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**OPINION ON THE LAW INTRODUCING AMENDMENTS TO CERTAIN
LEGISLATIVE ACTS OF THE RUSSIAN FEDERATION REGARDING THE
REGULATION OF ACTIVITIES OF NON-COMMERCIAL ORGANISATIONS
PERFORMING THE FUNCTION OF FOREIGN AGENTS**

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on behalf of the Expert Council
at the request of the Standing Committee of the Conference of INGOs**

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Foreword by the President of the Expert Council on NGO Law

The Expert Council on NGO Law was created in January 2008 by the Conference of INGOs of the Council of Europe. The Expert Council is an initiative by NGOs for NGOs in all Council of Europe member States and Belarus. 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. In the beginning, the Expert Council submitted to the Conference of INGOs thematic studies on specific aspects of NGO legislation and its implementation, covering the 47 member countries of the Council of Europe and Belarus.

In 2011 the Expert Council reviewed its mode of functioning and its outreach, in order to be an ever-more relevant contributor from the civil society viewpoint to the promotion of the Council of Europe's core values, namely democracy, human rights and the rule of law.

In this context the Conference of INGOs became aware that the legislation governing NGOs in the Russian Federation had been subject to amendments by the so-called “foreign agents’ law” that seemed to pose problems of conformity with international standards, notably the European Convention on Human Rights and the Council of Europe’s Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe. Moreover, the implementation of the law also seemed to be in contradiction with a number of these standards.

Responding to the foregoing concerns, the Standing Committee of the INGO Conference asked the Expert Council in April 2013 to review all these matters and prepare an Opinion on the “Law introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organisations Performing the Function of Foreign Agents”, with the intention of informing the Conference of INGOs and affording an opportunity for the Russian authorities to respond to the conclusions of the Opinion and take any appropriate action.

The Expert Council mandated Dragan Golubović to draft the Opinion.

I commend the Expert Council Opinion that follows to the attention of the Conference of INGOs and all other relevant organs of the Council of Europe, to the authorities and civil society of the Russian Federation, and to all other bodies and entities working to uphold and advance the Council of Europe’s core values: democracy, human rights and the rule of law.

Cyril Ritchie
President, Expert Council on NGO Law
August 2013

Executive Summary

The Law gives rise to a number of concerns with respect to its compatibility with the European Convention on Human Rights (Convention) and other recognised international standards and principles. Chief among those concerns include: the definition of non-commercial organisations (NCOs) political activities; the registration and the labelling requirements for "NCOs-foreign agents"; the new reporting and supervisory rules for NCOs-foreign agents; criminal and other sanctions and penalties against NCOs, their founders and managers, including NCOs-foreign agents; and the new reporting and supervisory rules for branch offices of foreign NCOs (FNCOs).

The vague definition of political activities in the Law falls short of satisfying "prescribed by law" requirement with respect to Article 10 (freedom of expression) and Article 11 (freedom of association) of the Convention. It gives the public authority the broad discretionary power to determine what activities of NCOs are deemed political and effectively prevents a NCO from engaging in any kind of otherwise legitimate advocacy activities, before it is entered into the registry of NCOs-foreign agents. This is of particular concern given the gravity of sanctions against NCOs which refuse to register as "foreign agents".

The introduction of a separate registry for NCOs-foreign agents raises the issue of compatibility with Articles 10 and 11 of the Convention, as the interference in question does not satisfy the requirement of proportionality. In addition, the separate registry requirement gives rise to the issue of compatibility with Article 14 of the Convention (prohibition of discrimination), which *inter alia* prohibits discrimination on political grounds. The registration requirement needs to be viewed against the background of the public authority's broad discretionary power to determine what activities of NCOs are deemed political.

The new labelling requirements for NCOs-foreign agents also raises the issue of compatibility with Articles 10 and 11 of the Convention, as they do not seem to serve any legitimate goal, given the exhaustive list of permissible derogations set out in Articles 10 and 11 respectively, and their narrow interpretation by the European Court of Human Rights (Court) which reflects its commitment towards pluralism, tolerance and broadmindedness. The mandatory use of term "foreign agents" gives rise to particular concerns, given its negative connotation in Russia. It unduly stigmatises those NCOs and hinders their ability to exercise their legitimate right to participate in social and political life.

The new reporting and supervisory rules unduly single out NCOs, based on their otherwise legitimate source of income (foreign funds) and "political" activities. The new reporting rules raise the issue of compatibility with Articles 11 and 14 of the Convention. As for the former, they fall short of satisfying the requirement of proportionality, in particular given that any amount of foreign funds received triggers

the application of the new rules. The new supervisory rules give rise to the issue of compatibility with Article 8 (right to privacy), given that the Law does not provide sufficient guarantees against the public authority's arbitrary interference in the NCOs affairs. In addition, they give rise to the issue of compatibility with Articles 13 (right to an effective remedy) and Article 14 of the Convention. In case of the former, with respect to the new grounds for supervision, NCOs-foreign agents are stripped from the guarantees otherwise afforded to private legal entities against the abuse of the public authority's supervisory power.

The scope and severity of the new sanctions and penalties against NCOs—and in particular against NCOs-foreign agents—coupled with the vague language by which they are formulated, presents a threat for the very existence of NCOs. Those provisions give rise to the issue of compatibility with Articles 10 and 11 of the Convention, as they fall short of satisfying "prescribed by law" and proportionality requirements. In addition, they run afoul Article 14 of the Convention and give rise to the issue of compatibility with Article 1 of the First Protocol (peaceful enjoyment of property), as they effectively strip a NCO from its proprietary rights as a founder of a media outlet.

The new reporting and supervisory rules for branch offices of FNCOs suggest that the activities of branch offices of FNCOs are inherently suspicious because of their foreign origin. They impose additional administrative and financial burden on those offices, which is likely to hamper their ability to pursue their otherwise legitimate activities.

As detailed in the Opinion of the Council of Europe's Commissioner for Human Rights and pertinent local sources, the application of the Law thus far has only compounded the foregoing concerns. Since March 2013 the public authority has launched a nationwide campaign of inspections involving hundreds of NCOs in different regions of Russia, with a primary goal to identify NCOs it deems foreign agents. The Human Rights Watch describes the campaign as highly extensive, disruptive, invasive, and often intimidating.

The extent to which the Law departs from the international norms makes it a challenge to bring it in line with those norms. Even if the notion of NCOs "political activities"— which seems to be the centrepiece of the current discussions in Russia regarding possible amendments to the Law — were significantly narrowed, it would not necessarily resolve the structural problems with this law, unless other provisions discussed in this opinion were also revised and brought in line with international standards.

OPINION ON THE LAW INTRODUCING AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF THE RUSSIAN FEDERATION REGARDING THE REGULATION OF ACTIVITIES OF NON-COMMERCIAL ORGANISATIONS PERFORMING THE FUNCTION OF FOREIGN AGENTS

Introduction

1. This opinion examines the compatibility with international standards and best practices, particularly the European Convention on Human Rights and the Council of Europe's Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe, of the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Function of Foreign Agents ('the Law'), dated 20 July 2012, №. 121-ФЗ. The opinion has been prepared at the request of the Conference of International Non-governmental Organisations of the Council of Europe.
2. The legislative acts that have been amended by the Law include the Law on Public Associations, the Law on Non-commercial Organisations, the Law on Counteracting Legalisation of Incomes Received in a Criminal Way and Financing Terrorism (Money Laundering Law), the Criminal Code, and the Code on Criminal Procedure respectively.¹ The Law went into effect 120 days after the date of its publication in the mass media on 23 July 2012.²

¹ Federal Law of the Russian Federation # 82- FZ On Public Associations, 19 May 1995; Federal Law of the Russian Federation #7-FZ On Non-commercial Organisations, 12 January 1996; Federal Law of the Russian Federation № 115-FZ On Counteracting Legalisation (Money Laundering) of Incomes Received in a Criminal Way and Financing Terrorism, 7 August 2001; Criminal Code of the Russian Federation, 13 July 1996 N 63-FZ; and Criminal Procedure Code of the Russian Federation, dated 2001.

² Article 6, Law. Other legislation pertinent to non-commercial organisations (NCOs) include Constitution of the Russian Federation, 12 December 1993; Civil Code of the Russian Federation, Part I, Federal Law No. 51-FZ, 30 November 1994, as amended; Civil Code of the Russian Federation, Part II, Federal Law No. 14-FZ, 26 January 1996, as amended; Federal Law №. 135-FZ "On Charitable Activities and Charitable Organisations", 11 August 1995, as amended; Federal Law №. 275-FZ, "On the Procedure of Establishment and Use of Endowments of Non-commercial Organisations," 30 December 2006; Law of the Russian Federation #294-FZ on Protection of the Rights of Legal Entities and Individual Entrepreneurs in the Exercise of State Control (Supervision) and Municipal Control, dated 26 December 2008; Code of Administrative Penalties, 30 December 2001 No. 195-FZ, as amended; Tax Code of the Russian Federation, Part II, Federal Law №. 118-FZ, 5 August 2000, as amended;. Federal Law №. 95-FZ, "On Gratuitous Assistance," 4 May 1999, as amended; Federal Law №. 54-FZ "On Assemblies, Meetings, Demonstrations, Marches and Picketing", 19 July 2004, as amended; The Law on "Information, Information Technologies and Information Protection," 30 July 2012; Resolution of the Government of the Russian Federation # 212, "On measures aimed at implementing certain provisions of the federal laws regulating activities of non-commercial organisations," 15 April 2006; The "Dima Yakovlev Law", 1 January 2013; Resolution of the Government of the Russian Federation #485, 28 June 2008, regarding the list of international organisations whose grants (free aid) obtained by Russian organisations shall be tax exempt and shall be accounted for as taxable income of taxpayers – recipients of such grants; Decree of the Ministry of Justice of the Russian Federation #222, "On the Procedure of State Control of NCO activity (including Spending of Resources)," 22 June 2006; Order of the Ministry of Justice of Russia, 30

3. The Law has been the subject of scrutiny by the Council of Europe and other interested parties³ since its enactment. The Secretary General of the Council of Europe has repeatedly expressed concerns over the impact of the Law on civil society in Russia.⁴ Those concerns are echoed in the statement of the Council of Europe Commissioner for Human Rights (Commissioner) of 11 April 2013, and further elaborated in the recent Opinion of the Commissioner on the legislation of the Russian Federation on non-commercial organisations in the light of Council of Europe standards.⁵
4. Significantly, President Putin has also acknowledged the need to improve the Law.⁶ Following suit, the Federation Council's Committee on Constitutional Legislation has recently announced that it would hold round table talks to discuss possible amendments to the Law.⁷ The Expert Council is therefore hopeful that this opinion will contribute to the concerted efforts to address the perceived shortcomings in the Law.
5. The opinion first outlines the critical issues in the Law, in particular with respect to the Law on Public Associations and the Law on Non-Commercial Organisations, which are discussed in some details in the opinion. Thereafter it presents the international standards pertinent to non-governmental (non-commercial) organisations, then considers the compatibility of the Law with those standards and outlines problems which have arisen in the application of the Law, and concludes with an overall evaluation of the compatibility of this law and practice with international standards.

