissolve an NGO on a voluntary basis. See paragraph 44 of Recommendation CM/Rec(2007)14.

[36].The European Court stated in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan***,** no. 37083/03, 8 October 2009 that the sanction of dissolution 'should be applied only in exceptional circumstances of very serious misconduct' (para. 63). Paragraph 44 of Recommendation CM/Rec(2007)14 also permits enforced dissolution in the case of bankruptcy and prolonged inactivity. The latter would probably apply only when no use was being made of funds that had been obtained for the public benefit, particularly if this had been on a tax-exempt basis, and there was a need to intervene to ensure that the funds were properly applied

[37] In *Tebieti Mühafize Cemiyyeti and Israfilov v.. Azerbaijan***,** no. 37083/03, 8 October 2009 the European Court considered 'that a mere failure to respect certain legal requirements on internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution. Therefore, even if the Court were to assume that there were compelling reasons for the interference, it considers that the immediate and permanent dissolution of the Association constituted a drastic measure disproportionate to the legitimate aim pursued. Greater flexibility in choosing a more proportionate sanction could be achieved by introducing into the domestic law less radical alternative sanctions, such as a fine or withdrawal of tax benefits' (para. 82).

45. The need for an extremely well-founded basis for such a drastic action as dissolution has been repeatedly emphasised by the European Court[38]. In doing so, the Court has made it clear that the protection afforded by Article 11 of the European Convention was not limited to the mere formation of an association but lasted for its entire life and that there was a need for rigorous supervision of all restrictions on freedom of association. The Court initially suggested that this was especially the case where an entire political party is dissolved and - as also occurred in the first case to deal with this issue - its leaders were banned from carrying on any similar activity in the future[39]. However, although almost all the subsequent dissolution cases have been concerned with political parties which, has already been noted are not NGOs for the purpose of Recommendation

---

See also the Views of the Human Rights Committee in *Korneenko et al v. Belarus*, no. 1274/2004, 31 October 2006 (in which it stated that 'In the present case, the court order dissolving "Civil Initiatives" is based on two types of perceived violations of the State party's domestic law: (1) improper use of equipment, received through foreign grants, for the production of propaganda materials and the conduct of propaganda activities; and (2) deficiencies in the association's documentation. These two groups of legal requirements constitute *de facto* restrictions and must be assessed in the light of the consequences which arise for the author and "Civil Initiatives". On the first point, the Committee notes that the author and the State party disagree on whether "Civil Initiatives" indeed used its equipment for the stated purposes. It considers that even if "Civil Initiatives" used such equipment, the State party has not advanced any argument as to why it would be *necessary*, for purposes of article 22, paragraph 2, to prohibit its use 'for the preparation of gatherings, meetings, street processions, demonstrations, pickets, strikes, production and the dissemination of propaganda materials, as well as the organization of seminars and other forms of propaganda activities'. On the second point, the Committee notes that the parties disagree over the interpretation of domestic law and the State party's failure to advance arguments as to which of the three deficiencies in the association's documentation triggers the application of the restrictions spelled out in article 22, paragraph 2, of the Covenant. Even if "Civil Initiatives'" documentation did not fully comply with the requirements of domestic law, the reaction of the State party's authorities in dissolving the association was disproportionate. Taking into account the severe consequences of the dissolution of "Civil Initiatives" for the exercise of the author's right to freedom of association, as well as the unlawfulness of the operation of unregistered associations in Belarus, the Committee concludes that the dissolution of "Civil Initiatives" does not meet the requirements of article 22, paragraph 2 and is disproportionate. The author's rights under article 22, paragraph 1, have thus been violated' (paras. 7.4-7.7)) and *Belyatsky et al v. Belarus*, no. 1296/2004, 24 July 2007 (in which it considered that that 'even if "Viasna"'s perceived violations of electoral laws were to fall in the category of the 'repeated commission of gross breaches of the law', the State party has not advanced a plausible argument as to whether the grounds on which "Viasna" was dissolved were compatible with any of the criteria listed in article 22, paragraph 2, of the Covenant [national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others]. As stated by the Supreme Court, the violations of electoral laws consisted of "Viasna"'s non-compliance with the established procedure of sending its observers to the meetings of the electoral commission and to the polling stations; and offering to pay third persons, not being members of "Viasna", for their services as observers .... Taking into account the severe consequences of the dissolution of "Viasna" for the exercise of the author's and his co-authors' right to freedom of association, as well as the unlawfulness of the operation of unregistered associations in Belarus, the Committee concludes that the dissolution of the association is disproportionate and does not meet the requirements of article 22, paragraph 2" (para.7.5)).

[38] The former European Commission found that the need for it in respect of political parties and trade unions had not been established in *The Greek Case*, 12 *Yb bis* 172 but complaints about the dissolution of political parties and other restrictions on freedom of association were the subject of a friendly settlement in *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82 7 December 1985.

[39] *United Communist Party of Turkey and Others v. Turkey*, [GC], no. 19392/92, 30 January 1998, para. 46.

CM/Rec(2007)14[40], the Court has also applied exactly the same approach of strict scrutiny to a decision to dissolve an organisation to which the Recommendation does apply and in doing so has underlined the important role of civil society[41]. It is thus clear that the fundamental requirements for dissolution are the same for NGOs and political parties; these are that a measure such as dissolution must not only be proportionate to the legitimate aim being pursued – dissolution must remain an exceptional step - but the reasons for it also have to be clearly 'relevant and sufficient'[42].

46. In the first case where the European Court found dissolution to be unjustified it was particularly significant that this occurred even before the applicant had been able to start its activities and that the dissolution was therefore ordered solely on the basis of its constitution and programme. The two grounds for dissolution derived from these by the constitutional court were that, contrary to a provision in the criminal code making it an offence to carry on political activities inspired by communist ideology, the applicant had included the word 'communist' in its name and that it sought to promote separatism and the division of the nation. In the European Court's view a choice of name could not in principle justify such a drastic measure as dissolution, without there also being other relevant and sufficient circumstances. However, these were clearly lacking; the formalistic approach of the constitutional court – which proceeded on the assumption that the use of the name automatically triggered the application of the provision in the code – was undermined by the fact that by the time of the dissolution this offence had been repealed and the constitutional court had itself found that the applicant, notwithstanding its name, was not seeking to establish the domination of one social class over the others, and that, on the contrary, it satisfied the requirements of democracy, including political pluralism, universal suffrage and freedom to take part in politics[43].

47. In these circumstances the choice of name could not support a conclusion that the applicant in this case had opted for a policy that represented a real threat to either society or the State and so this was insufficient to justify its dissolution[44]. Although the second ground invoked by the constitutional court, namely, an inadmissible objective, would undoubtedly be capable of

[40] Paragraph 1.

[41] *Tebieti Mühafize Cemiyyeti and Israfilov v.. Azerbaijan***,** no. 37083/03, 8 October 2009, in which the European Court concluded that breaches of the law invoked to justify its dissolution had not been proved with 'any sound evidence' to have occurred and, if so, whether they constituted 'a compelling reason for the interference in question' (para. 80). As a result the reasons adduced were found not to be 'relevant and sufficient' and there was 'pressing need' for the dissolution.

[42] Paragraph 74 of Recommendation CM/Rec(2007)14 requires 'compelling evidence' that the admissible grounds for involuntary dissolution - bankruptcy, prolonged inactivity or serious misconduct - have been met.

[43] *United Communist Party of Turkey and Others v. Turkey* [GC], no. 19392/92, 30 January 1998, para. 55.

[44] A choice of name is unlikely ever to be a basis for dissolution where this is a matter considered at the time of a recognition or registration process but, in any event, problems with names are generally going to be matters that require only some slight modification and not the termination of the bodies concerned; see *Tür KöySen v Turkey* (dec.), no 45504/04, 13 October 2009.

justifying such a drastic measure as dissolution, it is still necessary to demonstrate that this exists and the European Court's examination of the applicant's constitution and programme – which took into account the difficulties associated with the fight against terrorism in the country – failed to disclose anything that could be regarded as objectionable in what was being proposed. The Court did concede that a programme might conceal objectives and intentions but it added that these could be verified only by comparing that programme with its actions and the positions that it defended and that this was impossible given the peremptory dissolution of the applicant after its formation. Given the latter consideration, such drastic action was understandably seen as a disproportionate measure to protect the constitutional order and thus a violation of Article 11. Indeed dissolution at such a stage is always going to be very difficult to justify since, as in the case of a refusal of recognition or registration because of what an NGO's objectives or activities are thought might entail[45], there will be so little basis to substantiate the need for such action[46].

48. The absence of any concrete action by the body being dissolved was also important in the second case to come before the European Court. However, unlike the first case, this concerned an applicant that had been in operation for some time and was dissolved because of various public statements which the constitutional court considered to constitute evidence that was binding on it even though the person making them had ceased to be its chairman[47]. The European Court found nothing in those statements that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles; it noted on the contrary that he had in fact stressed the need for democratic change, even if strong

[45] [GC], no. 19392/92, 30 January 1998, para. 58.

[46] See to similar effect, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, no. 23885/94, 8 December 1999, where again the party was dissolved after just coming into existence and without any opportunity to engage in any activities; Turkey had affirmed that ÖZDEP bore 'a share of the responsibility for the problems caused by terrorism in Turkey ... [but] The Government nonetheless fail to explain how that could be so as ÖZDEP scarcely had time to take any significant action. It was formed on 19 October 1992, the first application for it to be dissolved was made on 29 January 1993 and it was dissolved, initially at a meeting of its founding members on 30 April 1993 and then by the Constitutional Court on 14 July 1993. Any danger there may have been could have come only from ÖZDEP's programme, but there, too, the Government have not established in any convincing manner how, despite their declared attachment to democracy and peaceful solutions, the passages in issue in ÖZDEP's programme could be regarded as having exacerbated terrorism in Turkey' (para. 46). The concern had been that the party's programme tended to undermine the territorial integrity of the State and the unity of the nation because it was supposedly based on the assumption that there was a separate Kurdish people in Turkey with its own culture and language. In addition it was suggested that by advocating the abolition of the government Religious Affairs Department in its programme (on the ground that religious affairs should be under the control of the religious institutions themselves), ÖZDEP had undermined the principle of secularism. However, the European Court found nothing in the programme that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles; indeed the need to abide by democratic rules had been stressed. Furthermore the reference to a right to self-determination of the 'national or religious minorities' was to be taken as encouraging not separation but the need for reform to be underpinned by the freely given, democratically expressed, consent of the Kurds. The lack of activity was also the reason for finding the dissolution of recently formed NGOs contrary to Article 11 in *Emek Partisi and Şenol v. Turkey*, no. 39434/98, 31 May 2005 and *IPSD and Others v. Turkey*, no. 35832/97, 25 October 2005.

[47] *Socialist Party and Others v. Turkey*, [GC], no. 21237/93, 25 May 1998; there had been an earlier unsuccessful attempt to have the party dissolved.

language had been used in the statements. Furthermore the latter had to be read in their context, so that references to self-determination and secession had to be understood in terms of the need for any federal system that might be adopted in the country being based on the freely given consent of a minority in it[48]. There was thus nothing anti-democratic in the statements and, in the absence of anything that would belie the sincerity of the speaker, action was effectively being taken against the applicant for conduct that was no more than a legitimate exercise of freedom of expression. As a result its dissolution, notwithstanding the legitimate aim of the protecting national security, could only be regarded as disproportionate and thus unnecessary in a democratic society[49].

49. However, the European Court has found a case for dissolution to be substantiated in two cases. In the first[50] its Grand Chamber considered that there was a sufficient basis in the remarks and policy statements of a party's leaders to conclude that its objective was anti-secular and thus anti-democratic, in that the leaders had advocated setting up a plurality of legal systems, the introduction of discrimination between individuals on the

[48] It was also significant that the speaker had been acquitted in criminal proceedings brought against him in respect of the impugned speeches.

[49] Similarly the mere advocacy of a political change, such as the proposed abolition of the Religious Affairs Department, could hardly be objectionable in a democracy. The latter point also weighed heavily in both *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, 9 April 2002 and *Socialist Party of Turkey (STP) and Others v. Turkey*, no. 26482/95, 12 November 2003, in which it was found that the party's policies were not aimed at undermining the democratic regime in Turkey and that its dissolution because of them could not, therefore, be necessary. In *Selim Sadak and Others v. Turkey*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002 the dissolution of a party on such a basis that led to the applicants losing their parliamentary seats was found to entail a violation of Article 3 of Protocol No. 1 but, in view of that, there was held to be no need to determine the Article 11 complaint. The dissolution measure could probably also be regarded as lacking proportionality in that it was based particularly on speeches by the former president of the party while abroad (para 36). The latter conclusion was actually reached in *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no. 25141/94, 10 December 2002, in which the potential impact of inflammatory remarks by a party's president were mitigated by the fact that they were made abroad in a foreign language. Speeches by other leaders invoked to justify dissolution were found not to be anti-democratic. The failure to demonstrate any improper activity where NGOs were dissolved supposedly for reasons permitted in the second paragraph of Article 11 also led to the finding of a violation of Article 11 in *Tourkiki Enosi Xanthis and Others v. Greece*, no. 26698/05, 27 March 2008, *Association of Citizens Radko & Paunkovski v."the former Yugoslav Republic of Macedonia"*, no. 74651/01, 15 January 2009 and *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan***,** no. 37083/03, 8 October 2009. A similar approach to that in these cases seems likely to be taken by the UN Human Rights Committee in view of its ruling in *Park v. Korea*, no. 628/1995, 20 October 1998, which concerned the imposition on the author of a year's suspended imprisonment and one year's suspension of exercising his profession for a conviction for breach of the national security law which was based on his membership and participation in the activities of an American organisation composed of young Koreans with the aim to discuss issues of peace and unification between North and South Korea. The case could not be examined as regards freedom of association because of a reservation but the Committee found a violation of freedom of expression. It noted that 'the State party has invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19' (para. 10.3).

[50] *Refah Partisi (The Welfare Party) and Others v. Turkey*, [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

ground of their religious beliefs and the operation of different religious rules for each religious community, in which Sharia law would be the applicable law for the Muslim majority of the country and/or the ordinary law. Furthermore they had given the impression that it did not exclude the possibility of recourse to force in certain circumstances in order to oppose certain political programmes, or to gain power and retain it. In these circumstances, it considered that a State might reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime[51].

50. It was important in this case that the danger posed by such aims was not something that was merely theoretical or illusory but was achievable since such drastic action as dissolution could only be justified where there is a genuine and immediate threat to public order. Such a threat was considered to exist in that case because the applicant had significant influence - through holding more than a third of the seats in the national assembly and through its increasing success in local elections – and because of the success that other political movements based on religious fundamentalism had had in the past in seizing political power and then setting up the societal model which they advocated. Furthermore the action was not seen as disproportionate in its effect since, apart from the dissolution, only five of the party's leaders temporarily forfeited their parliamentary office and their role as leaders of a political party[52]. Nevertheless the very thorough examination of the various remarks and policy statements demonstrates that dissolution remains an extremely difficult measure to justify and that it is not something that should be lightly undertaken[53].

[51] A statement made at para. 81 of the Chamber judgment of 31 July 2001 which was endorsed by the Grand Chamber in its judgment of 13 February 2003 at para 102.

[52] However, the fact that the 152 remaining MPs continued to sit in parliament and were able to pursue their political careers normally might suggest that the anticipated danger was not really that serious and thus call into question the propriety of the dissolution. In the circumstances it is not surprising that the European Court in the Chamber judgment was closely divided (4-3) in this ruling and the dissenting judges understandably placed some emphasis on the lack of action taken against those making the remarks and statements used to justify the dissolution, as well as on the need to pay more attention to the party's formal programme than to the views of individual leaders. Nonetheless the Grand Chamber ruling was unanimous. *Cf* the finding of a violation of Article 3 of Protocol No. 1 in *Selim Sadak and Others v. Turkey*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002 when dissolution of a party led to thirteen members of parliament losing their seats.

[53] See also *A C R E P v. Portugal* (dec.), no. 23892/94, 16 October 1995 in which the European Commission found nothing objectionable in the dissolution of an association which claimed the power to award medals, honours and titles under what it called 'the revived monarchical laws'. In this finding it was significant that not only was the association claiming prerogatives which are normally the exclusive domain of States but it was also intending to carry out its activity under a previous (monarchical) constitution without regard to the one now in force; it was thus pursuing an aim that could not be considered compatible with Portuguese public policy. In addition see the upholding in *X v Austria*, no. 8652/79, 15 October 1981 of a prohibition of an association that was continuing the illegal activities of another dissolved association that had been founded by the applicant; this was seen as necessary for the prevention of disorder.

51. The legitimacy of an enforced dissolution was also recognised by the European Court in the second case which concerned two political parties[54]. The Court considered that their dissolution corresponded to a 'pressing social need' as, in its view the national courts had arrived at reasonable conclusions after a detailed study of the evidence before them, which had allowed them to conclude that there was a link between them and a terrorist organisation[55]. In view of the situation that had existed in the country for many years with regard to terrorist attacks, it considered that those links could objectively be considered as a threat for democracy. In the Court's opinion, the domestic findings in this regard had to be placed in the context of an international wish to condemn the public defence of terrorism. In consequence, the Court considered that the acts and speeches imputable to the parties, taken together, created a clear image of the social model that was envisaged and advocated by the parties, which was in contradiction with the concept of a 'democratic society'. With regard to the proportionality of the dissolution measure, the fact that the applicants' projects were in contradiction with the concept of a 'democratic society' and entailed a considerable threat to Spanish democracy led the European Court to hold that the sanction imposed on them had been proportional to the legitimate aim pursued, within the meaning of Article 11(2) of the European Convention.

52. Where dissolution does appear to be justified, it is a measure that must be subject to effective judicial supervision in order to remain valid; without this there would be no effective remedy against a possible interference with freedom of association and thus there would be a violation of provisions such as Article 13 of the European Convention[56]. Furthermore

[54] *Herri Batasuna and Batasuna v. Spain* , nos. 25803/04 and 25817/04

[55] ETA.

[56] However, the Court in *Refah Partisi (The Welfare Party)and Others v. Turkey (*dec.), 3 October 2000, *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, 9 April 2002 and *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no. 25141/94, 10 December 2002, did not consider the right to a fair hearing to be applicable to the dissolution decision itself on the basis that no civil right or obligation was being determined and thus Article 6 was not applicable. The issue of the application of Article 6 was not considered necessary to be addressed in *Socialist Party and Others v. Turkey* [GC], no. 21237/93, 25 May 1998 and *Selim Sadak and Others v. Turkey*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002 and it was not raised in *United Communist Party of Turkey and Others v. Turkey* [GC] no. 19392/92, 30 January 1998 and *Freedom and Democracy Party (ÖZDEP) v Turkey*, 8 December 1999. It is not entirely clear whether the conclusion on Article 6 in the first two cases is limited to their specific context of the cases - dissolution of political parties by a constitutional court – but if it is not then there would appear to be a possible inconsistency with the view that a dispute over the grant of legal personality to an association is a matter concerned with its civil rights and obligations; see *Apeh Uldozotteinek Szovetsege, Ivanyi, Roth and Szerdahelyi v. Hungary*, no. 32367/96, 5 October 2000. However, the ruling in *Vatan (People's Democratic Party) v. Russia* (dec.), no. 47978/99, 21 March 2002 suggests the former is more likely as it was held that Article 6 was not applicable to the proceedings in which the activities of a regional branch of the association were suspended for six months as those affected were exclusively political. Although dissolution can have economic consequences for an NGO where its assets are confiscated (see below), this would not be sufficient to turn this process into the determination of civil rights where a political party is involved where this is merely an incident of it; see the admissibility decision in the *Refah Partisi* case. In the more recent cases of *IPSD and Others v. Turkey*, no 35832/97, 25 October 2005 and *Tourkiki Enosi Xanthis and Others v. Greece*, no 26698/05, 27 March 2008 the European Court found that the procedure leading to dissolution did not violate Article 6 without discussing its applicability to such a measure while in

it would be only in the most exceptional case that the effect of a dissolution decision would not be suspended until the outcome of any challenge to its validity; one of the factors in leading to the conclusion that dissolution was disproportionate in those cases where a violation of Article 11 was found was the 'immediate' effect of the measure[57] and its drastic character would undoubtedly be mitigated if the possibility of suspending it existed.

53. In all the cases of dissolution just considered, one of the automatic consequences of it was the transfer of the assets of the entities concerned to the State. This may well be an appropriate approach where anti-constitutional activity is involved but in other cases it could well also be a factor contributing to the possibility of the measure being seen as disproportionate[58]. However, such an automatic transfer has not been considered objectionable where the reason for the dissolution was an object of the NGO concerned which breached the arrangements regulating the control of the legal profession [59] Nonetheless such a transfer would probably not be justifiable where the dissolution is based on other considerations, such as repeated breach of a law not having a constitutional character or the prolonged inactivity of the NGO. In such a case there is no reason why this should lead to a windfall for the State; appropriate respect for the objectives of those giving property to the NGO would be to ensure it was transferred on to a body with similar objectives[60]. In addition to the violation of Article 11 in respect of a membership-based NGO and its members, a failure to do this would probably violate the rights of the

---

*Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan***,** no. 37083/03, 8 October 2009 it did not consider it necessary to examine the Article 6 complaint after having found the failure to substantiate the grounds for dissolution was a violation of Article 11.

[57] See *United Communist Party of Turkey and Others v. Turkey* [GC], no. 19392/92, 30 January 1998, *Socialist Party and Others v. Turkey* [GC], no. 21237/93, 25 May 1998, *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, 8 December 1999, *Selim Sadak and Others v. Turkey*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002 and (only implicitly) *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, 9 April 2002.

[58] As was found in the cases cited in the preceding footnote, although such assets did not figure in the amounts claimed for pecuniary loss in them. Furthermore the fact that it was not alleged that the transfer of assets did not result in pecuniary damage to either the party or its members was a factor in the finding that the dissolution in *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 was not disproportionate. However, in *Kalifatstaat v. Germany* (dec.), no 13828/04, 11 December 2006 the transfer of the assets of an NGO dissolved because of its objective of establishing a world Islamic regime founded on Sharia law was seen as a secondary consequence of a measure not in breach of Article 11 of the European Convention and thus not contrary to Article 1 of Protocol No. 1.

[59] *Bota v. Romania* (dec.), no. 24057/03, 12 October 2004.

[60] Indeed this would be the only approach consistent with the rationale underlying enforced dissolution in these circumstances. Where dissolution is based on the repeated illegal activities of an NGO, the transfer of its assets to the State would also be inappropriate insofar as these involved funds comprised funds obtained for entirely legitimate objectives. Paragraph 56 of Recommendation CM/Rec(2007)14 stipulates that assets should normally go to 'an NGO or legal person that most nearly conforms to its objectives or be applied towards them by the state' but that 'the state can be the successor where either the objectives, or the activities and means used by the NGO to achieve those objectives, have been found to be inadmissible'.

donors to control the use of their property under Article 1 of Protocol No. 1[61].

54. The activities of an NGO's members - such as speeches - may be evidence of the reality of the objectives of an NGO and thus relevant to the imposition of a sanction on it but an NGO should not be penalised for conduct that can only properly be regarded as that of the individual members themselves[62].

55. It should also be noted that the implementation of restrictions within the European Union pursuant to various UN Security Council resolutions that have required the freezing of the funds and other financial resources, as well as the prohibition on travel, by entities and persons suspected of terrorism[63] by means of Common Position 2001/931/CFSP has begun to be successfully challenged by reference to human rights considerations. Thus the listing of some organisations has been annulled by EU courts firstly for the insufficient statement of reasons and the absence of a fair

[61] This issue was not pursued by any donors in any of the cases just considered and, after having determined the Article 11 complaint in them (with the exception of *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v. Turkey*, 9 April 2002, in which it was not raised), the European Court did not consider it necessary to deal with the application of Article 1 of Protocol No. 1 in respect of the parties themselves. There is no guarantee of property rights in the International Covenant.

