EXPERT COUNCIL ON NGO LAW
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EXPERT COUNCIL ON NGO LAW

THE LAW OF GEORGIA ON TRANSPARENCY OF FOREIGN INFLUENCE

An opinion adopted by the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe

Based on a contribution by Mr Jeremy McBride, President of the Expert Council

A. INTRODUCTION

1. This opinion examines the compatibility of the Law of Georgia on Transparency of Foreign Influence ("the Law") with European and international standards relating to the right to freedom of association and the regulation of non-governmental organisations ("NGOs).

2. The Law was registered in the Parliament of Georgia on 3 April 2024, it received a second reading on 30 April 2024 and was finally approved on 14 May at third reading.

3. The opinion first outlines the requirements that would be introduced in the event of the Law becoming applicable after its promulgation. It then sets out the European and international standards of particular relevance for the objectives pursued by the Law insofar as they would affect non-governmental organisations ("NGOs") before considering the compatibility of the proposed requirements in it with those standards. It concludes with an overall assessment of the Law's compliance with European and international standards.

4. The opinion is based on an unofficial translation of the (draft) Law. [1]

B. THE LAW

5. The reasons for introducing the draft Law have not been set out in any form of explanatory note accompanying it but, in a letter to the Council of Europe Commissioner for Human Rights of 16 April 2024 ("the Chairman's letter"), the Chairman of the Parliament of Georgia stated that:

> The major thrust of the spirit and the letter of this draft law is to improve transparency, which is one of the pillars on which the Council of Europe and, with it, Georgian democracy stand.

6. In addition, the Chairman of the Parliament of Georgia stated that:

> Georgia has been subject to foreign invasion and manipulation of its politics for decades now. In the era of rising hybrid and informational warfare and geopolitical challenges, the lack of transparency of foreign interference leaves my country and society vulnerable. Foreign funding of political parties is, as in other European countries, against the law in Georgia. However, on numerous occasions, shadow schemes of political party financing via NPO funding were identified that were not known to the state and the general public. The proposed legislation has certain mechanisms to expose and avoid such illegal linkages between the political parties and NPOs. This is especially relevant ahead of upcoming elections in Autumn 2024.

7. The purpose of the Law is, however, somewhat wider than that since - according to paragraph 1 of Article 1 – it is "to ensure the transparency of foreign influence" without any specific connection with political parties and it is not limited to non-profit organisations ("NPOs").

[1] The finalisation of the present opinion took place shortly before the adoption of the law; it is understood that no further amendments were made with regard to aspects discussed in this document.

8. It purports to do this through the creation of a registration requirement for organisations "pursuing the interest of a foreign power" and other issues related to the transparency of the activities of such organisations.

9. At the same time, paragraph 2 of Article 1 would provide that the provisions in it may not restrict those activities.

10. Article 2 would provide for four kinds of organisation that could be ones pursuing the interest of a foreign power, namely, "a non-entrepreneurial (non-commercial) legal entity" with a number of exceptions, a broadcasting company, a legal entity owning a print media outlet and a legal entity owning or using an Internet domain and/or Internet hosting for Internet media. Such organisations will be viewed as ones pursuing the interest of a foreign power if 20% of their total income in a calendar year comes from a foreign power.

11. In addition, this provision would define "income", its receipt and how its source should be determined.

12. Article 3 would define a foreign power as comprising the constituent entity of a foreign country's state system, an individual who is not a Georgian citizen, a legal entity not established under Georgian legislation and other organisational formations and other type of association of persons created on the basis of the law of a foreign country and/or international law.

13. Article 4 would require the relevant organisations to register with the National Agency of the Public Registry ("the Agency") and would set out the requirements for doing so and the procedure to be followed.

14. Article 5 would provide for the application to be registered and for the application and the information entered in the register to be publicly available.

15. Article 6 would provide for an annual financial declaration to be made by the registered organisations and what this would be comprised of, as well for the public availability of the declaration and the power to specify the procedure to be followed in submitting a declaration.

16. Article 7 would provide for the cancellation of a registration where an organisation meets the criteria applicable.

17. Article 8 would empower the Ministry of Justice to identify organisations pursuing the interest of a foreign power and to verify compliance with the Law's requirements. It would also provide the basis on which monitoring for this purpose would be undertaken and would require the registration of organisations found to have evaded registration.

18. Article 9 would provide for the fines payable in the event of non-compliance with the requirements of the Law.

19. Articles 10 and 11 would deal with certain transitional arrangements and the entry into force of particular provisions in the Law.

20. The Law differs from a draft submitted to Parliament of Georgia in 2023 but subsequently withdrawn only by its replacement of the phrase "agent of foreign influence" by "organisation pursuing the interest of a foreign power".

C. RELEVANT STANDARDS

21. There is no explicit requirement for transparency in the restrictions authorised by the right to freedom of association in either the International Covenant on Civil and Political Rights ("the ICCPR") or the European Convention on Human Rights ("the ECHR").

22. Thus, Article 22 of the ICCPR only allows restrictions "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", while Article 11 of the ECHR provides that the right may be "subject to such formalities, conditions, restrictions or penalties … 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".

23. Furthermore, the ODIHR-Venice Commission *Joint Guidelines on Freedom of Association* ("the Joint Guidelines") stipulate that

> [t]he only legitimate aims recognized by international standards for restrictions are national security or public safety, public order (*ordre public*), the protection of public health or morals and the protection of the rights and freedoms of others.[2]

24. *Recommendation of the Committee of Ministers of the Council of Europe Rec(2007)14 on the Legal Status of Non-Governmental Organisations in Europe* ("Recommendation Rec(2007)14") does provide for the possibility of certain transparency requirements being imposed on NGOs, namely, as regards submitting accounts and an overview of their activities every year, making known the proportion of their funds used for fundraising and administration and having their accounts audited by an institution or person independent of their management.[3]

[2] Paragraph 34.

[3] Paragraphs 62, 63 and 65.

