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The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.

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1. INTRODUCTION

The present document provides a compilation of extracts taken from opinions adopted by the Expert Council with respect to issues of compliance by proposed and adopted legislation with European and international standards relating to non-governmental organisations.

It is structured in a thematic manner so as to facilitate access to the different issues that have been addressed by the Expert Council in its opinions.

The extracts selected aim to identify issues of more general application but, as each opinion referred to concerns the legislation of a particular member State of the Council of Europe, the specific context of that member State should still be kept in mind.

The title of the opinion concerned and the relevant paragraph number(s) are given for each extract taken but only the essential part of the paragraph(s) concerned is reproduced with any omissions indicated by (...). All footnotes are also omitted.

The full text of all the opinions from which extracts have been drawn can be found at: <https://www.coe.int/en/web/ingo/expert-council>

2. FORMATION

A. *Founders*

“The amendment (...) allows only aliens and stateless persons who have the right to permanent residence in the Republic of Azerbaijan to be founders of NGOs.

The absolute character of this restriction is incompatible with European and international standards insofar as it precludes the persons concerned from establishing NGOs that are membership-based. This is because the inclusive nature of 'everyone' in guarantees of the right to freedom of association such as Article 11 of the Convention mean that this freedom is one that should, in principle, be exercisable by people who are not actually permanently resident in the country concerned (whether they are citizens of another country or stateless persons). Moreover the restriction (...) also limits the freedom of citizens and aliens having permanent residence in the Republic of Azerbaijan to associate with them”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, paras. 84 and 85

B. *Entities without legal personality*

“It is questionable whether [‘legalisation’] (...) is a process that should be required simply to legitimise the pursuit of activities which would be lawful if carried out by individuals acting alone, even if - as the government maintains - notification is only 'statistically important' (...) It would be much more satisfactory for there to be explicit recognition in the law that the absence of registration does not mean an association is an unlawful body but is simply one that has no legal personality discrete from that of its members”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, paras. 26 and 29

“The change made to this provision is to specify that NGOs must be in the organizational-legal forms 'defined by this Law' rather than allowing them to be in 'any organizational-legal form'. It is doubtful whether this is a change of substance since only two forms of NGO are recognised under the law of the Republic of Azerbaijan - those that are registered and those that are legalised - but the effect of this change is undoubtedly to reinforce the illegitimacy of informal groupings notwithstanding that their existence comes within the guarantee of the right to freedom of association under Article 11 of the Convention”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 160

C. Form determined by objectives

“[T]he amendment is also objectionable in that it is likely to lead to entities which have objectives that are political or religious in character being required to become political parties or religious associations, notwithstanding that their fundamental goal is neither to be elected to public office nor to conduct religious worship or observance”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 69

D. Capital requirements

“There are no European or international standards governing the minimum capital required to establish a foundation but the amount specified is likely to mean that this form of NGO will not be generally available. Indeed it may not even be used by those with the required capital as there appears to be no incentive in the form of tax breaks to offset the liability to which a donor would otherwise incur. The combination of this new capital requirement with the absence of such incentives runs counter to the requirement in Recommendation CM/Rec(2007)14 that 'the legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 93

3. MEMBERSHIP

Disclosure requirements

“The government have explained that the existence of many disputes over membership are the reason for introducing a requirement to establish a register of members.

However, there is a need to clarify the circumstances in which there might be an obligation to disclose the contents of such a register once established as it is important to ensure compliance with both the right to respect for private life and to freedom of association (...). The NGO Law is silent on this point but, although the government have maintained that there is no requirement to submit the register to the authorities, this does not really address the issue of what, if any, are the circumstances in which disclosure or submission to inspection might be possible. There ought, therefore, to be a guarantee that this register is not subject to inspection by public authorities or to any other disclosure requirement except pursuant to a

court order issued for compelling reasons. It should be noted in this connection that it is well-established that the existence of unconstrained requirements for NGOs to disclose their membership lists to public authorities could operate as a discouragement to individuals joining them and thus constitute an unacceptable inhibition on their freedom of association”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, paras. 90 and 91