November 2012, № 223 "On procedure of maintaining Registry of Non-commercial Organisations Carrying Functions of Foreign Agents"; Federal law №. 139-FZ "On Amendments to Federal Law on Protecting Children from Information Harmful to Their Health and Development and Certain Legislative Acts of the Russian Federation", 28 July 2012. See ECNL, NCO Monitor Russia (last updated 8 May 2013) at <http://www.icnl.org/research/monitor/russia.html>. The sheer volume of pertinent legislation, coupled with its frequent revisions, itself poses a challenge for NCOs to comply with the law.

³ See statements of the United Nation (UN) High Commissioner for Human Rights and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association respectively at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12366&LangID=E> and <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13323&LangID=E>

⁴ Statement of the Secretary General, dated 7 July 2012 at <http://www.coe.int/en/web/secretary-general/news-2012>; meeting with President Putin on 20 May 2013 at <http://www.coe.int/en/web/secretary-general/news-2013>

⁵ "Opinion of the Commissioner for Human Rights on the legislation of the Russian Federation on non-commercial organisations in light of Council of Europe standards", Strasbourg, 15 July 2013, CommDH(2013)15.

⁶ President Putin's remarks on 4 July 2013, at <http://uk.reuters.com/article/2013/07/04/uk-russia-ngos-putin-idUKBRE9630MV20130704>

⁷ "Federation Council gets ready to discuss amendments to 'Foreign Agents' Law", at <http://hro.rightsinrussia.info/hro-org/foreignagents-90> (dated 1 August 2013).

6. The terms *non-governmental organisations* (NGOs) and *non-commercial organisations* (NCOs), which is a term used in the Russian legislation, are used inter-changeably in the opinion as appropriate.
7. Throughout the opinion the term "NCO-foreign agent" is used to refer to those NCOs to whom the Law may conceivably apply. The usage of the term is solely for ease of reference and has no connotation whatsoever of approval of the concept of terminology.
8. This opinion was prepared by Dragan Golubović on behalf of the Expert Council on NGO Law of the Conference of INGOs. Other members of the Expert Council have provided input.

The Law: Issues to consider

The analyses of the Law, as well as reports on the application of the Law, suggest that the following issues bear particular relevance for the assessment of its overall compatibility with international standards:

Definition of a NCO-foreign agent

9. The Law provides for a broad definition of a NCO-foreign agent and does not provide a clear-cut answer with respect to the impact of the Law on NCOs which are otherwise exempted from the application of this law.

Foreign funding

10. The Law unduly discriminates NCOs-foreign agents i.e. those receiving foreign funding and pursuing "political goals".

Political activities

11. The Law provides for a broad definition of "political activities" of NCOs-foreign agents, which effectively prevents them from engaging in any advocacy activities.

Registry of NCOs-foreign agents

12. The Law provides for a separate registry of NCOs-foreign agents. A NCO receiving or intending to receive foreign funding may not engage in political activities before it is entered into the registry of NCOs-foreign agents.

Labelling requirements

13. Under the Law any materials published or distributed by a NCO-foreign agent must have an indication that these materials are published and/or distributed by a "NCO performing the function of a foreign agent".

Reporting requirements

14. The Law requires that NCOs-foreign agents maintain separate accounting of funds and other property generated through local and foreign sources, and subjects them to specific reporting requirements.

Supervision of NCOs-foreign agents

15. The Law gives public authorities new grounds to conduct additional audit of NCOs-foreign agents.

Penalties and criminal sanctions

16. The Law introduces harsh penalties and criminal sanctions against NCOs which are found in breach of the Law.

Foreign NCOs

17. The Law introduces additional reporting and supervision requirements for foreign NCOs operating in Russia through registered branch offices.

The applicable international standards

The European Convention on Human Rights

18. Provisions of the European Convention on Human Rights ('Convention') governing the rights to *freedom of expression* (Article 10) and *freedom of assembly and association* (Article 11)—as well as the ensuing case law of the European Court of Human Rights ('Court')—bear particular relevance for assessing the compliance of the Law with international standards. In addition, the opinion takes into due consideration other articles of the Convention as appropriate, namely, the rights to privacy (Article 8); prohibition of discrimination (Article 14);⁸ and protection of property (Article 1, First Protocol to the Convention).
19. The rights protected by the Convention are guaranteed to "everyone". This includes natural but also legal persons—depending on the nature of the rights concerned—"within the jurisdiction" of a Signatory State (Article 1,

⁸ See also Article 1 of the Protocol No. 12 to the Convention (general prohibition of discrimination).

Convention). The Court interprets the notion "within jurisdiction" to at least include all persons residing—or for that matter having a place of business—on a territory of a State.⁹

20. Once recognised as a legal entity an NGO is entitled not only to rights protected by Articles 10 and 11, but also to other rights protected by the Convention which pertain to legal persons, notably, the right to a fair trial, no punishment without law, freedom of thought, conscience and religion, the right to an effective remedy, prohibition of discrimination, and protection of property.¹⁰ However, only membership NGOs (associations) — including those without legal entity status — may invoke protection afforded by Article 11 of the Convention.
21. The primary obligation of a State with respect to the rights guaranteed by Articles 10 and 11 is negative one: obligation not to interfere in the enjoyment of those rights.¹¹ This is in keeping with the overriding objective of those articles: to afford protection to legal and natural persons in exercising those rights from undue interference by public authorities.¹² The Court shall primarily interpret pertinent national legislation and domestic case law, as well as decisions and actions of government, against the background of the negative obligation of a State.¹³ Legitimate interference of a State ("positive obligation") is limited to instances in which a State action is deemed necessary to ensure the full protection of those rights.¹⁴ This *inter alia* includes an obligation of a State to allow an NGO to acquire legal entity status and afford necessary legal protection during its life-cycle.¹⁵

⁹ See e.g. *Brankovic and others v. Belgium and others*, Application No. 52207/99, judgement of 12 December 2001, par. 67.: "In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention". See also *Soering v. the United Kingdom*, Application No. 14038/88, judgment of 7 July 1989. On the application of the notion "everyone" with respect to Article 11 of the Convention see Expert Council on NGO Law, "Conditions of Establishment of Non-Governmental Organisations", OING Conf/Exp (2009) 1, First Annual Report, Strasbourg, January 2009, paras 20-24.

¹⁰ Articles 6, 7, 9, 11, 13 and 14 of the Convention respectively. Article 1 of the First Protocol to the Convention. See European Committee on Legal Co-operation, "Non-Governmental Organisations in the Case Law of the European Court of Human Rights", Strasbourg, 8 April 2010, CDCJ (2010) 12.

¹¹ The negative obligation of a State pertains to the right of privacy (Article 8) and freedom of thought, conscience and religion (Article 9) as well, which also belong to the group of the so called qualified rights. Article 9 is not addressed in the opinion, however, given that the Law does not apply to religious organizations.

¹² See e.g. *Brega and Others v. Moldova*, Application no. 61485/08, judgment of 24 January 2012 (Article 11, Convention).

¹³ See e.g. *Ramazanova and Others v. Azerbaijan*, Application no. 44363/02, judgment of 1 February 2007 (Article 11, Convention).

¹⁴ See e.g. *Demir and Baykara v. Turkey*, Application no. 34503/97, judgment of 12 November 2008.

¹⁵ See *Sidiropulos and Others v. Greece*, Application no. 57/1997/841/1047, judgment of 10 July 1998.

Legitimate interference with freedoms of expression and association

22. In deliberating if the alleged interference with Articles 10 and 11 is compatible with the Convention, the Court has developed an analytical framework which sets a high threshold for a State's legitimate interference with the rights protected by those articles. Accordingly, any interference with freedoms of expression and association must be "prescribed by law", must "serve legitimate aim", and must be "necessary in a democratic society".¹⁶ The Court applies the same analyses with respect to other qualified rights in the Convention, notably, the right to privacy and freedom of thought, conscience and religion, which are protected by Articles 8 and 9 respectively.
23. *Prescribed by law.* The expression "prescribed by law" requires that the impugned measure have a basis in domestic law. In addition, it also refers to the quality of the law in question, and requires that it must be both accessible to the persons concerned and formulated with *sufficient precision* so that a common person, if need be with appropriate advice, can reasonably foresee the consequence of a particular action. Because it is impossible to attain an absolute precision in the drafting process, a law which confirms some degree of discretion on the side of public authorities is not itself inconsistent with this requirement, insofar as the scope of the discretion and the manner of its exercises are formulated with sufficient clarity. The Court acknowledged that a degree of precision required for the law in question may depend on a number of factors, including the content of the instrument in question; the field it seeks to cover; and the status of those to whom it is addressed.¹⁷ This is also in keeping with the subsidiary role of the Court in the protection of the rights guaranteed by the Convention: it is primarily for national authorities to interpret and apply domestic law. However, this cannot serve as a pretext for a State to avoid obligations arising from the Convention.¹⁸
24. The subsidiary role of the Court by no means implies that it may not proceed with its own independent analyses of the contested legislation, decisions and case law of domestic authorities. Indeed, the Court has set high standards in applying "prescribed by law" requirement. In *Maestri v. Italy*, a case involving a justice who was reprimanded by the supervisory authority for violation of regulations prohibiting judges from membership of the Freemasons, the Court ruled violation of Article 11 because the contested regulations did not meet "prescribed by law" standard. The Court found regulations not foreseeable—i.e. written with necessary quality which would have allowed for their unambiguous interpretation, even though the applicant was a well informed person (justice). The Court noted that the expressions

¹⁶ See e.g. *Handyside v. United Kingdom*, Application no. 5493/72, judgment of 7 December 1976.

¹⁷ See e.g. *Maestri v. Italy*, Application no. 39748/98, Grand chamber judgment of 17 February 2004, par. 30. *Koretsky and others v. Ukraine*, application no. 40269/02, judgment of 3 April 2008 [ECHR] par. 47.

¹⁸ See e.g. *Refah Partisi and Others v. Turkey*, Applications nos. 41340/98, 41342/98, 41343/98, 41344/98, Grand chamber judgment of 13 February 2003, par. 57.

“prescribed by law” and “in accordance with the law” in Articles 8 to 11 of the Convention not only require that the impugned measure have some basis in domestic law, but that law is written with *certain quality*. The Court further noted:

"For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise".¹⁹

25. Legitimate aims. Any derogation from the aforementioned rights must serve "legitimate aim". The grounds for legitimate derogation set out in Articles 10 and 11 of the Convention are exhaustive i.e. *numerus clausus*, and therefore derogation (interference) may not serve any other goals. Article 10 par. 2 of the Convention reads as follows:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

26. Article 11 par. 2 of the Convention reads as follows:

"No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall 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".

27. The Court has acknowledged that a State has some margin of appreciation with respect to the manner and scope by which those legitimate derogations are applied. However, it goes hand in hand with rigorous European supervision. In *Sidiropulos and Others v. Greece*, a case involving violation of Article 11 of the Convention, the Court noted:

"Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association.