25. However, these requirements only apply to NGOs that receive some form of public support.

26. In addition, this Recommendation envisages all NGOs being required to submit their books, records and activities to inspection by a supervising agency but only 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.[4]

27. Also, it provides that the fundraising undertaken by NGOs should be:

> subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.[5]

28. It is well-established that, where admissible, reporting and disclosure requirements must always be proportionate.[6]

29. Thus, transparency is not - in itself - recognised in international standards as an admissible basis for imposing restrictions on the exercise of the right to freedom of association.

30. Moreover, the Joint Guidelines provide that, while openness and transparency are fundamental for establishing accountability and public trust,

> [t]he state shall not require but shall encourage and facilitate associations to be accountable and transparent.[7]

31. Nonetheless, although the imposition of certain requirements involving elements of transparency will amount to an interference with the exercise of the right to freedom of association, it is possible that there may be circumstances where this would be justified in pursuit of one or more of the legitimate aims recognised as allowing restrictions on this right.

32. Thus, the European Court of Human Rights ("the ECtHR") has found that a prohibition on the funding of political parties by foreign States – which effectively gave rise to an obligation for them to publish donations through depositing them in a specified bank account - was necessary for the prevention of disorder.[8]

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[4] Paragraph 68.

[5] Paragraph 50.

[6] See Venice Commission, Report on Funding of Associations, paras. 107-121 and Expert Council on NGO Law, International Standards relating to Reporting and Disclosure Requirements for Non-governmental Organizations.

[7] Paragraph 224.

[8] *Parti nationaliste basque – Organisation régionale d'Iparralde v. France*, no. 71251/01, 7 June 2007.

33. It has also recognised that the possibility for associations to participate in elections and accede to power might make it necessary to require some of them to register as political parties, so as to make them subject to, for instance, stricter rules concerning party financing, public control and transparency.[9]

34. In addition, the ECtHR has acknowledged that, in view of the fundamental role played by political parties in the proper functioning of democracies, the general public may be deemed to have an interest in political parties being monitored and in sanctions being imposed for any irregular expenditure, particularly as regards those parties that receive public funding so that the inspection of their finances did not in itself raise an issue under Article 11 of the ECHR.[10]

35. Furthermore, it has accepted, in principle, that the objective of increasing the transparency regarding the funding of civil society organisations may correspond to the legitimate aim of the protection of public order.[11]

36. Moreover, arrangements for transparency and accountability may be relevant to determining whether an obligation to support an organisation of which one is not a member would violate the right to freedom of association.[12]

37. However, even if a transparency requirement might be regarded as having a legitimate aim for an admissible purpose of restricting the right to freedom of association, it would still need to be established that it has both a legal basis and is necessary in a democratic society to prevent a finding of a violation of that right.[13]

38. For the purpose of having a legal basis, the law being relied on not only must formally exist and be accessible but also must be formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[14]

39. In one instance, there was found to be no compliance with the requirement of foreseeability both as regards the basis for finding particular items of expenditure unlawful in the course of the supervision of a political party's accounts and as to whether and when unlawful expenditure would be punished by a warning or a confiscation order.[15]

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[9] *Zhechev v. Bulgaria*, no. 57045/00, 21 June 2007.

[10] *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, 26 April 2016.

[11] *Ecodefence and Others v. Russia*, no. 9988/13, 14 June 2022.

[12] *Vörður Ólafsson v. Iceland*, no. 20161/06, 27 April 2010 and *Geotech Kancev GmbH v. Germany*, no. 23646/09, 2 June 2016.

[13] See, e.g., *Parti nationaliste basque – Organisation régionale d'Iparralde v. France*, no. 71251/01, 7 June 2007, at paras. 40-42.

[14] *Ibid*.

[15] *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, 26 April 2016.

40. Moreover, the legal uncertainty brought about by the unforeseeability of the lawfulness requirements was further exacerbated by the delays encountered in the inspection procedure, in the absence of any time-limits set out in the law.[16]

41. The ECtHR has found the imposition of requirements entailing transparency that were limited to a very specific form of entity and did not entail any significant disclosure or reporting requirement not to be disproportionate so that the interference with the right to freedom of association could be regarded as "necessary in a democratic society" for the "prevention of disorder.[17]

42. Similarly, a transparency requirement was not seen as objectionable where it involved disclosure as to the use of payments only to those who had actually made them.[18]

43. On the other hand, requiring an association to become a political party to be registered because its goals – the restoration of the Constitution of 1879 and of the monarchy – were deemed "political" and thereby become subject to stricter rules concerning party financing, public control and transparency even though there was no intention to field candidates could not be regarded as necessary in a democratic society.

44. Potentially in line with not only with the legitimate aims for which restrictions on the right to freedom of association can be imposed but also the requirement to be necessary in a democratic society, are the various transparency obligations which a number of international and regional standards propose should be imposed on certain forms of associations, NGOs and CSOs.

45. For example, the objective of FATF Recommendation 8 is to ensure that non-profit organisations (NPOs) are not misused by terrorist organisations: (i) to pose as legitimate entities; (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; or (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes, but diverted for terrorist purposes. For this purpose, it is suggested that States adopt requirements on: making publicly available information as to the identity of those who own, control or direct their activities; issuing annual financial statements; measures being taken by NPOs to confirm the identity, credentials and good standing of their beneficiaries and associate NPOs; and

[16] In the ECtHR's view, there should have been special diligence to finalise the inspections in a timely manner, which would also have allowed the applicant party to regulate its conduct in order to avoid facing sanctions for similar expenditure in the following years.

[17] As in *Parti nationaliste basque – Organisation régionale d'Iparralde v. France*, no. 71251/01, 7 June 2007 (as regards political parties).

