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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REPORT**  
**ON FUNDING OF ASSOCIATIONS**

**Adopted by the Venice Commission**  
**at its 118th Plenary Session**  
**(Venice, 15-16 March 2019)**  
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## I. Introduction

1. By letter of 23 November 2016, the Secretary General of the Council of Europe, Mr Thorbjørn Jagland requested the Venice Commission to prepare a review of the standards applying to foreign funding of non-governmental organisations (NGOs) in the member states of the Council of Europe. The Secretary General also indicated that the findings of the review would allow him to consider the need for new Committee of Ministers guidelines on this issue.

2. Ms Bílková, Ms Cleveland, Mr Kuijer, Ms Thorgeirsdottir, Mr van Dijk, and Mr Clayton acted as rapporteurs for this study.

3. On 4 October 2017, the Venice Commission, in cooperation with the OSCE/ODIHR and with funding from the Japanese Government, organised a roundtable in Venice on foreign funding of non-governmental organisations. The aim of the roundtable was to offer, firstly, a review of legal regulations in force in different countries across the world, including Latin American, African and Asian practices, in order to categorise the restrictions imposed on foreign funding and to analyse them in the light of their legitimate aims. The goal of the roundtable was to identify and develop international and common national standards concerning foreign funding of associations in order to deepen the legal discussion in this field and to develop good practices in promoting an enabling environment for cross-border activities of NGOs. The roundtable also addressed the issue whether certain restrictions on NGOs could be deemed legitimate in light of concerns state authorities might have as regards the financing of terrorist activities and/or money laundering. The roundtable brought together around 40 participants, including members of the Venice Commission, academics and national experts, representatives of the Council of Europe INGO conference, representatives of the European Union and of the OSCE/ODIHR, as well as representatives of civil society organisations. Speakers from Azerbaijan, the Czech Republic, Hungary, Iceland, Israel, Japan, Korea, the Netherlands, Peru, and the USA illustrated their presentations with references to comparative elements (domestic legislation and case-law of constitutional courts and other supreme jurisdictions in particular) as well as to the case-law of international courts, including the European Court of Human Rights (hereinafter, “ECtHR”), and the “views” of the UN Human Rights Committee.

4. The present report was prepared on the basis of contributions by the rapporteurs and on the basis of an updated version of the table on “Selection of Legislative Provisions on Freedom of Association” (CDL-REF(2019)002), which now also includes comparative research on legislative provisions regarding the funding, including foreign funding, of associations in member states of the Council of Europe and in other countries.

5. *This study was examined by the sub-commission on fundamental rights and was adopted by the Venice Commission at its 118<sup>th</sup> Plenary Session (Venice, 15-16 March 2019).*

## II. International Standards

### ***The right to freedom of association***

#### *Essential for the proper functioning of democracy*

6. Freedom of association is a fundamental human right that is crucial for the functioning of a democracy. It constitutes an essential condition for the exercise of other human rights. As the ECtHR stated in the case of *Sidiropoulos and others*,<sup>1</sup> the ability to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to

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<sup>1</sup> ECtHR, 10 July 1998, *Sidiropoulos and Others v. Greece*, application no. 26695/95, para. 40.

freedom of association. The way in which national legislation enshrines this freedom and its practical application by the authorities is indicative of a vital part of the state of democracy in a country. The Human Rights Committee likewise has recognized the existence and operation of a plurality of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society.<sup>2</sup> The 1990 Copenhagen document states that a vigorous democracy depends on the existence of democratic values and practices as well as on an extensive range of democratic institutions. Associations, as organised, independent, not-for-profit bodies based on the voluntary grouping of persons who pursue activities on a wide range of issues, such as human rights, democratic reforms, social and economic development etc., are an integral part of those institutions. For the purposes of the present report, the term “association” is not intended to refer to a particular type of legal entity, but more generally refers to all private, not-for-profit, non-governmental organisations based on the voluntary grouping of persons with a common interest. They include political parties, NGOs, religious organisations, foundations interest groups and trade unions, all of which are vital to a vibrant democracy.

### *Collective dimension of the freedom of association*

7. The fundamental and universal right of freedom of association is enshrined in various international human rights instruments, especially Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, “ECHR”), Article 20 of the Universal Declaration of Human Rights, Article 22 of the International Covenant on Civil and Political Rights (hereinafter, “ICCPR”), Article 12 of the Charter of Fundamental Rights of the European Union, Article 16 of the American Convention on Human Rights (hereinafter, “ACHR”), and Article 10 of the African Charter on Human and Peoples’ Rights.<sup>3</sup> Although European and other international treaties conceptualise the right to freedom of association as an individual right, it equally contains a collective dimension. The right is to be enjoyed alone or in community with others (cf. Article 18 Universal Declaration). Without this collective dimension, the effective realisation of the right would often not be possible. For the associations, as representative bodies of their founders and members, the right to freedom of association implies the freedom to pursue the common interests of those founders and members by performing activities toward that goal. Associations shall be free from outside intervention in the determination of their aims and activities, and of the scope of their operations.<sup>4</sup> Within the framework and for the effective enjoyment of that freedom they are also entitled to other civil and political rights, including in particular the freedom of expression and the freedom of assembly. Associations are also entitled to right to privacy and right to property.