¹⁹ Par. 30. of the judgment. See also *Sunday Times v. the United Kingdom* (no. 1), Application no. 6538/74, judgment of 26 April 1979, par. 49. *Hasan and Chaush v. Bulgaria* [GC], application, no. 30985/96, Grand chamber judgment of 26 October 2000, par. 84.

In determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts."²⁰

28. *Necessary in a democratic society*. The Court has repeatedly noted that democracy is a fundamental feature of the European public order and the only regime compatible with the Convention.²¹ Therefore, it is incumbent on a State to prove that interference with the rights enshrined in Article 10 and 11 is not only prescribed by law and serves legitimate aim, but is also in response to "pressing social needs".²² In *Refah Partisi (the Welfare Party) and Others v. Turkey* the Court stated:

"Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it".²³

29. Furthermore, it is incumbent on a State to prove that the interference in question is not only necessary in a democratic society i.e. serves pressing social needs, but is also *proportional* to the needs it purports to serve: a State must prove that the interference in question is the *minimum level of interference* necessary to attain legitimate goals. As the Court stated in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*:

"When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient"."²⁴

30. Proportionality therefore requires striking a fair balance between the general interest and the requirements for the protection of fundamental rights, which is

²⁰ Par. 40., *supra*, note 15. See also *Handyside v. United Kingdom*, par. 48-49., *supra*, note 16. *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Applications nos. 29221/95 and 29225/95, judgment of 2 October 2001. *Gorzelik and Others v. Poland*, Application no. 44158/98, Grand Chamber judgment of 17 February 2004. *Emin and Others v. Greece*, Application no. 34144/05, Chamber judgment of 27 March 2008. *Tourkiki Enosi Xanthis and Others v. Greece*, Application no. 26698/05, Chamber judgment of 27 March 2008.

²¹ See e.g. *United Communist Party of Turkey and Others v. Turkey*, Application no. 19392/92, judgment of 30 January 1998 par. 45.

²² *Handyside v. United Kingdom*, par. 48., *supra*, note 16.

²³ Par. 86. of the judgment.

²⁴ Application no. 37083/03, judgment of 8 October 2009 par. 68.

inherent in the whole of the Convention. In a significant number of cases involving violation of Articles 8, 10 and 11 of the Convention—which are pertinent to the analyses of the Law—the Court found that the interference served a legitimate aim, however, the respondent failed to meet the proportionality test.²⁵

Recommendation CM/Rec(2007)14

31. The Recommendation on the legal status of non-governmental organisations in Europe, although not legally binding, represents a major milestone in the Council of Europe's efforts to promote democracy, rule of law and human rights. The Recommendation recognises: "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". It also underscores the role of NGOs in "the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe".²⁶
32. The Recommendation defines NGOs as "voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members". This definition pertains to both membership and non-membership organisations, but not to political parties (paras. 1-2, Recommendation).
33. The Recommendation sets out a number of principles governing the legal status of NGOs which bear particular relevance for assessing the compliance of the Law with international standards.²⁷ This *inter alia* includes: the scope of NGOs legitimate objectives; the internal governance of NGOs; fundraising, property and public support to NGOs; accountability and supervision of NGOs; liability of NGOs; and the status of foreign NGOs. These principles are duly elaborated throughout the opinion.

²⁵ See e. g. *Campbell v. the United Kingdom*, application no. 1359/88, judgment of 25 March 1994 (violation of Article 8). *Handyside v. the United Kingdom*, *supra*, note 16. *Sunday Times v. the United Kingdom* (No. 1), Application no. 6538/74, judgment of 26 April 1979 (violation of Article 10). *Yeşilgöz v. Turkey*, Application no. 45454/99, judgment of 20 December 2005. *Kjeldsen, Busk, Madsen and Pederson v. Denmark*, Application no. 5095/71, 5920/72, 5926/72, judgment of 7 December 1976. *Loizidou v. Turkey*, Application no. 15318/89, judgment of 23 March 1995. *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, *supra*, note 24. (violation of Article 11). See also Compilation of Venice Commission opinions concerning freedom of association, Strasbourg, 16 July, 2013, CDL(2013)035 pp. 9-12.

²⁶ Preamble, Recommendation.

²⁷ See also the Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, adopted by the Committee of Ministers on 6 February 2008, which *inter alia*, calls on member states to "ensure that their legislation, in particular on freedom of association, peaceful assembly and expression, is in conformity with internationally recognised human rights standards..." (par. 2. vi).

34. Significantly, many of the principles enshrined in the Recommendation have been specifically invoked by the Court. Thus in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* the Court made specific references to the principles set out in the Recommendation governing the dissolution of an NGO, the internal governance of an NGO, permissible objectives of an NGO, and the supervision and liability of an NGO.²⁸ This underscores the point about the role of the Recommendation in the Council of Europe's overall structure designed to protect democracy and human rights, given the political nature of this document.

Foreign funding for NGOs

35. Recommendation *CM/Rec(2007)14* sets out an important guiding principle with respect to legitimate sources of income for NGOs:

"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" (emphasis ours).²⁹

36. In elaboration of that principle, the Venice Commission notes that:

"Foreign funding of NGOs is at times viewed as problematic by States. The Venice Commission acknowledges that there may be various reasons for a State to restrict foreign funding, including the prevention of money-laundering and terrorist financing. However, these legitimate aims should not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work, notably in defense of human rights. The prevention of money-laundering or terrorist financing does not require nor justify the prohibition or a system of prior authorisation by the government of foreign funding of NGOs".³⁰

37. The foregoing principle is also echoed in a number of the United Nations (UN) instruments, including the Declaration on Human Rights Defenders of UN General Assembly (Declaration),³¹ and the Resolution 22/6 of the UN Human Rights Council.³² Article 13 of the Declaration provides:

"Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration".

²⁸ Par. 39. of the judgment.

²⁹ See also paras 100-101 of the Explanatory Memorandum to the Recommendation ('Explanatory Memorandum').

³⁰ Compilation of Venice Commission opinions concerning freedom of association, p. 16, *supra*, note 25.

³¹ UN General Assembly resolution 53/144, annex.

³² Resolution No. 22/6 of 21 March 2013.

38. The significance of Article 13 of the Declaration stems from the fact that it makes no distinction between the sources of funding, be it from domestic, foreign or international sources. Although the Declaration is not a binding instrument, it was nevertheless adopted unanimously by the UN General Assembly, and contains a set of principles and rights that are based on human rights standards enshrined in other international instruments which are legally binding.³³
39. In a similar fashion, Resolution 22/6 of the UN Human Rights Council calls on Member States to ensure that reporting requirements do not inhibit the functional autonomy of NGOs and do not *discriminatorily* impose restrictions on potential sources of funding.³⁴
40. The second thematic report of the United Nation Rapporteur on the rights to peaceful assembly and association, which was issued in 2013, specifically deals with the issue of NGOs/CSOs foreign funding. The report *inter alia* states:
- "The ability of CSOs to access funding and other resources from domestic, foreign and international sources is an integral part of the right to freedom of association, and these constraints violate article 22 of the International Covenant on Civil and Political Rights and other human rights instruments, including the International Covenant on Economic, Social and Cultural Rights".³⁵
41. Although the preceding paragraph makes specific references to Article 22 of the International Covenant on Civil and Political Rights, it is important to note that Article 11 of the Convention is closely patterned to Article 22 of the International Covenant, including the grounds for legitimate interference with freedom of association.³⁶
42. NGOs right to receive grants is specifically recognised by the Court as an inherent right of a legal person. In *Ramazanova and others v. Azerbaijan*, the Court noted that domestic law effectively restricted the association's ability to function properly as a charity because, not having the status of a legal entity, it

³³ See second thematic report of the United Nation Rapporteur on the rights on peaceful assembly and association, United Nations General Assembly, A/HRC/23/39, 24 April 2013, par. 17.

³⁴ See also The Observatory for the Protection of Human Rights Defenders, "Violation of the NGO right to funding: form harassment to criminalization", annual report, 2013.

³⁵ Par. 20. of the report, *supra*, note 34.

³⁶ See Article 22, paras 1 and 2 of the International Covenant, in particular: "1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of 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. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right". See *supra* legitimate interference with freedoms of expression and association.

could not receive any grants or donations, which is one of the main sources of income for NGOs in Azerbaijan.³⁷

43. The Court did not look into the issue of legitimate scope of interference with regard to public funds which NGOs receive from public authorities, however, this issue was recently brought to the Supreme Court of the United States. In *Agency for International Development at all v. Alliance for Open Society International at all*.³⁸ the Supreme Court struck down a USAID regulation which required NGOs to adopt the government's anti-prostitution policy in order to receive funds to combat the worldwide spread of HIV/AIDS. The Court observed that the government cannot use a federal funding programme to compel adherence to governmental policy which by its nature cannot be confined within the scope of the government programme and ruled violation of *free speech* enshrined in the First Amendment to the US Constitution. The implication of this decision is significant: just because an NGO is a recipient of government's funds, it does not necessarily mean that it has to agree with or espouse governmental policy on a particular issue i.e. it has to act as an "agent" of the government.

Political activities of NGOs

44. Recommendation CM/Rec(2007)14 sets out a number of guiding principles with respect to the legitimate goals of NGOs:

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

6. NGOs should not be subject to direction by public authorities.³⁹

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".⁴⁰

³⁷ Par. 59. of the judgment, *supra*, note 13.

³⁸ No. 12-10, judgment of June 20, 2013. Available at http://www.supremecourt.gov/opinions/12pdf/12-10_21p3.pdf

³⁹ See paras 26-29, 31, Explanatory Memorandum.

⁴⁰ See paras 34-39, Explanatory Memorandum.

45. Articles 10 and 11 of the Convention ensure broad protection to NGOs with respect to their legitimate goals and activities, including "political" ones, and therefore any interference with those goals and activities must sustain the Court's vigorous scrutiny.
46. Recognising the role of "pluralism, tolerance and broadmindedness",⁴¹ as well as the role of NGOs in a democratic society, the Court has developed two principles underpinning freedom of expression. Firstly, subject to legitimate derogations (*infra*, par. 25.) it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive, or as a matter of indifference, but also to those that "offend, shock or disturb the State or any sector of the population".⁴² Secondly, legitimate derogations must be "narrowly interpreted and the necessity for any restrictions must be convincingly established",⁴³—and must not be construed in a fashion which would render rights protected by the Convention "theoretical and illusory", rather than "practical and effective".⁴⁴ With respect to Article 10, the Court affords NGOs the same level of protection which is afforded to other pillars of civil society, the media and journalists.⁴⁵
47. The Court holds a relationship between Articles 10 and 11 as the one between "lex generalis" and "lex specialis".⁴⁶ Notwithstanding its autonomous role and particular sphere of application, therefore, Article 11 is considered in the light of Article 10 given that "the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11".⁴⁷ This protection is afforded to both political parties⁴⁸ and other associations.⁴⁹ The Court recognises that individual interests must occasionally be subordinated to those of a group. However, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved, which ensures the fair and proper

⁴¹ *Handyside v. the United Kingdom*, par. 49., *supra*, note 16.

⁴² *Ibid.*

⁴³ *Observer and Guardian v. the United Kingdom*, Application no. 13585/88, judgment of 26 November 1991.