[62] See, e.g., *Tunceli Kültür ve Dayanışma Derneği v. Turkey*, no 61353/00, 10 October 2006, in which the immediate dissolution of an NGO was considered to be a violation of Article 11 of the European Convention after the chairperson and a member of the NGO's board of management were sentenced to one year's imprisonment for having made or authorised statements of a political nature, the tenor of which was contrary to the NGO's social aim, at a congress even though the NGO concerned had not been a party to the criminal proceedings brought against the directors. Such a measure was considered by the European Court not to meet a pressing social need and thus not be necessary in a democratic society. See also *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no. 25141/94, 10 December 2002, in which the potential impact of inflammatory remarks by a party's president were found to be mitigated by the fact that they were made abroad in a foreign language of party leaders. Speeches by other leaders invoked to justify dissolution were found not to be anti-democratic. Furthermore, while in *Selim Sadak and Others v. Turkey*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002 it was found unnecessary to determine an Article 11 complaint about the dissolution of a party that had led to the applicants losing their parliamentary seats because this was found to entail a violation of Article 3 of Protocol No. 1, the dissolution measure could probably also be regarded as lacking proportionality in that it was based particularly on speeches by the former president of the party while abroad (para 36). See also the conclusion in *Socialist Party and Others v Turkey* [GC], no. 21237/93, 25 May 1998 that the speeches of a former chairman did not provide evidence of the party's inadmissible objectives and thus justify its dissolution.

[63] Resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008). This blacklisting is undertaken by a Sanctions Committee comprised of Security Council members and has been strongly criticised by many bodies - notably the United Nation's Special Rapporteur on the promotion and protection of human rights while countering terrorism (Protection of human rights and fundamental freedoms while countering terrorism, A/61/267, 16 August 2006) and the Parliamentary Assembly of the Council of Europe (*United Nations Security Council and European Union blacklists*, Resolution 1597 (2008)) because this is a political rather than a judicial body, there is no hearing or disclosure of the evidence relied and there is no possibility of any judicial challenge to the imposition of the restrictions despite their indefinite applicability. Similar objections apply to the handling of applications for delisting, although limited and very general information is now being given to those who have been blacklisted (See Security Council Resolutions 1730 (2006) and 1735 (2006)).

hearing and judicial control[64] and secondly for lacking any evidential basis that the entity concerned was a terrorist organisation[65].

Founders

56. Those who are clearly shown to have established an NGO in order to deceive others could undoubtedly be held criminally liable for offences connected with fraud since, as with civil liability, the legal personality of the NGO would be regarded as an inadmissible device and not as a shield for the founders. Furthermore it is unlikely to be regarded as impermissible by the European Court or the Human Rights Committee to make it an offence to attempt to establish an organisation with inadmissible objectives but, as the cases on dissolution make clear, such a motive must be demonstrated and not assumed.

Members

57. Members should not generally be subject to any sanction simply because of their membership of an NGO, as is explicitly stated in paragraph 24 of Recommendation CM/Rec(2007)14. Although the illustrations in the Explanatory Memorandum[66] are concerned with action taken in the context of both public and private employment - such as dismissal[67] or loss of entitlement to benefits[68] - other forms of sanctions (including criminal ones) would be equally inadmissible if there were no circumstances justifying a departure from the general prohibition on their use. Even if admissible in principle, both the nature of a particular sanction and its specific application in an individual case would still need to respect the proportionality requirement.

58. In the context of employment, a justification for imposing sanctions might come from a specific conflict of interest between membership and a particular position[69] or from a more general need to maintain public confidence in the independence and impartiality of public servants such as judges, the police and soldiers.

59. The former rationale could apply to persons working both in the private and the public sectors but the circumstances would have to be particularly

[64] Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v. *Council* ('*OMPI*'), [2006] ECR II-4665 (ECJ) and Case T-229/02, *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) v. Council of the European Union*, 3 April 2008 (CFI).
[65] Case T-256/07, *People's Mojahedin Organisation of Iran v. Council of the European Union*, 23 October 2008.
[66] Paras. 60-63.
[67] *Frederiksen v. Denmark* (dec.), no. 12719/87, 3 May 1988.
[68] See, e.g., *Wilson and Others v. United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, 2 July 2002 (ineligibility of union members for certain pay increases) and *Grande Oriente D'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, 2 August 2001 (ineligibility of members of Masonic lodges for appointment to certain posts)
[69] See, e.g., *Van der Heijden v. The Netherlands* (dec.), no. 11002/84, 8 March 1985.

compelling for an administrative or criminal sanction – as opposed to more contractual ones - to be applied to private employees on account of a conflict of interest between their employment and membership of an NGO. Such circumstances might, however, exist where a private body undertook certain functions on behalf of the state, such as providing security for military installations.

60. Specific authorisation for the use of sanctions in respect of public servants beyond a specific conflict of interest would appear to be given by the last phrase of Article 11 of the European Convention which provides that the guarantee of freedom of association should not 'prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State'[70].

61. However, whereas it will be relatively clear who falls within the first two categories, the reach of the third may be more problematic because of the varying approaches taken by States with regard to the organisation of the public sector. Nevertheless it is a category which the European Court has indicated should be 'interpreted narrowly'[71] and it is unlikely that the fact that someone is paid out of public funds or is formally categorised as a public servant will be decisive. Certainly the Court has left open the question of whether it applies to teachers, notwithstanding the domestic designation of them as public servants[72] and in a different set of proceedings other public servants were only brought within the limitation because the purpose of the institution in which they worked resembled that of the armed forces and the police[73]. Furthermore the Court has not been prepared to regard appointees by a regional authority to membership of various public and private bodies as coming within the scope of the limitation since their link with that authority was seen as even less close that of a teacher with her employer[74]. It is thus possible that the term 'administration of the State' will ultimately come to be regarded as applying only to higher-ranking officials, with restrictions being held appropriate because of the level and nature of their responsibilities[75].

---

[70] There is a limitation in similar terms in Article 8(2) of the International Covenant on Economic, Social and Cultural Rights but those in the Convention Concerning Freedom of Association and the Right to Organise, Article 9 and in the International Covenant on Civil and Political Rights, Article 22(2) apply only to the armed forces and the police.

[71] *Vogt v. Germany* [GC], no. 17851/91, 26 September 1995, para. 67 and *Grande Oriente D'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, 2 August 2001, para. 31

[72] *Vogt v. Germany* [GC], no. 17851/91, 26 September 1995, at para 68. However, see the UN Human Rights Committee's concern that in the Republic of Korea 'restrictions on the right to freedom of association of teachers and other public servants do not meet the requirements of article 22, para 2'; CCPR/C/79/Add.114, 1 November 1999, para. 19.

[73] *Council of Civil Service Unions and Others v. United Kingdom* (dec.), no. 11603/85, 20 January 1987, which concerned persons working at an institution that had the function of ensuring the security of military and official communications and of providing signals intelligence to the government.

[74] *Grande Oriente D'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, 2 August 2001; drawing upon the ruling in *Vogt v. Germany* [GC], no. 17851/91, 26 September 1995.

[75] This functional approach was fundamental to certain restrictions being found proportionate in *Ahmed and Others v. United Kingdom*, no. 22954/93, 2 September 1998 (see below), although the ruling did not discuss whether local authority employees were part of the administration of the State. *Cf* the European Court's use in *Pellegrin v. France* [GC], no. 28541/95, 8 December 1999 of a functional

62. Any limitations on the freedom of association on all those who do fall within the scope of this clause must always have a basis in law and in particular satisfy the standard of foreseeability discussed above. They must also be for one of the purposes identified in the second paragraph of Article 11 and observe the principle of proportionality, even if they may be more extensive than the restrictions that would be considered acceptable in respect of anyone else. Thus, although in the European Court had left open the question of whether 'lawfulness' was the only condition governing restrictions where this clause was applicable[76], no limitation has yet been upheld where a legitimate aim did not also exist and the principle of proportionality was not respected. In any event a restriction is unlikely to be regarded as 'lawful' if it is in some way arbitrary in its character or effect and it is also unlikely that one which has no clear link to the performance of the responsibilities of those affected could ever be considered acceptable. Certainly the dismissal of a language teacher because of her membership and active involvement in the communist party was found to be a disproportionate measure to protect constitutional democracy when the party had itself not been banned and the applicant had not only asserted her belief in the constitutional order but had also never promoted the party ideology in the classroom[77]. On the other hand, in a case in which the limitation clause was not actually invoked, the European Court upheld restrictions which prevented certain local authority employees from being active in an organisational and administrative capacity in political parties or from being office-holders in such parties as justified in order to maintain a longstanding tradition of political neutrality on the part of those advising and guiding elected members of the authority[78]. In so doing the Court attached particular significance to the relatively precise functional definition of those covered by the restrictions[79].

---

criterion to determine whether disputes about a public servant's employment came within the conception of 'civil rights and obligations' for the purpose of attracting the fair hearing guarantee in Article 6. In its view this provision was inapplicable only to disputes involving those 'public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities' (para 66) and the armed forces and the police were specifically instanced as examples of persons falling within this functional definition. This approach was partially departed from in *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007 when the Court brought civil service disputes within the scope of Article 6 except those where it was shown that subject matter of the dispute in issue was related to the exercise of State power or that it had called into question the special bond of trust and loyalty between certain civil servants and the State but it may still be helpful in determining the scope of the limitation in Article 11.The acceptance in paragraph 24 of Recommendation CM/Rec(2007)14 that membership of an NGO may be 'incompatible with a particular position or employment' also reflects a functional approach to this issue but nonetheless it is still likely to cover a wide range of people.

[76] See *Rekvényi v. Hungary,* [GC], no. 25390/94, 20 May 1999.

[77] *Vogt v. Germany*, [GC], no. 17851/91, 26 September 1995.

[78] *Ahmed and Others v. United Kingdom* , no. 22954/93, 2 September 1998.

[79] It sought to catch those who were involved in the provision of advice to a local authority or who represented it in dealings with the media but it also made provision for certain categories of employees identified for this purpose to seek exemption where they were not actually involved in these functions and the fact that they did not preclude either membership of a political party or involvement in all the activities of such a party It was not accepted in *Zdanoka v. Latvia* [GC], no. 58278/00, 16 March 2006

63. The acceptance that the restrictions might be more extensive than the application of the general restrictions in Article 11(2) was implicit in the consideration of whether the 'administration of the State' limitation was applicable after first finding that the impugned restriction was not 'necessary in a democratic society'[80].

64. In one case the European Court accepted that a complete prohibition on members of the police even belonging to a political party, as well as engaging in various forms of political activity, could be justified on account of 'the desire to ensure that 'the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers'[81]. In this regard it saw as particularly significant that Hungary was in transition from a totalitarian regime which had greatly relied on the direct commitment of the police to the ruling party – the aim was that 'the public should no longer regard the police as a supporter of the totalitarian regime but rather as a guardian of democratic institutions'[82] - but, as the case of local authority employees indicated[83], political neutrality is of importance for all democratic societies and it is unlikely that a similar restriction would be regarded as unjustified merely because the recent political history of the society concerned was not similar to that of Hungary. However, in upholding this restriction, the Court emphasised that considerable scope was still left to police officers to engage in political parties so that it could not be regarded as disproportionate in its effect on either freedom of association or expression[84].

---

that parliamentarians were in an analogous position to the public employees covered by the restriction in Article 11 but this did not preclude disqualification based on their activities arising from membership of organisations found to be subversive.

[80] *Grande Oriente D'Italia di Palazzo Giustiniani v. Italy, n*o. 35972/97, 2 August 2001.

[81] *Rekvényi v. Hungary*, [GC], no. 25390/94, 20 May 1999, at para. 41.

[82] *Ibid*, at para. 44.

[83] *Ahmed and Others v. United Kingdom* , no. 22954/93, 2 September 1998.

[84] They could still be 'sometimes subject to restrictions imposed in the interest of the service, expound election programmes, promote and nominate candidates, organise election campaign meetings, vote in and stand for elections to Parliament, local authorities and the office of mayor, participate in referenda, join trade unions, associations and other organisations, participate in peaceful assemblies, make statements to the press, participate in radio or television programmes or publish works on politics' (para 49). See also *Sygounis, Kotsis and Union of Police Officers v. Greece* (dec.), no. 18598/91, 18 May 1994, in which no interference with the right to form and join trade unions was found to have been caused by a circular from the justice ministry to police departments asking them to appeal against any court decision establishing an association by members of the police because this had had no practical effect in dissuading police officers from joining; the association had been lawfully entered in the register of associations, its lawfulness had never been disputed and it had some 33,000 members. It was, however, also significant that an earlier circular prohibiting membership of the union and forbidding the latter from representing the interests of police officers had been suspended. In the light of all the cases just discussed it seems unlikely that the upholding in *Council of Civil Service Unions and Others v. United Kingdom* (dec.), no. 11603/85, 20 January 1987 of the complete prohibition of union membership for persons working at an institution which had the function of ensuring the security of military and official communications and of providing signals intelligence to the government would now be seen as proportionate, notwithstanding the national security dimension. This is especially so since the prime concern was industrial action which could have been addressed by the less drastic measure of a prohibition on strikes. It should also be noted that the Freedom of Association Committee of the Governing Body of the ILO found this ban to be in breach of the ILO Convention (Case No. 1261) and that it has since been revoked

65. However, such incompatibility must be supported by evidence and not be a matter of supposition[85].

66. Furthermore the grounds for any prohibition on membership of an NGO leading to the imposition of a sanction should not be contrary to the prohibition on discrimination in regional and universal human rights treaties[86].

67. It should be noted that in none of the cases discussed above where membership of an NGO was accepted as rightly regarded by national authorities as being incompatible with holding a particular post in the administration of the state was the sanction applied actually more than dismissal. This would suggest that a particularly cogent set of circumstances would be necessary before the imposition of a more severe administrative or criminal sanction for membership of an NGO would be held to be justified by the European Court.

68. However, it would not be impermissible to sanction membership of, or support for, an NGO which has been prohibited or dissolved on grounds and in a manner compatible with the right to freedom of association[87].

---

[85] As in *Grande Oriente D'Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, 2 August 2001. See also *Kiiskinen and Kovalainen v. Finland* (dec.), no. 26323/95, 1 June 1999, in which a suggestion that a judge was not impartial for the purpose of Article 6 of the European Convention was found to be unsubstantiated.

[86] See, e.g., *Grande Oriente D`Italia di Palazzo Giustiniani v. Italy (No. 2)*, no. 26740/02, 31 May 2007, in which the obligation to declare one's membership of a Masonic lodge when seeking nomination for public office was found to be a violation of Article 14 taken in conjunction with Article 11 because the legislative requirement applied only to membership of secret and Masonic associations but not to membership of any other associations. While accepting that .a prohibition on nominating Freemasons to public office, which had been introduced in order to 'reassure' the public at a time when there had been controversy surrounding their role in the life of the country, could pursue the legitimate aims of protecting national security and preventing disorder, the European Court considered that membership of many other non-secret associations might create a problem for national security and the prevention of disorder where members of those associations held public office. In its view this might be the case for political parties or groups advocating racist or xenophobic ideas, or for sects or associations with a military-type internal structure or those that established a rigid and incompressible bond of solidarity between their members or pursued an ideology that ran counter to the rules of democracy, which was a fundamental element of 'European public order'. However, the violation of the Convention arose in the instant case because no objective and reasonable justification for the difference in treatment between secret and Masonic associations and non-secret associations had been advanced by Italy. Revocation of appointments for failure to comply with a more general obligation to disclose membership of secret associations was not considered objectionable in *Siveri and Chiellini v. Italy* (dec.), no. 13148/04, 3 June 2008.

[87] See, e.g., *Mehmet Özcan and Others v. Turkey* (dec.), no. 56006/00, 13 June 2002, *Koçak, Yavaş and Özyurda v. Turkey* (dec.), nos. 23720/02, 23735/02 and 23736/02, 3 July 2003, *Şırın v. Turkey* (dec.), no. 47329/99, 27 April 2004, *Gökdere and Gül v. Turkey* (dec.), no. 49655/99, 27 May 2004, *Eşidir and Others v. Turkey*, no. 54814/00, 11 October 2005 and *Haydar Kaya v. Turkey*, no 48387/99, 8 November 2005. However, the need for safeguards against NGOs and others being caught up in the so-called 'war against terror' has been underlined in the *Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, an initiative of the International Commission of Jurists (*Assessing Damage, Urging Action* (2009)). The Panel recognised the need for governments to impose certain restrictions on freedom of association when there is a fear of violence but considered that the flexibility allowed to them was being abused. It reported that the ambiguity surrounding the meaning of 'support' for a terrorist organisation was having a chilling effect upon the public discourse around conflict resolution. Although the Panel accepted that sometimes public debate, or charitable work, can

69. Moreover there would be no objection to sanctions being imposed on the members of an NGO where this related to their own actions – whether or not these were on behalf of the NGO concerned – and thus were not a mere consequence of their belonging to it[88].

70. Furthermore the imposition of joint criminal liability on the individual members of an NGO without legal personality for a defamatory publication has not been considered incompatible with freedom of association where this liability arose as a consequence of the formulation of the imprint of the publication in question and the fact that the NGO was not a legal person susceptible of incurring a liability of its own[89].

71. As with all sanctions, the requirement of proportionality must always be respected in the case of any that are imposed of the members of an NGO notwithstanding that there are actually grounds for imposing them. Thus the European Court has found that a requirement that the applicant members of parliament automatically had to vacate their seats following the enforced dissolution of their party to be disproportionate and thus a violation of Article 3 of Protocol No. 1, under which states undertake to hold free elections in order to ensure the free expression of the opinion of the people in the choice of the legislature[90]. In reaching this conclusion,

---

be subverted for terrorist propaganda or terrorist purposes, and that some legal provisions to counter such abuses are necessary, it noted that it had been told of a wide range of related offences, including: associating with or providing material support to terrorists; receiving or giving training to a terrorist organisation; and failure to report information relating to a terrorist act. The Panel appreciated that valid arguments could be made for pursuing such offences but reported that it had been provided with examples of their chilling effect and of serious abuse. It also stated that states had to ensure appropriate safeguards against such human rights violations, and must take precautions not to destroy the lives and reputations of individuals who might come to be publicly portrayed as dangerous terrorist associates, despite having no actual involvement in terrorist activities. The Panel saw it as particularly incumbent on states to avoid casting the net of "association" so widely that the media, defence lawyers, human rights groups, and family members (especially children) are wrongly penalised. Furthermore the Panel considered that safeguards were also needed when declaring an organisation to be terrorist, particularly as there was no internationally shared consensus on the definition of 'terrorism'. Thus the Panel reported hearing of instances where organisations could be labelled 'terrorist' by the executive without notice to the organisation concerned, and with little, if any, room for judicial review. It agreed with the recommendation of the UN Special Rapporteur on Human Rights and Terrorism - Report of the Special Rapporteur on Human Rights and Terrorism, UN Doc. A/61/267, 16 August 2006, p. 11- that a minimal safeguard against unjustified penalties being imposed would be the need for a judicial determination of the nature of the organisation concerned before anyone could be punished for membership in, support of, or association with a terrorist organisation.

[88] See *Kaya v. Turkey* (dec.), no. 40885/02, 5 June 2007 (in which the conviction of the applicant for having distributed publications on behalf of an association occurred because this resulted in a breach of the rules governing the financial activities of associations and in particular those concerned with obtaining receipts for donations) and *Steel and Morris v. United Kingdom* (dec.), no. 68416/01, 22 October 2002 (which concerned civil liability, in which no interference with freedom of association was found to have occurred where proceedings for defamation were brought against two members of an NGO in respect of a leaflet whose publication they had been found to have 'caused, procured, authorised, concurred in and approved' and so the proceedings did not entail the suffering of any sanction in respect of their association with the NGO in question).

[89] *Fraktion Sozialistischer Gewerkschafter im ÖGB Vorarlberg and 128 of its individual members (Köpruner, Falschlunger and Others) v. Austria* (dec.), no. 12387/86, 13 April 1989.

[90] *Selim Sadak and Others v. Turkey (no. 2)*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002.

the Court emphasised that this forfeiture occurred regardless of the personal political activities of the applicants rather than being limited to the seat of the member of parliament whose words and deeds had led to the dissolution of the party and that the measure resulted in them being prohibited from engaging in their political activities and unable to fulfil their mandate[91]. Such a forfeiture of parliamentary seats following the dissolution of a political party, together with a ban on the persons concerned becoming founder members, ordinary members, leaders or auditors of any other political party for five years was similarly considered to be disproportionate and thus a violation of Article 3 of Protocol No. 1 in three other cases[92].

72. However, a similar ban to that in the last three cases was not seen as disproportionate in another case[93]. Moreover in two other cases[94] no violation of Article 11 was found by the European Court as a result of the disqualification of the applicants from standing in an election imposed on account of their activities within political parties that had been dissolved because of links to a terrorist organisation that could objectively be regarded as posing a threat to democracy. It was seen as significant in the first case that the disqualification applied only to a small number of the party's leaders and, apart from the gravity of the links involved and the fact that the applicants were not sitting parliamentarians, the two other cases can undoubtedly be distinguished from the ones previously discussed on the basis that the disqualification applied to a single election and did not last for a term of years.

73. Similar considerations to those examined in the preceding two paragraphs would be equally applicable where the consequence of dissolution was a disqualification not from parliament but from membership of the board of an NGO or indeed ordinary membership of one[95].

[91] This conclusion led the Court to find that it was not necessary to examine complaints that the forfeiture also infringed the rights to freedom of association, of expression and thought, conscience and religion, as well as the prohibition of discrimination.

[92] *Ilıcak v. Turkey*, no. 15394/02, *Kavakçi v. Turkey*, no. 71907/01 and *Sılay v. Turkey*, no. 8691/02, 5 April 2007.

[93] *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

[94] *Etxeberría and Others v. Spain*, nos. 35579/03, 35613/03 and 35626/03 and 35634/03, 30 June 2009 and *Herritarren Zerrenda v. Spain*, no. 43518/04, 30 June 2009.

[95] See, e.g., *Kaya and Diri v. Turkey* (dec.), nos. 60813/00 and 61317/00, 11 December 2007, in which the applicants' complaint was found to be manifestly ill-founded as not only was there nothing in the case file to demonstrate with certainty that they were members of the board at the material time but it had not been demonstrated (or even asserted) that, following the dissolution of their NGO, they had attempted to become but were prevented from becoming members or directors of another association, or that they had suffered personal apprehension and distress due to the imposition of any ban on them.

Officials and staff

74. Similar considerations to those governing the imposition of sanctions on members would undoubtedly apply to any imposed on the officials and staff of an NGO.

75. Thus in one case the conviction of a member of the executive board of an NGO for breach of the prohibition on associations forming organisations other than federations and confederations through her involvement with the "Platform of Conscientious Objectors to War", an organisation without any lawful status, was found by the European Court to be in breach of the foreseeability requirement for a restriction on a right or freedom[96]. In the Court's view, the wording of the prohibition was not sufficiently clear to enable the members of the association concerned to have realised that rallying to a movement or 'platform' would lead to criminal sanctions being imposed on them. Indeed the Court found it difficult to see how supporting the movement concerned could be deemed to amount to the formation of an organisation within the meaning of the relevant law and considered that the scope of the provision involved had been extended beyond that which could have been reasonably foreseen in the circumstances of the case. As a consequence the imposition of a fine, notwithstanding the fact that this was subsequently suspended, was a violation of Article 10 of the European Convention. In the same case a conviction for failing to annul the membership in the association of another member of its executive board (as well as that of some other ordinary members) pursuant to a requirement that those who had been convicted of certain offences could not be members of an association was found to be in violation of Article 11 of the European Convention because there was actually no legitimate basis for requiring her membership to be annulled. Although the applicant had been taken into custody during a protest action, she had been released and no criminal proceedings had been brought against her at that time. This fact led the Court to conclude that this applicant had been deprived of proper legal protection against arbitrary interference with her freedom of association, as there was a failure to meet the requirements of lawfulness[97].