[18] *Vörður Ólafsson v. Iceland*, no. 20161/06, 27 April 2010 and *Geotech Kancev GmbH v. Germany*, no. 23646/09, 2 June 2016.

making available to the public records of their charitable activities and financial operations.[19]

46. However, Recommendation 8 only applies to those non-profit organisations (NPOs) whose activities and characteristics which put them at risk of terrorist financing abuse, rather than on the simple fact that it is operating on a non-profit basis. Thus, in using the term NPO, it is referring only to "a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of "good works" and so its definition does not cover the entire universe of NPOs[20] and certainly not all associations, NGOs and CSOs.[21]

47. On the other hand, the use of the term "legal person" in FATF Recommendation 24 – which is directed to ensuring that there is adequate, accurate and up-to-date information on the beneficial ownership and control of legal persons that can be obtained or accessed rapidly and efficiently by competent authorities, through either a register of beneficial ownership or an alternative mechanism - means that it is capable of covering all NGOs with legal personality. The beneficial ownership information requirement involves some form of registry – determined based on risk, context and materiality – that enables efficient access to information on beneficial ownership.[22] While this requirement is well-adapted for corporate entities, it seems less apt for the structures of associations, CSOs and NGOs.[23]

48. This is not the case with the provision in Recommendation Rec(2007)14 for the possibility of certain transparency requirements being imposed on NGOs noted above.

49. Although Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns, (hereafter "Recommendation on funding"), which has provisions concerned with donations, including that States "specifically limit, prohibit or otherwise regulate donations from foreign donors", has a number of provisions concerned with transparency, these are not particularly exacting.

[19] Paragraph 6(b) of the Interpretative Note.

[20] Paragraph 1 of the Interpretative Note.

[21] See Non-governmental Organisations and the Implementation of Measures against Money Laundering and Terrorist Financing for problems with the way the Recommendation is actually being implemented by States.

[22] Paragraphs 7 and 8 of the Interpretive Note.

[23] See Non-governmental Organisations and the Implementation of Measures against Money Laundering and Terrorist Financing.

50. Thus, it is recommended in the Recommendation on funding that: political parties and the entities connected with them be required to keep proper books and accounts; these accounts should specify all donations received by the party, including the nature and value of each donation with the donors of donations over a certain value being identified; and these should be presented regularly, and at least annually, to an independent authority, with them or a summary of them being similarly made public.[24]

51. Moreover, as a result of having privileges not granted to other associations (particularly true in the area of finance and access to media resources during election campaigns), it is seen appropriate in the ODIHR-Venice Commission Guidelines on Political Party Regulation ("the Political Party Guidelines") to place certain obligations on political parties due to their acquired legal status. This may take the form of imposing reporting requirements or transparency in financial arrangements".[25]

52. Also, the Political Party Guidelines provide that "[b]oth routine party funding and campaign finance must be considered in legislation relevant to political parties to ensure a transparent and fair financing system".[26] In addition, they stipulate that rules on transparency should deal consistently with loans to parties and candidates.[27] Furthermore, the Guidelines recognise the possibility of regulation on account of the fact that "[c]ontributions from foreign sources are generally prohibited".[28]

53. In addition, the Appendix to the Recommendation of the Committee of Ministers to member States on the legal regulation of lobbying activities in the context of public decision making ("Recommendation on lobbying") – which is defined as "promoting specific interests by communication with a public official as part of a structured and organised action aimed at influencing public decision making" – recommends that "[i]Information on lobbying activities in the context of public decision-making processes should be disclosed"[29] and that there should be a public register of lobbyists.[30] In addition, it is recommended the register should, as a minimum include: "a. the name and contact details of the lobbyist; b. the subject matter of the lobbying activities; c. the identity of the client or employer, where applicable".[31]

[24] Articles 11-13.

[25] Paragraph 23.

[26] Paragraph 161.

[27] Paragraph 171.

[28] Paragraph 172.

[29] Paragraph 5.

[30] Section E.

[31] Paragraph 11.

54. The Recommendation on lobbying also recommends that, in order to further promote transparency, "registers may include additional information in accordance with national conditions and requirements".[32]

55. However, it is also provided in the Recommendation on lobbying that the legal regulation of lobbying activities

> should not, in any form or manner whatsoever, infringe the democratic right of individuals to: a. express their opinions and petition public officials, bodies and institutions, whether individually or collectively; b. campaign for political change and change in legislation, policy or practice within the framework of legitimate political activities, individually or collectively.[33]

56. Furthermore, it is provided that, where it can be demonstrated that "alternative mechanisms guarantee public access to information on lobbying activities and ensure equivalent levels of accessibility and transparency, it may be considered that the requirement for a public register is satisfied".[34]

57. Thus, these standards – if not always their implementation – might be seen as proportionate and thus necessary in a democratic society as they are not generally directed to all forms of associations, CSOs and NGOs and the resulting transparency requirements are not in most respects especially exacting.

58. Moreover, as regards the necessity in a democratic society of transparency requirements, it needs to be kept in mind that the right to respect for private life under Article 17 of the ICCPR and Article 8 of the ECHR applies to NGOs and their members where they are membership organisations. NGOs should not, e.g., be generally required to disclose the names and addresses of their members.[35] Moreover, the right to respect for private life is also enjoyed by those who provide funding to NGOs, which is recognised in the stipulation in paragraph 64 of Recommendation CM/Rec(2007)14 that the rights of donors should be respected in the context of transparency requirements.

59. Finally, it needs to be kept in mind that singling out entities on account of the source of some of their funding is liable to lead to them being stigmatised. This has been recognised by the ECtHR in the following terms:

> attaching the label of "foreign agent" to any applicant organisations, which received funds from foreign entities, was unjustified and prejudicial and also liable to have a strong deterrent and stigmatising effect on their operations. That label coloured them as being under foreign control, in disregard of the fact that they

[32] Paragraph 12.

[33] Paragraph 4.

[34] Paragraph 13.

[35] See, e.g., *National Association of Teachers in Further and Higher Education v. United Kingdom* (dec.), no. 28910/95, 16 April 1998

saw themselves as members of national civil society working to uphold respect for human rights, the rule of law and human development for the benefit of Russian society and its democratic system.[36]

60. As a recent study of the Expert Council has underlined, stigmatisation can not only entail restrictions on activities and various forms of discrimination but also media smears on NGOs and physical attacks against leadership and members of certain NGOs,[37] all of which are fundamentally inconsistent with the European and international standards relating to freedom of association and the need for an enabling environment for NGOs to operate.