⁴⁴ *Sakhnovskiy v. Russia*, Application no. 2127/03, Grand Chamber decision of 2 November 2009, par. 99. See also Venice Commission, "Standards on Non-Governmental Organisations and Free Association", CDL-AD(2013)017, 28 March 2013, par. 42.

⁴⁵ See e. g. *Vides Aizsardzibas Klubs v. Latvia*, Application no. 57829/00, judgment of 27 May 2004. *Radio Twist, A.S. v. Slovakia*, Application no. 62202/00, Chamber judgment of 19 December 2006.

⁴⁶ *Ezelin v. France*, Application no. 11800/85, judgment of 26 April 1991, par. 34.

⁴⁷ *Christian Democratic People's Party v. Moldova*. Application no. 25196/04, judgment of 2 February 2010.

⁴⁸ *United Communist Part of Turkey and Others v. Turkey*, Application no. 19392/92, judgment of 30 January 1998. *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, Application no. 46626/99, judgment of 3 February 2005.

⁴⁹ *Sidiropoulos and Others, v. Greece*, *supra* note 15. *Gorzelik and Others v. Poland*, *supra*, note 20. *Kalifatstaat v. Germany*, Application no. 13828/04, judgment of 11 December 2006. *Zhechev v. Bulgaria*, Application no. 57045/00, Chamber judgment of 21 June 2007.

treatment of minorities and avoids any abuse of a dominant position.⁵⁰ As already noted, while non-membership NGOs are not covered by Article 11, they do enjoy protection of Article 10, as well as other articles of the Convention pertaining to legal entities.⁵¹

48. As a starting point of any analyses, NGOs should be allowed to engage in any kind of activities otherwise allowed to individuals, without additional restrictions imposed on them.⁵² This certainly includes participation in public life and policy, which is in keeping with one of the principal features of democracy—that is, to create the possibility for members of a society to resolve social and political problems through dialogue, without recourse to violence, "even when they are irksome".⁵³ A State does have some margin of appreciation in setting out conditions for the establishment and oversight of political parties and other associations participating in elections. However, other than that, the Convention affords broad protection to NGOs "political" activities.
49. The Court has recognised the role of NGOs in democratic societies on numerous occasions. In *Zhechev v. Bulgaria*, a case involving an association which *inter alia* sought to repeal the Bulgarian Constitution of 1991, restore the monarchy and open the border between "the former Yugoslav Republic of Macedonia" and Bulgaria, the Court noted that an organisation may advocate for changes in the legal and constitutional order insofar as the means used to further that end are peaceful and democratic, and if the change proposed is itself compatible with basic democratic principles. The mere fact that an organisation demands political changes or that its activities are otherwise deemed "political" does not *per se* justify interference with its freedom of association, including a request that the organisation be registered as a political party, in order to participate in political life. This even more so if domestic legislation provides for a broad or vague definition of political activities:

"The first thing which needs to be noted in this connection is the uncertainty surrounding the term "political", as used in Article 12 § 2 of the Constitution of 1991 and as interpreted by the domestic courts. ... Against this background [of different interpretations by national courts] and bearing in mind that this term is inherently vague and could be subject to largely diverse interpretations, it is quite conceivable that the Bulgarian courts could label any goals which are in some way related to the normal functioning of a democratic society as "political" and accordingly direct the founders of legal entities wishing to pursue such goals to register them as political

⁵⁰ See *Young, James and Webster v. the United Kingdom*, Application no. 7601/76; 7806/77, judgment of 13 August 1981. *Chassagnou and Others v. France*, Application nos. 25088/94, 28331/95 Grand Chamber judgment of 29 April 1999.

⁵¹ This, of course, presumes that a non-membership NCO acquires legal entity status first.

⁵² See Expert Council on NGO Law, "Conditions of Establishment of Non-Governmental Organisations", par. 33 and further, *supra*, note 9.

⁵³ *United Communist Part of Turkey and Others v. Turkey*, paras 57-58., *supra*, note 21.

parties instead of “ordinary” associations. A classification based on this criterion is therefore liable to produce incoherent results and engender considerable uncertainty among those wishing to apply for registration of such entities”.⁵⁴

50. Protection afforded to NGOs political activities also include their right to publish and distribute propaganda materials, advocate with authorities promoting their ideas and aims and involve volunteers in their activities. Otherwise, the right to engage in political activities would be lacking any content.⁵⁵

Compatibility of the Law with international standards

Definition of NCO-foreign agent

51. The Law applies to NCOs which: 1) receive or intend to receive funds and other property from foreign states, their government bodies, international and foreign organisations, foreign persons, including those legally residing in Russia, stateless persons or persons authorised by them, and/or from Russian legal entities receiving or intending to receive funds and other property from the aforementioned sources; and 2) engage—including, but not limited to, in the interests of foreign donors—in “political activities” which are carried out in the territory of the Russian Federation as defined by this law.⁵⁶
52. Funds and other property provided by public joint stock companies with state shareholding and their subsidiaries are excluded from the definition of foreign funding.⁵⁷ In addition, state corporations and state companies, as well as NCOs established by them, state and municipal (including budgetary) institutions, political parties, religious organisations, and professional associations (associations of employers and chambers of commerce and industry) are also exempted from the application of this law.⁵⁸
53. The Law applies to all kinds of foreign funding for NCOs, the only notable exception being foreign funds received from public joint stock companies with state participation and their subsidiaries. It does not set any minimum amount threshold in this respect, and therefore even a symbolic foreign donation would seem to trigger the application of this law. It would seem on face value that donations from a Russian legal entity which itself received

⁵⁴ Par. 55. of the judgment. See also Expert Council on NGO Law, “Conditions of Establishment of Non-Governmental Organisations”, pars. 20-24., *supra*, note 9.

⁵⁵ See e.g. *Koretsky and Others v. Ukraine*, *supra*, note 30. See Expert Council on NGO Law, “Conditions of Establishment of Non-Governmental Organisations”, pars. 33-45., *supra*, note 9.

⁵⁶ Article 29, par. 6, item 9, Federal Law No. 82-FZ, “On Public Associations,” of May 19, 1995, as amended (‘LPA’). Article 2, par. 6, Federal Law No. 7-FZ, “On Non-Commercial Organisations,” of 12 January 1996, as amended (‘LNCO’).

⁵⁷ Article 2, par. 6, LNCO as amended.

⁵⁸ Article 1, par 4, 6, 7, LNCO as amended.

funds from the foreign sources are also deemed foreign funds/property.⁵⁹ However, the General Prosecutor's report on the implementation of the Law suggests otherwise. The report states that NCOs, in order to avoid the application of this law, have used Russian intermediary to receive foreign funds, in particular given that a Russian donor does not have a legal obligation to disclose to a NCO the source of a gift.⁶⁰

54. The Law applies to both NCOs which receive foreign funds as well as to those which *intend* to receive such funds. With respect to the former, this presumably pertains to NCOs which were recipients of such funds at the time the Law came into force and onward—and not to NCOs which had received funds before it came into force. However, it lacks clarity on that point (*infra*, paras 106-107, 111.).⁶¹ With respect to the latter, NCOs may not receive any foreign funds before they are entered into the registry of NCOs-foreign agents.
55. A NCO, with the exception of a political party, is deemed to engage in political activities if—irrespective of the goals and purposes stated in its founding documents—it participates (including through financing) in organising and conducting activities in the Russian Federation aimed at influencing public authorities with a view to having state policy pursued by those authorities changed. Activities aimed at influencing public opinion for the aforementioned purposes are also deemed political activities. Those activities are deemed political regardless of whether a NCO is conducting them in the interest of a foreign donor or without such purpose.⁶² Indeed, it seems that they do not necessarily have to be financed by foreign sources either, in order to trigger the application of the Law. A NCO is considered to engage in political activities even if it only participates in activities organised by another organisation which is funded by foreign sources. The Law does not elaborate on what kind of political activities precisely will trigger its application, but rather uses vague terms such as “political actions,” “state policy,” “the shaping of public opinion,” and “influence”.⁶³
56. Under the Law a broad range of goals and activities is exempted from the definition of political activities. These include: activities in the field of science, culture, arts, public health care, citizens' preventive treatment and health protection, citizens' social support and protection, protection of motherhood and childhood, social support to disabled people, promotion of

⁵⁹ See International Center for Not-for-Profit Law (ICNL), "Overview of the Federal Law on Introducing Amendments to Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Noncommercial Organisations Performing the Functions of Foreign Agents", dated July 20, 2012 №121-Φ3" (hereinafter: "Overview of the Federal Law"), p. 5.

⁶⁰ See Minutes of the Council of Federation meeting, dated July 10, 2013. p. 24. at council.gov.ru/media/files/41d47a3ddf1ee42efa03.pdf

⁶¹ See also Expert Council on NGO Law, "Opinion on the amendments in 2009 to the NGO Law in Azerbaijan and their application", OING Conf/Exp (2011) 2 September 2011, par. 139 (retroactive application of the law).

⁶² Article 2, par. 6, LNCO as amended.

⁶³ See ICNL, "Overview of the Federal Law", p. 5, *supra*, note 59.

healthy lifestyle, physical exercises and sports, protection of plants and animal life,⁶⁴ charitable activities, as well as activities promoting charity and volunteerism. However, *human rights* and *watch-dog* activities,⁶⁵ among others, are notably missing from the list.⁶⁶

57. The definition of a NCO-foreign agent in the Law gives rise to a number of issues. Firstly, it seems that any given amount of foreign funding received by a NCO engaging in "political activities" triggers the application of this law. With respect to Article 11 of the Convention, this gives rise to a lack of proportionality of the interference in question. In addition, the implications of the Law for NCOs which had received foreign funds before it came into force are not clear, and therefore those provisions fall short of satisfying "prescribed by law" requirement.
58. The definition of "political activities" in the Law also falls short of satisfying "prescribed by law" requirement with respect to Article 10 and 11 of the Convention. There is a manifest lack of clarity as to what activities are deemed political, which is recognised by public authorities (*infra*, par. 106.). The Law confers the public authority with broad discretionary power to qualify a particular activity as "political" and thereby effectively prevent a NCO-recipient of foreign funds from engaging in any kind of advocacy with respect to any government decision it might be concerned with.⁶⁷
59. The implications of the Law on NCOs whose activities otherwise fall out of the scope of its application (*supra*, par. 56.) are also not clear. For example, the Law on Public Associations permits a public association to participate in "advocacy" and "lobbying activities" as well as in election campaigns, subject to federal election law.⁶⁸ However, if a public association which pursues cultural goals and is recipient of foreign funds engages in advocacy on policy issues which are unrelated to its statutory goals—or for that matter, joins such an advocacy campaign of another organisation, it is not clear if those activities would trigger the application of the Law i.e. if such an association would be deemed a "foreign agent". Furthermore, given the broad notion of political activities in the Law, it is not clear what kind of activities would actually qualify as advocacy under this law. For example, if a charitable organisation - recipient of foreign funds issues a public statement in support to the initiative for this law to be revised, it is not clear whether such an activity would result in the charity having to be registered as "foreign agent". Conceivably, public

⁶⁴ However, the Opinion of the Commissioner, *supra*, note, 5, reports that at least 14 environmental groups have received official warnings from the prosecutor's office that they might be required to register as "foreign agents", see *infra*, par. 106.