76. Similarly a violation of Article 11 of the European Convention was found to have occurred when the director of the branch office of an association was convicted for having participated in an illegal assembly and thus acting in breach of the aims specified in the association's memorandum of association as a result of his taking part in a press conference[98]. The Court noted that the applicant had been convicted in his capacity as director of the association for taking part in a press conference which had de facto been labelled an illegal assembly by the authorities and not for behaving

[96] *Piroğlu and Karakaya v. Turkey*, nos. 36370/02 and 37581/02, 18 March 2008.
[97] In view of this conclusion the Court found that it was not required to determine whether this interference pursued a legitimate aim or whether it was proportionate to the aim pursued.
[98] *Çetinkaya v. Turkey*, no. 75569/01, 27 June 2006.

violently or for chanting slogans in support of a terrorist organisation. This meant that he had been convicted just for being present at the conference without any consideration being given to whether it had been conducted peacefully or not. In the Court's view the legal framework that had served as a basis for the applicant's conviction amounted to a general ban, restricting the exercise of freedom of peaceful assembly within uncertain limits that depended on the national authorities' assessment of the aims and the memorandum of association of the association in question. It considered that such measures undeniably affected both freedom of association and democracy in Turkey and that there had, therefore, been a violation of Article 11 of the European Convention.

B Review of national practice

77. In the preparation of its third thematic study a questionnaire on the issue of sanctions and liability 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 imposition of sanctions and liability specifically on NGOs in relation to their operation and activities. In particular it was concerned with the extent to which the members of an NGO (if any), the members of its management body and its officers can be held personally liable for the NGO's debts and obligations, the existence of penalties for pursuing activities on behalf of an NGO before it obtains legal personality or is registered, the existence of penalties for belonging to an NGO, the penalties (if any) for particular shortcomings in the conduct of an NGO, the possibility of temporarily suspending an NGO's activities, the grounds for involuntary dissolution and the existence of offences that can be committed only by foreign NGOs[99].

[99] The questions asked were as follows:

1. Are there any circumstances in which (a) members (if any), (b) members of any management body, (c) officers and (d) other employees can be held personally liable for the debts and other liabilities and obligations of their NGO? If so, please specify those circumstances and also indicate whether there is any limit to the extent of the liability concerned.
2. Is it an offence (administrative or criminal) to establish, pursue activities on behalf of or otherwise operate an NGO which does not have legal personality or has not been registered by some official body? If so, please specify (a) the maximum penalty that can be imposed and (b) the penalty that is generally imposed.
3. Are there any circumstances in which it is an offence (administrative or criminal) to belong to an NGO whether with or without legal personality or registration? If so, please specify (a) the maximum penalty that can be imposed and (b) the penalty that is generally imposed.
4. Are there any circumstances in which it is a disciplinary offence for a public official to belong to an NGO? If so, please specify (a) the maximum penalty that can be imposed and (b) the penalty that is generally imposed.
5. Can any penalties (administrative, civil or criminal) and disqualifications be imposed on persons belonging to either the highest governing body or a management body of an NGO that has been involuntarily dissolved? If so, please specify (a) the maximum penalty or disqualification that can be imposed and (b) the penalty or disqualification that is generally imposed?
6. Can any penalties (administrative, civil or criminal) be imposed for the following:
    a. failure to report to a public authority or seek approval for changes to the statute, internal rules, address or composition of any management body;
    b. failure to report to a public authority the receipt of a donation, grant or sponsorship;

78. Although the questionnaire was sent to a wide variety of contacts, including members of the Conference on INGOs and persons suggested by individual members of the Expert Council, the response has not been entirely comprehensive. Thus, as of 5 September 2010, there have been responses in respect of 21 countries[100], which compares very unfavourably with the responses in respect of 32 countries for the 2009 questionnaire and 34 countries for the 2008 questionnaire

79. As in previous years, not all the responses were complete[101] and in a number of instances the questions were either misunderstood or elicited an answer in the style of 'I do not know'. Problems of translation may have sometimes led to some shortcomings in responses but there were also some respondents who seemed insufficiently familiar with the general situation in their country regarding the imposition of sanctions and liability on NGOs.

80. In the case of a number of countries there were several respondents. In some instances these either corroborated each other or provided complementary information. However, in a few instances the responses were contradictory and this is noted throughout the analysis, with the predominant or more fully reasoned response being accorded the lead position in the analysis. An attempt has been made to reconcile a few apparent contradictions between responses to different questions or parts thereof.

---

c. failure to have the NGO's accounts audited and approved within a specified deadline;
d. failure to submit a report to a public authority on the activities (past or future) of an NGO;
e. failure to keep a record of members' addresses and/or other details;
f. failure to provide a list of members to a public authority; and
g. failure to seek approval from a public authority for any proposed activities?

If so, is the penalty imposed on the NGO or on any employee or member of its management found to be responsible for the failure? Please specify (a) the maximum penalty that can be imposed and (b) the penalty that is generally imposed.

7. Is there any requirement to give an NGO (a) notice of any alleged failure listed in the preceding question and (b) an opportunity to rectify its affairs before any liability to a penalty arises? If so, please specify the period within which such rectification is authorised.
8. Are there any circumstances in which the operation of an NGO can be temporarily suspended by a public authority? If so, please specify the circumstances and whether or not such a suspension is subject to any form of judicial control.
9. Are there any circumstances (other than bankruptcy) in which an NGO can be involuntarily dissolved? If so, please specify the circumstances and whether or not such a suspension is subject to any form of judicial control.
10. Are there any offences prescribed by law that can only be committed by foreign NGOs or persons working on their behalf? If so, please specify (a) the offences, (b) the maximum penalty that can be imposed and (c) the penalty that is generally imposed.
11. Are there any other areas of concern in your country about the sanctions and liability to which NGOs and their management, officers and employees can be exposed? If so, please specify them.

[100] Armenia, Austria, Belarus, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania, Netherlands, Poland, Russia, Spain, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine.

[101] Some responses were simply "yes" or "no" without elaboration and some respondents indicated not knowing the position regarding certain matters.

81. As with responses to previous questionnaires, it does not seem as if all the answers are entirely accurate. Certainly there are likely to be more grounds for involuntary dissolution than those given by some respondents. There was also a failure in many instances to make clear whether certain sanctions or liabilities were applied exclusively to NGOs or could be imposed on their staff and the members of their various governing bodies. In addition the lack of any response concerning the existence of judicial control in certain countries over some sanctions does not seem consistent with general familiarity with the legal systems of those countries.

82. Nevertheless, despite their limitations, the responses do seem to give a good starting point for a deeper examination of the problems arising from the imposition of sanctions and liability on NGOs in Europe.

Personal liability of board members, officers and staff[102]

83. For six countries there were reported to be no circumstances in which an NGO's members (if any), members of any management body, officers and other employees could be held personally liable for its debts and other liabilities and obligations[103].

84. Furthermore in respect of one country the respondent stated that this was generally the position but that provision for the acceptance of such liability could be voluntarily made in the statute of the NGO concerned[104].

85. However, it was reported in the case of one country that the founders will bear joint liabilities for the obligation related to the foundation of an NGO until it has been legally registered[105], while in the case of another country the respondent stated that there was such liability for the founders or their appointed legal representatives but that it was not joint[106].

86. Furthermore it was reported that in the case of one country the founders must take full responsibility for a particular type of NGO where its property is not enough to pay its debts[107]

87. With regard to four countries the respondents reported that there was protection from liability for members of an NGO for its debts and other liabilities and obligations[108].

[102] Q. 1:Are there any circumstances in which (a) members (if any), (b) members of any management body, (c) officers and (d) other employees can be held personally liable for the debts and other liabilities and obligations of their NGO? If so, please specify those circumstances and also indicate whether there is any limit to the extent of the liability concerned.
[103] Croatia, Czech Republic, Lithuania, Russia, "the former Yugoslav Republic of Macedonia" and Ukraine.
[104] Switzerland.
[105] Armenia.
[106] Austria.
[107] Belarus (for the so-called Institution).
[108] Belarus, Belgium, Hungary (one of two respondents) and Italy.

88. Moreover in the case of one country the board members of an NGO were said to be specifically exempted from any liability arising from an employment contract[109].

89. However, in the case of another country it was reported that the board members of a certain type of NGO would be personally liable where there had been a failure to make certain statutory payments[110].

90. The respondents for two countries reported that members, as well as the members of the management body and officers, could be held liable for the debts and other obligations of certain types of NGO[111].

91. In addition it was reported that in two other countries the president of an NGO was a guarantor for its debts and other obligations[112]. Furthermore as regards one of these countries the respondent stated that the members and employees of foundations were responsible for the debts and other obligations of this specific type of NGO[113].

92. It was also reported that in three countries there was a personal liability towards an association on the part of its members, legal bodies and auditors if either they culpably breached their legal obligations and caused damage to it or they misused its assets[114]. In the case of three other countries such personal liability applied only to board members and officers[115], while in the case of two others it existed for board members, officers and employees[116] but in yet another country this liability only applied to the board members of the NGO concerned[117]. In the case of three of the six countries just listed there was said to be no limit on the extent of this liability[118] and for one of them this liability was reported as extending to third parties[119]. There was also reported in respect of a country not previously listed in this paragraph to be liability for the members, the members of the management body and officers of an NGO who cause damage to third parties through their action[120].

93. In the case of one country the respondent stated that employees would be responsible for their negligent behaviour[121].

---

[109] Belgium
[110] Cyprus (as regards NGOs taking the form of a non-profit company).
[111] Cyprus (as regards associations, clubs and foundations) and Ireland (as regards unincorporated associations).
[112] France and Turkey (associations only).
[113] Turkey.
[114] Austria (only for members), France and Germany.
[115] Finland, Ireland and Spain.
[116] Italy and the Netherlands.
[117] Belgium.
[118] Belgium, Finland (but there was provision for reducing the amount where there were "special reasons") and Spain.
[119] Finland.
[120] Hungary (one respondent; the other one suggested that this existed only for the board members of foundations).
[121] Spain.

94. However, in the case of yet another country it was reported that the only liabilities existing were those of any ordinary citizen[122].

Liability for operating without legal personality or being registered[123]

95. For fifteen countries the respondents stated that there was no offence of establishing, pursuing activities on behalf of or otherwise operating an NGO which does not have legal personality or has not been registered by some official body[124]. In the case of only one of them it was made clear that this was not so where the NGO concerned was illegal, i.e., one calling publicly for 'extremist activity' which is not defined[125].

96. However, it was reported as regards two countries that it was a criminal offence to organise or participate in the activities of an unregistered public association, political party, religious organisation or foundation[126]. The maximum penalty prescribed for this offence in one of these countries[127] was two years' imprisonment but it was reported that in approximately two-thirds of the cases only a fine was imposed. As regards the other country it was reported that such conduct was a criminal offence but that the penalty was not mentioned in the NGO laws and was determined by the courts according to penal and other related laws[128].

97. In the case of another country it was reported that it was an administrative offence to organise or participate in the activities of an unregistered NGO but that no set penalty was stated by the law[129]. In the case of yet another country there was reported to be a penalty of EUR 350-1500 for starting work before being registered, without being able to indicate the level generally imposed[130].

98. It was reported in respect of one country that it was an administrative offence not to notify the relevant public authority about the foundation of an association before starting activities (other than agreeing on the status

[122] Poland.
[123] Q. 2: Is it an offence (administrative or criminal) to establish, pursue activities on behalf of or otherwise operate an NGO which does not have legal personality or has not been registered by some official body? If so, please specify (a) the maximum penalty that can be imposed and (b) the penalty that is generally imposed.
[124] Belgium, Croatia, Cyprus, France (but it was pointed out that the organisers of the activities of such NGOs could be subject to criminal responsibility insofar as those activities amount to offences), Germany, Hungary, Ireland (but registration will be required if it seeks to be a charity once the Charities Act 2009 enters into force), Italy (only one respondent; the other one said there was an offence but that no minimum or maximum penalty was imposed as it depended upon the obligation assumed), Lithuania (but there are sanctions for pursuing actions without a licence where one is required), the Netherlands, Poland, Russia, Spain, Switzerland and Ukraine.
[125] Russia.
[126] Belarus and Turkey.
[127] Belarus.
[128] Turkey.
[129] Czech Republic
[130] "the former Yugoslav Republic of Macedonia".

or calling of the first representatives)[131]. The penalties prescribed for this offence were fines of EUR 218 for the first occasion and EUR 726 in the case of subsequent ones.

99. In the case of one country it was reported that there would be responsibility for those officials of an NGO who carry out 'illegal activities' but that it was not clear to the respondent whether this covered operating without being registered, particularly as there was supposed to be a right for any group, as a union of people, to conduct any public activity without being registered[132]. However, in respect of that country it was also reported that it was not possible for an NGO to conduct financial transactions without being registered.

100. The question was not answered by the respondent for one country[133].

101. As has already been noted, in one country the founders were reported as bearing joint liabilities for the obligation related to the foundation of an NGO until it has been legally registered[134], while in another there was said to be such liability for the founders or their appointed legal representatives but this was not joint[135]. Furthermore as regards a third country it was pointed out that the associates in the case of a non-registered NGO would be personally liable for any damage inflicted on third parties[136].

Sanctions for membership of an NGO generally applicable[137]

102. There were reported to be no circumstances in which it would be an offence (administrative or criminal) to belong to an NGO whether with or without legal personality or registration in the case of fourteen countries[138].

103. In three other countries the answer to the question was stated generally to be 'no' but an exception was made for membership of 'anti-state', 'extremist' or 'proscribed' organisations but neither the criteria nor the penalties imposed were indicated[139]. In the case of one of these countries it was reported that an additional restriction that was soon to enter into force concerned the membership of an NGO where this also constituted its

[131] Austria.
[132] Armenia.
[133] Finland.
[134] Armenia.
[135] Austria.
[136] Spain (only one of the two respondents)
[137] Q. 3: Are there any circumstances in which it is an offence (administrative or criminal) to belong to an NGO whether with or without legal personality or registration? If so, please specify (a) the maximum penalty that can be imposed and (b) the penalty that is generally imposed.
[138] Armenia, Belgium, Croatia, Cyprus, France, Hungary, Italy, Lithuania, the Netherlands, Poland, Spain, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine.
[139] Germany (as regards the first), Ireland (as regards the last) and Russia (as regards the last).

governing body as certain persons would be barred from serving on such a body if the NGO was a charity[140].

104. However, the respondents for two countries stated that it would be a criminal offence to belong to an NGO which had not been registered[141]. In one of them the maximum penalty prescribed was said to be two years' imprisonment but it was reported that in approximately two-thirds of the cases only a fine was imposed[142]. In the case of the other country it was simply reported that the courts decided about the penalty[143].

105. With respect to one country the question was answered by citing the prohibition on associations that are 'militarily organised' and the offence of establishing, organising and participating in the leadership of an association 'organised in a military manner' without specifying whether membership of such an association is specifically an offence[144].

106. In the case of another country this question was treated as being concerned with proceeding with the activities of an association which has been prohibited or dissolved[145]. The prescribed penalty for such conduct was reported as being a fine of EUR 218 or EUR 726 in the case of any repetition of the offence.

107. The question also appeared not to have been fully understood as regards a third country[146].

Disciplinary sanctions for membership of an NGO on the part of public officials[147]

108. The respondents for eleven countries reported that there were no circumstances in which it was a disciplinary offence for a public official to belong to an NGO[148].

---

[140] Ireland; the Charities Act 2009 precludes from being a trustee of a charity any person who has (a) been adjudicated bankrupt, (b) made a composition or arrangement with creditors, (c) been convicted on indictment of an offence, (d) been sentenced to a term of imprisonment by a court of competent jurisdiction, (e) been the subject of an order under s 160 of the Companies Act 1990 or been prohibited, removed or suspended from being a trustee of a scheme under the Pensions Acts 1990 to 2002 or (f) been removed from a position of charity trustee of a charitable organisation by an order of the High Court under s 74 of the 2009 Act. Similar restrictions already apply to being a director of a company and this would thus preclude the membership of such an NGO that was restricted to its directors.

[141] Belarus and Turkey.

[142] Belarus.

[143] Turkey.

[144] Finland.

[145] Austria.

[146] Czech Republic (it was stated that an NGO cannot exist without registration).

[147] Q. 4: Are there any circumstances in which it is a disciplinary offence for a public official to belong to an NGO? If so, please specify (a) the maximum penalty that can be imposed and (b) the penalty that is generally imposed.

[148] Belgium. Croatia, Cyprus, Czech Republic, France (one of two respondents stated the duty on officials to respect the convictions of those with whom they are in contact in the course of their work), Italy, Lithuania, Spain, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine

109. Furthermore the respondent for another country stated that public officials could belong to NGOs but policemen and soldiers must ask or at least inform their supervisors before doing so[149].

110. Moreover as regards another country it was reported that there was no restriction on membership except for judges, prosecutors and members of the army and the security forces[150]. For breach of the prohibition on officials in this category it was stated that an administrative fine of approximately EUR 300 was prescribed.

111. The respondent for yet another country stated that the only restriction concerned membership of NGOs that were in receipt of foreign money[151].

112. In case of one country it was reported that disciplinary liability for membership of NGOs could arise where there this led to a breach of a more general prohibition on certain categories of public official being engaged in entrepreneurial activities, holding office in state or local self-government bodies or in commercial organisations, as well as engaging in any other paid occupation except for scientific, educational and creative work[152].

113. In the case of another country the only restriction was reported to concern membership of 'anti-state' organisations[153].

114. The respondent for one country stated that public officials could not be members of political parties or of campaigning NGOs that "have the characteristics of being political"[154].

115. The respondents for two other countries stated that there were restrictions on certain categories of officials joining political parties and associations but that these were not backed by any type of liability[155].

116. Furthermore as regards one country there was reported to be a prohibition on soldiers or persons in military service in the frontier guard joining or failing to resign from a political party or an association engaged in or clearly supportive of party politics[156].

117. The respondent for one country stated that there would be criminal liability where there was a conflict of interest generally involving a breach of

[149] Poland.
[150] Turkey.
[151] Russia (only one of two respondents but the penalty was not specified).
[152] Armenia (the categories and penalties were not specified).
[153] Germany (the penalties were not specified).
[154] Ireland (the penalties were not specified).
[155] Belarus and Hungary (the categories were not specified). In Hungary one of the two respondents reported that there was also a prohibition on civil servants serving on the boards of NGOs.
[156] Finland (the penalties were not specified).

confidentiality[157]. The penalty that could be imposed was imprisonment for up to one year or a fine of the fourth category.

118. In the case of another country the reply simply cited the exception regarding public officials in the last phrase of Article 11 of the European Convention on Human Rights[158].

Penalties following involuntary dissolution[159]

119. The respondent for one country stated that a penalty could be imposed on persons belonging to either the highest governing body or a management body of an NGO that has been involuntarily dissolved[160]. However, it was not clear if this was in all or only in certain cases. The penalty was stated to be generally imprisonment for one to three years and a fine of up to EUR 300.

120. The respondent for another country also gave an affirmative answer to the question but could not give any details, referring to both dissolution for illicit activities and bankruptcy[161].

121. In the case of a third country it was reported that unspecified penalties could be incurred where illegal activities had been conducted by the directors/management of an NGO[162].

122. The respondent for a fourth country reported that there was provision for a fine of EUR 1,500 where the NGO being dissolved had taken the form of a company[163] but the answer to an earlier questions suggests that certain disqualifications could also ensue[164].

123. In the case of a fifth country it was reported that unspecified penalties would be imposed only if those concerned had committed a crime such as misappropriation or fraud[165].

124. The respondent for a sixth country stated that an unspecified penalty would only be imposed if the governing body was responsible for a crime

[157] The Netherlands.
[158] Austria.
[159] Q. 5: Can any penalties (administrative, civil or criminal) and disqualifications be imposed on persons belonging to either the highest governing body or a management body of an NGO that has been involuntarily dissolved? If so, please specify (a) the maximum penalty or disqualification that can be imposed and (b) the penalty or disqualification that is generally imposed?
[160] Turkey.
[161] Spain (only one of two respondents; *cf* para 117). cross-referencing to be updated
[162] Armenia.
[163] Ireland.
[164] See n 140.
[165] Hungary (only one respondent; the other said just where the person claimed to be the member of the governing body of an NGO that had been dissolved).

committed by the NGO and the NGO was dissolved by a court for having committed that crime[166].

125. In the case of three other countries it was reported that penalties would only be imposed if the NGO concerned was illegal[167].

126. The respondents for ten countries stated that no penalties were imposed on persons belonging to either the highest governing body or a management body in the event of the involuntary dissolution of an NGO[168].

127. In the case of one other country no specific regulations were reported to apply in this situation[169].

128. With regard to yet another country it was reported that no penalties were imposed simply because of an NGO's dissolution but it was indicated that they could result for certain grounds without giving any details[170].

129. The respondents for two countries also reported that there were penalties for continuing the activities of an NGO that had been terminated[171].

130. The question appeared not to have been understood in the case of one country[172].

Specific penalties[173]

131. There was a very varied response to the question concerned with the existence and extent of penalties for various failings on the part of NGOs in complying with requirements governing aspects of their operation and accountability, not least because these requirements did not exist in all countries or did not apply to all forms of NGO established within them.

---

[166] Lithuania.

[167] Poland (unspecified), Russia (unspecified) and Spain (only one of two respondents, 2-4 years imprisonment and a fine).

[168] Belarus, Belgium, Croatia, Czech Republic, France, Germany, Italy, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine.

[169] Austria.

[170] Cyprus.

[171] Austria and Finland {unspecified fines in both cases).

[172] Netherlands (referring to penalties of up to one year's imprisonment imposed on public officials for conflict of interest).

[173] Q. 6: Can any penalties (administrative, civil or criminal) be imposed for the following:(a) failure to report to a public authority or seek approval for changes to the statute, internal rules, address or composition of any management body; (b) failure to report to a public authority the receipt of a donation, grant or sponsorship; (c) failure to have the NGO's accounts audited and approved within a specified deadline; (d) failure to submit a report to a public authority on the activities (past or future) of an NGO; (e) failure to keep a record of members' addresses and/or other details; (f) failure to provide a list of members to a public authority; and (g) failure to seek approval from a public authority for any proposed activities? If so, is the penalty imposed on the NGO or on any employee or member of its management found to be responsible for the failure? Please specify (a) the maximum penalty that can be imposed and (b) the penalty that is generally imposed.

(a) Notification of or seeking approval for certain changes

132. In respect of ten countries it was reported that a failure to notify or seek approval for changes in an NGO's address, statute and management body could lead to penalties being imposed[174], with these including dissolution in two of them[175]. In the case of one country the respondent stated that a penalty would be imposed only for a failure to notify a change to the NGO's statute[176].

133. In the case of one country it was reported that registration of a change of director and of the charter was required as otherwise these changes would not take effect[177] and for other two countries it was reported that without such notification any changes to the statute, internal rules, address or composition of any management body would also not be effective[178].

134. The respondents for four countries stated that there was no penalty for failing to report to a public authority or seek approval for changes to the statute, internal rules, address or composition of any management body[179] but in respect of one of them it was reported that there would be liability to an unspecified fine if the changed data was used in legal business without first having been reported to a public authority[180].

135. There was reported to be no requirement in one country to notify or seek approval for a change of address but it was also stated that this applied only to changes within the borders of the same area[181]. However, the respondent for that country stated that a change in the internal rules of an NGO did not require notification or approval.

136. In respect of one country the respondent stated that there was generally no notification requirement but that a failure to give notification of these

[174]Austria (the penalty is EUR 218 for a first offence and EUR 726 for any subsequent one), Czech Republic (not specified), France (only one respondent, which said that dissolution could ensue; the other respondent said any sanction would be contrary to the constitutional guarantee of freedom of association), Hungary (it could lead to dissolution), Ireland (as regards the names of directors for NGOs that are companies limited by guarantee and for NGOs that are charities once the Charities Act 2009 enters into force; the penalties were not specified), Italy (only NGOs with legal personality according to one respondent but the other one said the penalty would be imposed where committed for the NGO's advantage and could entail loss of legal personality, loss of official status of "Not-for Profit Association of Social Utility, loss of status as association for social promotion, as well as pecuniary sanctions and exclusion from or revocation of grants and public funding), Lithuania (but not for any employee or member of the management body; the penalties were not specified), Poland (admonition, fine (PLN 5,000) or liquidation), Russia (RUB 5000), "the former Yugoslav Republic of Macedonia".(EUR 350-1,500 fine) and Turkey (EUR 300).