### *Positive obligations*

8. Although formulated primarily as a freedom from intervention, the right to freedom of association also implies a positive obligation on the part of the State authorities. As the ECtHR has held: “*a genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere (...). Accordingly, it is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote.*”<sup>5</sup> This may require facilitating and protective regulations, including

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<sup>2</sup> Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, CCPR/C/111/D/1993/2010 (July 2014), para. 7.3; *Lee v. Republic of Korea*, CCPR/C/84/D/1119/2002 (July 2005), para. 7.2; Communication No. 2001/2010, *Q v. Denmark*, Views adopted on 1 April 2015, para. 7.3.

<sup>3</sup> See also The Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples’ Rights (African Commission) (May 2017).

<sup>4</sup> CDL-AD(2014)046, Venice Commission and OSCE/ODIHR, *Guidelines on Freedom of Association*, Warsaw, 2015, paras. 16-19 and 29.

<sup>5</sup> ECtHR, 20 October 2005, *Ouranio Toxo a. O. v. Greece*, no. 74989/01, para. 37.

regulations to protect associations against interference by non-state actors. The State must also create an enabling environment in which associations can effectively operate. As stated in the Venice Commission/OSCE/ODIHR Guidelines on Freedom of Association: “*It is vital that the role and functioning of associations and the right to freedom of association be effectively facilitated and protected by member states’ constitutions and other laws. Practice shows that a specific law on associations is not essential for the proper exercise and protection of the right to freedom of association. Instead, it is sufficient to have a number of legal regulations in place that serve the purpose of facilitating the establishment and existence of associations.*”<sup>6</sup>

### **Conditions for restriction of the right to freedom of association**

9. The right of associations to seek resources, as an inherent part of the right to freedom of association, is not an absolute but a qualified right. It may, however, only be restricted under the three cumulative conditions foreseen in, inter alia, Article 11(2) of the ECHR and Article 22(2) of the ICCPR: 1) the restriction shall be prescribed by law (condition of legality, including the requirements of foreseeability and accessibility); 2) the restriction shall pursue at least one of the legitimate aims exhaustively indicated in Article 11(2) ECHR<sup>7</sup> and Article 22(2) ICCPR<sup>8</sup> (the condition of legitimacy), and 3) the restriction shall be necessary in a democratic society to achieve that legitimate aim (the condition of necessity requiring also proportionality). The ECtHR has held that public authorities must be able to demonstrate that the disputed measure can truly be effective in pursuing the legitimate aim, that the disputed measure is necessary in addition to already existing means of pursuing the legitimate aim, the cumulative effect of all legal rules combined on the freedom concerned, and whether there is a proportionate relationship between the effects of the measure concerned and the freedom affected. While state authorities are granted a certain margin of appreciation under the European Convention, the abovementioned conditions should be applied and interpreted narrowly, in a manner that enhances the effective exercise of the right to freedom of association to ensure that the enjoyment of that right is practical and effective, and not theoretical or illusory.<sup>9</sup> The Human Rights Committee has likewise indicated that “the mere existence of objective justifications for limiting the right to freedom of association is not sufficient. The State party must further demonstrate that the restriction of the exercise of the right to freedom of association is necessary to avert a *real* and not only hypothetical threat to national security or democratic order, that less intrusive measures would be insufficient to achieve the same purpose,” and that the restriction is proportionate to the interest to be protected.<sup>10</sup> At the same time, States should establish a legal and administrative framework as well as a practice that facilitates access of associations to funding, including foreign funding, in order to achieve their aims.

### **Other Fundamental Rights of Associations**

10. The right to freedom of association is interrelated with other human rights and freedoms. Associations shall therefore enjoy other human rights, including the right to freedom of expression, the right to freedom of assembly, the right to the protection of their property, the private life and correspondence, the right to an effective remedy, the right to a fair trial and right to be protected from discrimination.

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<sup>6</sup> CDL-AD(2014)046, *Guidelines on Freedom of Association*, para. 51.

<sup>7</sup> National security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.

<sup>8</sup> 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.

<sup>9</sup> ECtHR, *Airey v. Ireland*, no. 6289/73.

<sup>10</sup> Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, CCPR/C/111/D/1993/2010 (July 2014), para. 7.3. See also Communication No. 2001/2010, *Q v. Denmark*, Views adopted on 1 April 2015, para. 7.3.

### ***Right to Freedom of Expression***

11. The right to freedom of expression is enshrined in Article 10 of the ECHR and Article 19 of the ICCPR . The ECtHR has described the right as “one of the basic conditions for the progress of democratic societies and for the development of each individual”.<sup>11</sup> Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights” (par. 2-3). Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.<sup>12</sup> The UN Human Rights Committee, in its General Comment No. 34, noted that “freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. (...)