D. ASSESSMENT OF COMPLIANCE

61. This section examines the compliance of the individual provisions of the Law in turn.

Article 1

62. The assumption underlying the object of the Law – transparency of foreign influence – would deem to be that such influence is necessarily negative. Moreover, although the Chairman's letter refers to a perceived problem of foreign influence over political parties, the provisions of the Law are not specifically directed to political parties and, as will be seen in the examination of Article 2, they are actually directed to entities that could not at all be regarded as political parties.

63. As such, it is in effect directed at the political activity undertaken by entities other than political parties, which is in principle guaranteed by European and international standards relating to the rights to freedom of association and freedom of expression.

64. Moreover, as the basis for the requirements stems from the source of income rather than any activity undertaken, these have the potential to affect entities that do not undertake any kind of activities of a political nature. Thus, the Law should be regarded as indiscriminate in the impact that it can be expected to have.

65. Furthermore, even if the object of the Law could be seen as having a legitimate aim, the linking in paragraph 1 of this object to the introduction of a registration requirement and other measures in it, namely, a requirement for annual declarations, monitoring and criminal liability does not demonstrate that these measures are the only, let alone the least onerous ones to achieve that objective.

[36] *Ecodefence and Others v. Russia*, no. 9988/13, 14 June 2022, at para. 136.

[37] *Stigmatisation of Non-Governmental Organisations in Europe*, at para.48.

66. This is something that needs to be borne in mind when considering whether, to the extent that there might even be a legitimate aim, the restrictions are proportionate ones and thus necessary in a democratic society insofar as they would impinge on the exercise of the right to freedom of association on which the NGOs affected are based.

67. Paragraph 2 as a supposed guarantee that the measures in the Law should not restrict the activities of any entity registered as an organisation pursuing the interest of a foreign power is theoretically to be welcomed. However, in view of the consequences that can be expected to flow from the specific requirements in its provisions, this does not appear to be a guarantee of any substance.

Article 2

68. Paragraph 1, as has been noted, defines an organisation pursuing an interest of a foreign power as covering one of four types of entity - non-entrepreneurial (non-commercial), broadcasting, print media and owner or user of an internet domain or one hosting internet media – whose source of more than 20% of its total income during a calendar year is from a foreign power.

69. It is likely that some entities falling into the first category will also fall into the third and fourth ones given that print and internet dissemination of material can be an aspect of the way in which non-entrepreneurial (non-commercial) entities function.

70. Leaving aside the definition of "foreign power", this provision is – together with some of definitions in other parts of the Article - problematic for several reasons.

71. First, the link made between source of income and the pursuit of the interest of a foreign power can hardly be justified and is certainly arbitrary.

72. This link is not justifiable since the receipt of some sort of income from a particular entity cannot by itself indicate that it is pursuing that entity's interests or that the pursuit of particular interests by the entity receiving it does not accord with the entirely legitimate objectives held by that entity, which it would pursue regardless of the source of the income. Indeed, as the financial support received by many governments themselves from international and foreign sources demonstrate, the receipt of income from outside a particular State can be and generally is with a view to pursue interests which that State considers important. Receipt of such income by a government does not in itself mean that it is pursuing the interests of the international or foreign source, even if there might be a coincidence in the results they want to see achieved, and that is no less true where non-governmental entities receive from a source outside their country.

73. It would, therefore, only be legitimate to regard the entities that would be covered by the Law as pursuing the interest of a foreign power where it can be demonstrated that the

activities being pursued with that income are inimical to the interests of the Republic of Georgia.

74. This seems to be impossible to conclude in respect of the provisions of the Law since there is no provision to evaluate what the activities undertaken by the entities covered amount to. Moreover, such a conclusion is necessarily precluded by paragraph 2 of Article 1 since the purported guarantee that the activities should not be restricted must mean that they are ones that are entirely consistent with what is permitted under the law and Constitution even if they are somehow funded by a foreign power.

75. Thus, there is an unwarranted assumption underpinning the Law that receipt of income from a foreign source necessarily means that the interests pursued with it are not those of Georgia or its citizens or ones that can be lawfully pursued in Georgia.

76. Secondly, there are a number of exclusions in paragraph 1 a) regarding the non-entrepreneurial (non-commercial) entities to be covered, namely, educational institutions, medical institutions, various organisation concerned with the rights of persons with disabilities, sporting bodies and blood institutions.

77. Certainly, there is no clear basis for the distinction between the entities covered and those that are covered given that there is no indication in the Law as to which interest of a foreign power are permissible and which are not. As a consequence, an entity covered could pursue essentially the same activity as an entity that is not covered, such as the provision of education on a particular topic, but only the former will be affected by the restrictions that would be imposed by the Law.

78. European and international standards only regard differential treatment between entities that are of a comparable nature where there is a rational and objective justification for so doing. In this instance, the difference in treatment is based on the legal status of the entities and as such is one of the prohibited grounds of discrimination under Article 14 of the ECHR and Protocol 12.

79. It is understandable that the government might want to preserve funding for entities that it regards as important, notwithstanding that the source of the funding comes from outside the country. This might, therefore, be seen as having the legitimate aim for differential treatment to be acceptable. However, it is questionable whether the differential treatment will always be capable of being regarded as meeting the need for a reasonable relationship of proportionality between the different treatment and the aim pursued where there are not only alternative means of achieving the transparency sought without the restrictions entailed by the Law's provisions but the effect of those restrictions is to affect activities which, as been seen, are entirely consistent with the law and Constitution of Georgia.

80. Thirdly, the definition of "Income" in paragraph 3 is potentially unclear in that it is not certain whether it relates to an unqualified transfer of entitlement to the money or goods or could also relate to a loan. Certainly, the latter would need to be treated as income for accounting purposes.

81. Finally, the way in which paragraph 4 seeks to determine how income comes from a foreign power is partly uncertain in its scope but also has the potential to be both arbitrary and an unjustified interference with the right to respect for private life under Article 8 of the ECHR.