4. ACQUISITION OF LEGAL PERSONALITY AND REGISTRATION

A. Documentation required

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

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 32

B. Names

“It is certainly legitimate to prevent an NGO from using a name that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person, and this could include official bodies (...) However, respect for the right to freedom of expression under Article 10 of the Convention would probably rule out an absolute bar on the inclusion of the names of state agencies as part of those of NGOs where there is clearly a satirical or critical objective and there is thus no risk of confusion by the public of the NGO with the official body. This aspect of the amendment is thus objectionable since its absolute character precludes any allowance for the use for NGOs that have a satirical or critical objective without being misleading”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 76

C. Computer-based registration

“[T]he registration process can only be completed in the capital (...) which can be a disincentive for those wishing to establish NGOs in the regions, although it is possible to send applications by mail. It is understood that planning is underway for computer-based registration and the establishment of a single information network of registry authorities (...). Such a development could obviate the need to travel to Baku and would be commendable”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 33

D. Evaluation of aims and objectives

“[R]espect for freedom of association requires that there be a presumption that whatever individuals collectively propose to do will be lawful unless it is clearly evident that there is a constitutional or legal defect in the statutes. Unfortunately present practice in evaluating the statutes of public associations seems to take quite the opposite approach as there is considerable reliance on apprehension as to what might be done”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 37

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

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 39

E. Rectification of applications

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

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 42

F. Reasons for refusals

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

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 44

G. Complying with amendment obligations

“As there is no indication as to the time-frame within which such amendments must be achieved or as to how this can be judged to have been satisfactorily done, some NGOs could find themselves at the mercy of notifications being issued by the Ministry of Justice (...) and the possibility of this leading to their liquidation if discrete notifications are issued for failure to amend different provisions in their statutes (...)

This lack of precision in the 2009 amendments necessarily means that the restrictions on rights and freedoms of NGOs and their members entailed by them are insufficiently prescribed by law and thus incompatible with the Convention and other relevant European and international standards”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, paras. 129 and 130

5. OBJECTIVES AND ACTIVITIES

A. Demonstrations

“[T]he ban on participation in mass street and public offences is unlimited and, as no relationship between its application and the existence of a genuine risk for which such restrictions may be imposed on the right to freedom of assembly is required, there will necessarily be a violation of Article 11 in respect of those who are so affected”.

Opinion on the Draft Federal Law on Introducing Amendments to Certain Legislative Acts of the Russian Federation #662902-6, OING Conf/Exp (2014) 2, December 2014, para. 2a

B. Functions performed by public authorities

“The use of the words 'usurp', 'powers' and 'functions' together with the terms 'state and local self-governments' and 'state control and inspection' is positing the notion that there are certain activities that are exclusive to public authorities, which cannot therefore be performed by NGOs (...)

However, even if there were greater precision regarding the powers and functions concerned, it is improbable that it would be consistent with European and international standards to provide by law that certain of these are exclusive to government. It would, of course, be entirely legitimate for the law to prohibit an NGO from portraying itself as a public authority when pursuing an objective. Moreover European and international standards do not require that NGOs be given all the powers that may be enjoyed by public authorities. Nonetheless, subject to these limitations, NGOs should be free to pursue any objectives, and use any means for this purpose, that are consistent with the requirements of a democratic society”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, paras. 107 and 109

C. Activities classed as 'political'

“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”.

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, OING Conf/EXP (2013) 1, August 2013, para. 58

“Given that 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 (...), there is a case to argue that NCOs-foreign agents are discriminated against for political reasons in this law”.

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, OING Conf/EXP (2013) 1, August 2013, para. 65

D. Activities classed as ‘undesirable’

“[T]he power of designation of the activities as undesirable for reasons that lack real specificity and on the basis solely of information that is untested by a court will mean that both the quality of law requirement for a restriction is not satisfied and any such designation must be regarded as arbitrary, thereby contrary to Article 11 (...)

the consequential blanket ban on such organisations disseminating, producing and storing their information will, because this is regardless of its content, be an unjustified restriction on the freedom of expression of both the organisations and those wishing to read their publications”.