### ***Right to privacy***

12. The right to privacy is guaranteed to associations and their members (Article 8 ECHR Article 17 ICCPR, Article 11 ACHR). Oversight and supervision of associations can interfere with the right to privacy of those associations. Under article 17 ICCPR, any such interference must not be arbitrary or unlawful. The concept of arbitrariness is intended to guarantee that any interference should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. Any interference with privacy accordingly must be proportionate to the legitimate aim sought and necessary in the circumstances of any given case.<sup>13</sup>

13. Oversight and supervision of associations should not be more intrusive than those applicable to private businesses. They should always be carried out based on the presumption of lawfulness of the aims and activities of associations. The ECtHR considers that associations should not be under an obligation to disclose the names and addresses of their members since this would be incompatible with their right to freedom of association and the right for private life.<sup>14</sup> Similarly, the legitimacy and necessity of asking for, and disclosing, private information of donors could be questioned. A list of individuals providing financial support to certain associations would likely expose their affiliation, opinion and belief. Such legal provisions could also constitute an interference in donors’ personal privacy, and violate data protection regulations depending on how the information may be used.<sup>15</sup> In its Opinion on the Hungarian Draft Law on Transparency of Organisations receiving funds from abroad, the Venice Commission considered that, although under certain circumstances it may be legitimate to require from associations to disclose the identity of the main sponsors, disclosing the identity of all sponsors, including minor ones, is excessive and unnecessary, in particular with regard to the requirements of the right to privacy.<sup>16</sup>

14. According to the Joint Guidelines on Freedom of Association, “*the right to privacy applies to an association*” (para. 228) and “[*]legislation should contain safeguards to ensure the respect of the right to privacy of the clients, members and founders of the associations, as well as provide redress for any violation in this respect*” (para. 231). Moreover, as noted in the Committee of

<sup>11</sup> ECtHR, *Handyside v. the United Kingdom*, 7 December 1976, para 49.

<sup>12</sup> ECtHR, 29 March 2016, *Bédat v. Switzerland*, application no. 56925/08, para. 48.

<sup>13</sup> HRC, General comment No. 16 (1988), para. 4; *Toonen v. Australia*, Communication No. 488/1992 (March 1994), para. 8.3.

<sup>14</sup> *National Association of Teachers in Further and Higher Education v. United Kingdom* (dec.), no. 28910/95, 16 April 1998.

<sup>15</sup> See, Expert Council on NGO Law, Conf/Exp(2017)1, Opinion on the Hungarian Draft Act on the Transparency of organisations Supported from Abroad, para. 72-74.

<sup>16</sup> CDL-AD(2017)015, paras. 52, 53.

Ministers' Recommendations (2007)<sup>14</sup>, “[a]ll 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”. According to the Explanatory Memorandum to the Fundamental Principles, “[...] reporting requirements must be tempered by other obligations relating to the respect for privacy and confidentiality. In particular, a donor's desire to remain anonymous must be observed. The respect for privacy and confidentiality is, however, not unlimited. In exceptional cases, the general interest may justify that authorities have access to private or confidential information, for instance in order to combat black market money transfers. Any exception to business confidentiality or to the privacy and confidentiality of donors, beneficiaries and staff shall observe the principle of necessity and proportionality”. In particular, disclosure of a donor's identity may endanger his safety or expose him to harassment.<sup>17</sup>

### **Right to Property**

15. The right to property is granted by Article 1 of Protocol I to the ECHR, by virtue of which “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”. In the 2014 Joint Guidelines on Freedom of Association, the Venice Commission and ODIHR note that “associations may also receive funding for their activities from private and other non-state sources, including foreign and international funding. States should recognize that allowing for a diversity of sources will better secure the independence of associations” (par. 218).

### **The prohibition of discrimination**

16. The prohibition of discrimination is enshrined in Article 14 of and Protocol 12 to the ECHR and Article 26 of the ICCPR. In assessing whether a difference in treatment amounts to discrimination under Article 14 ECHR, the ECtHR examines whether a different treatment is based on an objective assessment of essentially different factual circumstances, inspired by public interest and whether it strikes a fair balance between safeguarding community and respect for the rights and freedoms.<sup>18</sup> The UN Human Rights Committee in its General Comment No. 18 confirms that “(n)on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”.<sup>19</sup>

17. Article 26 ICCPR entitles all persons to equality before the law and equal protection of the law, prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination. The article prohibits any “distinction, exclusion, restriction, or preference,” based on a prohibited grounds, including religion and political or other opinion.<sup>20</sup> Prohibited grounds include religion and political or other opinion. Not every differentiation based on the grounds listed in article 26 amounts to discrimination, as long as it is based on reasonable and objective criteria, in pursuit of an aim that is legitimate under the Covenant. Article 26 is concerned not only with discrimination on the face of a law, but also with

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<sup>17</sup> See, for example, CDL-AD(2018)006-e Ukraine - Joint Opinion on Draft Law No. 6674 "On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance" and on Draft Law No. 6675 "On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance" adopted by the Commission at its 114th Plenary Session (Venice, 16-17 March 2018), para 47

<sup>18</sup> ECtHR, 28 November 1984, *Rasmussen v. Denmark*, application no. 8777/79, paras. 37 *et seq.*

<sup>19</sup> UNHRC, *General Comment No. 18: Non-Discrimination*, 10 November 1989, par. 1.