82. Thus, although there is unlikely to be any difficult in discerning whether – for the purpose of paragraph 4 a) - income has come directly or indirectly in most instances, it may be less easy to discern whether it has come directly or indirectly from "a legal entity that directly or indirectly received income from a foreign power", as specified in paragraph 4 b), not least as the double use of "indirectly" is capable of catching income that has only a remote connection with the original source of the money or other goods which paragraph 2 regards as income.

83. As a result, there are likely to be many instances where entities considered to be pursuing the interest of a foreign power will not be able to foresee that this will purport to be justified on account of the income which they have received notwithstanding that there may have been many degrees of separation, often implausible and certainly arbitrary between them and the source being a foreign power. In these circumstances, the lack of predictability will mean that this aspect of the provision could not be regarded as meeting the quality of law requirement for a restriction on rights under the ECHR and the ICCPR.

84. Furthermore, the formulation of paragraph 4 b) is also capable of catching income received from the Government of Georgia itself where it has received some income from an entity coming within the definition of a foreign power, including potentially loans if those come within the definition of "income" for the purpose of paragraph 2.

85. Finally, the stipulation in paragraph 4 c) that income that is not identified would be considered as being received from a foreign power would be arbitrary in its effect where only a minute fraction of an entity's income that is not identified as amounting to 80% of income from Georgian sources could not be identified because of the legitimate wish of the donor not to be identified, even though that person is a citizen of Georgia.

86. As paragraph 64 of Recommendation CM/Rec(2007)14 recognises, the rights of donors should be respected in the context of transparency requirements and that includes the right to respect for private life. However, that right would necessarily be disrespected if the non-identification of a Georgian donor would be treated as contributing to the income said to constitute that coming from a foreign power as that would necessarily either put pressure on the persons concerned to allow their identity to be disclosed or lead them not to make the donation at all.

87. Moreover, there is also the possibility of situations arising where 20% of an entity's income is not identified but all of it comes from Georgian sources, these having good reason to retain their anonymity, whether this is to mask their identity out of shyness about their generosity or their concern that adverse consequences might result from them being linked to a particular activity. In such cases, the presumption of that income coming from a foreign power would again unjustifiably encroach on the right to respect for private life of the persons concerned.

Article 3

88. The scope of the definition of a foreign power that would be established by this provision is definitely very wide. At the same, there are aspects of its formulation that are not entirely clear.

89. Certainly, the notion of "constituent element of a foreign country's state system" in sub-paragraph a) seems a little imprecise.

90. This is because the notion of "state system" is more apt to describe the arrangements established following the Peace of Westphalia that have underpinned the modern international order rather than the constitutional arrangements within a State, which presumably sub-paragraph a) is directed to. However, what might be regarded as a "constituent element" within a State's constitutional order can be quite debatable, particularly where functions within a particular State may be performed by private actors.

91. Nonetheless, this is unlikely to be a fundamental problem given that sub-paragraph c) extends the definition to a legal entity not established under the legislation of Georgia. This extension is theoretically capable of catching anything established under international as much as national law, which may not be the intention given the specific reference to international law in sub-paragraph d).

92. The breadth of the formulation of the latter sub-paragraph not only seems capable of extending to any kind of entity established under a national law other than that of Georgia but also of covering all international organisations in which Georgia participates, including the United Nations and the Council of Europe.

93. The treatment of these as a foreign power is rather odd given that the activities of the latter organisations, which can result in the disbursement of funds to at least some of the entities covered by paragraph 1 of Article 2, are only undertaken in agreement with the authorities of Georgia.

94. In such circumstances, it might seem a little disingenuous to characterise the activities of the entities that receive funding from such organisations as ones that are pursuing the interest of a foreign power given that these can be activities which Georgia itself regards as appropriate.

95. This will be relevant when considering the requirements in other provisions of the Law that would lead to the identification of certain Georgian entities as pursuing interests that are alien to those of the country, with the consequent risk of them being stigmatised for that, notwithstanding that they are interests which Georgia itself has agreed should be pursued, whether through specific agreements with the organisations concerned or because they fall within the scope of international undertakings freely made by Georgia, as well as recognising as legitimate under paragraph 2 of Article 1.

96. It might be argued that the replacement of the term "foreign agent" in the Law by that of "an organisation pursuing the interest of a foreign power" would take this designation outside the scope of the ECtHR's objection to the former term on account of it being:

> unjustified and prejudicial and also liable to have a strong deterrent and stigmatising effect on their operations.[38]

97. However, the new term is just as objectionable since it necessarily treats the entities concerned as pursuing the interest of a foreign power regardless of what they do or their motives for doing it.

Article 4

98. This Article's provisions deal with making a request for registration, the body dealing with this, the timeline for submission of applications, the details to be submitted, the processing of an application and the cost, together with the possibility of establishing supplemental rules, that are entailed by the registration requirement which is made applicable to the entities considered under the Law to be ones pursuing the interest of a foreign power.

99. However, the provisions dealing with the timeline for making an application and the means of doing so will not be applicable at the time of the Law's entry into force as the transitional provisions in paragraph 2 of Article 10 would require an application for registration to be made within a month of that occurring. Moreover, such an application could not be submitted through a website as envisaged in Article 4 but should be made "in writing (in the tangible form)". Apart from that, the provisions dealing with registration below are applicable both to applications immediately after the entry into force of the Law and those made at some subsequent point in time.

100. However, the purported requirement to apply for registration within a month of the Law's into force seems problematic in that there is unlikely to be a calendar year applicable at the point in view of the general understanding of that term as a period running from 1 January to 31 December in any given year. Certainly, any treatment of that term as meaning in that case the period of 12 months preceding the entry into force of the Law would not be a foreseeable one and thus the obligation imposed could not be prescribed by law for

[38] *Ecodefence and Others v. Russia*, no. 9988/13, 14 June 2022, at para. 136.

the purpose of imposing restrictions on rights guaranteed by the ECHR or the ICCPR. Furthermore, the fact that the obligation would apply to funding received before the Law came into effect would mean it governs conduct which the entities concerned are in no position to alter, with such arbitrariness being a consideration to take into account when assessing its overall acceptability.