Opinion on the Draft Federal Law on Introducing Amendments to Certain Legislative Acts of the Russian Federation #662902-6, OING Conf/Exp (2014) 2, December 2014, para. 2c and 2e

6. MEMBERS

Protection of rights

“[T]he third sentence is entirely inappropriate in that it provides for the suspension of an NGO simply because there has been a violation of the rights of the members regardless of the nature of the violation concerned and of the wishes of the members, including those whose rights have been violated. As such this provision is authorising a response that is both inappropriate and disproportionate. It is inappropriate because a claim by a member of an NGO to assert his rights in that capacity is best remedied by enforcing those rights (e.g., by preventing expulsion, ensuring due notification of meetings, etc.) rather than by stopping the NGO from operating. It is disproportionate because the suspension does not have to take any account of the nature of the violation or of any wider public interest in such a sanction being imposed”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 168

7. MANAGEMENT AND INTERNAL ORGANISATION;

Relationship with volunteers

“[The] requirement (...) that there be a contract on volunteering between the organisation and its volunteers is entirely inappropriate for those NGOs that are not providing services (...) [and] (...) will undoubtedly make it much more difficult for NGOs to engage the support of volunteers who contribute so much to their effectiveness and will certainly make it impossible for them to mobilise support in situations requiring a rapid response. These changes run counter to the enabling environment for NGOs required by European and international standards. As such, they are an entirely backward step and are unnecessary for those who wish to be engaged with NGOs that are not providing services”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 169

8. PROPERTY AND INCOME

A. Grants - registration requirements

“Although the registration requirement before any transactions can be undertaken with grant funds - including their withdrawal from a bank as this requires a document of grant registration - is not new, its restatement in the 2009 Decree follows a substantial increase in the fine for failure to submit a copy of each grant contract to the Ministry of Justice (...). This change will not affect the ability to receive grants but will necessitate timely reporting and this has been problematic because of the requirement that the contracts be notarised and the failure to specify the documents required for the purpose of registration. The restated requirement with the more significant penalty has the potential to become an instrument of control over NGOs that may not be able to get their grants registered without any fault on their part”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 117

“The introduction of these requirements needs to be viewed in the light of changes to Law "On Grants" which now prohibits the acceptance of any financial assistance greater than 200 AZN (192 EUR) without having presented a copy of a signed agreement on the donation to the Ministry of Justice for registration. This not only entails disclosing the identity of all donors above 200 AZN but also makes the ability to accept such donations subject to the discretion of the Ministry of Justice to register the agreement concerned and will inevitably frustrate a rapid response by NGOs to issues or problems of concern to them. The latter is especially likely to be the consequence of the extension of these requirements to cover any changes to a grant agreement. (...)

These requirements are said to be necessary in order to ensure transparency in the use of funds and to prevent money laundering but given the low level of the grants from which the need to obtain approval starts this seems questionable, particularly as there is a discrete financial reporting requirement. Moreover, if the concern is with money laundering then there would be no reason why similar requirements are not imposed with respect to ostensibly commercial transactions for the same amount”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, paras. 190 and 191

B. Foreign funding

“[P]rovisions 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 (...) 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*. This narrows the ability of a State to invoke any of the legitimate grounds for interference set out in Articles 10 and 11 of the Convention”.

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, OING Conf/EXP (2013) 1, August 2013, para. 67

The draft Act does not offer publicly available evidence of imminent threat by foreign funded NGOs that would merit further scrutiny over their funding, especially funding from abroad. Further the reasoning does not actually indicate any problems that have arisen in practice that could not be dealt with by existing legal provisions or less intrusive measures. Therefore, it is not likely to pass the ‘necessary in democratic society’ nor ‘proportionality’ test”.

Opinion on the Hungarian draft Act on the Transparency of Organisations Supported from Abroad, OING Conf/Exp (2017) 1, 24 April 2017, para. 27

The ECHR allows restrictions to freedom of association and expression in the interests of national security. However, there is a lack of evidence that any such restrictions are doing what the draft Act claims. In addition, there are undoubtedly sufficient criminal provisions already in place dealing with terrorism and money laundering in the Hungarian legal system. This would make the approach of the draft Act a restriction on the right to freedom of association that the European Court would consider unjustified.

Furthermore, the potential restriction on links by Hungarian nationals with those in other countries in the name of national security– which is the inevitable consequence of them receiving funds for projects that each side considers desirable – runs counter to the freedom of expression under Article 10 which guarantees the right to impart information and ideas regardless of frontiers. Since it will affect all NGOs, regardless of the activities involved, it would not be regarded by the European Court as pressing social need, proportionate nor necessary in democratic society”.

Opinion on the Hungarian draft Act on the Transparency of Organisations Supported from Abroad, OING Conf/Exp (2017) 1, 24 April 2017, paras. 31 and 32

“The draft Act does not contain any elements allowing to determine whether the rules that would apply to certain NGOs are based on a proper assessment of risk. Lack of evidence and Hungary’s own rating of the NGO’s risk as low, would suggest that the draft Act is not justified by what is necessary to prevent money laundering and terrorist financing and that the objectives could be met by less restrictive means”.