<sup>20</sup> General Comment No.18 (1989), para. 13. Communication No. 2001/2010, *Q v. Denmark*, Views adopted on 1 April 2015, para. 7.3.

“discrimination in fact”<sup>21</sup>, whether practiced by public authorities, by the community, or by private persons or bodies.<sup>22</sup> It therefore includes, inter alia, discrimination by private actors that may result from government action. The test for any such discrimination under article 26 is whether a distinction meets the criteria of reasonableness, objectivity and legitimacy of aim. Reasonableness, in turn, requires a determination of proportionality to the stated aim.

### ***The right of associations to seek financial and material resources***

18. The right of associations to seek financial and material resources is primarily protected as an inherent part of the right to freedom of association and has been confirmed in various international soft-law instruments. It is seen as an important condition for an association to be able to exist and to exercise its functions and fulfil its mission in an independent way. In interpreting article 22 of the ICCPR, the U.N. Human Rights Committee has recognized that fundraising activities are protected under Article 22, and funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with the freedom of association.<sup>23</sup> The Committee accordingly has issued a number of important decisions concerning the restrictions on NGOs’ access to foreign funding and the implications of such restrictions under Articles 19 and 22 of the ICCPR guaranteeing, respectively, the freedom of expression and the freedom of association. For example, in communication No. 1274/2004, the Human Rights Committee observed that “*the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association [...]*”.<sup>24</sup> The Committee likewise has raised a number of concerns and recommendations in concluding observations to states regarding restrictions on access to funding for NGOs.<sup>25</sup>

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<sup>21</sup> General Comment No. 18, *supra*, para. 9.

<sup>22</sup> General Comment No. 18, para. 9.

<sup>23</sup> See A/HRC/23/39, second report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para. 16. See also Conf/Exp(2018)3 Expert Council on NGO Law, International standards relating to reporting and disclosure requirements for non-governmental organisations, 27 November 2018.

<sup>24</sup> Human Rights Committee, communication No. 1274/2004, *Korneenko et al. v. Belarus*, Views adopted on 31 October 2006, para. 7.2.

<sup>25</sup> In its concluding observations of April 2017 on Bangladesh (U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Bangladesh*, at 27, U.N. Doc. CCPR/C/BGD/CO/1 (27 April 2017)), the Committee expressed concern about the undue restrictions imposed by the Foreign Donations Regulation Act, which restricts the ability of NGOs to secure resources. The Committee recommended that any legal provisions restricting access to foreign funding must not risk the effective operation of NGOs as a result of overly limited fundraising options, and that States should ensure that NGOs can operate freely and without fear of retribution for exercising the freedom of expression. The lack of clarity of restrictions imposed on foreign funding of associations under the provisions of the National Sovereignty and Self Determination Act in Venezuela (U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Venezuela*, at 20, U.N. Doc. CCPR/C/VEN/CO/4 (28 April 2016)), the mandatory disclosure of foreign funds received by an association or company in Israel (U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, at 22, U.N. Doc. CCPR/C/ISR/CO/4 (21 November 2014)), or the prohibition made in Ethiopia for NGOs to receive more than 10% of their funding from foreign resources (U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ethiopia*, at 25, U.N. Doc. CCPR/C/ETH/CO/1 (19 August 2011)), were criticised by the Human Rights Committee for putting at risk the effective operation of public associations as a result of overly limited or overly regulated fundraising options.



19. The *UN Declaration on Human Rights Defenders*<sup>26</sup> states that “everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means” (Article 13). The provision does not make any distinction between the sources of funding (i.e. domestic, foreign or international) and makes eligible for access to funding both registered and unregistered associations. Article 6(f) of the Declaration on the Elimination of All Forms of intolerance and of Discrimination Based on Religion or Belief (General Assembly Resolution 36/55) also explicitly refers to the freedom of access to funding, stating that the right to freedom of thought, conscience, religion or belief shall include, inter alia, the freedom “to solicit and receive voluntary financial and other contributions from individuals and institutions”.

20. In its 2013 Resolution on the same issue, the UN Human Rights Council calls upon States to “ensure that they do not discriminatorily impose restrictions on potential sources of funding aimed at supporting the work of human rights (...), other than those ordinarily laid down for any other activity unrelated to human rights within the country to ensure transparency and accountability, and that no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto”.<sup>27</sup>

21. In his 2013 report, the UN Special Rapporteur on the right to freedom of peaceful assembly and of association, after noting that “the ability to seek, secure and use resources is essential to the existence and effective operations of any association, no matter how small”,<sup>28</sup> underscored that the “legal framework and policies related to resources have a significant impact on the freedom of association; they can strengthen the effectiveness and facilitate the sustainability of associations or, alternatively, subjugate associations to a dependent and weak position”.<sup>29</sup> Human Rights Council Resolution 22/6 (adopted on 21 March 2013), also calls upon States to ensure that reporting requirements “do not inhibit functional autonomy [of associations]” and “do not discriminatorily impose restrictions on potential sources of funding”.