101. Those entities considered to be ones pursing the interest of a foreign power – in practice that would mean those entities which would have considered themselves to have breached the 20% threshold - would first have to make a request "in writing (in the tangible form)" for registration to the body dealing with this, namely, the Legal Entity of Public Law – National Agency of the Public Registry ("the Agency") in the January of the calendar year after they meet the criteria specified in Article 2.

102. The Agency would be required to make available access to a specified website "within two workings days". This period is presumably meant to run from the receipt of the request rather than the making of it but this is not addressed Paragraph 1.

103. The mere specification of "in January of the calendar year" after supposedly the criteria being met does not make it clear whether a particular day is involved, or the beginning of the month is intended, or it is left to the entities concerned to determine which specific date in the January concerned should be regarded as applicable for the purpose of starting the application process.

104. Paragraph 2 would provide a deadline for completing an application for registration, namely, 10 working days from access to the webpage with the form concerned. The period allowed is not unreasonable in itself but it seems unnecessarily bureaucratic for there to be a need even to apply for access to the webpage when other processes are frequently completed online without any need first to seek access to the webpages concerned.

105. Paragraph 3 would require various information to be submitted in the application the author of the application, which is to be understood as the entity itself given the phrase in paragraph 4 stating "If the author of the application meets the criteria of an organisation pursuing the interest of a foreign power".

106. The information to be submitted relates to the author's identification data and address, as well as the address of the author's webpage, information about the source, amount and purpose of the income – as defined in paragraph 2 of Article 2 – received by the author during the previous calendar and information on the amount and purpose of funds spent by the author during the previous calendar year.

107. There is nothing problematic in the information required relating to identification data, address and webpage address.

108. While it may be relevant - on the assumption that registration is actually appropriate - for the Agency to be informed about the source and amount if income received from the sources specified in Article 3, i.e., the so-called "foreign powers", as well as the total amount of income, so that it is then possible to check whether the entity is correct in considering that the 20% threshold for becoming required to register has been met; as already noted, the entity would itself need to make such a provisional assessment in order to determine whether it is under any obligation to make an application for registration.

109. However, it is not evident that there is any justification for the entity to be required to provide any information about sources that are other from "foreign powers". This is not only inconsistent with the privacy of those providing that income, but it is entirely unnecessary since the function of the Agency is to check whether registration should proceed and not to monitor sources from non-foreign power sources.

110. Equally, it is not all relevant for the function of the Agency for it to informed of the purpose for which income has been received or the amount and purpose of the funds spent in the preceding calendar year. This information would certainly not help it determine whether the entity making the application has passed the 20% threshold.

111. Moreover, imposing a requirement to inform the Agency about the purpose of either income or expenditure, whether from Georgian or "foreign power" sources, suggests that some other kind of monitoring exercise would actually be undertaken, which is fundamentally inconsistent with the limits on the transparency obligations of NGOs and their freedom to pursue their objectives. In addition, it is also inconsistent with the assumption of the Law, already noted, that there is nothing contrary to the law and Constitution in the activities of the entities to which the Law would apply, which reflects the stipulation in paragraph 67 of Recommendation CM/Rec(2007)14 that "The activities of NGOs should be presumed to be lawful in the absence of contrary evidence".

112. There is nothing problematic, in principle, as regards the specification in Paragraph of the deadline for the Agency to consider an application and to register an entity submitting an application that has been filled out correctly and completely (30 working days), nor with the deadlines set for completing or correcting applications (10 working days) and then registering the entity once this is done (3 working days). However, the reasonableness of the time allowed for completion and correction will depend upon the extent of what is actually requested of an entity and there ought to be some flexibility allowed in the Law as regards the application of this deadline.

113. The stipulation in Paragraph 5 that no fee would be charged for registration is entirely appropriate.

114. Paragraph 6 would authorise the Minister of Justice to make rules for registration and entering an entity into the register, as well as for the application form. Such rules cannot, of course, be the subject of any assessment since they have not yet been made. However,

insofar as any that those adopted might add to the information to be disclosed for the purpose of registration – the possibility of which is alluded to in the reference in paragraph 1 of Article 5 to the entity's charter and other constituent documents being amongst the material relating to an entity which should be made publicly available – there is certainly a risk that such requirements could be inconsistent with European and international standards in that they could go beyond legitimate obligations in respect of transparency.

115. Finally, as regards the registration requirement as a whole, it might be wondered why such a bureaucratic process should be needed at all. As the Chairman's letter makes clear, NGOs in Georgia already often voluntarily make a declaration as to their sources of income on their web pages. A simpler, less costly and less onerous – and thus more proportionate - way of achieving transparency, if that is really the goal, could be achieved through just a requirement for such a declaration by the entities to which the Law is directed.

Article 5

116. Both the request regarding an application for registration and the application itself would, according to Paragraph 1, be public, with the Agency being required to place them on a certain webpage. Such publicity is also envisaged, as has been noted, for the charter and constituent documents of the entities concerned, notwithstanding that these are not specified amongst the information required in paragraph 3 of Article 4.

117. Although public access to details relating to an entity itself (i.e., identification data, residence and webpage address) is not problematic, such access could be as regards other information, notably that regarding material irrelevant for the purpose of registration and other information that might be required under the rules to be made under paragraph 6 of Article 4.

118. Certainly, that would be the case were there to be any specification in those rules as to the submission of information relating to the personal data of individuals working for or otherwise involved in entities that have applied for registration or been registered since that would be inconsistent with their right to respect for private life.

119. However, also a matter of concern is the requirement, already noted to provide information about the purposes of income received and spent as that runs the risk, given the characterisation of the entities concerned, as ones pursuing the interest of a foreign power, that this will lead to the stigmatisation of those entities and of those associated with them, as well as the possibility of the latter even being harassed or attacked.