[175] France and Hungary (but in the latter this occurred in practice only if the changes did not meet legitimacy).

[176] The Netherlands (the penalty is in the form of "dishonour foul discharge").

[177] Armenia

[178] Belgium (third parties) and Cyprus (as regards the authorities).

[179] Belarus, Croatia, Finland and Ukraine.

[180] Croatia.

[181] Armenia; no information was given as to the requirements governing a move outside that area.

changes could lead to the NGO concerned losing its status of public utility and thus of certain fiscal benefits[182].

137. The respondent for another country did not know whether any penalties could be imposed for a failure to notify the authorities of these changes[183].

(b) Reporting receipt of funds or support

138. In the case of one country it was reported that the failure to report to a public authority the receipt of a donation, grant or sponsorship from abroad could lead to the dissolution of the NGO concerned and the imposition of a fine on its manager[184]. The failure to give notification of such receipts generally was reported in the case of six other countries as also leading to penalties but not dissolution[185].

139. The respondents for thirteen countries reported that there was no specific obligation to report to a public authority the receipt of any donation, grant or sponsorship[186]. However, two of them observed that the details would have to be included in the accounts of the NGOs concerned[187] and a third stated that such receipts would have to be mentioned in their annual reports[188]. Furthermore four of them recalled the existence of the general obligation to report any form of income to the tax authorities and that non-disclosure would attract the general penalties prescribed by law[189].

140. In respect of one other country the respondent stated that there was generally no reporting requirement but that a failure to report the receipt of a donation, grant or sponsorship could lead to the NGO concerned losing its status of public utility and thus of certain fiscal benefits[190].

141. In the case of yet another country it was reported that there were no penalties for failing to report the receipt of a donation, grant or

[182] Spain
[183] Germany
[184] Belarus; the fine is up to 300 basic units which is approximately USD 3,000.
[185] Czech Republic (not specified), Germany (not specified), Ireland (not specified but only in respect of donations over EUR 127 where its use could be considered to have been applied for a political purpose in the context of an election), Italy (only one respondent and not specified; the other respondent stated the penalty would be imposed where committed for the NGO's advantage and could entail loss of legal personality, loss of official status of "Not-for Profit Association of Social Utility, loss of status as association for social promotion, as well as pecuniary sanctions and exclusion from or revocation of grants and public funding), Poland (not specified but only as regards public benefit organisations) and Turkey (EUR 300).
[186] Armenia, Austria, Belgium (but approval by the Ministry of Justice may be the price for receiving certain benefits), Croatia, Cyprus, Finland, France, Hungary, Lithuania, the Netherlands, Russia, Switzerland and "the former Yugoslav Republic of Macedonia".
[187] Belgium and France (only one of the two respondents, as regards associations of public utility).
[188] Russia.
[189] Armenia, France, Hungary and the Netherlands.
[190] Spain

sponsorship but it was not indicated whether there was any reporting obligation in respect of such a receipt[191].

(c) Auditing of accounts

142. In the case of one country it was reported that the failure to have the NGO's accounts audited and approved within a specified deadline could result in its dissolution[192], whilst the respondents for eleven other countries stated that such a failure could result in a lesser penalty being imposed[193].

143. A failure to have an NGO's accounts audited and approved was said by the respondents for six countries not to result in any penalty being imposed[194] and the respondent for a seventh country reported that there was no obligation for NGOs to have their accounts audited[195].

144. In respect of one other country the respondent stated that there was generally no penalty for failing to have accounts audited and approved but this could nonetheless lead to the NGO concerned losing its status of public utility and thus fiscal benefits[196].

145. The position in the case of one country was not clear from the response[197] and the question was not answered by the respondent for one country[198].

(d) Submission of reports

146. In the case of sixteen countries it was reported that there was no penalty for a failure by an NGO to submit a report to a public authority on its activities (past or future)[199].

---

[191] Ukraine.
[192] Belgium
[193] Cyprus (only as regards NGOs registered as non for profit companies; the penalty was not specified), Czech Republic (the penalty was not specified), Finland (a fine or imprisonment for up to two years; this is under generally applicable auditing rules), Germany (the penalty was not specified), Hungary (but only where its income is above a certain (unspecified) level), Ireland (only as regards companies limited by guarantee and the fine is up to EUR 1,270. This obligation will apply to all charities once the Charities Act 2009 enters into force), Italy (only NGOs with legal personality according to one respondent; the other one stated that the penalty would be imposed where committed for the NGO's advantage and could entail loss of legal personality, loss of official status of "Not-for Profit Association of Social Utility, loss of status as association for social promotion, as well as pecuniary sanctions and exclusion from or revocation of grants and public funding), Poland (in the form of an admonition, fine or liquidation, the first two applying also to employees), Russia (only foundations) and Turkey (EUR 300).
[194] Croatia, France, Lithuania, the Netherlands, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine (but it was not clear whether this was a general requirement as the answer was "Partially yes").
[195] Armenia.
[196] Spain.
[197] Austria; there was a reference to s 24 of the Associations Act (Vereinsgestz) without giving any details.
[198] Belarus.

147. However, in the case of two countries it was reported that such a failure could lead to the dissolution of the NGO concerned[200], as well as in one of them the imposition of a disqualification as a director on the board members[201]. Moreover for two other countries it was reported that such a failure could result in a fine being imposed[202].

148. In respect of one country the respondent stated that there was generally no reporting requirement but that a failure to make a report could lead to the NGO concerned losing its status of public utility and thus of certain fiscal benefits[203].

149. The question was not answered by the respondent for another country[204].

(e) Recording members' addresses

150. The respondents for fourteen countries reported that there was no requirement to keep a record of members' addresses and/or other details[205] but in the case of one of them it was also reported that a record of members without such details was required and non-compliance could result in a fine being imposed[206].

151. In the case of one country it was reported that the keeping of such a record was required just for a certain form of NGO and that non-compliance could lead to a penalty being imposed[207].

152. As regards two other countries it was stated that the failure to keep a record of members' addresses and/or other details could be treated as a

---

[199] Armenia, Austria, Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Italy (only one of the two respondents; the other said there was an obligation but gave no details other than to state that the penalty would be imposed where committed for the NGO's advantage and could entail loss of legal personality, loss of official status of "Not-for Profit Association of Social Utility, loss of status as association for social promotion, as well as pecuniary sanctions and exclusion from or revocation of grants and public funding), Lithuania, the Netherlands, Poland, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine.

[200] Hungary (only one of the two respondents; the obligation to submit applies just to public benefit NGOs) and Ireland (only as regards companies limited by guarantee).

[201] Ireland..

[202] Russia (RUB 5000 for the NGO) and Turkey (EUR 300).

[203] Spain.

[204] Belarus.

[205] Armenia, Austria, Croatia, Czech Republic, Finland, France, Germany, Italy (only one of the two respondents; the other one said there was an obligation but gave no details other than to state that the penalty would be imposed where committed for the NGO's advantage and could entail loss of legal personality, loss of official status of "Not-for Profit Association of Social Utility, loss of status as association for social promotion, as well as pecuniary sanctions and exclusion from or revocation of grants and public funding), Lithuania, the Netherlands, Poland, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine.

[206] Croatia.

[207] Ireland (only as regards companies limited by guarantee; the (unspecified) penalty would be imposed on the company secretary).

serious violation of the law justifying dissolution[208]. The respondent for another country stated that such a failure would be subject to an unspecified penalty[209], while that for another said that a fine would be imposed[210] and that for a third country reported that there could be a penalty for not keeping this sort of record but that there also seemed to be a broad discretion as to how any such shortcoming was treated[211].

153. In respect of yet another country the respondent stated that there was generally no record-keeping requirement but that a failure to keep one could lead to the NGO concerned losing its status of public utility and thus of certain fiscal benefits[212].

154. The question was not answered by the respondent for one country[213].

(f) Providing a list of members

155. The respondents for eighteen countries reported that there was no general obligation to provide a list of members to any public authority[214] but one of them also stated that the Ministry of Justice had the right to require and receive any information relating to an NGO's activities if necessary[215], two others noted that the submission of such a list was required when registering NGOs[216] and a fourth stated that disclosure of membership could be required for a certain form of NGO[217] but they did not indicate what, if any, penalties could be imposed for non-compliance.

156. As regards one country it was reported that there could be a penalty for not providing a list of members but that there also seemed to be a broad discretion as to how any such shortcoming was treated[218].

157. The respondent for one other country stated that a failure to provide a list of members could result in a fine being imposed[219].

---

[208] Belgium and Hungary.
[209] Cyprus (only for NGOs registered as non for profit companies).
[210] Turkey (EUR 300).
[211] Russia.
[212] Spain.
[213] Belarus.
[214] Armenia, Austria, Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Hungary (only ELSA), Ireland, Italy (only one of the two respondents; the other said there was an obligation but gave no details other than to state that the penalty would be imposed where committed for the NGO's advantage and could entail loss of legal personality, loss of official status of "Not-for Profit Association of Social Utility, loss of status as association for social promotion, as well as pecuniary sanctions and exclusion from or revocation of grants and public funding), Lithuania, the Netherlands, Poland, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine.
[215] Armenia.
[216] Cyprus and Poland.
[217] Ireland (only as regards companies limited by guarantee; in the event of winding up or receivership).
[218] Russia.
[219] Turkey (EUR 300).

158. In respect of another country the respondent stated that there was generally no requirement to provide a list of members but that a failure to do so could lead to the NGO concerned losing its status of public utility and thus of certain fiscal benefits[220].

159. The question was not answered by the respondent for one country[221].

(g) Approval for activities

160. The respondents for fourteen countries reported that there was no general requirement for an NGO to seek approval from a public authority for any of its proposed activities[222].

161. The respondents for two others stated that there was a penalty for failing to get approval for activities but gave no details[223] and a third indicated that there could be a penalty for not obtaining approval but that there also seemed to be a broad discretion as to how any such shortcoming was treated [224].

162. In respect of one country the respondent stated that there was generally no requirement to seek approval but that a failure to do so could lead to the NGO concerned losing its status of public utility and thus of certain fiscal benefits[225].

163. As regards two countries it was reported that the only requirements to seek permission for activities concerned ones that were of general application[226].

164. As regards two other countries the respondent stated that there was a requirement to obtain approval respectively for assemblies and meetings[227] and for marches, large gatherings and the collection of money[228]. The former respondent indicated that breach of this requirement could lead to a fine and/or imprisonment[229].

---

[220] Spain.
[221] Belarus.
[222] Armenia, Austria, Belgium, Croatia, Czech Republic, Finland, France, Hungary (only one of the two respondents), Italy (only one respondent; the other said there was an obligation but gave no details other than to state that the penalty would be imposed where committed for the NGO's advantage and could entail loss of legal personality, loss of official status of "Not-for Profit Association of Social Utility, loss of status as association for social promotion, as well as pecuniary sanctions and exclusion from or revocation of grants and public funding), Lithuania, the Netherlands, Poland (unless the activities are against the law), Switzerland and Ukraine.
[223] Germany and Turkey (EUR 300).
[224] Russia.
[225] Spain.
[226] Armenia (e.g., for a demonstration or procession) and Cyprus (the sale of lottery tickets).
[227] Belarus.
[228] Ireland.
[229] The fine is up to 50 basic units (approximately USD 400) and the imprisonment can be up to 15 days. These penalties apply to the managers and employees of the NGO and also the participants.

165. The question seemed to have been misunderstood by the respondent for one country[230].

Warnings and opportunities for rectification[231]

166. In the case of ten countries there was reported to be no obligation to give a warning about any of the failings discussed in the preceding set of questions[232] but it was stated that in one of them it was the practice for this to be given where third parties would not be prejudiced[233]. Furthermore in the case of another of them it was reported that a caution could be issued instead of dissolution where the latter was not required in the public interest[234] and it was stated in respect of yet another of them that sanctions would not be imposed where the NGO had fully repaid the damage caused, made available the money earned with the offence and effectively implemented the appropriate organisational, management and control models in order to prevent repetition of the offence concerned[235].

167. In the case of one country it was reported as being possible, as a sanction, to give an NGO a warning or suspend its activities for up to six months - during which it has to correct all infringements - but it was also stated that there was no possibility of correcting a violation where the imposed sanction was a financial one[236].

168. The respondents for two countries stated that the body responsible for supervising the compliance of an NGO's activities with the law should, when any violations have been discovered which can be rectified by proper measures taken by the NGO concerned, issue it with a written warning that suggests the order and terms for fixing those violations[237]. In the case of one of them it was stated that this period was usually 30 days[238].

169. In the case of three other countries it was reported that an opportunity to correct shortcomings would be given[239]. In one of them the period allowed was 7-15 days[240], in the second it was 30 days[241] and in the third the period

[230] "the former Yugoslav Republic of Macedonia".(said to depend on "the Statute and Standing Orders").
[231] Q. 7: Is there any requirement to give an NGO (a) notice of any alleged failure listed in the preceding question and (b) an opportunity to rectify its affairs before any liability to a penalty arises? If so, please specify the period within which such rectification is authorised.
[232] Belgium, Croatia, Cyprus, Finland, France, Ireland (but this approach may be used once the Charities Act 2009 enters into force), Italy, Lithuania, Switzerland and Ukraine.
[233] Belgium.
[234] Finland.
[235] Italy (only one of the two respondents).
[236] Belarus
[237] Armenia, Hungary
[238] Hungary (only one of the two respondents).
[239] Poland, "the former Yugoslav Republic of Macedonia" and Turkey.
[240] Turkey
[241] "the former Yugoslav Republic of Macedonia".

was said to be flexible[242]. Furthermore, as regards the last country it was also reported that if an NGO rectified any failing with respect to notifying changes in its address, statute and management body before any fines became payable then they would not have to be paid.

170. The respondent for one country stated that the Ministry of Justice gave 30 days for corrections to be made in relation to failings that it identified[243] and the respondent for another country indicated that an opportunity would be given to rectify matters in relation to tax issues[244].

171. The respondent for another country thought that an opportunity of rectification did exist but was uncertain as to the details[245].

172. The respondent for one country only made reference to the possibility of extending a deadline where the presented statute showed that the foundation of an association might be against the law[246].

173. The respondent for another country did not think it was possible to issue warnings or to give an opportunity to correct failings[247] and the respondent for a third did not know what was the position[248].

Temporary suspension of an NGO's activities[249]

174. In the case of one country it was reported that there was a possibility for a court to suspend an organisation's activities for six months so that it could correct the violations which had led to a warning being issued[250].

175. Similarly in the case of another country the respondent stated that an NGO may be suspended and given time to rectify its affairs but that it would be dissolved if it did not do so[251]. In such instances a custodian could be assigned to help with the rectification measures and the suspension was also subject to appeal.

176. A temporary suspension was also reported as being possible in a third country with respect to those activities of an NGO regarding which it had has been found guilty of certain offences. Again this measure would be

[242] Poland.
[243] Russia.
[244] The Netherlands.
[245] Spain (only one of the two respondents).
[246] Austria.
[247] Germany.
[248] Czech Republic.
[249] Q. 8: Are there any circumstances in which the operation of an NGO can be temporarily suspended by a public authority? If so, please specify the circumstances and whether or not such a suspension is subject to any form of judicial control.
[250] Belarus.
[251] Poland.

imposed with the aim of preventing their recurrence[252]. The suspension can be for a minimum of one year.

177. With regard to a fourth country such a suspension was possible where the NGO concerned was responsible for committing a crime and this was part of the penalty imposed by the court[253].

178. The respondent for a fifth country stated that the operation of an NGO could be temporarily suspended where fraud had been reported to the authorities by one of its members[254].

179. In the case of a sixth country the provisional prohibition of an association's activities by a court was reported as being possible where legal proceedings had been taken in order to have it terminated[255]. In that country such a provisional measure was reported as also being possible at the request of the Ministry of the Interior or the Public Prosecutor before such proceedings have been initiated if there was a likelihood of it essentially acting in violation of the law or good practice or illegally continuing the activities of a terminated association. However, in that case the measure would lapse if proceedings to terminate the association had not been brought within fourteen days and it should not be in force any longer than the point at which the case was taken up at a court session. In the case of all provisional prohibitions of activities, the maintenance in force of any order was reported as having to be reconsidered each time the court handled the case but it could not be subject to a separate appeal. Where a temporary prohibition had been issued it was also reported that a new association could not then be founded to continue the activities of the association concerned.

180. In the case of two other countries the respondents stated that a temporary suspension of an NGO's activities was possible during court proceedings to dissolve it[256].

181. The respondent for a ninth country reported the prosecutor could temporarily suspend an NGO's operation and/or detail a legal supervisor to oversee its further actions where the actions of the NGO concerned did not meet legitimacy[257].

[252] Italy (only one of two respondents). The offences covered are: fraud against the state or a public authority, perception of undue payments, computer fraud against the state or a public authority, unlawful data processing, crimes against industry and trade, corporate crimes, participation in organised crime activities, extortion and bribery, money and credit cards or distinctive marks counterfeiting, terrorism or attempted subversion of democracy.
[253] Lithuania.
[254] Cyprus.
[255] Finland.
[256] Russia and Spain.
[257] Hungary (only one of the two respondents; the other one said it was not possible).

182. It was reported in the case of a tenth country that the temporary suspension of an NGO's activities was possible where the NGO concerned was suspected of being involved in criminal activities[258].

183. As regards an eleventh country the respondent stated that the operations of NGOs could be temporarily suspended for clearly unlawful acts or activities against the Constitution[259].

184. In the case of a twelfth country it was reported that a temporary suspension was possible for a breach of the governance provisions in the statute of the NGO concerned[260].

185. The respondent for a thirteenth country indicated that a temporary suspension could be imposed in order to stop an NGO from acting as a charity as a result of its non-compliance with the legislation governing charities[261]. Such a suspension is subject to a right of appeal to a court.

186. As regards a fourteenth country it was reported that a temporary suspension of activities was possible where an NGO used its property and assets contrary to the Law for NGOs and Foundations[262]. Such a prohibition could be for one to three years and could be imposed in addition to a fine or imprisonment imposed on a natural person for the relevant offence where the manner of the commission of the crime in question generated the danger of the repeated commission of the same or similar crime.

187. A temporary suspension of an NGO's activities was reported not to be possible in the case of seven countries[263].

188. The respondent for one country did not know whether or not a temporary suspension of an NGO's activities was possible[264].

Grounds for involuntary dissolution[265]

189. The involuntary dissolution of an NGO - other than for bankruptcy - was reported as being possible for the following reasons; for breaches of the law in its formation in one country[266]; failure to notify changes to the statute and other aspects of the NGO's governance in the case of another

[258] The Netherlands.
[259] Turkey.
[260] France (only one of the two respondents; the other one said it was not possible).
[261] Ireland (when the Charities Act 2009 enters into force).
[262] "the former Yugoslav Republic of Macedonia".
[263] Armenia, Austria, Belgium, Croatia, Germany, Switzerland and Ukraine.
[264] Czech Republic.
[265] Q. 9: Are there any circumstances (other than bankruptcy) in which an NGO can be involuntarily dissolved? If so, please specify the circumstances and whether or not such a suspension is subject to any form of judicial control.
[266] Armenia.

country[267]; inactivity in the case of three countries[268]; a fall in membership below a prescribed level in the case of two countries[269]; activities in contravention of its statutory purposes in the case of five countries[270]; activities aimed at the forced overthrow of the constitutional order in the case of three countries[271]; incitement of ethnic, racial and religious hatred in the case of one country[272]; propaganda of violence and war in the same country[273]; activities forbidden by the constitution and the law in the case of five countries[274]; breach of the penal laws in the case of six countries[275]; serious violations of the law in the case of five countries[276]; ceasing to comply with the conditions of its 'legal consistence' in the case of one country[277]; where needed to protect the freedom and safety of others in the case of another country[278]; where needed to protect health and public morals in the case of the same country[279]; training in the use of firearms where its sole purpose is not hunting in the case of another country[280]; the sale and or use of alcohol on its premises in the case of another country[281]; the appointment of a chairman who is a non-resident or, where its primary purpose is to exert influence over State affairs, of non-residents as members of its executive committee in the case of yet another country[282]; the failure to submit a report in the case of one country[283]; and unspecified causes stated in the law in the case of another country[284].

190. In the case of one country it was clear that the grounds for involuntary dissolution given did not deal with all forms of NGO[285] and as regards

[267] France (only one of the two respondents)
[268] Hungary (no means of action for one year and/or membership permanently below five persons ; only one of the two respondents), Lithuania (not defined) and "the former Yugoslav Republic of Macedonia".(not defined).
[269] Hungary and "the former Yugoslav Republic of Macedonia" below five members in both instances).
[270] Armenia, Austria, Croatia, Cyprus (associations, foundations) and Finland (must be a substantial breach).
[271] Armenia, Croatia and Italy (only one of the two respondents).
[272] Armenia.
[273] Armenia.
[274] Croatia, Cyprus (associations and foundations), Hungary, Poland (where nonresponsive to warnings and admonitions), Russia (if more than twice in one year) and "the former Yugoslav Republic of Macedonia".
[275] Austria, Cyprus (clubs where in breach of article 63 (no details given)), Italy (only one of the two respondents), Lithuania (only if closure of the NGO was part of the penalty prescribed by the convicting court), the Netherlands and Spain (only one of the two respondents).
[276] Armenia (also numerous), Belarus (but the formulation of the legislation is such that practically any minor violation can be treated as a serious one), Belgium, Finland and, Italy (only one of the two respondents).
[277] Austria.
[278] Croatia.
[279] Croatia.
[280] Finland.
[281] Cyprus (clubs).
[282] Finland.
[283] Ireland (only as regards companies limited by guarantee and in relation to the annual return required for all companies).
[284] Spain (only one of the two respondents).
[285] Cyprus (nothing on non for profit companies).

three other countries the respondents reported that bankruptcy was the only ground for involuntary dissolution[286].

191. In one country involuntary dissolution for the grounds previously listed was reported as only being possible where other means of eliminating the violations of the law had produced no results or had proved to be exhausted[287] and in the case of another country it was reported as only being possible where such a measure was required in the public interest[288].

192. A decision to dissolve an NGO involuntarily was said by the respondents for nine countries to be one that could only be taken by a court[289] whereas the respondent for another country indicated that just one ground for involuntary dissolution specifically required a court ruling[290].

193. In the case of one country it was reported that there was the possibility of an appeal against the rulings of administrative authorities concerning involuntary dissolution[291].

194. The respondents for three countries did not address the issue of judicial control over involuntary dissolution[292].

195. The respondent for one country admitted to not knowing any aspect of the position regarding involuntary dissolution[293] but the respondents for two other countries did not answer the question[294].

Offences that can be committed just by foreign NGOs[295]

196. In the case of eighteen countries no offences were reported as being restricted to commission by foreign NGOs[296].

197. As regards one country the respondent stated that foreign NGOs were subject to being excluded from working in the country if they implemented

[286] Germany, Switzerland and Ukraine; this is surprising at last for the last country given the information in the country study in the following section.
[287] Armenia.
[288] Finland.
[289] Armenia, Belarus, Croatia, Finland, Ireland, Hungary, Italy, Lithuania and Poland.
[290] "the former Yugoslav Republic of Macedonia".(finding by the constitutional court that the NGO's statute and mission statement were contrary to the constitution).
[291] Austria.
[292] France, Germany and the Netherlands.
[293] Czech Republic.
[294] Belgium and Turkey (the latter referred only to temporary suspension "for clear unlawful acts or for activities against the Constitution").
[295] Q. 10: Are there any offences prescribed by law that can only be committed by foreign NGOs or persons working on their behalf? If so, please specify (a) the offences, (b) the maximum penalty that can be imposed and (c) the penalty that is generally imposed.
[296] Armenia, Austria, Belgium, Croatia, Cyprus, Czech Republic, France (only one respondent; the other one did not know), Germany, Hungary, Italy, Lithuania, the Netherlands, Poland, Spain, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine.

a programme in breach of a prohibition by the Ministry of Justice or financed any special NGO or person[297].