22. The U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association, in his report of 21 May 2012, recognised preventing money-laundering and terrorism financing as legitimate aims for imposing restrictions on the ability of associations to receive foreign funding, but considered that these legitimate aims should “never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work. In order to ensure that associations are not abused by terrorist organizations, States should use alternative mechanisms to mitigate the risk, such as through banking laws and criminal laws that prohibit acts of terrorism.”<sup>30</sup>

23. In the European context, the ECtHR considered in its case-law that receiving and using financial donations is part of the right to freedom of association.<sup>31</sup> In the case of *Ramazanova and others v. Azerbaijan*, the ECtHR considered that the inability of the association concerned to receive any grants or financial donations (for lack of legal status) which constituted one of the main sources of financing of non-governmental organisations in Azerbaijan effectively restricted the association’s ability to function properly. The Court stated that “without proper financing, the

<sup>26</sup> UN Doc. A/RES/53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 8 March 1999.

<sup>27</sup> UN Doc. A/HRC/RES/22/6, *Protecting human rights defenders*, 12 April 2013, par. 9(b).

<sup>28</sup> UN Doc. A/HRC/23/39, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, 24 April 2013.

<sup>29</sup> *Ibid.*

<sup>30</sup> U.N. Human Rights Council, A/HRC/20/27, 21 May 2012, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai.

<sup>31</sup> ECtHR, 7 June 2007, *Parti Nationaliste Basque – Organisation Régionale d’Iparralde v. France*, application no. 71251/01, para. 36-38 ; ECtHR, 1 February 2007, *Ramazanova and others v. Azerbaijan*, application no. 44363/02, paras. 59-60.

association was not able to engage in charitable activities which constituted the main purpose of its existence.”<sup>32</sup> Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe states that “NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties”.<sup>33</sup> The Explanatory Memorandum to the Recommendation adds that “the only limitation on donations coming from outside the country should be the generally applicable law on customs, foreign exchange and money laundering, as well as those on the funding of elections and political parties. Such donations should not be subject to any other form of taxation or to any special reporting obligation”.<sup>34</sup> Recommendation CM/Rec(2018)11 of the Committee of Ministers to member states on the need to strengthen the protection and promotion of civil society space in Europe recommends the member states to respect the freedom of human rights defenders, including civil society organisations, to seek, receive and utilise resources from domestic, foreign and international sources.<sup>35</sup>

24. The Venice Commission/OSCE/ODIHR Guidelines on Freedom of Association stipulate that “associations shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities. In particular, states shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source, nor stigmatize those who receive such resources. This freedom shall be subject only to the requirements in laws that are generally applicable to customs, foreign exchange, the prevention of money laundering and terrorism, as well as those concerning transparency and the funding of elections and political parties, to the extent that these requirements are themselves consistent with international human rights standards”.<sup>36</sup>

25. In OSCE commitments on the “human dimension”, the OSCE participating States pledged to “ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in non-governmental organizations” (Copenhagen Document, 1990) and to “enhance the ability of NGOs to make their full contribution to the further development of civil society and respect for human rights and fundamental freedoms” (Istanbul Document, 1999).

26. The European Union’s *Guidelines on Human Rights Defenders* recognise in Article 13 the right of everyone, individually and in association with others, to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means. In addition, Article 12(2) of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms<sup>37</sup> also recognises the positive obligation of the States to take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination,

<sup>32</sup> *Ramazanova and others, ibid.*

<sup>33</sup> Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states *on the legal status of non-governmental organisations in Europe*, 10 October 2007, § 50.

<sup>34</sup> Explanatory Note to the Recommendation CM/Rec(2007)14, 10 October 2007, § 101.

<sup>35</sup> Recommendation CM/Rec(2018)11 of the Committee of Ministers on the need to strengthen the protection and promotion of civil society space in Europe (*Adopted by the Committee of Ministers on 28 November 2018 at the 1330<sup>th</sup> meeting of the Ministers' Deputies*).

<sup>36</sup> CDL-AD(2014)046, *Guidelines on Freedom of Association*, 17 December 2014, Principle 7.

<sup>37</sup> Adopted by General Assembly resolution 53/144 of 9 December 1998.

pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.

### **“Public utility status” and public funds**

27. Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe states that NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemptions from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits.

28. As the nature, category or regime of an association may, among others, be a relevant consideration when deciding to grant it public support, states have considerable discretion to decide which societal objectives are of a general interest and, therefore, more encouraged to be pursued within the means of NGOs.<sup>38</sup> Therefore, the grant of public support may be linked to the acquisition of “public utility status” granted to associations considered by the State as pursuing activities related to general or community interest.