⁶⁵ See e.g. *Vides Aizsardzības Klubs v. Latvia*, par. 42, in which the Court specifically recognised the watch dog role of NCOs, *supra*, note 45.

⁶⁶ Article 2, par. 6, LNCO as amended.

⁶⁷ See also Expert Council on NGO Law, "Opinion on the amendments in 2009 to the NGO Law in Azerbaijan and their application", paras. 2, 16, 63, 64, 66, 67, 137., *supra*, note 61.

⁶⁸ Article 27, LPA.

statement support might be perceived by public authorities as human rights activity, which would trigger the application of this law on that charity. These are but few examples of uncertainties surrounding the definition of political activities, which give rise to concerns.⁶⁹

60. The application of the notion of political activities in the Law reinforces the foregoing concerns. As detailed in the Opinion of the Council of Europe Commissioner for Human Rights:

"52. Based on the results of the inspections to date, the range of activities which were recognised as "political" encompass the following: providing information to the United Nations Committee Against Torture on Russia's compliance with the Convention Against Torture; bringing cases to and litigating before the European Court of Human Rights; advocating on environmental issues, including with state authorities; monitoring human rights violations and raising public awareness on the results of the monitoring; organising seminars, round table discussions and other events to discuss governmental policies and foreign policy; providing state officials with ideas, opinions and recommendations on public interest policy and similar activities. All of these activities fall under the legitimate exercise of the right to freedom of expression".⁷⁰

61. It is noteworthy that providing for a legal definition of NCOs political activities is not necessarily problematic in itself, given the qualified nature of the rights protected by Articles 10 and 11 of the Convention. However, this requires careful balancing between the legitimate public goals such definition would conceivably seek to accomplish and private individual interests. In Germany, for example, tax-exempted NGOs cannot engage in a narrowly construed list of "political activities": they cannot act as direct supporters of political parties, and are not allowed to support or campaign for political parties or their political representatives. A NGO in breach of this obligation may lose its tax privileged status, however, it cannot be dissolved. On the other hand, no restrictions on political activities are provided for NGOs which are not tax exempted, which is a standard in Europe.⁷¹

Registry of NCOs-foreign agents

62. A NCO performing the function of a "foreign agent" must be entered into a separate registry ('foreign agents registry'), which is maintained by the Ministry of Justice. The Law requires a NCO applying for legal entity status to simultaneously file an application to be entered into the foreign agents registry, if it receives or *intends* to receive foreign funds and engage in political activities. NCOs which are already entered into the registry of legal entities and seek to engage in political activities must file a petition to enter

⁶⁹ See ICNL, "Overview of the Federal Law", pp. 4-6, *supra*, note 59.

⁷⁰ *Supra*, note 5.

⁷¹ See ICNL, "Political Activities of NGOs: International Law and Best Practices", *International Journal of Not-for-Profit Law*, Volume 12, Issue 1, November 2009.

into the foreign agents registry, irrespective of whether they have already received foreign funds or intend to do so.⁷² It is not clear, however, what are the consequences of the Law for a NCO which is entered into the foreign agents registry, but subsequently fails to materialise plans to receive foreign funds.⁷³

63. The Order of the Ministry of Justice of the Russian Federation on the Procedure for Entering into the Registry of NCOs Performing the Function of Foreign Agents details rules governing the content of foreign agents registry and the registration process. A NCO-foreign agent is required to furnish an extensive list of information to be entered into the registry, including personal data about its founders and legal representatives, information about the planned revenues from foreign sources, the type of foreign source income, data on foreign donors, and the purpose and type of political activities the organisation seeks to engage.⁷⁴
64. A separate registry for NCOs-foreign agents gives rise to the issue of compatibility with Articles 10 and 11 of the Convention, as it does not satisfy the proportionality requirement. If the presumed purpose of the separate registry was to ensure transparency of foreign funding for NCOs, it could have been achieved by less intrusive measures. Especially given the revisions in the money laundering law, which provide for mandatory scrutiny of any foreign transaction received by a NCO (not only "foreign agents") exceeding a 200,000 rubles threshold (*infra*, par. 78.).
65. A question can also be raised about compatibility of the separate registry requirement with Article 14 of the Convention (prohibition of discrimination). Article 14 states:

"Enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, *political or other opinion*, national or social origin, association with a national minority, property, birth or other status" (our emphasis).⁷⁵

Russian legislators have repeatedly stated that the overriding goal of this law was to counter the *political* influence of NCOs-foreign agents.⁷⁶ Given that

⁷² Article 21, par. 6, item 9, Article 29, par. 8, item 6, LPA as amended, Article 13.1, par. 5, items 9-10, LNCO as amended. Article 2 of the Order of the Ministry of Justice of the Russian Federation on the Procedure for Entering into the Registry of NCOs Performing the Function of Foreign Agents of 30 November 2012, N 223 ('Order').

⁷³ ICNL, "Overview of the Federal Law", pp. 5, 7, *supra*, note 59.

⁷⁴ Article 8, Order.

⁷⁵ It is important to note that the breach of Article 14 does not presuppose the breach of the other rights guaranteed by the Convention. See *Belgian Linguistic Case*, Application nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, judgment of 23 July 1968.

⁷⁶ See e.g. statements of Mr Mikhail Starshinov (the co-author of the Law, member of the State Duma, and delegate of the United Russia party): "some political technologies [...] allow the destruction of the constitutional order of states with the use of NGOs and similar structures", and the ruling United Russia

NCOs which are not deemed "political" are not required to be entered into the foreign agents registry—irrespective of the level of funding they receive from foreign sources—and given penalties and criminal sanctions against NCOs which refuse to be entered into this registry (*infra*, paras. 86-87), there is a case to argue that NCOs-foreign agents are discriminated against for political reasons in this law.

Labelling requirement

66. Under the Law any materials published or distributed by a NCO which is entered into the foreign agents registry, in particular through mass media and/or with the use of Internet, must have an indication that these materials are published and/or distributed by a "NCO performing the functions of a foreign agent". The Law—or for that matter other Russian legislation—does not provide for a definition of "materials", and therefore the labelling requirement appears to apply to any materials published or distributed by a NCO, including those which are not necessarily related to its political activities.⁷⁷ In addition, it does not seem clear as to whether the labelling requirement pertains to any page of a given material, or to a cover page thereof only.
67. The labelling requirement does not observe the guiding principles enshrined in Recommendation CM/Rec(2007)14 with respect to NGOs freedom of expression (*supra*, paras 44-50.), and gives rise to the issue of compatibility with Articles 10 and 11 of the Convention. Significantly, Article 10 affords protection not only to the substance of the ideas and information expressed, but also to the *form* in which they are conveyed.⁷⁸ In this respect, provisions on labelling in this law do not satisfy the "prescribed by law" requirement, given the vague notion of the term "materials" and a lack of clarity as to what materials are subject to labelling. The labelling requirement does not seem to serve any legitimate goal either, given the exhaustive list of permissible derogations set out in Articles 10 and 11 (*supra*, paras 25-26.) and their narrow interpretation by the Court which reflects its commitment towards "pluralism, tolerance and broadmindedness".⁷⁹ In this respect, it is important to note that the Law does not deem "political activities" and foreign financing of NCOs illegitimate activities *per se*.⁸⁰ This narrows the ability of a State to invoke any of legitimate grounds for interference set out in Articles 10 and 11 of the Convention.

party: "those NGOs which are engaged in political activity and are paid from abroad must have the status of foreign agent so the public can see who implants ideas into their minds and who pays for their work". <http://www.mdx.ac.uk/aboutus/news-events/news/russia-foreign-agent-law.aspx>

⁷⁷ Article 24, par. 1, LNCO as amended. See ICNL, "Overview of the Federal Law", pp. 7-8, *supra*, note 59.

⁷⁸ *Oberschlick v. Austria* (no 1), judgment of 23 May 1991, par. 57.

⁷⁹ *Handyside v. the United Kingdom*, par. 49., *supra*, note 16.

⁸⁰ Art. 24, par. 1, Art. 26, par. 1, LNCO as amended.

68. Similar to the registration requirement (*supra*, par. 65.), provisions governing the labelling requirement and the use of the term "NCO-foreign agent" give rise to the issue of compatibility with Article 14 of the Convention (prohibition of discrimination). As already noted, Russian legislators have repeatedly stated that the overriding goal of the Law is to counter "political" influence of NCOs-recipients of foreign funds, and therefore there is concern that the labelling requirement and the use of the term "foreign agent" will only provide additional grounds for undue discrimination against NCOs for political reasons.
69. The use of the term "foreign agent", broadly defined in this law, gives rise to special concerns, given its hostile connotation in Russia.⁸¹ This concern is compounded by the potential impact of the Law on Treason on NCOs. The Law, which entered into force on 14 November 2012, defines treason as: "transfer of classified information to the foreign state, international or foreign organisation or their representatives by a Russian national, who was entrusted with such information or gained knowledge of it through his/her service, work or study and in other cases provided by the Russian law, or the provision of financial, material and technical, consultative or any other assistance to foreign states, international or foreign organisations or their representatives that is aimed against the security of the Russian Federation".⁸² To date, no case of the application of this law on NCOs has been reported, and therefore its impact on NCOs remains yet to be seen.⁸³
70. The use of the term "foreign agent" is justified by public authorities by invoking similar practices in other countries, including the U.S. Foreign Agents Registration Act ("FARA").⁸⁴ However, as pointed out in ICNL's note on FARA:

"There are numerous key differences which distinguish FARA from the Law on Foreign Funding (the Russian Law, *our remark*)....(1) FARA requires a principal-agent relationship, which are distinct and are more narrow than financial relationship; (2) FARA specifically does not apply to persons or organizations engaged in purely religious, academic, or charitable activities; (3) FARA is not limited to or specifically directed at non-governmental organizations (NGOs), and instead of defining entities subject to regulation focuses on activities subject to regulation irrelevant which entities carry such activities".⁸⁵

⁸¹ An opinion poll carried out by a Russian institute for sociological surveys revealed that 62% of respondents negatively perceive the term "foreign agent". See Opinion of the Commissioner, par. 57. The Opinion also reports that in winter of 2013 homeless people were refusing to accept an offer of shelter from representatives of a NCO engaged in providing support to people in need, indicating that they were unwilling to accept help from "foreign agents". Ibid, par. 58., *supra*, note 5.

⁸² Art. 1.2. of the Law.

⁸³ See Opinion of the Commissioner, paras 23-24, *supra*, note 5

⁸⁴ 22 U.S.C. § 611 *et seq.*

⁸⁵ ICNL, Note on U.S. Foreign Agents Registration FARA, dated 5 July 2012, p. 1.