198. The respondent for another country reported that it was an offence for a foreign national or stateless person to provide grant assistance for activities prohibited by its laws and that this offence was punishable by deportation[298]. In respect of the same country it was reported that the activities of foreign NGOs which have not opened a representative office were banned but there were no sanctions for that.

199. In the case of a third country it was reported that, if the primary purpose of the association was to exercise influence over State affairs, the members could only be citizens, resident foreigners and associations whose members or whose direct or indirect member association members were citizens or resident foreigners[299].

200. The respondent for a fourth country reported that there was a prohibition on receiving donations for a 'political purpose' from non-citizens or entities not registered in the country but that the penalties applied to those receiving rather than those giving them[300].

Other areas of concern[301]

201. No other areas of concern about the sanctions and liability to which NGOs and their management, officers and employees could be exposed were reported in respect of sixteen countries[302].

202. The respondent for one country stated that its law was in the process of being amended which could lead to significant changes but no details were given[303]

203. In the case of a second country it was indicated that, as there had been no bans on NGOs, court practice was unknown and it was thus not possible to estimate the existence of any concerns[304].

204. In the case of a third country there was reported to be concern about the fact that NGOs could be involuntarily dissolved for committing two or more breaches of the law in one year[305].

---

[297] Russia (the meaning of "special" was not given).
[298] Belarus.
[299] Finland.
[300] Ireland.
[301] Q. 11:Are there any other areas of concern in your country about the sanctions and liability to which NGOs and their management, officers and employees can be exposed? If so, please specify them.
[302] Armenia, Cyprus, Czech Republic, Finland, France, Germany, Hungary, Italy, Lithuania, the Netherlands, Poland, Spain, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine.
[303] Armenia.
[304] Croatia.
[305] Russia.

205. The respondent for a fourth country identified two areas of particular concern, namely, the existence of criminal responsibility for the activities of unregistered organisations and the possibility of groundless dissolution of NGOs based on a court decision. Also of concern was the responsibility (including criminal liability) that could arise for managers in respect of the tax sanctions issued against NGOs[306].

206. In the case of a fifth country it was reported that there was concern about a 'political purpose' being capable of embracing advocacy and campaigning work on account of the restrictions on the amount or source of donations for such a purpose which could result in a fine ranging from EUR 1269.74 to 25,394.80 and imprisonment for up to 3 years for those accepting such donations[307].

207. The respondents for two countries did not answer the question[308].

[306] Belarus.
[307] Ireland; donations from non-citizens and entities not registered in Ireland are entirely prohibited and no more than EUR 6,348.69 can be accepted from any permitted donor in a single year.
[308] Austria and Belgium.

III. COUNTRY STUDIES

Belgium

Introduction

208. In Belgium, the specific regulation of NGOs is laid down in the Law of 27 June 1921 on not-for-profit associations, on international not-for-profit associations and on foundations ('LNPAF') last modified in 2009.

209. In its first part, the law covers not-for-profit associations established both in Belgium and abroad. A not-for-profit association ('NPA') is one that is not engaged in industrial or commercial activities and that does not seek material gain for its members[309]. When the association is legally established abroad but operates one or more offices in Belgium[310], it is considered a foreign NPA[311]. The second part of the law focuses on foundations – both recognised in public benefit and private[312]. The third part relates to international not-for-profit associations ('INPA'), legally established in Belgium by nationals or/and foreigners, that pursue not-for-profit objectives in public benefit within an international context. They must also be in line with the above mentioned definition of NPA. INPAs can only exist with legal personality granted by Royal Decree conditional upon their objectives or activities not being in breach of the law or the public order[313].

210. The organisations regulated by LNPAF follow different incorporation procedures depending on their form but need all to be enrolled with the clerk's office of the commercial court assigned with a role of registration body ('the Register') in their location. A file, containing a number of documents required by law is kept for each organisation in the Register.

211. The sanctions and liability engaged in the context of the operations of NGOs may arise at natural and/or legal person level and be based on civil (contractual and tort liability) or criminal law. Legal persons bear criminal liability in Belgium since 1999.

[309] Article 1, LNPAF.
[310] Article 26octies (1), LNPAF.
[311] The 'foreign NPA' category is embedded in the law as a result of the recognition provided on the basis of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations of 1986 ratified by Belgium in 1990 (in force since 1991).
[312] According to Article 27, LNPAF, foundations have also a not-for-profit purpose and do not seek material gain. Foundations may be recognised with public benefit status when they pursue objectives of a philanthropic, philosophic, religious, scientific, artistic, educational or cultural character. The foundations that do not enjoy such status are private.
[313] Article 46, LNPAF.

Personal liability of members, board members, officers and staff

212. In Belgian law, different personal liability frameworks exist for the various actors involved in the operations of an NGO, i.e., the founders, the members if any, the board members, the managing executive, the person(s) with a general representative power, the person(s) with specific mandate, the employees and the volunteers.

213. In criminal liability matters, the legal responsibility of the NGO may coexist, as an exception, with the one of the individual who has committed a particular crime or offence[314].

214. In civil liability matters, a few distinctions need to be made.

215. In principle, founders and members are not held legally responsible in person for the liabilities and obligations of their NGO[315]. However, they may be held personally liable in case of tort and they bear joint and several liability in case of non-acquisition of legal personality and when contractual obligations taken by them in the process of establishment are not confirmed afterwards in the name of the legal person, as well as when obligations are contracted on behalf of the NGO without identifying oneself clearly in the manner prescribed by the law as acting in its name.

216. Belgian law operates three separate concepts - board members, managing executive and person(s) with a general representative power - that are all considered bodies of the organisation. The individuals in these roles share similar personal liability mechanisms[316], they are all supposed to execute their mandate in a competent manner according to the general care and diligence standard. When acting as bodies, they engage directly the liability of the organisation[317]. They are all liable contractually (*actio mandati*) to the NGO in the limits of and for the faults, personal or collective[318], committed in their mandate. In the framework of this contractual relationship, the liability of the person with unpaid mandate is enforced less severely[319].

217. No personal liability is contracted by the NGO bodies towards third parties but such liability may arise when a fault that represents equally a tort is committed, or when the individual did not identify himself clearly in the manner prescribed by the law as acting on behalf of the organisation. As

[314] According to Article 5 of the Criminal Code, the legal person can be sentenced for infractions intrinsically linked to the realisation of its statutory objectives, to the defence of its interests or committed on its behalf. In such cases, when the incriminated act is committed intentionally by an individual, both the natural and the legal person may be sentenced by the court. When the infraction of the naturall person is based on negligence, the court will consider who, the individual or the legal person, has committed the greater infringement and only this one will be convicted.

[315] Article 2bis, LNPAF.

[316] Moreover, in establishing the personal criminal or tort liability, the law assimilates the individuals acting *de facto* in such roles to the ones that are formally assigned with the concerned position.

[317] Articles 14bis, 15, 36 and 49, LNPAF.

[318] In the case of collective fault, the liability is joint and several.

[319] Article 1992 (2) of the Civil Code.

an exception, when the NGO fails to do it, the creditors may introduce *actio mandati* against the person who committed the fault, thus substituting themselves to the general assembly and acting in its name[320]. Third parties and in some circumstances the NGO itself, may engage the non-contractual liability of individuals composing the bodies to the extent that fault, damage and causation can be proved[321].

218. Special laws[322] lay down that in large NGOs[323] subject to increased requirements for their financial accounting, the individuals involved in the governance or management bodies bear joint and several liability for unpaid VAT and payroll tax[324] when they have committed a fault[325] that constitute tort in the sense of article 1382 of the Civil Code. Similarly, the joint and several liability of the individuals composing the bodies of large NGOs may be at stake for unpaid social security contributions[326]

219. Board members also have joint and several liability during the process of transformation of the NGO into a social enterprise[327]

220. Certain factors may lead to limitation of the personal liability. One of them is the behaviour of the concerned individual[328]. The NGO may also subscribe a civil liability insurance in order to obtain a degree of financial protection for its board members. The contractual liability of board members has a limitation period of 10 years and the non-contractual liability has one of 5 years since the moment from when the victim is aware of the damage and the perpetrator or of 20 years starting from the harmful event[329].

---

[320] Article 1166 of the Civil Code.

[321] The classic tort liability is regulated by Article 1382 *et seq.* of the Civil Code.

[322] Article 442quater of the Revenues Taxation Code and article 93undecies C of the Value Added Tax Code

[323] According to Articles 17, 37 and 53 of LNPAF, NGOs are large when they employ an annual average of over 100 employees in full time equivalents or when they combine at least two of the following three criteria – an annual average of more than 50 employees in full time equivalents; over EUR 6.250.000 of total income, VAT not included; over EUR 3.125.000 of total annual balance sheet.

[324] This is a tax on wages and salaries deducted at source.

[325] There is a rebuttable presumption of fault in the case of repeated failure to pay the due VAT or payroll tax.

[326] According to Article 40ter of the Law of 27 June 1969 modifying the Decree-law of 28 December 1944 on the Workers' Social Security**,** in the case of repeated non-remittance of the contributions over a one year-period, the social security institution may require certain data regarding the debtors of the NGO. When this data is not correctly provided by the NGO-employer, the person/s in charge for the daily management may be subject to legal action in personal joint and several liability for the unpaid contributions, the increases and the interests, as well as for a fixed indemnification of EUR 500. This liability may be extended to other individuals involved in the governance or management bodies when they have committed a fault contributing to the lack of payment.

[327] Article 26septies, LNPAF.

[328] For instance, when the individual disagreement with a decision likely to cause damage is formalised in the minutes; when the general assembly is alerted by the person of the severe faults of the bodies or the individuals composing them; when an explicit discharge of the board members is granted by the general assembly, provided it has received sufficient and correct information; when the individual resigns from the position, provided this is not causing damage to the NGO, there is a limitation effect for the future; when the person introduces a criminal complaint or legal action seeking dissolution.

[329] Article 2262bis (1) of the Civil Code.

221. The personal liability of the person(s) with a specific mandate cannot be engaged if they act within its limits. Where the mandate is overstepped, their tort liability may be engaged by a third party and their contractual liability by the NGO.

222. Employees and volunteers are exonerated from personal civil liability while carrying out their activities except in the cases of deceitful act, of severe fault or of not severe but recurring fault[330]. The liability of an employee who is acting as a NGO body is equally limited. This immunity is not applicable to unpaid board members except when they take part in activities as ordinary volunteers and not in their board member's role.

Liability for operating without legal personality or being registered

223. The Belgian law recognises *de facto* associations existing without legal personality and does not impose any sanctions for their informal functioning[331].

Sanctions for membership of an NGO, general or related to public officials

224. Under Belgian law there are no circumstances in which it would be an offence merely to belong to an NGO either with or without legal personality. However, public officials are not allowed to cumulate any activity or mandate within an NGO with their public agent function if there is a potential conflict of interest between both occupations or if this is harmful for the preservation of the dignity of their function or for the accomplishment of their duties[332]. A breach of these rules may be subject to disciplinary sanctions[333], such as call to order, reprimand, payroll withholding, disciplinary transfer or suspension, incremental scale

[330] Article 18 of the Law on Employment Contracts and Article 5 of the Law on the Rights of the Volunteers.

[331] However, the lack of legal personality has a number of implications: in principle legal action is accessible only to legal persons; the *de facto* association cannot acquire rights, including property, and obligations, and cannot enter into contractual relations; the members have unlimited liability involving their personal property, this liability being not joint and several but limited to their share in any debts resulting from the pursuing of the association's objectives.

[332] The legal and regulatory framework governing public officials in Belgium is manifestly complex. It is not centralised and unified but stemming from multiple levels of the administrative structure of the State and covering separately different categories of public officials. This results in a great number of legal and regulatory texts.See for example Article 7 *et seq*. of the Royal Decree of 2 October 1937 on the Status of the Public Agents, Article 18 of the Royal Decree of 13 December 2006 on the Status of the Agents of the External Services of the State Intelligence and Security Institution, Article 3 of the Law of 13 May 1999 on the Disciplinary Status of Police Personnel.

[333] See for example Article 77 *et seq*. of the Royal Decree of 2 October 1937 on the Status of the Public Agents, Article 199 *et seq.* of the Royal Decree of 13 December 2006 on the Status of the Agents of the External Services of the State Intelligence and Security Institution and Article 4 *et seq.* of the Law of 13 May 1999 on the Disciplinary Status of Police Personnel.

decrease, downgrading, compulsory resignation, removal from post with loss of retirement benefits[334].

Penalties following involuntary dissolution

225. Penalties and disqualifications may be imposed on persons belonging to the governing or management bodies of an NGO that has been involuntarily dissolved, although such penalties are not the consequence of some special dissolution-related liability established by the legislation but result from the parallel personal civil or criminal liability of the concerned individual for the events that have led to the dissolution. Examples of the most severe sanctions that may arise in such circumstances may be found in the Criminal Code. For instance, it establishes a few specific crimes by which the persons involved in the operations of NGOs are particularly concerned: Article 491 incriminates the breach of trust and Article 492bis the fraudulent misuse of the NGO assets[335], while Article 504bis incriminates private corruption (active and passive bribery)[336].

Specific penalties

(a) Notification of or seeking approval for certain changes

226. The main sanction for lack of due notification of changes to the statute, internal rules, address or composition of any governing or management body is the unenforceability towards third parties. Some modifications in the case of public benefit foundations and of INPAs need approval by the King in order to become effective. The non-conformity with the notification rules may result in any legal action initiated by the NGO being suspended until submission of the missing information within a delay defined by the judge[337]. The omission to comply with this delay leads to inadmissibility of the legal action. When applying for an authorisation, necessary for the receipt of donations exceeding EUR 100.000, the

[334] The incompatibility of this last sanction with Article 1 of Protocol No. 1 to the European Convention is already addressed by the European Court in its Chamber Judgment in *Azinas v. Cyprus*, no. 56679/00, 20 June 2002..

[335] The possible sanctions are imprisonment of 1 month to 5 years and/or a fine of up to EUR 500.000. In addition, a number of disqualifications may be imposed (Article 31, Criminal Code), such as the interdiction to occupy public function, office or employment; to be elected; to bear any decoration or nobility titles; to become juror, expert, witness in view of certifying facts; to testify in court otherwise than by simply providing information; to sit in a family council, to exercise the function of guardian or committee; to be assigned by the justice system with missions aiming at safeguarding legal interests; to be authorised to deal with weapons or to serve in the armed forces. The right to vote may also be subject to disqualification.

[336] According to Article 504ter of the Criminal Code, the sanctions are imprisonment of 6 months to 2 years and/or a fine of EUR 100 to 10.000. When the active and passive deeds are combined, the sanctions are imprisonment of 6 months to 3 years and/or a fine of EUR 100 to 50.000.

[337] Articles 26, 38 and 52, LNPAF.

organisation may also be sanctioned by authorisation refusal for its failure to submit certain information[338] as required.

(b) Reporting receipt of funds or support

227. There is no general obligation to report to a public authority the receipt or expenditure of any donation, grant or sponsorship. However, the annual accounts must be communicated and published in the manner prescribed by the law and such information is part of them. In some particular circumstances, NGOs are required to report on donations for the purpose of receiving authorisation. This concerns the donations by gift or bequest exceeding EUR 100.000 that are not transferred hand-to-hand. They need to be approved by the Ministry of Justice[339] which has a large margin of appreciation in the matter. The authorisation will not be granted if the recipient does not have legal personality, is not enrolled in the Register, has not respected its obligations for publicity or has not submitted duly its annual accounts at least for the last three years.

228. In addition to the sanction precluding the access to authorisation for significant donations, the omission to submit the accounts over three consecutive years may also lead to involuntary dissolution, unless the missing accounts are submitted before the close of the oral procedure at the end of the hearings[340]. A single omission may also result in any legal action initiated by the NGO being suspended until submission of the missing accounts within a delay defined by the judge[341] and the failure to comply with it will lead to inadmissibility of the legal action.

229. It is also to be noted that in addition to the potential tort liability in such cases, the failure to inform properly the relevant authorities about circumstances that lead to misuse of public funding would result in severe criminal liability for both individuals and the legal person involved[342].

(c) Auditing and approval of accounts

230. NGOs are in obligation to appoint certified auditors when they meet the criteria for large organisations[343]. When auditors are not duly appointed, the first instance court president is competent on initiative of any interested party to proceed to a provisional auditor's appointment[344].

[338] Articles 16, 33 and 54, LNPAF.
[339] Articles 16, 26octies (3), 33 and 54, LNPAF. The procedure requires the identity of the donor to be revealed.
[340] Articles 18 and 39, LNPAF.
[341] Articles 26, 38 and 52, LNPAF.
[342] The Royal Decree of 31 May 1933 on the Declarations in Relation to Public Funding or Allowances establishes severe sanctions with imprisonment and fines.
[343] Articles 17 (5) and (7), 37 (5) and (7), 53 (5) and (6), LNPAF. The financial accounting and the auditing of large NGOs are regulated by the Law of 17 July 1975 on the Companies Accounting and Annual Accounts and the Companies Code.
[344] Article 130 of the Companies Code in relation with Article 17 (7), LNPAF.

Associations and foundations must proceed to the approval of the annual accounts and the budget for the next year by the highest governing body within 6 months following the date of close of the accounts[345]. Within 30 days after this approval, the accounts of large associations and large private foundations must be submitted to the National Bank of Belgium[346]. INPAs must establish the accounts annually and proceed to their approval at the next meeting of the highest governing body[347]. For all NGOs, the annual accounts must be filed in the Register. The failure to file the accounts as required may result in a number of sanctions[348] .

(d) Submission of activity reports

231. No general legal obligation exists to produce activity reports on a periodic basis. However, organisations to which a particular licence and/or public funding have been granted may be required to report on their situation annually, project/programme based or otherwise. The failure to provide the reporting may result in the loss of financial support for the future or in the obligation to reimburse, partly or entirely, the public funding[349] received.

(e) Recording members' addresses and/or other details

232. The addresses of the founders constitute a mandatory element to be mentioned in the statutes submitted for registration during the establishment[350]. The omission to include it may also lead to involuntary dissolution if this negligence is considered as a serious breach of the law according to Article 18 of LNPAF listing the dissolution grounds. In this case, the non-contractual liability of the founders may also be engaged.

233. The association's board must keep an up-to date register of members with mandatory identification elements to be mentioned[351]. The non-compliance with the requirements related to the membership register could result in the suspension of any legal action initiated by the association until regularisation of the situation within a delay defined by the judge or, in case of failure to do so, in the inadmissibility of the legal action[352]. It may also lead to involuntary dissolution if the negligence is considered to be a serious breach of the law according to Article 18, LNPAF.

[345] Articles 17 (1) and 37 (1), LNPAF.
[346] Articles 17 (6) and 37 (6), LNPAF.
[347] Article 53 (1), LNPAF. This is a flexibility offered by the law to INPAs in view of their international dimension.
[348] See '*(b) Reporting receipt of funds or support'* above.
[349] Article 7, Law of 14 November 1983 on the Control of the Granting and the Use of Certain Subsidies.
[350] This requirement concerns NPAs and foundations, Articles 2 and 28, LNPAF
[351] Article 10, LNPAF. INPAs are not concerned by this requirement.
[352] Article 26, LNPAF.

(f) Providing a list of members

234. According to Article 10 of LNPAF, in case of an oral or written request by the authorities, associations are obliged to provide them immediately with access to the membership register and the necessary copies or excerpts. Non-compliance with this provision may result in sanctions identical to the ones for non-compliance with the requirements related to keeping the membership register as described in the previous paragraph

(g) Approval for activities

235. There is no general requirement for an NGO to seek approval from a public authority for its proposed activities. The subsequent judicial control over the legality of the NGOs' activities may lead to dissolution, annulment of the unlawful acts or other sanctions. However, if the activity is generally subject to authorisations or licences, they need to be obtained accordingly[353].

Warnings and opportunities for rectification

236. The provisions of LNPAF that introduce the sanction of suspending the legal proceedings initiated by an NGO when it has not met certain fundamental transparency and publicity requirements, provide for the judge to define a delay for achieving compliance[354]. When this is not complied with, the legal action is considered inadmissible.

237. The unenforceability towards third parties of the elements that are not duly submitted has a penalising effect but there is a possibility for the NGO to reverse the presumption that the third party was unaware of those elements by proving the contrary.

238. In the framework of nullity procedure which may be initiated when the statutes do not contain certain essential and mandatory elements or when a statutory objective violates the law or the public order, the organisation can rectify the element concerned during the proceedings, before the nullity is pronounced by the judge. However, a warning is not explicitly required.

239. In the procedure for involuntary dissolution based on the failure to conform with certain formalities, when rectification is possible in the sense that the organisation has the capacity to organise the action of its bodies necessary for this purpose, the judge will generally provide a delay for the compliance to be achieved and evidenced. When the omission is related to the annual accounts, LNPAF offers explicitly the opportunity to submit the missing documents before the close of the oral procedure at the end of the

[353] Examples of such activities are: demonstrations, collecting of funds from individuals in certain circumstances, various social services etc.
[354] Articles 26, 38 and 52, LNPAF.

hearings[355]. The legal action for dissolution on the ground of failure to submit duly annual accounts for three or more consecutive years can be introduced for associations at the expiry of 13 months after the date of closing of the accounts for the third consecutive year[356] and for foundations, similarly as for commercial companies at the expiry of 7 months[357]. In practice, this provides associations with a longer period for correcting action.

240. In the case of failure of large NGOs to pay VAT or payroll tax[358], the legal action becomes admissible only one month after a formally communicated warning inviting to pay or to demonstrate that the failure to pay is not resulting from fault[359].

Temporary suspension of an NGO's activities

241. In certain circumstances, it is possible that NGOs face a temporary or even permanent suspension of their activities. The Criminal Code provides that in the matter of crimes, offences and contraventions committed by legal persons[360], the common penalties are fine[361] and confiscation[362]. For crimes and offences only, possible sanctions are also the dissolution[363], the temporary or permanent interdiction to carry out an activity related to the statutory objectives[364], the closing down temporarily or permanently of one or more offices[365], the publicity of the conviction[366]. The above sanctions may be imposed in the cases specified in the legislation, by the courts or subject to judicial control.

242. Special laws stipulate the modalities of the various crimes and offences that may lead to these sanctions. In all cases the sentence is enrolled with the Register where the record of the legal person concerned is held. The court may also order the closing down of the office/s of a foreign NPA having activities contrary to the statutes, the law or public order[367], or decide to suspend any legal action initiated by an NGO when it failed to meet certain legal requirements[368]).

---

[355] Articles 18 and 39, LNPAF.
[356] Article 19bis, LNPAF.
[357] Article 40 (2), LNPAF.
[358] See the paragraphs on *'Personal liability of board members*' above.
[359] However, preservation measures on the NGO property or on the personal property of the individuals involved in its governing or management bodies are possible before the expiration of this delay.
[360] Article 7bis, Criminal Code.
[361] Article 41bis of the Criminal Code provides a special conversion mechanism for the sanctions with imprisonment for naturall persons in order to make them applicable to legal persons.
[362] Article 42 *et seq.* of the Criminal Code regulate the seizure of goods that are the object of, are used for, were meant to be used for, or are resulting from the incriminated act.
[363] Article 35, Criminal Code.
[364] Article 36, Criminal Code. Only the activities contributing to or constituting the offence are concerned.
[365] Article 37, Criminal Code.
[366] Article 37bis, Criminal Code.
[367] Article 26octies (4), LNPAF.
[368] Articles 26, 38 and 52, LNPAF.

Grounds for involuntary dissolution

243. Bankruptcy may only be pronounced for businesses[369]. The grounds for involuntary dissolution are listed by the law exhaustively. Common for all forms of NGOs are: using the organisation's property or its revenues for objectives different from the statutory ones and serious breach of own statutes, infringement of the law or of public order. In addition, for associations there are also: the incapacity to assume its contracting obligations, failure to submit its annual accounts as required by the law during three consecutive years except if the missing accounts are submitted before the judicial proceedings are closed and fall of the membership below three people[370]. For foundations, the additional grounds are: the achievement of the statutory purpose, the impossibility to pursue further the statutory objectives, the failure to submit its annual accounts as required by the law during three consecutive years except if the missing accounts are submitted before the judicial proceedings are closed and the expiration of the period of existence defined by the statutes[371]. In the category of INPAs, among the grounds for dissolution are added insolvency and the absence of administration[372].