Opinion on the Hungarian draft Act on the Transparency of Organisations Supported from Abroad, OING Conf/Exp (2017) 1, 24 April 2017, para. 42

“All NGOs should be treated equally regardless of the type of activities they engage in or source of funding they receive. However, the draft Act applies exclusively to associations and foundations. Furthermore, it specifically states that it does not apply to sport associations nor associations pursuing religious activities. Also, the draft Act discriminates NGOs that receive funding from foreign resources, from those that don’t. (...)”

(...) the inclusion of funding from European Union countries in the measure amounts to differential treatment of European Union nationals in the absence of any evidence that European Union sources of funding have created the problems which are supposed to be addressed.

Further, the general reasoning of the draft Act stipulates that “it cannot be disregarded that the resulting danger does not threaten the for-profit sector only, but may also appear in the civil sector”. Yet similar rules about registering, labelling and sanctions do not apply to the for-profit sector nor other legal entities that receive funding from foreign sources”.

Opinion on the Hungarian draft Act on the Transparency of Organisations Supported from Abroad, OING Conf/Exp (2017) 1, 24 April 2017, paras. 46, 49 and 50

“Prescribing separate public registration of NGOs that receive funding from abroad, coupled with the labelling requirements, will likely single out and stigmatize NGOs that receive such funding. (...)

NGOs will likely be seen as a threat to the national security and sovereignty, the political and economic interest of the country and connected to money laundering and terrorism financing. This will hamper the legitimate activities of NGOs, including their ability to seek, access and raise resources not only from sources from abroad but also domestically. For example donors will fear that their personal information will be subject to greater scrutiny or that they will be seen as linked to organisations working against the national interest. The draft Act will also affect delivery of important services, not only because some groups may not want to receive services from ‘organisations funded from abroad’; but also due to its likely negative effect on private philanthropy; which will reduce available resources to address people’s needs”.

Opinion on the Hungarian draft Act on the Transparency of Organisations Supported from Abroad, OING Conf/Exp (2017) 1, 24 April 2017, paras. 67 and 68

9. STATE SUPPORT AND FINANCING

A. Public benefit status

“There is no requirement in international standards that States should establish the possibility of non-governmental organisations acquiring a status such as recognition of public utility with the possibility of thereby acquiring certain benefits, such as exemption from particular taxes and preferential access to funding or use of facilities. Nonetheless the possibility of acquiring such a status is a feature of most democratic States and the desirability of non-governmental organisations being assisted in this way is recognised in paragraphs 57-61 of Recommendation

CM/Rec(2007)14 and in the Interpretative Notes to the Freedom of Association Guidelines. (...) There can, therefore, be no objection to the proposal to state in more specific terms what is to be regarded as being in “the general or community interest” as is proposed in the amendment .

(...) Nonetheless, it is surprising that the promotion and protection of democracy and human and legal rights is not explicitly mentioned in the list given the importance of this for all members of society and the view of other European States generally to recognise this as being of public benefit”.

Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, OING Conf/Exp(2017)3, 11 December 2017, paras. 20-22

“The explanatory memorandum for the draft Law indicates that the five groups of activities that would be specified as being in the general and community interest are strategic ones for Romania (...) there is no indication in the explanatory memorandum as to how concretely these areas are actually understood as a matter of Romanian law and, indeed, whether there is sufficient appreciation by officials and others as to how they ought to be interpreted when assessing the activities and objects of a particular association or foundation seeking public utility recognition. Some precision in such an understanding is essential since, as paragraph 58 of Recommendation CM/Rec(2007) 14 underlines, there is a need for public support to be governed by “clear and objective criteria” (...) This also means that there would be scope for treating differently associations or foundations that are undertaking essentially the same sort of activities when decisions on recognition are made, the very thing that clear and objective criteria are designed to forestall or, if necessary to allow effective judicial challenge in the event of abuse”.

Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, OING Conf/Exp(2017)3, 11 December 2017, paras. 24 and 26

“A further risk of discriminatory treatment might lie in the proposal to use a percentage-based algorithm to determine which associations or foundations will be recognised for public benefit status under the five subject headings. Thus, it is unclear from the proposed provision how the algorithm is intended to work”.

Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, OING Conf/Exp(2017)3, 11 December 2017, para. 28

“[I]nvolvement in public policy debates ought to be an inevitable feature of the subjects that would be specified as being of general or community interest, given the expertise and knowledge gained by carrying out work in relation to them. The preclusion of engaging in “any kind of political activities” would not only be inconsistent with the international best practices but would also effectively neutralise the scope for the recognised associations and foundations actually being ones of genuine public utility”.

Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, OING Conf/Exp(2017)3, 11 December 2017, para. 33

B. Tax incentives

“There are no European or international standards governing the minimum capital required to establish a foundation but the amount specified is likely to mean that this form of NGO will not be generally available. Indeed it may not even be used by those with the required capital as there appears to be no incentive in the form of tax breaks to offset the liability to which a donor would otherwise incur. The combination of this new capital requirement with the absence of such incentives runs counter to the requirement in Recommendation CM/Rec(2007)14 that ‘the legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation’”.

Opinion on the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 93

C. Withdrawal of support

“It would (...) be inconsistent with international standards and best practices for this provision to be retained without establishing a fair procedure for determining whether or not there has been some non-compliance with the conditions leading to recognition and a requirement that, where such noncompliance has occurred, a withdrawal of support should not be automatic but only applied where this is in accordance with the principle of proportionality”.

Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, OING Conf/Exp(2017)3, 11 December 2017, para. 51

“Article II of the draft Law would require those associations and foundations currently recognised as being of public utility to seek a new recognition (...)

However, the time-scale for making decisions on the renewed applications is unclear and no allowance is made for any transitional arrangements once a decision has been taken that a particular association or foundation will not be recognised as being one of public utility. Furthermore, such an association or foundation cannot anticipate the outcome and thus prepare itself for the changed assessment of its activities, which may have detrimental implications for its commitments to beneficiaries and donors, as well as its staff (...) This is not consistent with the principles of good administration generally observed in modern democracies.

There is thus a need for a provision such as the present one to ensure that a change in the status of an association or a foundation is not prejudicial to the completion of undertakings that were treated as ones of public utility at their outset.

Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, OING Conf/Exp(2017)3, 11 December 2017, paras. 73, 75 and 76

10. ACCOUNTABILITY AND SUPERVISION

A. Transparency as a justification

“[T]he mere fact that NGOs put forward different options or actions than what the current government would want to hear does not justify interference in the name of transparency into their rights to association, expression, privacy, ability to seek, access and use resources among others”.

Opinion on the Hungarian draft Act on the Transparency of Organisations Supported from Abroad, OING Conf/Exp (2017) 1, 24 April 2017, para. 26

B. Disclosure requirements

“[T]he stipulation regarding transparency in Article 29.5 gives no indication as to how the obligation is to be fulfilled in contrast to the elements set out in Recommendation CM/Rec(2007)14 and it will, therefore, be difficult for an NGO to know what is required of it or to answer allegations that it has not done enough. This requirement is thus inadequate as a basis for imposing obligations on NGOs and, indeed, leaves plenty of scope for arbitrary interference by the authorities”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 196

“[T]he lack of clarity in the draft amendments gives the supervisory authority a great deal of unwarranted discretionary power to decide on whether a (private) legal person is deemed to pursue activities in “general interest”. As a result, an NGO which is otherwise established to pursue activities deemed in “public interest” or in “public benefit interest” might as well fall under the notion of a “public authority” i.e. a legal person which pursues activities deemed in “general interest”. This in turn would trigger the full range of disclosure obligations which are otherwise envisaged in the Law (...) Significantly, these obligations can be triggered *irrespective* of whether an NGO is the recipient of public funds”.

Opinion on the Draft Amendments to the Serbian Law on Access to Information of Public Utility, OING Conf/Exp(2018)1, 18 April 2018, para. 22

“[T]he draft amendments do not provide any guidance which would facilitate determination of the precise scope and substance of activities of an NGO which has reached the dominant public funding threshold, and which are relating to its corresponding disclosure obligations”.

Opinion on the Draft Amendments to the Serbian Law on Access to Information of Public Utility, OING Conf/Exp(2018)1, 18 April 2018, para. 30

C. Financial reporting

“A requirement for NGOs to submit a financial statement to a public authority - in this instance specified by the 2009 Decree to be the Ministry of Finance - is not inherently problematic. (...)