120. Moreover, the need for such additional detail to be included in the registry is open to question, regardless of whether any unjustified adverse inferences might be drawn from it, since the application for registration will include the webpage of the entity concerned and that should be sufficient to facilitate access to information about itself in a way that

provides sufficient context to avoid any mischaracterisation and that also respects legitimate privacy interests.

121. Paragraph 2 repeats unnecessarily the requirement for the Agency to ensure public accessibility for information entered in the register.

Article 6

122. This provision would require the entities registered under Article 4 to complete each year a financial statement which provides the information required under paragraph 3 of that Article. As previously noted, that information extends to matters not relevant to whether the entity concerned is pursuing the interest of a foreign power and it is unclear whether the possibility to extend the scope of the information to be submitted in the case of registration applications would also exist in respect of the information required for the annual financial statement.

123. This statement is to be completed "in January", with again no specification as to what would be the actual deadline in that month for doing so. The declarations would have to be completed electronically, under a procedure and in a form prescribed by the Minister of Justice, and then submitted to the Agency.

124. There would then be a period of 30 working days within which the authorised person of the Ministry of Justice could request "the necessary information, including personal data" and seek any incorrect and/or incomplete completion of the statement.

125. It is not evident why any personal data, i.e. that concerning individuals, should be required could not shed any light on whether an entity was pursuing the interest of a foreign power in the sense defined by Article 2, apart from just the actual citizenship of those providing funding to an entity who are not Georgian. Not only would requiring the provision of any such data in respect of anyone else be irrelevant but it would be inconsistent with the right to respect for private life of those individuals who would be affected.

126. The requirement to address "incorrect" as opposed to "incomplete" information in a statement points to the need for the Agency to have some basis for making such an assessment about what has been provided by the entity concerned. It is not clear how the Agency would be equipped for the purpose of identifying information as "incorrect" unless it had some other source, for which the only possibility in the Law would be the monitoring that would be authorised under Article 8, concerns about which are considered below.

127. The deadline of 10 working days for correction and completion is, in principle, unproblematic but, as with the application for registration, the Law ought to have allowed some flexibility as to its application since the feasibility of compliance with it may well depend upon the extent of the matters for which correction and completion is required.

128. The requirement that financial declarations should be made publicly available gives rise to the same concerns about the possible disclosure in applications for registration of personal information of individuals working for or otherwise involved in the entities concerned.

129. Again, as with the registration requirement, the object of transparency could have been achieved in a more proportionate way of requiring the entities concerned to make the financial declaration concerning truly relevant matters available on their web pages.

Article 7

130. This provision would allow for the cancellation of the registration of an entity where in the preceding calendar year it ceased to meet the criteria set out in Article 2 for being an organisation pursuing the interest of a foreign power.

131. Paragraph 1 provides that, for this purpose, the entity would first to have made the financial declaration required under Article 6 and then to make a motivated written application (in the tangible form) to the Ministry of Justice. The latter would have 30 working days to decide on such an application. It is supposed to do this "on the basis of a proper enquiry and study of the issue", with that including the right to "request the necessary information, including personal data".

132. Cancellation would, of course, be appropriate where the relevant criteria – i.e., no longer receiving 20% of income from a foreign power – are no longer met. However, the formulation of Paragraph 1, just noted, would suggest that a decision would not be based, either entirely or even at all, on a change in the percentage of income from a foreign power as unspecified personal data could be sought and thus taken into account.

133. Certainly, personal data, i.e., that concerning individuals, could not shed any light on whether an entity was pursuing the interest of a foreign power in the sense defined by Article 2, apart from just the actual citizenship of those providing funding to an entity who are not Georgian. Not only would requiring the provision of such data in respect of anyone else be irrelevant but it would be inconsistent with the right to respect for private life of those individuals who would be affected.

134. The arrangements in Paragraphs 2-4 that would apply for the exclusion from the register and the removal of information of information of information and documents relating to the entity whose registration has been cancelled, as well as for making the cancellation decision publicly available and establishing a procedure for cancellation, are entirely appropriate.

Article 8

135. This provision would establish a power with the stated purposes of identifying organisations pursuing the interest of a foreign power and of verifying compliance with the other requirements of the Law.

136. There is not much detail in the Law as to the form that the monitoring would take, other than that the relevant authorised person of the Ministry of Justice is, pursuant to Paragraph 3, entitled "to request the necessary information, including personal data, in accordance with the Law". The process by which this is to be sought is left by Paragraph 6 to a procedure to be established by the Minister of Justice.

137. The width of the power to request information is a matter of considerable concern in that it could entail significant intrusion in the activities of NGOs and other entities, regardless of whether they have been registered under Article 4. This is because, as Paragraph 5 makes clear, the outcome of monitoring could be a requirement for an entity to request registration, which means that they need not be registered when the monitoring is undertaken. In effect, the monitoring power that would be introduced would provide a means of monitoring any and every NGO so long as it does not come within the exceptions allowed in Article 2.1 a).

138. Certainly, as has been noted about other provisions, the possibility of seeking personal data is of doubtful relevance for the purpose of determining whether particular entities are pursuing the interest of a foreign power. However, the formulation of Paragraph 3 essentially leaves it to the relevant authorised person of the Ministry of Justice to determine what is relevant and that could be extensive, even if it is not objectively justified.

139. There is also a lack of clarity as to whether any liability could be imposed in respect of any alleged obstruction by an entity which is being monitored where information has been requested. Certainly, it is clear from the text of Article 9 dealing with liability that its provisions are inapplicable to such obstruction as, in the context of monitoring, there is only a possibility of this being imposed in respect of non-compliance with the obligation to request registration that might be the outcome of the monitoring process in some instances.

140. The possibility of instituting the monitoring process with regard to a particular entity is something open under Paragraph 2 to either a decision of the authorised person in the Ministry of Justice or anyone else making a written application to that person. There is, however, no criteria for the institution of the process other than that the decision or the application must relate to "a specific organisation pursuing the interest of a foreign power". As such pursuit can only be determined through monitoring, this would at most entail an allegation or suspicion, for which no evidential standard is prescribed. It may be that this will be included in the procedure to be established pursuant to Paragraph 6. However, as it stands, the present provision would allow vexatious and ill-intentioned

claims to be made about NGOs, potentially subjecting them to intrusive but entirely unwarranted investigation into their activities.