71. The foregoing analyses needs also to be viewed against the background of international best practices. A survey published by the Venice Commission, which *inter alia* covers NGOs legal framework for foreign funding in 24 member states of the Council of Europe as well as Algeria, Kyrgyzstan, Morocco and Tunisia, suggests that broad restrictions imposed on NGOs-recipients of foreign funds depart from international best practices and are an exception, rather than a rule.⁸⁶

Reporting requirements for NCOs-foreign agents

72. The Law introduces new reporting requirements for NCOs-foreign agents. In addition to entering into a separate registry, they must maintain separate accounting of funds and other property generated through local and foreign sources; submit an activity report to the Ministry of Justice and information about the composition of its governing bodies on a biannual basis; publish an activity report on its Internet site or in mass media on a biannual basis; submit a report on expenditures of funds and other property, including those from foreign sources, on a quarterly basis. In addition, they are required to pass through a mandatory annual audit.⁸⁷ By contrast, other NCOs are required to submit activities and expenditures reports annually.⁸⁸
73. Under the Law the Ministry of Justice shall submit to the State Duma of the Federal Assembly of the Russian Federation an annual report detailing political and other activities of NCOs-foreign agents and their sources of funding, as well as the results of supervision of those activities.⁸⁹
74. It seems that the mere fact that a NCO is entered into the foreign agents registry triggers the new reporting requirements, regardless of the amount of foreign funds involved.
75. In light of the standards set out by the Court, the new reporting requirements for NCOs-foreign agents fall short of satisfying the proportionality threshold with respect to Article 11 of the Convention. They impose disproportional administrative and financial burden for those NCOs, in particular given that any amount of foreign funds received triggers the application of the new rules. On the other hand, the new reporting requirements do not apply to other NCOs, even if the level of funds received in each individual case exceeds the 200,000 rubles threshold. In such cases, those NCOs are only subject to mandatory supervision of a transaction in question, pursuant to the money laundering law (*infra*, par. 78.).

⁸⁶ Venice Commission, "Selection of Legislative Provisions on Freedom of Association", CDL(2013)018, Strasbourg, 28 March, 2013. See also Venice Commission, "Some preliminary reflections on standards and legislation relating to freedom of association and non-governmental organisations", CDL(2013)17, Strasbourg, 28 March 2013, paras. 30-31.

⁸⁷ Article 32, par. 1. 3. LNCO as amended.

⁸⁸ Article 32, par. 3.2. LNCO as amended.

⁸⁹ Article 32, par. 16. LNCO as amended.

76. A question can also be raised with respect to compatibility of the new reporting requirements with Article 14 of the Convention (prohibition of discrimination), as the Law unduly singles out NCOs-foreign agents with respect to those requirements. The introduction of the Ministry of Justice annual funding and activity report of NCOs-foreign agents (*supra*, par. 73) signifies the fact that those NCOs are the matter of high interest and scrutiny by public authorities and legislators, because of their otherwise legitimate political activities.

Supervision of NCOs-foreign agents

77. Under the Law the public authority will conduct scheduled annual audits of NCOs-foreign agents, while other private legal entities, including other NCOs, are subject to scheduled audits once every three years.⁹⁰ The Law provides new grounds for the public authority to conduct an unscheduled audit of NCOs-foreign agents. Thus the competent public authority will conduct an unscheduled audit if a NCO fails to meet a deadline set out in the public authority's notice requesting that it remedy its activities and bring it in line with law; upon receiving information by citizens, legal entities or media indicating potential extremist activities of a NCO; upon receiving information from other government agencies and local self-government bodies regarding violation of the Russian Federation legislation; and acting upon the public prosecutor's notice.⁹¹ These new grounds for unscheduled audits are not covered by the procedural safeguards which protect other private entities (including NCOs which do not fall within the "foreign agents" category) against public authorities unwarranted interference, which are set out in the Law on Protection of the Rights of Legal Entities and Individual Entrepreneurs in the Exercise of State Control (Supervision) and Municipal Control.⁹²
78. Under the Law, in addition to the Ministry of Justice which has the general jurisdiction to supervise NCOs, the government body which is authorised to monitor money laundering activities (Rosfinmonitoring) is conferred with power to review information about NCOs activities which it receives within its scope of power, at its own initiative or at the request of the Ministry of Justice. In cases when information in reports is incomplete or false, it will inform the Ministry of Justice to that effect.⁹³ Rosfinmonitoring is required to

⁹⁰ Article 32, par. 4.1., 4.5. LNCO as amended. Federal Law of the Russian Federation #294-FZ on Protection of the Rights of Legal Entities and Individual Entrepreneurs in the Exercise of State Control (Supervision) and Municipal Control, dated 26 December 2008. See, ICNL, "Overview of the Federal Law", p. 9, *supra*, note 59.

⁹¹ Article 32, par. 4.6. LNCO as amended.

⁹² See ICNL, "Overview of the Federal Law", p. 10, *supra*, note 59.

⁹³ Article 32, par. 14.1. LNCO as amended.

control all foreign transfers above the 200,000 rubles threshold received by NCOs, including those labelled "foreign agents".⁹⁴

79. Recommendation CM/Rec(2007)14 sets out a number of guiding principles with respect to the supervision of NGOs by public authorities. These principles are summarised as follows:

"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".⁹⁵

80. Significantly, the aforementioned principles are *specifically* referenced in the Court's case-law.⁹⁶ Therefore, while a State does have some margin of appreciation in setting out a framework for NGOs supervision, this margin goes hand in hand with the Court's rigorous supervision.
81. Provisions in this law which confer the government with broad oversight power over NCOs-foreign agents do not observe the foregoing principles, and give rise to the issue of compatibility with Articles 8 and 14 of the Convention, in particular.
82. Article 8 of the Convention guarantees the right to respect for private and family life, home and correspondence. The Court extended the privacy protection under Article 8 to business premises, including those of NGOs.⁹⁷ Accordingly, any legislation conferring the public authority with power to search must provide *sufficient guarantees* against *arbitrary interference*.⁹⁸ The

⁹⁴Article 4, par. 1.2. Federal Law of the Russian Federation № 115-FZ On Counteracting Legalisation (Money Laundering) of Incomes Received in a Criminal Way, and Financing Terrorism The Federal Law of the Russian Federation № 115-FZ, dated 7 August 2001.

⁹⁵ See Explanatory Memorandum to the Convention, pars. 119-125.

⁹⁶ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, par. 39., *supra*, note 24.

⁹⁷ See e.g. *Niemietz v. Germany*, Application no. 13710/88, judgment of 16 December 1992. *Halford v. United Kingdom*, Application no. 20605/92, judgment of 25 June 1997.

⁹⁸ *Ernst and others v. Belgium*. Application no. 33400/96, judgment of 15 July 2003.

same pertains to *terrorism* or other kind of *extreme activities* when they are invoked as a basis for search.⁹⁹

83. In light of the foregoing standards underpinning Article 8, the expanded supervisory power of the public authority gives rise to the issue of proportionality. In addition, some of the new grounds for unscheduled audit fall short of satisfying "prescribed by law" requirement. For example, the Law confers the public authority with power to conduct unscheduled audit of a NCO based on information received from citizens, legal entities or media indicating potential extremist activities of a NCO. This seems to indicate that any anonymous tip received by the public authority can constitute a basis for unscheduled audit, in particular given a lack of clarity as to what constitutes extremist activities.
84. As detailed in the Opinion of the Council of Europe Commissioner for Human Rights, the application of the provisions on supervision in practice underscores the foregoing concerns (*infra*, par. 107.).
85. Provisions on supervision in the Law also give rise to the issue of compatibility with Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination). In case of the latter, with respect to the new grounds for supervision, NCOs-foreign agents are stripped from the guarantees otherwise afforded to private legal entities against the abuse of the public authority supervisory power.

Suspension of NCOs activities

86. A NCO which does not register as a foreign agent may have its activities suspended for up to 6 months by a decision of the competent public authority, which is subject to appeal. In case of a temporary suspension, a NCO's rights as a founder of a media outlet shall also be suspended, it shall be precluded from conducting public gatherings and events, and its bank account shall be frozen, except for payments related to its economic activities, labour agreements, compensation of damages and fines and penalties against the organisation.¹⁰⁰ A NCO may resume its activities only upon successfully applying to be entered into the foreign agents registry.¹⁰¹

⁹⁹ *Gillan and Quinton v. United Kingdom*, Application no. 4158/05, judgment of 20 January 2010. See also Opinion of the Commissioner, pars. 63-64., *supra*, note 5.

¹⁰⁰ Article 32, par. 5, item 6. LNCO as amended.

¹⁰¹ Article 32, par. 5, item 6.1. LNCO as amended.

Criminal sanctions

87. Under the amendments to the Criminal Code deliberate evasion of the duty to submit the documents required for the entrance into the foreign agents registry, as well as other violations of the Law, shall be penalised with a fine in the amount of 300,000 rubles (ca 6,800 euros), or in the amount of accumulated personal income for the period of the last two years, or with mandatory public works in the amount of up to 480 hours, correction works, or a prison term of up to two years.¹⁰²
88. Criminal sanctions are imposed on the founders and management of a NCO (including a NCO-foreign agent) or a branch office of a foreign NCO (FNCO), the activities of which are connected with urging citizens to refuse to perform their civic duties or to perform other unlawful acts. They are subject to a penalty of up to 200,000 rubles (ca 4,500 euros), or in the amount of accumulated personal income for the period of up to 18 months, or with mandatory works for a period of up to three years, or a prison term of up to three years.¹⁰³
89. The guiding principles enshrined in Recommendation CM/Rec(2007)14 with respect to sanctions against NGOs is that, in most instances, the appropriate sanction against NGOs for breach of the legal requirements should merely be the requirement to rectify their affairs. Insofar as administrative, civil or criminal penalties are imposed on NGOs and/or any individuals directly responsible, they should be based on the law in force which is otherwise applicable to legal entities, and observe the principle of proportionality.¹⁰⁴
90. In elaboration of the foregoing principles the Expert Council on NGO Law report on sanctions against NGOs notes the following:
- "36. 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

¹⁰² Article 330.1, Criminal Code of the Russia Federation as amended.

¹⁰³ Article 239, Criminal Code, par. 2

¹⁰⁴ Par. 72, Recommendation. See Explanatory Memorandum to the Recommendation, par. 128.

is unlikely to be justifiable, except in the case of grave and repeated violations of the law."¹⁰⁵

91. Like other provisions in the Law, those governing sanctions need to meet the safeguards provided by the Convention, including the principle of non-discrimination which is set forth in Article 14 of the Convention and the requirement that the interference in question is "prescribed by law", "serves legitimate aim" and is "necessary in a democratic society".¹⁰⁶
92. However, the Law falls short of observing the foregoing standards and principles. Provisions on a temporary suspension do not satisfy the "prescribed by law" requirement with respect to Articles 10 and 11 of the Convention, as the implications of suspension of a NCO's founding rights in a media outlet, as well as the right to conduct public gatherings and events, are not clear. With respect to the former, it is not clear whether a suspended NCO can participate in meetings of the management board of the media outlet, and if so, whether it can take part in the decision-making. In addition, it is not clear if a suspended NCO can freely transfer its founding rights to another person or entity during the period of a temporary suspension. With respect to the latter, while a temporary suspension specifically entails the prohibition of a NCO to host public gatherings and events, it is not clear whether it can nevertheless participate in public gatherings and events organised by others. These are but few primers of uncertainties surrounding the provisions governing temporary suspension, which exhibit problems with meeting the "prescribed by law" requirement.
93. Provisions in the Law on a temporary suspension do not satisfy the requirement of proportionality with respect to Articles 10 and 11 of the Convention either. As the Expert Council on NGO report on sanctions against NGOs states:

"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".¹⁰⁷ (emphasis ours)
94. In the light of the foregoing standards, there could hardly be any justification for a temporary ban against a NCO, in particular if it is already entered into the registry of legal entities and thereby recognised by the authority as a legal person pursuing *lawful* activities. In addition, as already noted, the Law does not deem political activities illegitimate *per se*, and therefore the failure to be entered into the foreign agents registry can hardly meet the threshold of "serious problems", which would justify such a measure.