29. CM Recommendation (2007)14 considers that those NGOs which have been granted any form of public support may be required to annually submit reports on their accounts and an overview of their activities to a designated supervising body. Moreover, they may be required to make known the proportion of their funds used for fundraising and administration. NGOs which have been granted any form of public support, may be required to have their accounts audited by an institution or person independent of their management.<sup>39</sup>

30. The Explanatory Memorandum to Recommendation CM/Rec(2007)14 explains that NGOs receiving any form of public support should expect to have to account for the use made of it. Accordingly, it is not unreasonable for NGOs to be required to report each year on the activities that they have undertaken and on the accounts for the income and expenditure relating to the public support. However, such a reporting obligation should not be unduly burdensome and should not require the submission of excessive detail about either the activities or the accounts<sup>40</sup> or the disclosure of private data about all the sponsors.<sup>41</sup> In particular, the specific reporting obligations imposed on associations with public utility status should be related and limited to the use made of the public funds granted to them. Public utility status cannot be a pretext to impose additional reporting obligations concerning the private funds and donors which are subject to reporting requirements generally applicable to all grants and donations.<sup>42</sup>

### **Lobbying**

31. Recommendation CM/Rec(2017)2 of the Committee of Ministers on Legal Regulation of Lobbying Activities in the context of Public Decision Making and the explanatory

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<sup>38</sup> CM/Rec(2007)014, para. 59.

<sup>39</sup> CM/Rec(2007)14, paras. 62-65.

<sup>40</sup> Explanatory Memorandum to recommendation CM/Rec(2007)14, para. 114.

<sup>41</sup> See CM/Rec(2007)14, para. 64. In the Opinion CDL-AD(2017)015 on the Draft Law on Transparency of Organisations receiving support from Abroad (paras. 52-53), the Venice Commission considered that it could be legitimate for States to monitor, in the general interest, who the main sponsors of civil society organisations are and it could also be legitimate in order to secure transparency, to publicly disclose the identity of the main sponsors. Disclosing the identity of all sponsors, including minor ones, is however excessive and unnecessary.

<sup>42</sup> In the same vein, see, CDL-AD(2018)004, Joint Opinion on Draft Law No. 140/2017 on amending governmental ordinance No. 26/2000 on associations and foundations (16-17 March 2018), paras. 39-40.

memorandum<sup>43</sup> define “lobbying” as “*promoting specific interests by communication with a public official as part of a structured and organised action aimed at influencing public decision making.*” A “specific interest” in the sense of the Recommendation may represent a “private interest”, such as a corporation which may wish to see their public policy preferences reflected in the legislation, or a more “public” concern, such as environmental issues.<sup>44</sup> Further, a “structured and organised action” is understood as a “*deliberate, planned, methodical or co-ordinated strategy lobbyist pursue in order to influence policy and promote their policy position, usually supported by an infrastructural or organisational apparatus.*” According to the explanatory memorandum, it is the element of “structured and organised action” that distinguishes lobbying from other acts of influence which are isolated, unstructured and/or spontaneous and do not form part of a pre-determined plan.

32. “Lobbyist” is understood in the CM Recommendation as “*any natural or legal person who engages in lobbying when public decisions are made.*” The Venice Commission’s Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying) specifies that lobbying usually involves the lobbyists receiving directly or indirectly consideration for their services to attempt to influence political decisions, i.e. pursuing this activity on a “professional” basis. Therefore, other forms of participatory democracy, such as petitions to Parliament or everyday action of citizens who may seek to discuss matters of importance with their representatives or campaigns on matters of public interest conducted for instance by NGOs in the framework of their ordinary activities are excluded from the definition of lobbying.<sup>45</sup>

33. Lobbying is carried-out by an “*extra-institutional actor*” which is defined in the Report on the Role of Extra-Institutional Actors (Lobbying) as an entity or person who is not, in doing so, exerting public authority or fulfilling a constitutional mandate.<sup>46</sup> The role of public bodies with a constitutional mandate in formulating policy does not fall under the definition of “lobbying” but constitutes an expression of representative democracy. On the other hand, the term “extra-institutional actor” is used in the Report interchangeably with that of “lobbyist”, which may include professional consultancies, law firms, in-house corporate lobbyists (lobbyists that work in businesses and industries), professional associations, trade unions, NGOs, think tanks, etc. which perform lobbying activities.

34. The following Recommendations and Resolutions of the Council of Europe bodies, including the Report of the Venice Commission on the Role of Extra-Institutional Actors (Lobbying), put an emphasis on the requirement of transparency in the context of lobbying, because lobbyists with the strong financial resources are in the position to exert important political pressure on public bodies and the public, who will be affected by government law-making, has an interest in knowing about private interests attempting to influence the policy-making process.

35. Recommendation CM/Rec(2017)2 of the Committee of Ministers on legal regulation of lobbying activities in the context of public decision making states that “*information on lobbying activities in the context of public decision-making processes should be disclosed. The rules on disclosure should be proportionate to the importance of the subject matter of the public decision-making process and should reflect constitutional guarantees*”.

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<sup>43</sup> Recommendation CM/Rec(2017)2 on legal regulation of lobbying activities in the context of public decision making, adopted by the Committee of Ministers on 22 March 2017, and explanatory memorandum.