141. Paragraph 4 provides for the periodicity of monitoring to be "allowed only once every 6 months". This formulation might give the impression of being a limitation but, given the time that might be required to complete a specific monitoring activity, it is possible to envisage this as being a process that becomes one of an effectively continuous nature. Moreover, given that registration is required based on the income from sources in the course of a calendar year, the possibility of monitoring occurring every 6 months is clearly excessive.

142. The requirement that would be imposed under Paragraph 5 for an entity found through monitoring to meet the criteria of an organisation pursuing the interest of a foreign power to be registered and to make a request for this purpose is consistent with the logic of the Law, notwithstanding the concerns already raised about the object and effect of other provisions in it.

Article 9

143. This provision would allow for imposition of liability for (i) evasion of registration, (ii) failure to submit a financial declaration, (iii) failure to fill out the electronic application form for registration, (iv) failure to correct or complete applications and annual financial declarations and (v) failure to request registration following the outcome of the monitoring process.

144. The penalties in respect of (i) and (ii) are 25,000 GEL (8,600 EUR) and those for (iii)-(v) are 10,000 GEL (3,440 EUR), although continued failure after the imposition of the fines for (iii)-(v) concerned after one month can lead to repeated fines of 20,000 GEL (6880 EUR).

145. These fines are at least as great and often more so than ones which led the ECtHR to consider non-compliance with requirements in Russia's foreign agent legislation to be excessive for what are essentially regulatory offences and were liable to turn the fines into an instrument for suppressing dissent. This led it to conclude that they could not:

> be regarded as proportionate to the legitimate aim pursued. This finding is applicable *a fortiori* to criminal sanctions, since a failure to comply with formal requirements relating to the re-registration of an NGO can hardly warrant a criminal conviction and such sanctions are disproportionate to the legitimate aim pursued.[39]

146. These observations are equally applicable to the fines that could be imposed under the Law. Certainly, they cannot be regarded as entailing an interference that, as the Chairman's letter asserts, would be "proportionate and minimal to the legitimate aim".

[39] *Ecodefence and Others v. Russia*, no. 9988/13, 14 June 2022, para. 185.

147. The provisions in Paragraphs 6 and 9 relating to the proceedings in respect of the administrative offences established by this Article and the fact that the imposition of liability would not provide any relief from fulfilling the requirements concerned are not in themselves problematic.

148. Paragraph 10 would fix the limitation period for the imposition of liability to 6 years after its commission, which seems excessive for a regulatory offence.

Article 10

149. Paragraph 1 of this provision would require the adoption and issuing of by-laws for the implementation of the Law, as well as ensuring their compliance with it, to be occur within 60 days of its entry into force. It would also require the Ministry of Justice to take preliminary logistical and other measures necessary for the implementation of the Law within the same period. None of these requirements are, in principle, problematic.

150. Paragraph 2 would, as already noted, require registration to be sought within a month from the entry into force of the Law of entities who, according to the data in respect of 2023 meet the criteria set out in Article 2 of an organisation pursuing the interest of a foreign power. This seems an unnecessarily tight deadline.

Article 11

151. This Article would provide for the provisions other than Articles 1-9 and Paragraph 2 of Article 10 to enter into force upon the Law's publication and for excepted provisions to do so on the 60th day after publication. It is not, in itself, problematic.

E. CONCLUSION

152. There are certain aspects of the Law which are unclear, notably as regards whether loans would be treated as income, the extent of indirectness bringing a particular source of income within the scope of its provisions and the deadline for requesting registration in the years after it would come into force and for making financial declarations.

153. However, addressing such problems would not have been sufficient to bring the (draft) Law into conformity with the requirements of European and international standards.

154. Even if it were accepted that there was a need for transparency of the entities that would be affected by the provisions in the Law, they do not comply with the requirement that restrictions affecting the right to freedom of association should be necessary in a democratic society.

155. Thus, the restrictions entailed by the Law affects entities in an indiscriminate manner despite it being evident from Paragraph 1 of Article 1 that the activities of those subject to them are entirely legitimate.

156. In addition, the purported retrospective inclusion of income received before the Law enters into force is clearly arbitrary in that those entities affected could not escape the obligation to register even if thereafter the income received from foreign sources was less than 20% of their total income.

157. Furthermore, the Law imposes registration and financial declaration requirements when public awareness of the sources of income could be acquired simply through a requirement for the details to be published on the website of the entities concerned, something that is acknowledged already to be occurring as regards many entities.

158. Moreover, many provisions impose requirements to disclose personal data that have no conceivable link with the supposed object of securing the transparency of the sources of income coming from foreign powers.

159. In addition, the Law would establish a monitoring power which would be very extensive in its scope, affecting all civil society organisations and not just those that are to be regarded under its provisions as organisations pursuing the interest of a foreign power. This monitoring would be unnecessarily intrusive in its range and frequency.

160. Finally, the Law makes provisions for the imposition of penalties that are manifestly excessive for a regulatory measure.

161. Thus, the disproportionate nature of the requirements in the Law necessarily precludes them from being admissible for any legitimate aim being asserted.

162. However, the legitimacy of the aim of the Law is itself open to question as there is nothing in its provisions that would support the view that it is appropriate to regulate certain entities solely on account of the source of their income as opposed to the nature of the activities which they undertake.

163. This weakness in the rationale for the Law is compounded by the way in which it will necessarily lead to the unjustified stigmatisation of the entities concerned by making the assertion that they are pursuing the interest of a foreign power simply because of the source of some of their income. Such a link is not warranted because it ignores the consistency of those activities with both the law and Constitution of Georgia and of the international obligations and commitments which Georgia has itself undertaken.

164. To sum up: there is no justification for this Law that would be consistent with European and international standards.