¹⁰⁵ Expert Council on NGO Law, "Sanctions and Liability with Respect to NGOs", OING Conf/Exp (2011) 1, Strasbourg, January, 2011.

¹⁰⁶ Ibid. par. 31 and further.

¹⁰⁷ Ibid. par. 38.

95. A temporary suspension also gives rise to the issue of compatibility with Article 1 of the First Protocol (peaceful enjoyment of property), as it effectively strips a NCO of its proprietary rights as a founder of a media outlet. Article 1 of the First Protocol to the Convention stipulates:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

96. Article 1 affords broad protection to "possessions" which extends to all manner of things having an economic value,¹⁰⁸ including the ownership of shares in a company.¹⁰⁹ While a State enjoys somewhat broader margin of appreciation with respect to Article 1, as compared with Articles 8-11 of the Convention, any interference with the right to peaceful enjoyment of property must nevertheless be "prescribed by law", serve legitimate aim ("general interest")—and be in accordance with the general principles of international law. Certainly, the principle of proportionality is an inherent part of the Court's determination as to whether the impugned measure serves legitimate aim/general interest.¹¹⁰ In this respect, the suspension of proprietary rights of otherwise legitimate NCO in a media outlet, until it is entered into the foreign agents registry, can hardly satisfy the requirement of proportionality in Article 1 of the First Protocol.
97. Provisions on a temporary suspension need to be considered against the background of a great discretionary power which the law otherwise confers on public authorities.¹¹¹ There is the perceived danger therefore that a temporary suspension could likely result in the effective dissolution of a NCO, given that once suspended NCO can resume its activities only after it is entered into the foreign agents registry. The case law of the Court is clear on the point that only grave or repeated serious violations of the law, narrowly construed, may constitute a legitimate ground for the dissolution of a NGO.¹¹²

¹⁰⁸ See e.g. *Smith Kline and French Laboratories Ltd v. Netherlands*, Application no. 12633/87, judgement of 4 October 1990. *Van Marle and Others v. Netherlands*, Application nos 8543/79, 8674/79, judgement of 26 June 1986. *Fredin v. Sweden*, Application no. 12033/86, judgment of 18 February 1991.

¹⁰⁹ See e.g. *Branelid and Malmström v. Sweeden*, Application nos. 8588/79, and 8589/79, judgment of 12 October 1982.

¹¹⁰ See e.g. *James v. United Kingdom*, Application no. 8793/79, judgment of 21 February 1986.

¹¹¹ See the Opinion of the Commissioner, par. 65., with specific references to the case law since 2009 in which the Court looked into the role of public prosecutors in civil proceedings in Russia, and par 70. of the Opinion, *supra*, note 5.

¹¹² *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, *supra*, note 24. *Christian Democratic People's Party v. Moldova*, Application no. 28793/02, judgment of 14 February 2006.

98. Provisions on criminal sanctions further underscore the foregoing concerns with the Law. In *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* the Court noted:

"The Court considers that the nature and severity of the sanction imposed are factors to be taken into account when assessing the proportionality of the interference.... In the present case, forced dissolution was the only sanction available under the domestic law in respect of public associations found to have breached the requirements of the NGO Act and, accordingly, this sanction could be applied indiscriminately without regard to the gravity of the breach in question. The Court considers 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".¹¹³

99. In light of the foregoing standards set out by the Court, provisions on criminal sanctions fall short of meeting the proportionality test with respect to Articles 10 and 11 of the Convention. In addition to a temporary suspension, they seem to be the only sanctions prescribed against NCOs which refuse to register as "foreign agents".¹¹⁴ It is critical to note that criminal sanctions shall not be imposed because the goals of a NCO are deemed illegal *per se*, but because of a non-compliance with the foreign agents registration requirements. As a result, an issue (registration) which is ultimately a civil or administrative law issue has transcended into the matter of criminal proceedings.¹¹⁵
100. With respect to Articles 10 and 11 of the Convention, some of the new sanctions against NCOs fall short of satisfying the "prescribed by law" requirement. Thus criminal sanctions are imposed on the founders of a NCO (including a NCO-foreign agent) or a structural unit of a FNCO, the activities of which are connected with urging citizens to refuse to perform their civic duties, or to perform other unlawful acts. It is not clear, however, what activities will precisely meet the threshold of urging citizens to perform their civic duties or other unlawful acts. For example, it is not clear whether a call on citizens to boycott elections, because of the alleged lack of transparency of the election process, amount to an action urging citizens to refuse to perform

¹¹³ Par. 83. of the judgment.

¹¹⁴ *Ibid.*, par. 63 of the judgment.

¹¹⁵ See also Venice Commission, "Some preliminary reflections on standards and legislation relating to freedom of association and non-governmental organisations", par. 32., *supra*, note 84. ICNL, "Overview of the Federal Law", pp. 11-12, *supra*, note 59.

their civic duties. A question can also be raised as to whether criminal sanctions pertain only to *founders* of a NCO or also to *members* of a NCO who have subsequently joined the organisation. These are but few examples of the lack of clarity in this law, which gives the public authority the scope of discretionary power beyond the one recognised by the Court.

101. In addition, the aforementioned sanctions give rise to the issue of compatibility with Article 14 (prohibition of discrimination), given that "subversive" activities in this law (*supra*, par. 88) seem to amount to criminal activities only when carried out by the founders of a NCO or a structural unit of a foreign NCO (FNCO)—but not by other persons.

Foreign NCOs

102. The Law sets out new requirements for FNCOs operating in Russia through registered branch offices, including a duty to undergo an annual independent audit by a Russian auditing company and submit the resulting auditing report to the Ministry of Justice, unless otherwise provided by international treaties by which Russia is bound. The Ministry of Justice shall post all auditing reports as well as reports on the finances and activities of foreign organisations operating in Russia on its web site, and provide them to the media. In addition to a mandatory independent audit, the competent public authority shall also have the power to conduct its own audits of the registered branch offices of foreign organisations.¹¹⁶
103. Russia is not a signatory to the Council of Europe Convention (ETS 124) on the Recognition of the Legal Personality of International NGOs and therefore under international law is not obliged to recognise the legal personality of foreign NGOs, to allow them to operate on its territory. However, Recommendation CM/Rec(2007)14 makes it clear that reporting requirements for NGOs and branch offices of foreign NGOs should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality¹¹⁷ — and that those offices should be subject to supervision under the same rules otherwise provided for domestic NGOs.¹¹⁸
104. The new reporting requirements for branch offices of FNCOs and the expanded supervisory power of the public authority run afoul of the foregoing principles. They also run afoul of the principle that "activities of NGOs should be presumed to be lawful in the absence of contrary evidence",¹¹⁹ but rather suggest that those activities are inherently suspicious because of their foreign

¹¹⁶ Article 32, par. 4, LNCO as amended.

¹¹⁷ Par. 64, 66, Recommendation.

¹¹⁸ Par. 73, Recommendation.

¹¹⁹ Par 67, Recommendation.

origin.¹²⁰ In addition, they impose additional administrative and financial burden on FNCOs branch offices, which are likely to hamper their ability to pursue their otherwise legitimate statutory activities.

Application of the Law

105. The Association of NGOs in Defence of Voters' Rights "Golos" (Moscow) was the first NGO that had its operations temporarily suspended under the new Law. As Human Rights Watch reports: "According to the protocol from the Ministry of Justice dated 9 April, the group drafted and promoted a unified Electoral Code and allegedly received foreign funding in the form of the Andrey Sakharov Freedom Award from the Norwegian Helsinki Committee (NHC). Notably, Golos had sent the monetary prize in question back to the NHC. The organisation was fined 300,000 rubles (ca 6,800 euros) by the Presnenskiy court of Moscow on 25 April. The head of Golos was also personally fined 100,000 rubles (ca 2,300 euros). Golos appealed the court ruling on May 8. On 14 June the appeals court upheld the ruling of the Presnenskiy Court. On 25 June the Ministry of Justice ordered that the group be suspended for 6 months. On 15 July the group lodged a judicial appeal against the decision. On 15 July the group appealed this decision to a court".¹²¹

106. According to the data presented by the *Prosecutor General* at the Council of Federation's meeting held on 10 July 2013, since the Law came into force, public prosecutors have identified 22 NCOs that have violated the new legislation. These organisations received more than 800 million rubles from abroad in the course of the last three years, but do not intend to voluntarily register as foreign agents. Prosecutors have issued formal notices of violation of the Law to those organisations and initiated administrative proceedings against them, four of which have already been heard by the courts. In addition, 193 NCOs which, prior to the Law coming into force, had received a total of over 5 billion rubles from foreign sources, have since ceased political activities taking a "wait and see attitude", or continued to engage in such activities, but refrained from receiving foreign funding. All 193 organisations have received warnings from prosecutors not to violate the Law. Overall, public prosecutors have issued more than 300 warnings to NCOs to observe the Law. According to the Prosecutor General, 17 NCOs have violated the norms of the 1961 Vienna Convention, having received funds from the embassies of U.S. Britain, Belgium, Germany, the Netherlands, and Switzerland to support their political activities.¹²² Significantly, the Prosecutor General admitted difficulties in the

¹²⁰ See *Moscow Branch of the Salvation Army v. Russia*, Application no 72881/01, judgment of 5 October 2006, in which the Court dealt with the foreign origin issue with respect to Article 9 and 11 of the Convention.

¹²¹ <http://www.hrw.org/news/2013/05/14/russia-foreign-agents-law-hits-hundreds-ngos-updated-august-26-2013>

¹²² Minutes of the Council of Federation meeting, pp. 20-32, *supra*, note 61.

implementation of the Law, due to "the lack of generally accepted concept of political activities".¹²³

107. The Opinion of the Council of Europe Commissioner for Human Rights details the following concerns with respect to the application of the Law:

"42. Since the beginning of March 2013, a series of inspections of non-commercial organisations began to be carried out by the Prosecutor General's Office, with the participation of representatives of other federal structures. The exact number of NCOs undergoing checks is difficult to estimate, partly because not all of them have chosen to state publicly that they have been inspected. According to *Openinform* media, by 30 April 2013 at least 270 NCOs from 57 Russian regions had been inspected.

43. During his visit to the Russian Federation in April 2013, the Commissioner received contradictory information as to the purpose of the inspections. In some cases reference was made to the need to ensure compliance with anti-extremism legislation; in others the need to establish which organisations are carrying out "political activities", in order to ensure the implementation of the Law on Foreign Agents; in other circumstances it was said that the purpose was to verify compliance with the legislation in general.