However, the requirement under Article 29.4 is not linked in any way to the receipt of public support, which is the basis on which a financial reporting obligation is authorised by Recommendation CM/Rec(2007)14. Moreover no distinction is made in applying the requirement between those NGOs that are registered and thus are legal entities and those that have only been legalised and thus relatively informal”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, paras. 120 and 122

“[T]he financial reporting Rule. This requires annual financial accounting in compliance with the National Accounting Standards for NGOs (...)

If taken in isolation, this is not a requirement that is particularly burdensome for all NGOs. However, it is one that has been added to the pre-existing requirement to submit reports to the tax authorities, it applies to all NGOs whatever their size and level of activity and it fails to clarify the object of the exercise. As such the requirement has the potential to be unduly intrusive and could ultimately provide the basis for interference with the operation of at least some NGOs”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, paras. 123 and 124

“The requirement in Article 24-1.5 that information defined by the Ministry of Justice about the sum of the donations accepted by a non-governmental organization and about the persons who gave a donation is included in the financial report presented to that ministry is a matter for concern regardless of the level fixed for the reporting obligation as it runs counter to the requirement in paragraph 64 of Recommendation CM/Rec(2007)14, namely, that “All

reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality.” Undoubtedly, there may be situations in which a government may have well-founded reasons to require the disclosure of the identity of those who make donations to an NGO but such disclosure ought not to be automatically required by reference just to the amount involved”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 188

“NGOs are already subject to detailed financial and narrative reporting requirements under the existing legislation, including the breakdown of income from various resources (inter alia grants from the EU, other states and international organizations) and detailed description on the utilization of grants and donations from the central and local governments, international sources and other funders. (...)

The itemized reporting of every single transaction prescribed by the draft Act will be excessive, intrusive and disruptive to the work of the NGOs, as it will add additional administrative burden and costs (as NGOs will need to draw additional human and financial resources to comply). Considering this and the fact that Hungarian NGOs are already subject to strict reporting and transparency requirements, the draft Act will likely not satisfy the ‘necessary in a democratic society’ and ‘proportionality’ requirement”.

Opinion on the Hungarian draft Act on the Transparency of Organisations Supported from Abroad, OING Conf/Exp (2017) 1, 24 April 2017, paras. 76 and 77

“[T]he 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”.

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, OING Conf/EXP (2013) 1, August 2013, para. 75

“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”.

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, OING Conf/EXP (2013) 1, August 2013, para. 117

“This new provision (...) would require all associations, foundations and federations to publish each six months (...) in Part IV of the Official Gazette their financial statements for the previous semester.

This requirement is not limited to those associations and foundations recognised as ones of public utility, which are already required each year (...) to publish in summary their activity reports and annual financial statements. It is unclear whether the annual financial statement

submitted under this provision would count as one of the two that the new provision would require associations and foundations to submit.

Furthermore, these statements would have to mention separately “the individual or activity (whichever is the case), generating each income, as well as the value of each income”.

Moreover, any failure to publish such a declaration would lead to the suspension of the association, foundation or federation’s functioning for 30 days and the immediate cessation of its activities entirely if the statement is not then published within 30 days according to the conditions provided for in Chapter IX, which provides for the dissolution and liquidation of associations and foundations.

The proposed provision is inconsistent with international standards and best practices both as regards the extent of the reporting obligation and the consequences envisaged as flowing from the failure to fulfil this obligation.

Thus, the frequency of the reporting required is excessive and the level of detail required is not only unduly onerous but is also inconsistent with the legitimate privacy rights of donors (...)

the explanatory memorandum does not refer to any actual problems that have arisen in practice or give any indication as to why existing legal provisions are insufficient for supervisory purposes. The invocation of “transparency” and “accountability” in support of this provision is thus entirely hollow. In the circumstances, such a requirement cannot, therefore, be seen as having a legitimate aim (...)

Moreover, the fact that such a requirement is not proposed for political parties or corporate bodies despite these being equally open to the possibility of improprieties connected with the receipt and use of funding – points to an unjustified difference in treatment, which would entail a violation of Article 11 of the European Convention when taken with the prohibition on discrimination in Article 14”.

Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, OING Conf/Exp(2017)3, 11 December 2017, paras. 52-60

D. Inspections and audits

“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”.