<sup>44</sup> Explanatory memorandum to the Recommendation (2017)2, para. 11.

<sup>45</sup> CDL-AD(2013)011, Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying), adopted by the Venice Commission at its 94<sup>th</sup> Plenary Session (Venice, 8-9 March 2013), para. 13.

<sup>46</sup> Para. 13.

36. In its Recommendation 1908(2010) on Lobbying in a democratic society (European code of good conduct on lobbying), the Parliamentary Assembly of the Council of Europe considered that pluralism of interests is an important feature of democracy and that it is perfectly legitimate for members of the society to organise and lobby for their interests. The Parliamentary Assembly underlined nevertheless that unregulated, secret lobbying as such may undermine democratic principles and good governance and that the lack of transparency in political and economic lobbying activities may constitute one of the causes of the dramatic decline in public confidence in politics in many Council of Europe states. It recommended, *inter alia*, that transparency in the field of lobbying should be enhanced and that entities involved in lobbying activities should be registered.<sup>47</sup>

37. In its Resolution 1744(2010) on Extra-institutional actors in the democratic system, the Parliamentary Assembly reiterated that some aspects of activities of extra-institutional actors aimed at influencing political decision-making may raise a number of concerns with regards to the fundamental principles of democracy. It considered that, in particular, the legitimacy of extra-institutional actors is often doubtful as their mandate does not stem from the whole society while their representativity is limited and difficult to assess. At the same time, the real influence and authority of such actors may extend far beyond their legitimacy and representativity". Moreover, according to the Resolution, the lack of transparency as regards the internal functioning of extra-institutional actors and their relations with public institutions and officials may cause suspicions of political corruption and further damage the image of, and public confidence in, political institutions as they are not subject to any democratic accountability. The Assembly therefore considered that, in order to improve public confidence in public institutions of government, and thus strengthen democracy and the rule of law, the decision-making process needs to be more transparent: "*people have a democratic right to know those actors who have access to government decision making for the purpose of influence. All kind of influence which are not exercised in full transparency should be considered as being suspicious and harmful to democracy*"<sup>48</sup>

38. In its 2013 Report on the Role of extra-institutional actors in the democratic system (lobbying), the Venice Commission considered that as a contribution to pluralism, extra-institutional actors may be regarded as a way to improve the functioning of the democratic system. However, it underlined that the activities of extra-institutional actors aimed at influencing political decision-making may raise concerns with regard to legitimacy, representativeness, equality and accountability, which are fundamental principles of democracy.<sup>49</sup> In particular, the Commission was of the opinion that the unequal means and resources of different extra-institutional actors performing lobbying activities may become a source of concern, since the lobbyists with the "most money" to dedicate to their lobbying activities are usually the ones that are able to exercise relatively more and sustained political pressure.<sup>50</sup> Transparency, in the context of lobbying, therefore means that information is available to the public not only about government activity, its motives and objective, but also about private interests attempting to influence the State when public policy is formulated. The Commission further considered that a political system is transparent if such information is available to those who will be affected by governmental law-making, decisions and enforcement, and when the information is accessible, sufficient and easily understandable.<sup>51</sup>

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<sup>47</sup> Recommendation 1908(2010) Lobbying in a democratic society (European code of good conduct on lobbying), 26 April 2010, paras. 2, 8 and 11.

<sup>48</sup> Resolution 1744(2010) Extra-institutional actors in the democratic system, 23 June 2010, para. 16.

<sup>49</sup> CDL-AD(2013)011, para. 94.

<sup>50</sup> *Ibid.*, para. 53.

<sup>51</sup> *Ibid.*, paras. 61 and 62.

### III. Restrictions of the Right of Associations to Seek Financial and Material Resources in Comparative Constitutional Law

39. Associations may receive funding for their activities from private and other non-state sources, including foreign and international funding. Access to resources is an integral part of the right to freedom of association, as defined in Article 11 ECHR and Article 22 ICCPR. States should recognise that allowing for a diversity of sources will better secure the independence of associations. Legal frameworks and policies related to resources have a significant impact on the freedom of association. They can strengthen the effectiveness and facilitate the sustainability of associations or subjugate associations to a dependent and a weak position.<sup>52</sup> Undue restrictions on resources of associations also affect the enjoyment by associations of the rights to freedom of association and expression, and undermine other civil and political rights as well as economic, social and cultural rights.<sup>53</sup>

40. An important number of countries increase the regulatory framework concerning the financial resources of non-governmental organisations. Restrictions on the right of associations to seek financial and material resources may take many forms. Some restrictions are related specifically to foreign funding of associations, either by imposing additional (reporting and/or disclosure) obligations or by totally prohibiting foreign funding. While such restrictions are not completely new, certain states, including member states of the Council of Europe, have recently introduced such measures or are contemplating introducing such measures.