244. The court of first instance is competent in dissolution matters. Even when the dissolution is rejected, the court may pronounce the annulment of the unlawful act[373]. Both the dissolution and the annulment judgements are subject to appeal[374]. The initiative for the legal action[375] is open in the case of associations to the prosecutor's office, the member and any third party with legitimate interest; in the case of foundations to the prosecutor's office, the founder or his/her successor and to one or more board members; for INPAs - to the prosecutor's office and anyone with legitimate interest. The nullity of the association may be pronounced by the court when the statutes do not contain certain mandatory elements[376] or when a statutory objective violates the law or public order. The nullity has an effect for the future and leads to liquidation[377]. As mentioned above, dissolution is also possible as a criminal sanction for legal persons. The judge may pronounce the dissolution when the legal person has been deliberately created with the purpose to carry out the incriminated activities for which it is convicted or when its objectives have been intentionally misused in order to carry out those activities[378].

[369] Article 2 of the Law of 8 August 1997 on Bankruptcies.
[370] Article 18, LNPAF.
[371] Article 39, LNPAF.
[372] Article 55, LNPAF.
[373] Articles 18 and 39, LNPAF.
[374] Article 21, LNPAF.
[375] Articles 18, 39 and 55, LNPAF.
[376] According to Article 3bis, LNPAF – the NPA's name, address, precise description of its purpose or objectives.
[377] Article 3ter, LNPAF.
[378] Article 35, Criminal Code.

Offences that can be committed just by foreign NGOs

245. Article 26octies (4), LNPAF, provides for the court of first instance to order, on the initiative of the prosecutor's office or any interested third party the closing down of one or more of the Belgian offices of a foreign NPA having activities contrary to the statutes, the law or public order. This specific sanction relates to the fact that the dissolution of foreign entities can only be pronounced in the country where they are registered.

Conclusions

246. The NGO-related sanctions and liability legal framework in Belgium is generally and in some aspects thoroughly aligned with the existing international standards.

247. In relation to paragraphs 10 and 52 of Recommendation CM/Rec(2007)14, attention is to be paid to the sanction of suspending the legal proceedings initiated by an NGO. Depending on the irregularity giving rise to the sanction and the legitimate interest in the legal action at stake, the proportionality of the penalty might turn to be questionable and the right to an effective remedy under Article 13 of the European Convention might be likely to be violated.

248. The authorisation procedure for receipt of donations is questionable from the perspective of Paragraph 50 of Recommendation CM/Rec(2007)14. The necessity and proportionality of such procedure are doubtful having in mind its large scope of discretion, the parallel existence of all necessary common legal means to challenge in court irregularities related to such donations and its impact on legitimate confidentiality and on the right to private life of third parties, donors in particular[379]. Revealing the identity of donors and members in the case of associations with unpopular purposes and activities risks hindering the financial support to them. It has a disadvantageous effect for such associations in comparison to NGOs with non-controversial nature. Therefore, this aspect of LNPAF can not be seen as contributing to an enabling environment for the operations of NGOs.

[379] See Paragraph 64 of Recommendation CM/Rec(2007)14

Serbia

Introduction

249. The legal status of NGOs in Serbia is governed by the Law on Associations[380] and the Law on Legacies, Foundations and Funds[381] ('Law on Foundations') .

250. An association is a voluntary, non-governmental and not-for-profit organisation established by natural or legal persons, to pursue private or public benefit goals, which are not prohibited by the Constitution or the Law on Associations[382]. In addition to governing the legal status of associations (i.e., the establishment, the internal governance, and the dissolution of an organisation), the Law on Associations also governs registration, activities and oversight of foreign associations' branch offices in Serbia.

251. There are three categories of non-membership, property-based organisations. All must pursue public benefit objectives. Categories are based on the type of founders and source of funding. A 'legacy' can be established only by natural persons using private resources[383]. A legacy may be established *inter vivos* or by a testamentary act. A 'foundation' can be established only by legal persons using 'socially owned resources' (i.e., public property)[384]. A "fund" can be established by natural or legal persons using 'socially owned resources' or a combination of 'socially owned resources' and private assets[385]. Because the 2006 Constitution no longer recognises the concept of socially-owned property, the legal status of foundations is currently unclear[386]. In July 2010, the Government approved a new draft Law on Foundations and Endowments ('the draft Law on Foundations'), which seeks to modernise the legal framework for non-membership organisations[387].

252. The sanctions and liability engaged in the context of the operations of NGOs may arise at natural and/or legal person level and be based on civil (contractual and tort liability) or criminal law. Legal persons became subject to criminal responsibility in 2008.

[380] Official Gazette of the Republic of Serbia, No. 51/2009.
[381] Official Gazette of the Republic of Serbia, No. 59/89.
[382] Article 2, Paragraph 1..
[383] Article 4, Paragraph..
[384] Article 4, Paragraph 2 of the Law on Foundations.
[385] Article 4, Paragraph 3 of the Law on Foundations.
[386] According to the Ministry of Culture, which is the registration authority for non-membership organisations, very few foundations operate in Serbia.
[387] According to the draft, a 'foundation' may be established to pursue public benefit goals. No founding capital is required to establish a foundation. An 'endowment' may be established to pursue both mutual and public benefit goals. A founding capital is required to establish an endowment.

Personal liability of members, board members, officers and staff

253. The Law on Associations provides for specific rules governing personal liability for the various actors involved in the operations of an association, i.e., the founders/members, the members of the governing bodies, and the person(s) with a general representative power[388] (*infra*). The Law on Foundations is silent on that point; there are no specific rules in this respect[389]. Presumably, the Law on Obligations[390], which generally governs tort and contractual liability, applies to non-membership organisations, as appropriate. However, there has not been any case law providing clearer guidelines in this respect.

254. The regime of criminal liability of legal persons is addressed in the Law on the Liability of Legal Persons for Criminal Offences[391]. Pursuant to this law, the legal responsibility of legal entities, including NGOs, for a particular crime and offence may co-exist, as an exception, with the one of the individual who has committed a particular crime or offence[392].

255. In civil liability matters, few general rules apply.

256. In principle, founders/members, members of the management bodies and person(s) with general representative power are not held legally responsible in person for the liabilities and obligations of an association[393]. However, they may be held liable if they have used the property of an organisation to advance their private financial interests, or if they have used the organisation as a shield for their fraudulent or illegal activities[394]. In addition, member(s) of the management bodies and person(s) with a general representative power bear joint and several liability for the damage incurred on the organisation as a result of their decisions involving tort or gross negligence – unless they abstained from voting or voted against that decision[395].

257. As noted, the Law on Foundations is silent on the civil liability matters of the foregoing persons. Nevertheless, pursuant to the general civil law rules, they are mainly not held legally responsible for the liabilities and obligations of a foundation. The draft Law on Foundations details exceptions to that effect, which are closely patterned to the Law on Associations[396].

[388] See Article 25, 40 of the Law on Associations.
[389] The new draft Law on Endowments and Foundations contains rules governing civil liability of the founders, the managing bodies, and the persons with general representative power, which are closely patterned to the ones provided by the Law on Associations (*infra*).
[390] Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 29/78, 39/85, 45/89.
[391] Official Gazette of the Republic of Serbia, No. 97/08.
[392] Article 34.of the Law on the Liability of Legal Persons for Criminal Offences.
[393] Article 40, Paragraph 1 of the Law on Associations.
[394] Article 40, Paragraph 2 of the Law on Associations.
[395] Article 25, Paragraph 1 and 3 of the Law on Associations.
[396] Article 43, 49 of the draft Law on Foundations.

258. Serbian law recognises two standards of diligence: the diligence of the prudent common sense person and the diligence of the prudent businessperson person. While the former primarily applies to corporations, it is not clear whether it also applies to members of the NGO's managing bodies with respect to their decisions relating to direct economic activities of the organisation[397]. The draft Law on Foundations is more specific on that point: members of the management board must exercise the diligence of the common sense person in carrying out their duties. In addition, with respect to the decisions relating to the direct economic activities of the organisation, they must exercise the diligence of the prudent businessperson[398].

259. Employees and volunteers are exonerated from any personal civil liability while carrying out their activities, except in the cases of intention or gross negligence[399].

Liability for operating without legal personality or being registered

The Law on Associations recognises the possibility of *de facto* associations existing without legal personality and does not impose any sanctions for their informal functioning[400].However, there is a certain *tension* between the Law and the 2006 Constitution , as the language of the latteris somewhat ambiguous in this respect. Thus Article 55, Paragraph 2 of the Constitution provides that: "associations may be established without prior approval, subject to registration with the competent public authority, pursuant to law". As a result, a case is pending before the Constitutional Court challenging the legality of provisions in the Law on Associations allowing informal associations to operate.

Sanctions for membership of an NGO, general or related to public officials

260. Serbian law does not envisage any circumstances in which a membership in the NGO is subject to criminal sanctions. However, public officials may be subject to disciplinary (administrative) sanctions for their membership in an NGO whose goals and activities are deemed to violate the code of conduct prescribed for public officials.

[397] Associations and Foundations may engage directly in economic activities, under conditions stipulated in their respective framework regulation and tax law.
[398] Article 42 of the draft Law on Foundations.
[399] Article 163 of the Labour Law (Official Gazette of the Republic of Serbia, No. 24/2005, 61/2005, 54/2009), Article 24, Paragraph 3 and 4 of the Law on Volunteers (Offiicial Gazette of the Republic of Serbia, No. 36/2010).
[400] Article 4, Paragraph 1.

Penalties following involuntary dissolution

261. There are no specific penalties and disqualifications for persons that sit on the highest governing body or a management of an NGO that has been involuntarily dissolved. General penalties for criminal activities of those persons which resulted in the bankruptcy of a legal entity – as well as penalties levied on the bankrupt legal person insofar as it was involved in those activities – are prescribed in the Criminal Code and the Law on the Liability of the Legal Persons for Criminal Offences, respectively.

Specific penalties

(a) Notification of or seeking approval for certain changes

262. An association must notify the registration authority of any change of data which is entered into the Registry of Associations[401]. Fines ranging from RSD 50,000 to 500,000 (EUR 500-5,000) are levied on the association which fails to report those changes within 15 days after they have occurred. In addition, for the same offence, fines ranging from RSD 5,000 to 50,000 (EUR 50- 500) are levied on a person with a general representative power[402].

263. The Law on Associations requires *inter alia* that an association must notify the registration authority of its membership in domestic, foreign or international umbrella organisations, or any changes thereof. The foregoing fines are levied on the association and its representative in the breach of the notification requirement. It would seem that this requirement undermines the principle of self-governance of the organisation, as the basic principle of its operations. It is not reflective of the negative obligation of the state in respect of the freedom of association and the principle of proportionality, which any interference with freedom of association must observe.

[401] Pursuant to Article 28 of the Law on Associations, the following data shall be entered in the Registry: the association's name and its abbreviated name; the association's head office and address; the area of association's activities; the date of the association's establishment; economic and other activities that are directly carried out by the association; the personal name, permanent or temporary place of residence and the personal identification number or number of the travel document and the state that has issued the travel document to a person representing the association; the envisaged period for which the association is being established; membership in the (con)federation of associations; the date of approval of the statute or of its amendments; the data on status change; the data related to the association's liquidation and bankruptcy; a note on launching the procedure to ban the association's activities and the prohibition on the association's activities; termination of the association; the number and date when the decision(s) on entry, change of data and deletion from the Registry was (were) taken.

[402] Article 74 of the Law on Associations.

(b) Reporting receipt of funds or support

264. There is no general obligation imposed on NGOs to report receipt of funds or support; it is sufficient that those funds are properly accounted for in the organisation's books (*infra*). However, pursuant to the Central Bank's regulation, an NGO receiving foreign funds must have it instantly converted into Serbian dinars, even if those funds are meant to support cross-border programmes. This has created all sorts of problems and significant losses for NGOs, due to the frequent and unpredictable fluctuation of the national currency.

(c) Auditing and approval of accounts

265. An NGO with the legal entity status must prepare its annual financial report and submit it to the Central Bank, in accordance with the Law on Accounting and Auditing[403]. An NGO (or for that matter any other private legal entity) which fails to prepare or submit the annual financial report is subject to administrative fines ranging from RSD 100,000 to 3,000.000 (EUR 1,000-30,000). In addition, fines ranging from RSD 5,000 to 150,000 (EUR 50-1,500) are levied on a person with a general representative power[404]. He is also held responsible for the accuracy of the submitted financial report and personally liable for criminal offences committed in this respect.

266. NGOs must appoint a certified independent auditor if they meet the threshold prescribed for the large and medium-size legal entities. However, the threshold set out in the law in this respect is so high that it is extremely unlikely that an NGO would fall in either of those two categories[405].

(d) Submission of activity reports

267. An association which has received public funds must make available to the public its annual activity report, which includes information on the public funds received and how it has been spent, and must submit it to its donors. This obligation also pertains to associations which used tax and custom benefits in the prior year[406]. An association has a degree of discretion in choosing ways to make the report available to public, given that the statute of the organisation is the controlling instrument in this respect[407]. Fines ranging from RSD 50,000 to 500,000 (EUR 500-5,000) are levied on the

[403] Official Gazette of the Republic of Serbia, No. 46/2006.
[404] Article 68 of the Law on Accounting and Auditing.
[405] Pursuant to Article 7 of the Law on Accounting and Auditing, a medium-sized legal person is deemed to be one that meets at least two of the folowing criteria: (a) the average number of employees of the organisation in the year concerned ranges from 50 to 250; (b) the annual income of the organisation ranges from EUR 2.500.000-10.000.000 in the RSD value; and (c) the value of the property of the organisation in the year concerned ranges from EUR 1,000,000-5,000,000.
[406] Article 38, Paragraph 6 and 8 of the Law on Associations.
[407] Article 12, Paragraph 4 of the Law on Associations.

association which is in breach of the reporting obligation. In addition, fines ranging from RSD 5,000 to 50,000 (EUR 50-500) are levied on a person with a general representative power[408]. The Law on Foundations is silent on this point, but the draft Law on Foundations makes specific references to the Law on Association as the controlling instrument for non-membership organisations in this respect[409].

((e) Recording members' addresses and/or other details

268. An association must keep an up-to-date list of its members[410]. The Law on Associations is not specific as to what this must contain, but the list should presumably include the addresses and the personal ID numbers of its members, as that piece of information is necessary to prove the identity and place of living of a person in question. However, the Law does not envisage any specific sanctions for an organisation or its legal representatives which is in breach of this duty.

(f) Providing a list of members

269. An association which seek to obtain the legal entity status must submit to the Registry of Associations the founding act, which contains the list of founders and the personal data thereof. However, the names of the founders are not part of the data which must be entered into the Registry. Rather, only the data of a person with a general representative power (and the subsequent change thereof) must be entered into the Registry[411].

(g) Approval for activities

270. There is no general requirement for an NGO to seek approval from a public authority for its proposed activities. However, if the activity is generally subject to authorisations or licences, they need to be obtained accordingly.

Warnings and opportunities for rectification

271. Opportunities for rectification primarily arise in the process of registration of an NGO. If the application for registration of an association or a foundation is incomplete or flawed, the registration authority will instruct the applicant how to remedy the application, within the deadline prescribed by the Law on the General Administrative Procedure. The same rule pertains with respect to the amendments of the statute or any other

[408] Article 74 of the Law on Associations.
[409] Article 46 of the draft Law on Foundations.
[410] Article 19 of the Law on Associations.
[411] Article 28 of the Law on Associations.

data that must be entered into the registry of associations and foundations, respectively.

Temporary suspension of an NGO's activities

272. There are no specific instances envisaged by law for a temporary suspension of an NGO's activities. The procedure for an association to acquire the legal entity status may be temporarily halted if the registration authority determines that the association in question is a secret or paramilitary organisation, or that its goals violate provisions of Article 3, Paragraph 2 of the Law[412]. In such instances, the registration authority will put the registration process on hold and instigate a procedure before the Constitutional Court to ban the applicant organisation. Depending on the outcome of the proceedings before the Court, the registration authority will reject the application for registration or proceed with the registration process[413].

Grounds for involuntary dissolution

273. Other than in the case of bankruptcy, an association may be involuntarily dissolved for the following reasons: (a) the number of members falls below the minimum number of members required for its establishment (three) and the association's competent body fails to take a decision to admit new members within thirty days following the breach of the prescribed membership threshold; (b) it is established that the association has not been pursuing activities to achieve its statutory goals or has not been organised in line with its statute for over two years without any interruptions, or if double the time envisaged in the statute for holding of the general meeting has passed, and the general meeting has not been convened; and (c) the association's activities have been banned[414]. In the light of the European Court's recent case law, the dissolution of an organisation for failure to convene a general meeting within the prescribed time frame gives rise to concern[415].

274. The Constitutional Court decides on the prohibition of the association's activities. The decision to ban the association's activities may also be based on the actions of the association's members if there is a connection between these actions and the association's activities or its goals, if the actions are based on the members' premeditated will, and if, under the circumstances, it is established that the association has espoused the

[412] Article 3, Paragraph 2 of the Law on Associations: "the association's goals and operations may not be aimed at violent overthrow of the constitutional order, breach of the Republic of Serbia's territorial integrity, violation of the guaranteed human or minority rights or incitement and instigation of inequalities, hatred and intolerance based on racial, national, religious or other affiliation or commitment as well as on gender, race, physical, mental or other characteristics and abilities".
[413] Article 31 of the Law on Associations.
[414] Article 49 of the Law on Associations.
[415] *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan,* no. 37083/03), 8 October 2009.

actions of its members. The activities of the association shall also be banned if it becomes a member of a domestic or international organisation, which is referenced in Article 2, Paragraph 4 of the Law on Associations (secret and paramilitary organisations) or whose goals are prohibited, as stipulated in Article 3, Paragraph 2 of the Law. The ban on the activities of a (con)federation of an NGOs shall also apply to its members which have been party to the banning procedure[416].

275. The procedure to ban the work of an association shall be launched on the proposal of the Government, the Republic Public Prosecutor, the ministry responsible for administrative affairs, the ministry responsible for the oversight of the field in which the association's goals are pursued or the registration authority[417].

276. The procedure to ban an association may also be initiated and conducted against an association which does not have legal entity status, as well as the branch office of a foreign association. A note shall be entered in the Register indicating that the procedure to ban the association has been set in motion[418].

277. The Law on Foundations is silent on this point, and as a result there is currently no legal basis to ban a non-membership organisation engaged in illegal activities. The draft Law on Foundations envisages the power of the Ministry of Culture in this respect. The Ministry's decision to ban a non-membership organisation may be contested under the rules governing general administrative proceedings[419].

Offences that can be committed just by foreign NGOs

278. While the Law provides for a voluntary registration of (domestic) associations, branch offices of foreign membership organisations may operate only after they are entered into the Registry of Foreign Associations. Fines ranging from RSD 50,000 to 500,000 (EUR 500-5,000) are prescribed for the breach of the registration requirement. Fines ranging from RSD 5,000 to 50,000 (EUR 50-500) are also levied on a representative of the branch office[420].

Conclusions

279. The Serbian law is generally reflective of international standards and best practices relating to sanctions and fines levied on NGOs.

280. However, given the level and range of some of the prescribed fines, it is critical for the public authority to apply the regime of sanctions in

[416] Article 50 of the Law on Associations.
[417] Article 51 of the Law on Associations.
[418] Article 51 and 67 of the Law on Associations.
[419] Article 52 of the draft Law on Foundations.
[420] Article 73 of the Law on Associations.

conformity with the principle of proportionality so that it does not impact adversely on the sustainability of NGOs.

281. In addition, the requirement for an association to notify the registration authority of its membership in umbrella organisations, as well as any changes thereof, undermines self-governance as the basic principle of the organisation's activities. It is also not reflective of the negative obligation of the state in respect to the right to freedom of association and, in particular the duty to observe the principle of proportionality.

282. Finally, in the light of the European Court's recent case law, the dissolution of an organisation for failure to convene a general meeting within the prescribed time frame gives rise to concern, as it does not necessarily meet the principle of proportionality.

Turkey

Introduction

283. In Turkey, the specific regulation for associations is set forth by the law no.5253 on associations ('the Law') which was adopted on 4 November 2004 and published by the Official Gazette on 23 November 2004[421]. The law covers associations, branches of associations, federations, confederations and foreign associations established both in Turkey and abroad. According to the law, an association is a legal entity which may be set up by seven or more natural persons with capacity to act to achieve an aim that is not contrary to the law. However, no association shall be set up for sharing any profit[422]. In other words an association in Turkey can not seek any material gain for its members.

284. Under Article 3 of the Law an association can be established without securing any prior official permission. However, in order to acquire a legal status, the founders of an association must always submit its by-laws and other official documents to the associations directorate established in each province ('the Associations Directorate'). The Associations Directorate must certify the establishment of an association. Therefore, for its legal status, certification by the Associations Directorate is an essential pre-condition. The associations regulated by the law shall be registered by the Association Directorates in their provinces. A file, containing documents (by-laws, etc.) required by law is also kept for each association in the relevant directorates.

285. The sanctions and liability engaged in the context of the activities of association may arise at physical or/and legal person level and be based on civil (contractual and tort) liability or criminal law.

Personal liability of members, board members, officers and staff

286. In Turkish law, different personal liability frameworks exist for the various actors involved in activities of an association, namely, the founders, members if any, board members, managing executive, the person/s with a general representative power, the person/s with specific mandate, the employees and the volunteers.

287. In criminal liability matters, the legal responsibility of an association may co-exist, as an exception, with that of an individual who has committed a particular crime or offence. Legal persons have been made subject to criminal responsibility in Turkey since 2005[423].

[421] No.25649.
[422] Article 2/a of the Law.
[423] Article 20 of the Turkish Penal Code which says that "no criminal sanction shall be applied to legal persons except the security measures". The relevant articles concerning legal persons in the Turkish penal code are 54, 55, 76, 77, 79, and 302.

288. In civil liability matters, a few distinctions need to be made. In principle, an association is itself liable and responsible for its lawfully incurred debts/liabilities. Therefore if any party claims any amount (based upon a lawful debt/liability) from an association he/she/it must at first claim it from the association[424]. If a creditor and/or claimant is unable to collect this amount from the association due to the fact that it does not have any assets/money then the claimant is entitled to collect it from its executive board members as those members of the board who were on it when the debts were incurred are jointly and severally responsible and liable for them.

289. If the debt is based upon any kind of tax and/or duty and/or insurance premium then again the association is itself mainly responsible/liable for such debts/liabilities. However, if the association fails to pay them then the board members are jointly and severally responsible as well for the debts/liabilities which were incurred during their membership. There is no limitation in respect of the amount of such debts and liabilities.

290. In principle, the founders and members are not personally responsible for the liabilities and obligations of their association. However, they may be held personally liable in case of torts, they bear joint and several liability in case of the non-acquisition of legal personality and they also have such liability when contractual obligations taken by them in the process of establishment are not confirmed afterwards in the name of the legal person, as well as when obligations are contracted on behalf of the association without identifying oneself clearly in the manner prescribed by the law as acting in its name.

291. The personal liability of the person(s) acting with specific mandate on behalf of an association cannot be engaged if they act within its limits. Where the mandate is overstepped, their tort liability may be engaged by a third party and their contractual liability by the association.

292. Employees and volunteers are exempt from any personal civil liability while carrying out their activities except in the case of deceitful act, severe fault or recurring fault even if not severe.

Liability for operating without legal personality or being registered

293. There is no clear regulation concerning the activities of an association which has no legal personality[425]. However, under Article 32/a of the Law, it is an administrative offence to establish an association by those who are not eligible to do this. The maximum penalty for this kind of violation is TL572 (EUR 301)[426]. There are several restrictions for army and security

[424] See Article 85 of the Turkish Civil Code.
[425] Article 3 of the Law.
[426] Article 32/a of the Law.

personnel regarding the foundation of an association. Those restrictions are regulated by the special laws of those categories[427].