44. The Commissioner has also received conflicting accounts about whether these inspections were ordinary (planned) or extraordinary. According to the legislation in force at the time of the inspections, the only ground for an extraordinary inspection of a NCO could have been a request from the election commission to verify information about the donations to political parties. While most of the Commissioner's official interlocutors indicated that the inspections were of the planned type, many of the organisations which were subject to such inspections claimed that they were not on the list of the organisations where an inspection was planned for 2013. Moreover, in some cases, the organisation had just undergone a planned inspection by the Ministry of Justice, when the Prosecutor's Office announced that it would be subject to yet another inspection.

45. As of 24 June 2013, at least 64 NGOs have been affected by the measures undertaken to enforce the Law on Foreign Agents. At least 7 administrative cases were brought to court against NGOs for alleged failure to apply for registration in a Register of organisations performing the function of foreign agents. Seventeen NGOs had received notices of violation of the Law on Foreign Agents from the prosecutor's office. At least 40 NGOs were given official warnings to abstain from violating the Law on Foreign Agents, meaning that the affected NGOs should seek registration in the above-mentioned Register, if they pursue their statutory activities (which in the meantime had been qualified as being "political").

46. Although the Law on Foreign Agents exempts "protection of plant and animal life" from the definition of "political activity", at least 14 environmental groups have received official warnings from the prosecutor's office that they might be required to

¹²³ Ibid, p. 23.

register as “foreign agents,” and one environmental advocacy NGO was already ordered to do so.

47. In two cases, official warnings were issued by the prosecutor’s office and subsequently revoked. This happened in the case of an NGO providing assistance to individuals with cystic fibrosis and an NGO dealing with the preservation of wildlife.

48. The two issues emerging from the implementation of the Law on Foreign Agents are the use of sanctions (and the choice of sanction) in each particular case and what could be qualified as a retrospective application of the Law. There seems to be a lack of clear, consistent and identifiable criteria that would explain why in some cases it was decided to bring administrative charges against the organisation and its management; while in other cases the organisations were ordered to correct the violation by registering; and yet in other cases it was decided to give an official warning about the necessity to register. It appears that the choice of sanctions to be applied remained at the discretion of a particular local prosecutor’s office in charge of carrying out the inspections. Moreover, in many of these cases the decisions about whether the organisation carries out “political activity” were made based on past activities and/or because foreign funding had been received in the past, i.e. before the Law on Foreign Agents was enacted and entered into force.

49. The Commissioner’s overall assessment of those inspections is that they were carried out in an unnecessarily intrusive and disproportionate manner”.

108. In addition, the Commissioner's Opinion takes note of problems with the overlapping jurisdiction of supervising authorities:

"62. As has been already noted...the reasons and legal grounds for these inspections in many cases were not clearly defined. Inspectors generally requested to be provided with statutory and operational documentation, as well as financial and tax reports and documentation for years 2010-2013. In those cases where the prosecutors were accompanied by representatives of other federal oversight bodies, the scope of documents requested was much broader. In St. Petersburg, for example, inspectors asked to produce documents such as a rat control certificate, results of chest X-rays of NGO employees, rubbish disposal arrangements etc. Consequently, several NGOs have questioned the legality of the inspections and brought their cases to domestic courts.

65. In principle, the Ministry of Justice is the authorised governmental agency vested with power to regulate activities of non-commercial organisations, including their registration, reporting and ensuring due oversight over their activities. In 2011-2012, the Ministry of Justice initiated and carried out 226 extraordinary inspections of NGOs. In 41 cases, such inspections had not been authorised by the Prosecutor’s Office. Nevertheless, its role in the on-going (extra)ordinary inspections was not fully clear. Based on his discussions with various interlocutors in Russia, the Commissioner obtained the impression that the Ministry of Justice played an auxiliary role, while the Prosecutor’s Office has been taking the lead by virtue of the powers vested in it by the Federal Law on the Prosecution Service of the Russian Federation and in fulfillment of its supervisory function in relation to execution of the laws in force. This *de facto* change of roles appears to be partially rooted in legislative provisions which do not clearly delimit the roles and duties between the

two institutions with regard to the oversight of NGO activities, but apparently allow those to overlap. This has certainly contributed to the overall confusion with regard to the implementation of the Law on Foreign Agents.

66. In January 2013, a human rights organisation in the Chuvash Republic applied to the Ministry of Justice with a request to register as a “foreign agent”, but was declined. In its commentary on the decision not to include the organisation into the Registry of non-commercial organisations performing the function of a foreign agent, the Ministry of Justice explained its decision by pointing out that the declared goals of the organisation – rooting out the human rights violations on the territory of Chuvash Republic – were fully in line with the human rights principles embodied in the Russian Constitution and legislation in general. The Prosecutor’s Office has subsequently qualified the Ministry of Justice’s decision not to include the above-mentioned organisation in the Register as abuse of authority.

67. On 28 June 2013, the Ministry of Justice announced that the first organisation had been registered in the Register of non-commercial organisations performing the functions of a foreign agent – a non-commercial partnership promoting competition in the member states of the Commonwealth of Independent States”.¹²⁴

109. The Human Rights Watch (HRW) maintains a well-documented web site of NCOs which thus far have been subjected to various official warnings and inspections relating to the Law. According to HRW:

"Starting in early March 2013 the Russian government launched a nationwide campaign of inspections of nongovernmental organisations, unprecedented in its scale and scope. The inspections were highly extensive, disruptive, invasive, and often intimidating. To date, hundreds of organisations in different regions of Russia have been subject to such inspections; most have yet to be informed of the inspection findings. However, it is clear that the main objective of these inspections is to identify organisations the government deems “foreign agents” and force advocacy groups to either assume this false, misleading, and demonizing label or suspend their work”.¹²⁵

110. As of 5 August 2013, HRW reported nine cases pending before the administrative court against NCOs which chose not to be entered into the foreign agents registry; 17 NCOs received "official notices of violations" i.e. the official order to remedy violation of the Law and be entered into the foreign agent registry within one month after the notice was served; 47 NCOs received official warnings not to violate the Law i.e. they were warned of a need to be entered into the foreign agent registry if they plan to carry out "political activities" or receive foreign funding in the future.¹²⁶

111. On 25 July 2013, the decision to impose a fine of 500,000 rubles (approximately €11,500) on the LGBTI advocacy organisation "Coming

¹²⁴ Opinion of the Commissioner, *supra*, note 5.

¹²⁵ <http://www.hrw.org/news/2013/05/14/russia-foreign-agents-law-hits-hundreds-ngos-updated-july-26-2013>

¹²⁶ *Ibidem*.

Out" for violating the Law was repealed on appeal from the Vasileostrovsky district court of St. Petersburg, and the case has been sent back to the Magistrates' court for a re-trial.¹²⁷ Based on the media report dated 10 August 2013, Transparency International-Russia's appeal against a Moscow City Prosecutor's office warning to register as a 'foreign agent' was rejected.¹²⁸ In May 2013 Transparency received an official warning from the Prosecutor's office to register as a "foreign agent", because it was shaping public opinion with respect to government policies in the field of law enforcement and had an impact on the adoption of laws and regulations. Transparency maintained it had received funds before the Law came into force and therefore it should not be subject to the Law.¹²⁹

112. Most recently, an application is being lodged with the European Court of Human Rights on behalf of eleven leading Russian human rights NGOs to contest the Law. They allege violation of their rights to freedom of association and expression (Articles 11 and 10 of the Convention), and request that the Court gives urgent priority to their case. The case is being brought by the Russian NGO "Memorial' and the European Human Rights Advocacy Centre" (EHRAC), based at Middlesex University, on behalf of Ecodefence, Golos, Citizens Watch, Civic Assistance Committee, the Committee against Torture, Mashr, International Memorial, Moscow Helsinki Group, Public Verdict, Memorial Human Rights Group and the Movement for Human Rights. The applicants argue that the Law unnecessarily and unjustifiably puts them at risk of serious sanctions, including criminal prosecutions of individuals and the possible suspension of their organisations.¹³⁰

CONCLUSIONS

113. As the opinion suggests, the Law gives rise to concerns with respect to its compatibility with the European Convention on Human Rights and other recognised international standards and principles. Chief among those concerns include: the definition of NCOs political activities; the registration and the labelling requirements for NCOs-foreign agents; the new reporting and supervisory rules for those NCOs; criminal and other sanctions and penalties against NCOs, their founders and managers, including NCOs-foreign agents; and the new reporting and supervisory rules for branch offices of FNCOs.
114. The vague definition of political activities in the Law gives the public authority broad discretionary power to determine what activities of NCOs are deemed political, and effectively prevents a NCO from engaging in any kind of otherwise legitimate advocacy activities, before it is entered into the foreign

¹²⁷ <https://www.frontlinedefenders.org/node/23460>

¹²⁸ <http://en.rian.ru/russia/20130810/182686708.html>

¹²⁹ <http://transparency.org.ru/en/>

¹³⁰ <http://www.mdx.ac.uk/aboutus/news-events/news/russia-foreign-agent-law.aspx>

115. agent registry. This is of particular concern given the gravity of sanctions against NCOs which refuse to register as "foreign agents".
116. The new registration and labeling requirements pose a disproportional burden on NCOs-foreign agents and need to be viewed against the background of the public authority discretionary power to determine the nature of NCOs activities. The use of the term "foreign agents" gives rise to particular concerns, given its negative connotation in Russia. It unduly stigmatises those NCOs and hinders their ability to exercise their legitimate right to participate in social and political life.
117. The new reporting and supervisory rules unduly single out NCOs based on their otherwise legitimate source of income (foreign funds) and on their political activities. They impose additional administrative and financial burdens on those organisations which are likely to hamper their ability to carry out their statutory mission.
118. The scope and severity of the new sanctions and penalties against NCOs—and in particular against NCOs-foreign agents—coupled with the vague language by which they are formulated, presents a threat for the very existence of NCOs. Those sanctions and penalties are reflective of the overall structural problems with the Law i.e. overly restrictive regulatory approach towards the exercise of otherwise legitimate NCOs activities and their foreign source of income.
119. The foregoing also pertains to the new reporting and supervisory rules for branch offices of FNCOs. Those rules suggest that the activities of branch offices of FNCOs are inherently suspicious because of their foreign origin. They impose additional administrative and financial burden on those offices which is likely to hamper their ability to pursue their otherwise legitimate statutory activities.
120. The application of the Law underscores the foregoing concerns. In particular, the vague definition of key terms and uncertainties surrounding the scope of application gives public authorities discretion in interpreting the Law which goes beyond the recognised international standards.
121. The extent to which the Law departs from international norms makes it a challenge to bring it in line with those norms. Even if the notion of NCOs "political activities"—which seems to be the centerpiece of the current discussions in Russia regarding possible amendments to the Law—were significantly narrowed (so, for example, to include only NCOs which directly support political parties or candidates during the election campaign), it would not necessarily resolve the structural problems with this law, unless other provisions were also revised and brought in line with international standards. This would also create conditions necessary for a more consistent and impartial application of the Law.