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, OING Conf/EXP (2013) 1, August 2013, para. 77

E. Official warnings

“[I]n the event of action contrary to the objectives of the NGO Law, the relevant executive authority - the Ministry of Justice - can warn the NGO concerned or instruct it to eliminate the violations involved. The deadline for compliance with a warning will not necessarily take account of the time required to change an NGO's statutes through convening a general assembly”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 52

11. LIABILITY AND SANCTIONS

A. Approach required

“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”.

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, OING Conf/EXP (2013) 1, August 2013, para. 118

B. Need for precision

“[T]he various offences imposed for organising and participating in the activities of an organisation designated on the above basis lack the precision in their definition that will enable anyone accused of committing them to foresee that conviction would be a necessary consequence of their conduct”.

Opinion on the Draft Federal Law on Introducing Amendments to Certain Legislative Acts of the Russian Federation #662902-6, OING Conf/Exp (2014) 2, December 2014, para. 2c and 2f

C. Breach of statutes

“Paragraph 2 provides for the giving of a written notice by the Ministry of Justice to an NGO or a branch or representation of a foreign NGO and a direction to eliminate the violation concerned within a period of 30 days. This power is, however, concerned only with situations “when responsibility for violation of requirements arising from the provisions of the legislation of the Republic of Azerbaijan, as well as of the statute, is not prescribed by law”. The effect is thus to create responsibility where none has been provided by law through an indirect method since failure to comply with a warning or direction can then be the basis for suspension or liquidation of the entity concerned.

This is entirely inappropriate firstly because, as has already been noted, compliance with the statute is not a matter for the state where a breach of the law is not entailed, and secondly because the indirect approach to imposing responsibility allows for grave sanctions to be imposed on NGOs and the branches and representations of foreign NGOs in respect of matters that the legislature has not considered significant enough to warrant expressly imposing responsibility. In the latter case, responsibility can thus be imposed for trivial shortcomings and it should be recalled that the Court considers that only 'serious breaches' could justify a ban on an organisation's activities”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, paras. 204 and 205

D. Suspension of activities

“Paragraph 6 provides that an appeal to court in respect of a suspension of activity is to be made by the relevant body of executive power of the entity concerned except where the ground of suspension is a violation of the rights of members where it is to be by the members of the NGO concerned. The general approach is undoubtedly correct but that adopted where a violation of the rights of members is involved is inadequate. Certainly members should be entitled to appeal, particularly those who may not consider the rights of others have been violated, but so should the executive body which has supposedly violated the rights of members. Without such a right of appeal for the executive body, those belonging to it will be deprived of their position in the organisation and thus there will have been a determination of their civil rights without a hearing before a court, contrary to Article 6(1) of the Convention”.
Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 212

“[T]here 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”.

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, OING Conf/EXP (2013) 1, August 2013, para. 94

“[T]he failure to submit a financial report in time – or for it to be published in time by the Official Gazette¹⁶ - could hardly be expected to be regarded by the European Court as being of such gravity as would warrant the suspension of the activities of the association or foundation concerned”.

Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, OING Conf/Exp(2017)3, 11 December 2017, para. 68

E. Suspension of proprietary rights

“[T]he 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”.

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, OING Conf/EXP (2013) 1, August 2013, para. 96

“[T]he freezing of bank accounts and deposits regardless of whether their use is connected with the reason for the suspension of the activities of the organisation concerned is disproportionate in its effect and thus will be contrary to both Article 11 and Article 1 of Protocol No. 1”.

Opinion on the Draft Federal Law on Introducing Amendments to Certain Legislative Acts of the Russian Federation #662902-6, OING Conf/Exp (2014) 2, December 2014, para. 2b

12. TERMINATION AND DISSOLUTION

A. Inadequate justification

“Paragraph 4 provides for the liquidation of an NGO or the branch or representation of a foreign NGO that has been given more than two notices or directions on the elimination of violations. (...) However, [this] (...) is requiring only a number of notices or directions to eliminate violations without seeking in any way to specify some degree of seriousness of those violations, which might actually concern only trivial matters. There is, therefore, a very serious risk that the power introduced by this provision will make it possible for NGOs and the branches or representations of foreign NGOs to be liquidated in circumstances where that would not be compatible with European and international standards”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 210

“There could hardly be any justification for a dissolution of a NGO just because it has not entered into the registry of ‘organisations supported from abroad’. In addition, as already noted, the draft Act does not deem ‘support from abroad’ as illegitimate *per se*, and therefore the failure to be entered into the registry can hardly be considered a real danger which would justify such a measure”.