294. Associations can open branches and liaison offices abroad. They may also co-operate with foreign associations and institutions without permission. However, foreign associations are required to have the prior permission of the Ministry of Interior (upon the opinion of the Ministry of Foreign Affairs) for their activities (such as the foundation of a branch, liaison office, any kind of cooperation etc) in Turkey[428].

Sanctions for membership of an association, general or related to public officials

295. Under Turkish law there are no circumstances in which it would be an offence merely to belong to an association. However, some categories of public officials (such as army and police personnel) are subject to restrictions prescribed by their own laws[429]. For instance army personnel cannot join an association by virtue of Article 43 of law no.211 (Service Act of Military Personnel). Furthermore according to law no.3201 (Law on Security Institution), additional Article 11, a police officer cannot be founder and/or member of an association. A breach of these rules may lead to disciplinary sanctions. Under Article 3 of the Law, those who have capacity to act are entitled to be a founder and member of an association (general clause). However, with regard to membership of an association, under Article 3/sub-paragraph 2 of the same law there are restrictions regulated by several other laws in particularly in respect of military and police personnel and finally for some categories of civil servants (national intelligence service, etc.). In connection with this matter, the Law only covers an administrative penalty for those who establish an association without having this right/permission and for executive board members that admit as a member to their association anyone who actually lacks the right of being a member of an association[430]. However, other laws concerning the status of the above said categories may contain some other criminal and administrative penalties (including removal from the post).

296. However, in recent years some categories of the public officials have tended to form their own associations. Thus YARSAV (acronym for 'Union of Judges and Prosecutors') and Democrat Justice Association are two examples recently set up by judges and prosecutors in justice sector. Even though there is no concrete legal and/or administrative provision prohibiting membership in this kind of association, the government has stated that it is inappropriate for judges and prosecutors to set up such associations since membership in them may violate their impartiality[431].

[427] Article 3 & 2 of the Law.
[428] Article 5 of the Law.
[429] Article 3 of the Law.
[430] TL 572/EUR 301; Article 32/a.
[431] YARSAV is highly critical about some of the policies of the current government because the substantial policy changes orchestrated by it are seen as being aimed at undermining the secular pillar of the Turkish Republic..

Penalties following involuntary dissolution

297. The Law does not contain any direct administrative and criminal penalty for an ordinary member and/or a member of a governing body where the association concerned has been involuntarily dissolved. However, if an association has been dissolved due to and/or in connection with some criminal activities and/or if a person commits a crime then a criminal court can prevent that member and/or person from being a member of an association for a certain time[432].

Specific penalties

(a) Notification of or seeking approval for certain changes

298. The main sanction for lack of due notification of changes to the statute, internal rules, address or composition of any governing or management body is their unenforceability towards third parties. Under the Law, associations are obliged to submit a report every year concerning their activities within the last year, their incomes and expenses and any change in their by-laws.[433] Furthermore the associations must submit to the Associations Directorate names of their executive and auditing board members (including the substitute ones) and any change in the by-law after every general assembly[434].

(b) Reporting receipt of funds or support

299. There is no general obligation to report to a public authority the receipt or expenditure of any donation, grant or sponsorship. However, an annual report which contains an association's past year's income and expenses must be submitted to the Associations Directorate each year[435]. Moreover the associations that receive foreign donations (in kind or in cash) must secure prior permission to that effect[436].

(c) Auditing and approval of accounts

300. Every association must have an internal auditing board even in the circumstances where the auditing is carried out by certified auditors[437]. The auditing board is entitled to inspect all the activities of an association including its income and expenses. Under the Law all the financial activities of an association must be filed with the Associations Directorate

[432] Article 53/1-d of the Turkish Penal Code.
[433] Article 19 of the Law.
[434] Article 23 of the Law.
[435] Article 19 of the Law.
[436] Article 21 of the Law.
[437] Article 9 of the Law.

each year[438]. Furthermore, every year the auditing board must submit its report concerning the activities and financial situation of the association to the executive board and the general assembly.

(d) Submission of activity reports

301. There is a general legal obligation to produce an activity report concerning the past year. The failure to provide the report can lead to an administrative penalty[439].

(e) Recording members' addresses and/or other details

302. The by-laws of an association when being submitted for registration must include the addresses of the founders and a failure to do so can also lead to its involuntary dissolution if this failure is not corrected within the time limit (generally 30 days) given by the Associations Directorate[440]. The association's board must keep an up-to date register of members with mandatory identification elements to be mentioned.

(f) Providing a list of members

303. The list of members must be recorded in the membership book of an association. However, there is no general obligation to submit the names of members to the Associations Directorate. Nevertheless associations must submit to the Associations Directorate the names of their executive and auditing board members (including the substitute ones) after every general assembly[441].

(g) Approval for activities

304. There is no general requirement for an association to seek approval from a public authority for its proposed activities. The subsequent judicial control over the legality of the association’s activities may lead to dissolution, annulment of unlawful acts or other sanctions. However, if the activity is generally subject to authorisations or licences, then these will need to be obtained accordingly.

Warnings and opportunities for rectification

305. The wrongful acts and transactions of an association that do not constitute crime must be rectified by the association itself within 30 days that runs

[438] Article 19 of the Law.
[439] Articles 19 and 32 of the Law.
[440] Article 17 of the Law.
[441] Article 23 of the Law.

from the notification date.[442]

Temporary suspension of an NGO's activities

306. The Law does not contain any direct provision concerning the temporary suspension of activities of an association. However, if a dissolution action against an association is brought before a first instance civil court, then the trial court may issue an interim measure in order to temporarily suspend the activities of an association.

Grounds for involuntary dissolution

307. If the by-laws and/or activities of an association are in violation of the Law and if the board has not rectified the notified wrongful transactions and the by-laws and other establishment requirements within the prescribed time limit which is, in general, 30 days, then a lawsuit against the association may be brought for its involuntary dissolution. The proceedings must be heard by a first instance civil court. The parties (the association and the prosecutor and the complainant/intervener) may appeal the judgment of the first instance court to the Cassation Court.

Offences that can be committed just by foreign NGOs

308. There is no specific category for this subheading. In general a foreign association which acquired the aforementioned ministerial permission is subjected to the same domestic regulations as its Turkish counterparts[443].

Conclusions

309. The framework for association-related sanctions and liability in Turkey is generally, and in some aspects thoroughly, aligned with the existing international standards.

[442] Article 30 of the Law.
[443] Article 5 of the Law.

D Ukraine

Introduction

310. The Constitution of Ukraine has incorporated a number of comparatively detailed provisions pertinent to establishment and continued operation of NGOs[444]. They are of direct relevance to the liability to which they can be exposed to. Its Article 36 guarantees to its citizens

> "[t]he right to freedom of association in parties and non-governmental organisations for the exercise and protection of their rights and freedoms and for the satisfaction of their political, economic, social, cultural and other interests, with the exception of restrictions established by law in the interests of national security and public order, the protection of the health of the population or the protection of rights and freedoms of other persons."

Moreover, its Article 37 specifies that

> "[t]he founding and activities of political parties and non-governmental organisations are prohibited if their programme goals or actions are aimed at the liquidation of the independence of Ukraine, the change of the constitutional order by violent means, the violation of the sovereignty and territorial indivisibility of the State, the undermining of its security, the unlawful seizure of Sate power, the propaganda of war, violence, the incitement of inter-ethnic, racial, [or] religious enmity, and encroachments on human rights and freedoms and the health of the population. . . Political parties and non-governmental organisations shall not have paramilitary formations. . . The prohibition of the activities of associations of citizens shall be exercised only through judicial procedure."[445]

311. While a limitation of the right to freedom of association for non-nationals could be partially justified only in light of the possibility to restrict their political activity under Article 16 of the European Convention, it is deplorable that the term 'citizens' used in these constitutional provisions is related to both political and non-political associations. It contains a potential for corresponding restrictions for non-nationals being expanded over the right to found and join NGOs.[446]

312. The legal framework governing the establishment and continued operation of NGOs in Ukraine comprises Associations of Citizens Act of 1992 ("the ACA"); Law on Charity and Charities of 1997 ('the LCC'); Law on Children and Youth Public Organisations of 1998; Law on State Registration of Legal Persons and Physical Persons – Entrepreneurs of 2003 amended in 2006 ('the LSR'); Decree of the Cabinet of Ministers of Ukraine N140 of 1993 on Approval of the Regulations on Legalisation of

[444] As understood by Recommendation CM/Rec(2007)14 (paragraphs 1-4).

[445] English versions of the constitutional provisions are cited according to *Koretskyy and Others* v. *Ukraine*, no. 40269/02, 3 April 2008, para. 20.

[446] See paragraphs 16 and 22 of Recommendation CM/Rec(2007)14. It should be mentioned, however, that the specific legislative texts including Associations of Citizens Act (Articles 11-12) and the Law on Charity and Charities (Article 5) rightly spell it out that they apply to foreign citizens and stateless persons.

Associations of Citizens ('the Regulations on Legalisation') and some other acts of primary and secondary legislation.[447]

313. In addition, the Civil Code of Ukraine recognises non-entrepreneurial partnerships and institution.[448]

314. The official website of the Ministry of Justice of Ukraine contains a special well-developed portal on public associations, which among a number of normative and methodological materials has incorporated a separate link to the Recommendation CM/Rec(2007)14.[449]

315. Since several years the total number of NGOs in Ukraine exceeds 50,000.[450] Although it is acknowledged that there are excessive difficulties with registration of NGOs and that its legislation does not meet relevant qualities and expectations,[451] due to which Ukraine was found by the European Court in breach of Article 11 of the European Convention[452] and it is suggested that many NGOs (up to 90%) are inactive,[453] the numbers of newly created NGOs demonstrates that this sector is still developing. Thus, according to the official report of the Ministry of Justice of Ukraine, in 2009 the competent authorities legalised[454] around 3,000 local and 246 national associations of citizens, as well as 692 charities on both levels.[455] According to relevant studies, Ukrainian NGOs are predominantly

[447] Other laws and normative acts provide for such specific non-governmental organisations as organisations of employers (law of 2001) and include Decree of the Cabinet of Ministers of Ukraine N143 of 1993 on Regulations on Registration of Symbols of Associations of Citizens; Decree of the Cabinet of Ministers of Ukraine N362 of 1998 on Approval of the Regulations on Registration of Charities; Decree of the Cabinet of Ministers of Ukraine N113 of 1994 on Regulations on Payment and Rates of Fees for Registration of Associations of Citizens; Decree of the Cabinet of Ministers of Ukraine N383 of 1998 on Regulations on Payment and Rates of Fees for Registration of Charities and so on. Since their enactment the legislative texts in issue have been subjected to a number of amendments, including those of 2006 incorporated in view of the introduction of the single register under the LSR.

[448] Articles 81, 83-86.

[449] Available in Ukrainian on <www.minjust.gov.ua/0/23578>, consulted on 20.06.2010.

[450] According to the government statistics cited in 'The 2008 NGO Sustainability Index. For Central and Eastern Europe and Eurasia' (USAID), by 2009 there were 43,859 associations and 9,637 charities in Ukraine.<198.76.84.6/locations/europe_eurasia/dem_gov/ngoindex/2008/ukraine.pdf>, consulted on 20.06.2010.

[451] *Ibid*, see also Explanatory Memorandum to the Draft Law on Civic Organisations of 2008, www.rada.gov.ua:8080/pls/zweb_n/webproc4_1?id=&pf3511=33677, consulted on 23.06.2010; Section 10. The Right to Freedom of Associations in Human Rights in Ukraine – 2008. Generalised Report of Human Rights Organisations (in Ukrainian) <www.khpg.org/index.php?id=1245855455>; T. Yatskiv, A Toughening Experience for NGOs, <//helsinki.org.ua/en/index.php?id=1265975840> consulted on 20.06.2010.

[452] *Koretskyy and Others* v. *Ukraine*, no. 40269/02, 3 April 2008.

[453] Nations in Transit. 2009. <www.freedomhouse.hu/images/nit2009/ukraine.pdf>, consulted on 20.06.2010; S. Stewart, NGO Development in Ukraine since the Orange Revolution, in Juliane Besters-Dilger (ed.), Ukraine on its way to Europe. Interim Results of the Orange Revolution, Peter Lang Verlag, Frankfurt a.M. et.al. 2009, p.p. 177-194.

[454] According to the Ukrainian legislation the term is a substitute for 'official recognition' applying to both registration and notification..

[455] Informative-analytical report on results of activities of the Ministry of Justice of Ukraine and its territorial organs on issues of legalization of citizens' associations and other public formations in 2009 as compared to 2008 (in Ukrainian). <www.minjust.gov.ua/0/29689>, consulted on 20.06.2010.

engaged in such sectors as youth and children (40%); civic education, social protection and human rights (32 %).[456]

316. The difficulties with legalisation and, in particular, acquiring legal personality ('registration'), as well as the indefensible limitation of activities of all NGOs to protection of interests of its members only and confinement of 'local associations' to catchment areas of corresponding territorial authorities were supposed to be remedied by the draft Law on Civic Organisations submitted by the Government of Ukraine to its Parliament ('Verhovna Rada') on 13.11.2008. Unfortunately this legal text elaborated after public debates with participation of the NGO community has been stuck and actually neglected by the legislators.[457]

Personal liability of board members, officers and staff

317. The Ukrainian legal framework does not provide for any special norms on circumstances in which an NGO's members (if any), members of any management body, officers and other employees could be held personally liable for its debts and other liabilities and obligations. Thus, a personal liability towards an NGO on the part of the persons in issue, if either they culpably breached their legal obligations and caused damage to it or third parties, is subject to general principles and relevant norms of civil and criminal legislation. The same applies to their protection from bearing its debts and other liabilities.

Liability for operating without legal personality or being registered[458]

318. Up to the entry into force of the new Criminal Code of Ukraine on 1 September 2001 it was a criminal offence to lead an association of citizens which had been not legalised in the order envisaged by law, or the legalisation of which had been refused, or which had been dissolved by a court decision, but which continued to act, as well as to participate in the activities of such associations within a year following the application of the administrative sanction for the same offence. Article 187-8 of the previous Criminal Code made this crime punishable by the deprivation of liberty for a term of up to five years. The decriminalisation was a correct move because of the highly questionable proportionality of such measure and availability of less stringent effective legal means of securing the legitimate interests and aims outlined in paragraph 2 of Article 11 of the

[456] See L. Palyvoda, S. Golota, Civil Society Organizations in Ukraine. The State and Dynamics (2002-2009): Survey Report; Kyiv: Publishing house «Kupol», 2010, p. 8.

[457] See the relevant web-page of the Verhovna Rada (Parliament), <www.rada.gov.ua:8080/pls/zweb_n/webproc4_1?id=&pf3511=33677>, consulted on 23.06.2010. See also 'Civic organizations call on Prime Minister to keep her promises', <helsinki.org.ua/en/index.php?id=1254823593>, consulted on 20.06.2010.

[458] In view of the focus of the study that is concerned with the NGO legislation, the analysis does not deal with offences and other contraventions (including crimes against statehood and so on) that could be committed by any person regardless of their affiliation with an NGO seen as a component of relevant *corpus delicti*.

European Convention, as well as Articles 36 and 37 of the Constitution of Ukraine.

319. In spite of the revision of the criminal legislation, Article 27 of the ACA has retained the misleading reference to a criminal responsibility for the abovementioned acts.[459]

320. Article 186-5 of the Code of Administrative Offences of Ukraine enacted in 1984 ('the COA') proscribes leading an association of citizens which has not been legalised in the order envisaged by law, or the legalisation of which has been refused, or which has been dissolved by a court decision, but which continues to act, as well as participation in the activities of such associations. This administrative offence is punishable by a fine in the amount of twenty-five to one hundred and thirty times the statutory non-taxable monthly income.[460]

321. Notwithstanding the limited use of Article 186-5 of the COA,[461] there are indications of its disputably formalistic application. Although in the context of alleged signs of incompatibility of aims and activities of the NGOs with the substantial restrictions envisaged by the Constitution and legislation of Ukraine, Article 186-5 was put into operation vis-à-vis persons participating in actions or leading associations dissolved or suspended on the grounds of violation of the 'local status' only, i.e., just for carrying out activities outside the territory of the region in which they have been legalised[462]

Sanctions for membership of an NGO generally applicable

322. The Ukrainian legislation does not envisage circumstances in which it would be an offence (administrative or criminal) to belong to an NGO whether with or without legal personality or registration.

Disciplinary sanctions for membership of an NGO on the part of public officials

323. According to Article 4 of the ACA only political parties are banned from activities in executive and judicial organs, military forces, border service and some other relevant state institutions. The study did not come across any recent account of public officials being disciplined for belonging to an NGO.

[459]The LCC has incorporated a general norm suggesting that those violating this law are held responsible according to the legislation of Ukraine (Article 25)

[460] Approximately 42 and 200 EUR respectively

[461]The only reported recent occasion concerned its application in 2007 against the leadership of the Bakhchisaray district organisation of the Eurasian Youth Union. According to the cited official accounts of the Ministry of Justice of Ukraine, its activities had been suspended and the organisation was formally dissolved due to the violation of its 'territorial status'. See 'The Ministry of Justice has liquidated the Bakhchisaray District Organization of the EYU [Eurasian Youth Union]', <www.khpg.org.ua/ru/index.php?id=1193235085>, consulted on 20.06.2010.

[462] On sanctions applicable to NGOs and respective practice see below.

Penalties following involuntary dissolution

324. There are no provisions in the Ukrainian legislation that would make it possible to impose any penalties (administrative, civil or criminal) and disqualifications on persons solely due to their affiliation with either the highest governing body or a management body of an NGO that has been involuntarily dissolved.[463]

Specific penalties

325. Neither primary nor secondary legislation of Ukraine obliges NGOs to keep a record of addresses or other details of their members or submit reports to any public authority on their activities and, therefore, there are no specific penalties for a failure to do so.

326. There is no general requirement for an NGO to seek approval from a public authority for any of its proposed activities, unless their particular types are subject to relevant licensing, notification requirement or other measures equally applicable to other entities.

327. Public associations are obliged to present regular financial reports to the tax authorities that are of the same nature as those submitted by other legal persons.[464] Besides that, charities are subject to rules allowing for a control over their financial status and relevant privileges.[465] Due to absence of specific sanctions or accounts of discrimination against NGOs in this respect, these arrangements did not raise any particular concerns.[466]

328. At the same time, the secondary legislation and practice have expanded the provisions of the ACA and the LCC related to specification of statutory provisions[467]. Registered NGOs and legalised associations and charities are required respectively to seek an approval for and to notify changes to their statutes, configuration of central statutory organs and some other basic aspects of their internal governance and structures. Thus, based on paragraph 3 of the Regulations on Legalisation they should register or

[463]As suggested above, members of an NGO, its leadership and officers are subject to administrative responsibility under Article 186-5 of the Code of Administrative Offences, which is related to continuation of activities of dissolved associations. Besides that they are subject to general principles and norms providing for criminal, administrative or civil liability.
[464] Articles 24-26 of the ACA.
[465] Articles 14 and 24 of the LCC.
[466] According to paragraph 2 of Article 38 of the LSR a legal person can be involuntarily dissolved in case of a failure to submit tax declarations or financial accounts within the period of one year. NGO-related difficulties in this area concern the registration procedures, acquisition of 'non-profit' status for charities, obligation to comply with the statutory activities that are not properly defined by the legislation etc. See S. Kuts, L. Palyvoda, Civil Society in Ukraine: "Driving engine or spare wheel for Change?", CIVICUS Civil Society Index Report for Ukraine, Kyiv 2006, Center for Philanthropy/Counterpart Creative Center, p. 50.
[467] Articles 15 and 17 and Article 8 respectively.

notify through their statutes membership rules (if any), financial sources and the whole range of other key components of their statutory frameworks.[468].

329. It is indicative that according to the Methodological Guidelines on Execution by the Ministry of Justice and its Territorial Organs of Legally Prescribed Controlling Powers in the Sphere of Activity of Public Organisations ('the GEC'), failures to comply with the above-mentioned requirements -which go beyond those in the legislation - are also treated as breaching the more limited requirements of the laws concerned.[469]

330. The range of legal sanctions applicable to NGOs is defined by Articles 28-32 of the ACA. It includes a formal warning;[470] fine; temporary suspension of particular activities of an NGO; temporary suspension of all its activities; involuntary dissolution ('liquidation').[471]

331. It should be mentioned that while specifying that NGOs can be fined for 'grave or systematic transgressions' Article 30 does not provide for their amounts.[472]

332. All the sanctions (except of a warning that is issued by the legalising body) are subject to a court decision.

333. Although the ACA[473] and other relevant legislative texts, as well as the Methodological Explanatory Note on Limitations on Creation and Activities of Citizens Associations of the Ministry of Justice of Ukraine[474] do reiterate the constitutional (substantial) restrictions on freedom of association, in parallel they operate with such an indefinite concept as 'a violation of the legislation'.[475] The European Court has criticised this ambiguity in the context of NGO registration. However, this assessment is fully valid for their continued operation and possible sanctioning.[476]

334. Indeed, the approach does not provide clear distinction between substantial breaches and formal inessential discrepancies. That creates a possibility for an arbitrary application of the law and sanctions. For these reasons the legal norms at issue do not meet the lawfulness standard under Article 11

[468] See paragraph 19 of Recommendation CM/Rec(2007)14. and relevant provisions of the Explanatory Memorandum to it. Those establishing or belonging to NGOs (as well as those responsible for their direction in the case of non-membership-based bodies) are free to specify additional matters in their statutes but they should not normally be under any obligation to do so.
[469] Available in Ukrainian on <www.minjust.gov.ua/0/11717#21>, consulted on 25.06.2010.
[470] To be distinguished from a recommendation to rectify a breach. See below.
[471] The key sanctions and practice of their application are commented below.
[472] Article 186-5 of the COA applies to natural persons only. See above.
[473] In Articles 4, 27-32.
[474] <www.minjust.gov.ua/0/11717#21>, consulted on 25.06.2010.
[475] Some of these provisions use the terms 'transgression' and 'illegal activities'. Paragraph 2 of Article 38 of the LSR operates with a slightly different wording, namely 'activities that contradict statutory documents'. It is indicative that this norm differentiates that from the notion of 'legally proscribed' activities. See also relevant comments suggested further in this text.
[476] Their list meets the outline of legitimate aims incorporated in Article 11(2) of the European Convention. See paragraphs 57-73 above..

of the European Convention. Moreover, in combination with the questionable territorial and other unsubstantial limitations of public associations' activities it seriously increases a potential for disproportionate interference with the exercise of the right to freedom of association.

335. The restrictive application of Articles 3, 8 and 20 of the ACA that have been interpreted and applied in practice as norms limiting the scope of NGO activities to protection of lawful interests of its members can serve as one more example of that.[477]

Warnings and opportunities for rectification

336. Conversely, there is a system that allows for rectification of violations identified in the course of examination of lawfulness of NGOs' activities. The GEC commands that an examining body is obliged to draw up an act, and where necessary, incorporate a chart of deficiencies with remarks and recommendations made to the NGO concerned and time-frame for their implementation. This kind of procedure does not constitute a sanction. It is reported that in 2009 the Ministry of justice of Ukraine (its territorial structures) applied this procedure against 1400 public associations.[478]

337. Furthermore, according to Article 29 of the ACA the relevant legalising organ is entitled to penalise the NGO concerned by issuing an official written warning. The norm indicates that this sanction can be applied only for violations that do not require other forms of punishment envisaged by the ACA. The Ministry of Justice reported that in 2009 it carried out 9,000 examinations and issued 572 warnings.[479]

Temporary suspension of an NGO's activities

338. With one more reference to the vaguely defined concept of "illegal activities of citizens' associations",[480] the Ukrainian legal framework makes it possible to suspend either specific kinds of activities or all of them of a particular NGO for a three months period that can be prolonged up to six months.