Opinion on the Hungarian draft Act on the Transparency of Organisations Supported from Abroad, OING Conf/Exp (2017) 1, 24 April 2017, para. 84

“Article 2, paras. 1-3 of the Decree envisages dissolution and seize of assets of associations and foundations as the *only* measure for NGOs with the alleged links to the FETÖ movement ... The Government argues that dissolution of NGOs (rather than temporary measures) was deemed necessary, given that “the extraordinary periods necessitate to take extraordinary measures”, and that “it has become mandatory to take permanent measures in order to break the strength of the terrorist organization”. This vague language of the rationale for the NGOs dissolution however falls short of the requirement for proportionality and government’s obligation to apply the minimum interference necessary to accomplish the legitimate goal”.

Opinion on the Impact of the State of Emergency on Freedom of Association in Turkey, OING Conf/Exp (2017)2, 30 November 2017, paras. 41 and 46

“[T]he use of dissolution as a sanction for not submitting financial statements would be viewed by the European Court as an entirely disproportionate response to it”.

Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, OING Conf/Exp(2017)3, 11 December 2017, para. 71

B. Inability to challenge decision

“[T]he right to complain is about the 'measures of responsibility' that have been applied and not the steps leading to them, namely, a warning or instruction. The effect, therefore, is that it will not be possible to mount a challenge until the liability procedure has completed its course, which is likely to make it improbable that an NGO sanctioned will be able to recover from suspension or liquidation at this later stage. This is clearly inconsistent with the right to an effective remedy under Article 13 of the Convention and paragraph 69 of Recommendation CM/Rec(2007)14”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 211

“The Decree does not guarantee *due process* either, given that Article 9 thereof provides that the Commission shall carry out examination “on the basis of the documents in the files”, which are compiled by state bodies—unless those documents are classified as a state secret (in which case the Commission will have no access to those documents, Article 5, Decree). We note however that NGOs and legal entities affected by emergency decrees never had an opportunity to review documents which justified their dissolution, and hence are not aware of the precise nature of charges against them. This is particularly significant, given that a party cannot challenge proceedings before the Commission”.

Opinion on the Impact of the State of Emergency on Freedom of Association in Turkey, OING Conf/Exp (2017)2, 30 November 2017, para. 64

13. FOREIGN NON-GOVERNMENTAL ORGANISATIONS

A. Registration – approach required

“[A]lthough the requirements to comply with the Constitution and the law and not to have activities in occupied territories are consistent with European and international standards, other terms used in the Decree are overly broad and could entail restrictions that go beyond those admissible under those standards. This is especially so of the provisions regarding respect in Article 3.2.2 and propaganda in Article 3.2.4, both of which can be subjectively interpreted and applied inconsistently with international guarantees of freedom of expression. As the Court has made clear, the fact that someone comes from outside the country does not dispense a state from the obligation to ensure that restrictions on this freedom are prescribed by law, have a legitimate aim and are necessary in a democratic society, respecting in particular the principle of proportionality”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 101

“The Decree is also problematic in that it does not provide for any proper time-frame or clear process for reaching an agreement that would allow the existing process of registration under the Registration Law then to be pursued. Thus there is no deadline for the relevant state bodies to provide their feedback or for the Ministry of Justice to reach a conclusion that the gathered opinions are positive and there is no indication as to the manner in which negotiations are to be conducted. Indeed the process of negotiations with the Ministry of Justice could be prolonged for as long as that Ministry wants since, while there is provision for termination in the event of a refusal to accept the conditions laid down in Article 3.2 of the Decree, acceptance of those conditions does not result in a favourable conclusion to them”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 103

B. Registration – renewal requirement

“This is essentially a power to revisit the grant of registration at any time since it means that such a grant - or the registration of an amendment under Article 14 - can no longer be seen as conclusive, notwithstanding the elaborate scrutiny that this entails. Such a power will necessarily render uncertain the legal status of all NGOs and branches and representations of foreign NGOs and runs counter to the prohibition in paragraph 41 of Recommendation CM/Rec(2007)14 on NGOs being 'required to renew their legal personality on a periodic basis”.

Opinion the NGO Law of the Republic of Azerbaijan in the light of amendments made in 2009 and 2013 and their application, OING Conf/Exp (2014) 1, September 2014, para. 174