[477] It was reported that in 2006 the Ministry of Justice of Ukraine issued on these grounds an official warning to the 'National Committee for Combating Corruption', a pan-Ukrainian NGO, which had aired critical information on abuses in consumers' unions and intended to represent interests of their members. <www.khpg.org.ua/ru/index.php?id=1165917732>, consulted on 21.06.2010.

[478] Informative-analytical report on results of activities of the Ministry of Justice of Ukraine and its territorial organs on issues of legalization of citizens' associations and other public formations in 2009 as compared to 2008 (in Ukrainian). <www.minjust.gov.ua/0/29689>, consulted on 20.06.2010.

[479] *Ibid*. See also the comments on the case of 'National Committee for Combating Corruption' referred to above.

[480] On uncertainty of the legal construction at issue see comments above. Its deficiency becomes even more obvious in comparison with the wording ('systematic or grave transgressions') used for defining the grounds for fining an NGO.

339. Although Article 31 of the ACA suggests an illustrative (non-exhaustive) list of specific types of activities that can be suspended,[481] the norm could benefit from a clear requirement that these measures should be used to an extent that is no greater than would be necessary to address the violation.

340. Any suspension measure can be lifted by the court that has ordered it upon a motion of the NGO concerned.

Grounds for involuntary dissolution

341. The involuntary dissolution of an NGO - other than for bankruptcy – is envisaged by Article 32 of the ACA. It can be applied for a violation of the substantial restrictions on freedom of association outlined in its Article 4, which in its turn echoes Article 37 of the Constitution. Besides that, the norm specifies that it can be used in case of a continuation of illegal activities after other penalties applied to the NGO.[482]

342. Notwithstanding the actual ban on immediate dissolution of an NGO for reasons other than the specified anti-constitutional activities, it is rendered less effective due to the discussed ambiguity of the legal framework developed in this regard.[483]

Offences that can be committed just by foreign NGOs

343. There are no offences prescribed by law that can only be committed by foreign NGOs or persons working on their behalf in Ukraine.

Other areas of concern

344. As regards other areas of concern about the sanctions to which NGOs can be exposed in Ukraine, it should be mentioned that the ACA does not specify a procedural framework applicable to their imposition by courts.

Conclusions

345. In the light of the preceding discussion, the Ukrainian legal framework can be seen to provide a range of sanctions for NGOs, their founders, management, members or those otherwise involved in their activities and work that is formally appropriate. However, its compatibility with the requirements of a pluralist democratic society is questioned by the grounds

[481] The list includes manifestations and other public events, publishing, banking transactions and operations with its material assets.
[482] In addition to the dissolution of the Bakhchisaray district organisation of the Eurasian Youth Union (see above), there were reports of this measure applied to its Kharkiv subdivision, as well as some other NGOs. < www.khpg.org.ua/en/index.php?id=1193162601>, consulted on 25.06. 2010.
[483] See above.

for the use of these sanctions that lack clarity and consistency in their application. Along with some discordant restrictions on activities of NGOs, these shortcomings risk undermining international expectations for an enabling environment for the creation and continued operation of NGOs

IV CONCLUSIONS AND RECOMMENDATIONS

346. This analysis 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 it is not in a position to confirm the accuracy of the information provided by the respondents.

347. Nonetheless a number of problems do seem to emerge in some countries.

348. Firstly board members can be held liable for or be expected to guarantee the debts and obligations of NGOs having legal personality in circumstances that are not compatible with the grant of such personality to the NGOs concerned.

349. Secondly persons belonging to or organising or participating in the activities of an NGO are sometimes subjected to criminal liability merely on account of the fact that the NGO has no legal personality or has yet to be registered or otherwise recognised.

350. Thirdly the restrictions on members of the armed forces and the police and on public officials becoming members of NGOs are sometimes wider than is really necessary to protect the integrity of their position or to maintain public confidence in their impartiality and integrity and thus sanctions for membership of NGOs are being unjustifiably applied to such persons.

.

351. Fourthly the regulatory requirements for NGOs are sometimes greater than needed to protect legitimate public interests, leading to the unjustified imposition of sanctions on them when such requirements are not observed.

352. Fifthly NGOs are not always given a sufficient opportunity to comply with admissible regulatory requirements before sanctions are imposed on them or their members, officers and staff.

353. Sixthly the grounds for prohibiting or dissolving an NGO sometimes lack sufficient precision or are applied without either adequate evidence establishing their existence or appropriate regard for the principle of proportionality.

354. These are all matters which merit continued scrutiny but the following measures seem necessary to improve the present situation.

355. Firstly it should be ensured that the grant of legal personality to an NGO protects its founders, members, officers and staff from any liability for its debts and obligations except where these are directly attributable to misconduct or neglect of duties by them.

356. Secondly no sanction should be applied by virtue simply of the NGO to which a person belongs or in whose activities he or she participates not having legal personality or being registered or otherwise recognised.

357. Thirdly restrictions on members of the armed forces and the police and on public officials belonging to NGOs should be reviewed and eliminated where they are not necessary to protect the integrity of their position or to maintain public confidence in their impartiality and integrity.

358. Fourthly the regulatory requirements for NGOs should be reviewed and limited to ones that serve legitimate public interests.

359. Fifthly NGOs should be given an adequate opportunity to comply with regulatory requirements before sanctions are imposed on them or their members, officers and staff unless the nature of the non-compliance is not capable of being rectified.

360. Sixthly the grounds for prohibiting or dissolving an NGO should always be framed in precise terms and courts should subject to the strictest scrutiny both the evidence that such grounds exist and the need for such a measure.

361. Finally, the organs of the Council of Europe need to make stronger efforts to raise awareness throughout Europe of Recommendation CM/Rec(2007) 14, particularly through promoting its widespread dissemination and supporting presentations to, and training activities for, NGOs and public authorities.

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 member
- 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.

ANNEX 3

DEVELOPMENTS IN STANDARDS AND CASE LAW

1. There have been several developments of note relating to both standards and case law relevant to the mandate of the Expert Council since 30 August 2009, the cut-off date for its previous Annual Report.

A Standards

2. There are two developments in the Council of Europe concerned with standards.

3. Firstly, the Council of Europe adopted the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority[484]**.** The right to participate is defined as "the right to seek to determine or to influence the exercise of a local authority's powers and responsibilities"[485], which is envisaged as applying to any person or group and so would cover NGOs. Of particular note is the obligation to take all such measures as are necessary to give effect to the right to participate in the affairs of a local authority[486]. These should include empowering local authorities to enable, promote and facilitate the exercise of the right to participate set out in this Protocol and (b) securing the establishment of: procedures for both involving people such as consultative processes and giving access to official documents.

4. Secondly a Code of Good Practice for Civil Participation in the Decision-making Process designed to facilitate the activities of civil society organisations was adopted on 1 October 2009 by the Council of Europe's Conference of INGOs[487]. The Code draws upon practical experiences from various countries in Europe concerning relations between NGOs and the authorities, which are based on a principle of independence, transparency and trust. Examples of good practices and tried-and-tested methods for facilitating these relations have therefore been analysed and set out in an operational document. The Code of Practice chimes well with the adoption of the Additional Protocol just noted, although it applies to all public authorities and not just those operating at the local level.

B Case Law

5. The European Court has delivered judgments dealing with effective compulsion to belong to an NGO, the refusal of registration[488], interference

[484] CETS No. 207. The Additional Protocol requires eight ratifications in order to enter into force and has so far been ratified by Hungary, Norway and Sweden.
[485] Article 1(2).
[486] Article 2(1).
[487] CONF/PLE(2009)CODE1.
[488] A subject covered in the First Annual Report.

with internal management[489] and the decision to dissolve. It has also made reference for the first time to Recommendation CM/Rec(2007)14 in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*[490] and in the same case it underlined the importance of the role of civil society, stating that:

> While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively ...[491]

Membership

6. An obligation to belong to an NGO is generally incompatible with the right to freedom of association but there can be a requirement to join a professional association as part of the regulatory control of that profession so long as there is no restriction on the members setting up their own NGO in addition to the one which they are obliged to join[492].

7. The case of *Vörður Ólafsson v. Iceland*[493] shows that this aspect of freedom of association is relevant even when there is no actual membership but there is a compulsion to provide support for an NGO to which one does not wish to belong. It concerned an employer in the building sector and a member of the Master Builders' Association who was under a statutory obligation to make a contribution to the Federation of Icelandic Industries ("the FII"), a private organisation with between 1,100 and 1,200 member, although he (like his Association) was not a member and was not obliged to join. The obligation arose from the levy imposed by the Industry Charge Act No. 134/1993 on almost all industrial activities in Iceland which was to be transferred to the FII and used for industrial development.

8. The European Court found that the statutory obligation on the applicant to make a financial contribution to the FII that was not of his own choosing and which advocated policies – such as accession to the European Union – which were contrary to his own political views and interests had amounted to an interference with his right not to join an association. It further considered that that obligation had been "prescribed by law" and pursued the legitimate aim of promoting industry in Iceland.

---

[489] A subject covered in the Second Annual Report.
[490] No. 37083/03, 8 October 2009.
[491] Para. 53.
[492] See *Le Compte, Van Leuven and De Meyere v. Belgium*, nos. 6878/75 and 7238/75, 23 June 1981.
[493] No. 20161/06, 27 April 2010.

9. In the European Court's view not only had the relevant national law been open-ended, failing to set out specific obligations for the FII, but there had also been a lack of transparency and accountability, vis-à-vis non-members such as the applicant, as to the use of the revenues from the charge. The definition of the FII's role and duties – "to promote industry and industrial development in Iceland" – in the Act was considered to be very broad and unspecific. A similar view was taken of its duty to "annually provide a report to the Ministry of Industry on the use of the revenues". Furthermore the European Court noted that neither the Act nor any other instrument drawn to its attention set out any specific obligations vis-à-vis non-members who financially contributed to the FII via the Industry Charge. Indeed, according to the FII's annual reports to the Ministry of Justice, no separate accounts were kept of whether the Federation's operations were financed by monies derived from membership fees, capital income, or the Industry Charge. The European Court was also not convinced that the FII's reporting to the Ministry of Industry involved substantial and systematic supervision, the FII having unrestricted power to decide how the charge was allocated, and the Ministry of Industry not being able to interfere with that as long as it remained within the framework of the law. The European Court was therefore not satisfied that there had been adequate safeguards against the FII favouring its members and placing the applicant and other non-members like him at a disadvantage.

10. The European Court thus concluded that the Icelandic authorities, having failed to sufficiently justify the interference with the applicant's freedom of association, had not struck a proper balance between his right not to join an association on the one hand and the general interest in promoting and developing Icelandic industry on the other. As a result it found that there had been a violation of Article 11.

Internal management

11. In *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*[494] - which concerned the dissolution of an association after it had failed to convene a general assembly of its members for around seven years contrary to a requirement that one be held every five years - the European Court recognised that States could interfere with freedom of association in the event of non-compliance by an association with reasonable legal formalities applying to its establishment, functioning or internal organisational structure but this was subject to the condition of proportionality It emphasised, in particular, that freedom of association did not preclude either the laying down of rules and requirements on corporate governance and management or the making of arrangements to ensure observance of those rules and requirements by incorporated entities. The Court did not, therefore, see a problem *per se* in that Azerbaijani law provided for certain formal requirements concerning corporate legal forms (together with associated internal management structures) which associations had to satisfy in order to be eligible for state registration as a non-profit-making legal entity. These included the formal

[494] No. 37083/03, 8 October 2009.

requirement that public associations have certain governing bodies and periodically convene a general assembly of members. Rather than see this as an undue interference with freedom of association, the Court saw the latter requirement as serving to ensure the right of association members to directly participate in the management and activities of the association. Moreover, the Court considered that this requirement, together with other rules concerning the rights of members and internal control and management mechanisms, were normally designed to prevent any possible abuse of the legal status and associated economic privileges enjoyed by non-commercial entities.

12. However, the Court also made it clear that there was a need for any domestic authorities' findings concerning alleged breaches of the legal requirements on internal management to be well-founded and, as such, sufficient to justify any sanction imposed. In the case before it, the Court concluded that neither were there compelling reasons that could justify the interference giving rise to the application to it nor was this an interference that was proportionate to the legitimate aim pursued.

13. Although the failure to convene a general assembly of its members in this case had been a wanton disregard of the requirements not only of the law but also of the association's own charter and the association had thereby put itself in a situation where it risked sanctions, the reaction to the breaches was considered not to be justified and proportionate. In reaching this conclusion the Court took account of the association's attempts to rectify the problem by convening a general assembly prior to the first warning given to it and the failure to give it a genuine chance to put matters right before being dissolved. Furthermore it took account of the authorities' response to this attempt by impugning the lawfulness of the assembly and giving warnings of other breaches with only ten-day periods to eliminate them being allowed. It emphasised the arbitrariness of these periods, the lack of any explanation in the warning letters as to what specific measures taken by the association would be deemed as acceptable and the practical impossibility of convening a further general assembly as the law required two weeks' notice for this.

14. The Court also noted that the second and third warnings referred to the fact hat not all members of the association had been properly informed of the previous general assembly that had been convened, that the association's local branches had not been equally represented at that assembly, and that the current membership records had not been properly maintained. It saw little justification for the authorities to interfere with the internal workings of the association to such an extent, especially in the absence of any complaints by its members concerning these matters. In the Court's view a State could introduce certain minimum requirements as to the role and structure of associations' governing bodies but should not intervene in the internal organisational functioning of associations to such a far-reaching extent as to ensure observance by an association of every single formality provided by its own charter.

15. A further problem in this case there had been a failure on the part of the domestic courts to verify whether the allegations made against the association

were well-founded. In particular these courts did not appear to have attempted to evaluate the merit of the ministry's factual findings by independently examining such evidence as the minutes of the general assembly that had been held, the association's membership records and documents relating to the organisational structure of the association's branches.

16. In the circumstances it is not surprising that the Court concluded that there was no pressing social need for the action taken against the association.

17. However, of equal importance was the Court's conclusion as to the proportionality of this action, namely, that a mere failure to respect certain legal requirements on internal management of non-governmental organisations could not be considered such serious misconduct as to warrant outright dissolution, which was in fact the only sanction available. It suggested that greater flexibility in choosing a more proportionate sanction could be achieved by introducing into the domestic law less radical alternative sanctions, such as a fine or withdrawal of tax benefits and invoked examples of alternative sanctions that were available in other member States of the Council of Europe.

Registration

18. There have been two cases concerned with refusals of registration, one of which has been referred to the Grand Chamber following the judgment of the Chambers concerned. Both cases concerned religious bodies but the principles underpinning the rulings in them are of general application, underlining the importance of an NGO being able to acquire legal personality and the requirement that any refusal have both a legitimate aim, be adequately substantiated and not be unduly formalistic.

19. The case referred to the Grand Chamber is *Kimlya and Others v. Russia*[495], which concerned the refusal to register two churches of Scientology as "religious organisations" because the Religions Act required that any new religious group had to prove that it had existed for at least 15 years in a given Russian territory or that it was affiliated with a centralised religious organisation. A religious group, as defined in the Religions Act, has no legal personality; as such it cannot own or rent property, have a bank account, hire employees or ensure judicial protection of the community, its members and assets. Its status also rules out the opening of places of worship, the holding of religious services that are accessible to the public, acquisition and distribution of religious literature and creation of educational institutions. The European Court found that the lack of legal personality and the restricted scope of rights of religious groups under the Russian Religions Act did not allow their members to effectively enjoy their right to freedom of religion and association. There had therefore been an interference with the applicants' rights under Article 9 interpreted in the light of Article 11.

[495] Nos. 76836/01 and 32782/03, 1 October 2009.

20. Although that interference had been prescribed by law and pursued the legitimate aim of protecting public order, the European Court found that at no point in the proceedings had it been shown that the applicants – either as individuals or as a religious group – had engaged or intended to engage in any unlawful activities or pursued any aims other than worship, teaching, practice and observance of their beliefs. In its view they were denied registration as a religious organisation, not because of any shortcoming on their part or of any specific feature of their religious creed, but rather as a result of the automatic application of a legal provision, the "15-year rule" contained in the Religions Act. The European Court regarded this ground for refusing registration had therefore been purely formal and unconnected with their actual functioning. Furthermore, it considered the contested provision of the Religions Act had targeted base-level religious communities that could not prove either their presence in a given Russian region or their affiliation with a centralised religious organisation. Accordingly, only those newly emerging religious groups, such as Scientology groups, that did not form part of a strictly hierarchical church structure had been affected by the "15-year rule". As the Government was found not to have given any justification for such differential treatment, the European Court concluded that the interference with the applicants' rights to freedom of religion and association had not been "necessary in a democratic society" and held unanimously that there had been a violation of Article 9 of the European Convention, interpreted in the light of Article 11.

21. The other case - *Özbek and Others v. Turkey*[496] - concerned an unsuccessful application to register a public-benefit foundation called Kurtuluş Kiliseleri Vakfı (the Foundation of Liberation Churches), to be based in Ankara. The Directorate General of Foundations, to whom the matter had been referred by the first-instance court for an opinion, had opposed the registration on the grounds that the principal aim of the foundation, according to its constitution, was to serve the interests of the Protestant community and this was not compatible with the prohibition in the Civil Code on supporting a specific community. This opinion was followed by the first-instance court and the Court of Cassation in refusing the application for registration. Subsequently the applicants asked the Court of Cassation to review its decision, submitting that it had misinterpreted the foundation's constitution, which they submitted was poorly worded and did not reflect the true intention of the founding members, which was in fact to provide support to people in need and to victims of natural disasters, regardless of their beliefs or religion. They added that if the Court of Cassation changed its judgment they would amend the constitution to reflect the real intentions of the founding members. However, the Court of Cassation rejected their request.

22. The European Court pointed out that the ability to establish a legal entity in order to act collectively in a field of mutual interest was one of the most important aspects of freedom of association. It also noted that the applicants had been willing to amend the constitution of their foundation both to reflect their true aims and to comply with the legal requirements for registration.

[496] No. 35570/02, 6 October 2009.

However, by not allowing them time to do this – something it had done in a similar case – the Court of Cassation had prevented them from setting up a foundation that would have had legal status. The European Court further noted that depositing a new constitution for a new foundation would have been more expensive than before. In addition, it considered that the fact that some of the applicants had subsequently been able to register an association with aims similar to those of the foundation, but with no reference to supporting any particular community, did not prevent the would-be founders from complaining about the authorities' refusal – which had not been acknowledged or remedied at the national level – to register their foundation. The European Court therefore held unanimously that the refusal to register the foundation, although permitted under Turkish law, had not been necessary in a democratic society, and that there had been a violation of Article 11.

Dissolution

23. It is well-established in the European Court's case law that the prohibition of NGOs and/or their enforced dissolution is not incompatible with Article 11 of the European Convention where the NGOs concerned pose a clear threat to democracy and national security[497]. However, not only must the grounds for dissolution meet the foreseeability standard in order to be prescribed by law - as required for all limitations on rights and freedoms - but there must also be some evidential basis before such a drastic step as dissolution or prohibition can be taken.

24. The European Court found the foreseeability standard not to have been met in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*[498] because the legal provisions were far from being precise as to what could be a basis for warnings that could ultimately lead to an association's dissolution. This was because the warning power could be directed to activities that were deemed to be "incompatible with the objectives" of the NGO law and this included, *inter alia*, the general regulation of the principles and rules for the establishment, management and scope of activities of public associations and so appeared to encompass an unlimited range of issues related to an association's existence and activity. The Court thus considered that the law afforded a rather wide discretion to intervene in any matter related to an association's existence which could render it difficult for associations to foresee which specific actions on their part could be qualified by the ministry as "incompatible with the objectives" of the law. This was all the more problematic because involuntary dissolution was the only sanction available under the domestic law against associations engaging in activities "incompatible with the objectives" of the law. In the Court's view such a sanction required that the circumstances in which it could be applied be more precisely defined.

25. An additional difficulty, as far as the Court was concerned, was that the law contained no detailed rules governing the scope and extent of the ministry's

[497] See, e.g., *Herri Batasuna and Batasuna v. Spain*, nos. 25803/04 and 25817/04, 30 June 2009
[498] No. 37083/03, 8 October 2009.

power to intervene in the internal management and activities of associations, or any minimum safeguards concerning, *inter alia*, the procedure for conducting inspections by the ministry or the period of time granted to associations to eliminate any shortcomings detected, thus providing sufficient guarantees against the risk of abuse and arbitrariness.

26. Although the Court did not conclusively determine that the foreseeability standard was not met because it considered that respect for human rights required it to examine whether the interference with freedom of association was necessary in a democratic society, it seems improbable that it would regard such a legal framework to be sufficiently precise for a limitation on freedom of association.

27. Although the European Court has undoubtedly been willing to give the benefit of the doubt to a state in cases of this kind, it is still confronted with instances in which no such evidential basis could be found to exist.

28. This was certainly the situation in *Tourkiki Enosi Xanthis and Others v. Greece*[499], a case concerning the dissolution of the "Turkish Association of Xanthi" on the ground that its statute ran counter to public policy. This action was directed to an association which had been founded in 1927 under the name "House of the Turkish Youth of Xanthi" with the purpose of preserving and promoting the culture of the "Turks of Western Thrace" and creating bonds of friendship and solidarity between them.

29. The European Court noted that the association had pursued its activities unhindered for nearly half a century. Furthermore, it found that the Greek courts had not identified any element in the title or statute of the association that might be contrary to public policy. In the European Court's view, even supposing that the real aim of the applicant association had been to promote the idea that there was an ethnic minority in Greece, this could not be said to constitute a threat to democratic society. The European Court reiterated that the existence of minorities and different cultures in a country was a historical fact that a democratic society had to tolerate and even protect and support according to the principles of international law. It also considered that it could not be inferred from the factors relied on by a domestic court - namely, that some of the members presented the Muslim minority of Thrace as a "strongly oppressed minority", the president of the association's participation in conferences organised by the Turkish authorities and the publication of a letter in a Turkish daily referring to the "Turks of Western Thrace" - that the applicant association had engaged in activities contrary to its proclaimed objectives. Moreover it found that there was no evidence that the president or members of the association had ever called for the use of violence, an uprising or any other form of rejection of democratic principles

30. The European Court considered that freedom of association involved the right of everyone to express, in a lawful context, their beliefs about their ethnic identity. However shocking and unacceptable certain views or words used

[499] No. 26698/05, 27 March 2008.

might appear to the authorities, their dissemination should not automatically be regarded as a threat to public policy or to the territorial integrity of a country. It thus found the dissolution of the association to be in violation of Article 11 of the European Convention.

31. An insufficiency of evidence was also partly the basis for finding a violation of Article 11 of the European Convention in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*[500].

32. Thus in respect of the alleged breaches invoked to support the basis for dissolution already considered[501] - the failure to convene a general assembly of members - the Court found that "neither the domestic authorities, nor the Government in their observations before the Court, have been able to prove with any sound evidence that these breaches did indeed take place"[502].

33. Furthermore, as regards the second ground invoked to justify the dissolution of the association - engaging in activities in which non-commercial organisations were prohibited from engaging - the Court noted that the fact that no criminal proceedings had ever been instituted against the association's managers or members in connection with the allegations was indicative of a lack of sound evidence supporting the authorities' findings. It also found that neither the warning in which the allegations were made nor the submissions to the domestic courts in connection with a request to dissolve the association contained any specific evidence proving these allegations. The Court observed that "the allegations themselves were extremely vague, briefly worded and offered little insight into the details of the alleged illegal activities".[503]

34. In reviewing the proceedings before the domestic courts, the European Court found that the allegations had been accepted as true, without any independent judicial inquiry and without examining any direct evidence of the misconduct alleged.

35. The Court's summation of the situation was unsurprisingly blunt: "Put simply, the fact of the Association's alleged engagement “in activities prohibited by law” was unproven. In such circumstances, the domestic courts' decision to dissolve the Association on this ground is, in the Court's view, nothing short of arbitrary"[504]. As a consequence it found no justification had been provided for the dissolution of the association, which was thus a violation of Article 11

[500] No. 37083/03, 8 October 2009.
[501] See paras. 11-17.
[502] Para. 80.
[503] Para. 86.
[504] Para. 89.