41. Political parties, which are also associations,<sup>54</sup> may require specific regulation and because of their role as critical actors in the election of the government, their freedom to receive and use funding, including foreign funding, may be subject to stricter regulations to avoid and combat undue or corrupt influence on the political life in the State, including from outside the State. In its 2006 Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources, the Venice Commission noted that such restrictions have been imposed on political parties in numerous countries. In its 2001 Guidelines and Report on the Financing of Political Parties, the Venice Commission even stated that “*donations from foreign States or enterprises must (...) be prohibited*”.<sup>55</sup> In the case of *Parti Nationaliste basque – Organisation Régionale d’Iparralde v. France*, referring to the 2001 Guidelines of the Venice Commission, the ECtHR said that it had no difficulty in accepting that the prohibition on the funding of political parties by foreign States is necessary for the preservation of national sovereignty. It concluded that the fact that political parties are not permitted to receive funds from foreign parties is not in itself incompatible with Article 11 of the Convention.<sup>56</sup>

42. However, while political parties are actual participants in the electoral process, NGOs are not. The fact that certain NGOs express views and campaign on subjects disputing government policy does not equate them to political parties.

43. In the majority of the Venice Commission member states, there are no specific provisions regulating or restricting the ability of associations to receive funding from abroad.

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<sup>52</sup> See, Challenges facing civil society organisations working on human rights in the EU, European Union Agency for Fundamental Rights, 2018, p. 29.

<sup>53</sup> *Ibid.*

<sup>54</sup> ECtHR, 30 January 1998, *United Communist Party of Turkey and others v. Turkey*, appl. no. 19392/92, para. 25. CDL-AD(2010)024, Venice Commission/OSCE/ODIHR, *Guidelines on Political Party Regulation*, 2011, para. 9.

<sup>55</sup> CDL-AD(2001)08, *Guidelines and Report on the Financing of Political Parties*, 21 March 2001, para. 6.

<sup>56</sup> ECtHR, 7 June 2007, *Parti Nationaliste Basque – Organisation Regionale D’Iparralde v. France*, Application No. 71251/01.

44. In some countries, foreign funding of associations is explicitly authorised by law.<sup>57</sup>

45. In some of the countries, however, such restrictions exist, and can take various forms. In most of the countries which adopted such restrictive legislation, foreign funding of associations is not altogether prohibited. More commonly, however, it is allowed but accompanied by specific obligations imposed on NGOs that receive funding from abroad or subject to prior authorisation from the government or a governmental agency.<sup>58</sup> Restrictions may also be placed on the uses that may be made of such funds or the type of organisation that may seek foreign funding.

46. Some states restrict access to foreign funding through laws imposing additional reporting/disclosure obligations on associations receiving funds from abroad.<sup>59</sup>

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<sup>57</sup> Article 17 of the Law on Public Associations of Armenia (adopted on 4 December 2001) provides that *“the organisation's property comes from membership fees; grants; donations; from activities carried out in the manner prescribed by the law, and from other sources not prohibited by the law, including foreign ones.”* In Croatia, the Law on Associations, adopted on 6 June 2014, provides in Article 30 that the property of an association includes funds that it has acquired through the collection of membership fees, voluntary contributions and gifts, revenue from the performance of activities carried out to meet its goals (...), financing of the association's programs and projects from the state budget and the budget of local and territorial (regional) self-government units and/or *foreign sources*, (...) and other property rights.

<sup>58</sup> Azerbaijan, Algeria, Belarus.

<sup>59</sup> In the UK, the Charity Commission introduced a requirement that from February 2018 charities must in their annual returns list all countries they receive income from, and report all funding from overseas governments, quasi-governmental bodies, charities, non-governmental organisations and civil society groups. Charities with an annual income of more than £25,000 will also be asked to give the total value of donations received from individuals and other institutional donors outside the UK which are more than £25,000. Charities with an annual income of less than £25,000 will be asked to report these donations if they amount to more than 80% of the charity's gross annual income. Israel does not prohibit or restrict receiving funding from abroad as such, but does impose reporting and disclosure obligations for donations to associations from Foreign States Entities (e.g., donations from foreign governments) (Defined as including a foreign state, a union or a group of foreign states, a, organ or a representative of a foreign state, a local or a regional authority, the Palestinian Authority, a company owned by a Foreign State Entity or a foreign company whose financial turnover was mostly from a Foreign State Entity). If the donation is over 20 000 NIS (5 600 dollars), the supported entity must, in its annual financial report submitted to the Registrar of Associations, file the information concerning the identity of the donor, the sum donated, the goal of the donation, the term of the donation, including commitments the association has given in relation with the donation orally or in writing, directly or indirectly, if there are such terms. Such information must be disclosed by the supported entity/association on its internet site, and if it has none, to the Registrar and he/she will disclose it on the internet site of the Ministry of Justice. Under the Law on Disclosure Duty of Bodies Supported by a Foreign State Entity (2011), the supported entity must submit a quarterly report to the Registrar specifying the details mentioned in § 36A of the Associations Law: Identity of the donor, sum donated, goal thereof and terms connected, as specified (duty to report). The Registrar publishes, on the Internet site of the Ministry of Justice, the list of supported entity which submitted a quarterly report and the contents of their reports (duty to disclosure). On 11 July 2016, the *Knesset* amended the Law to requires a higher standard of disclosure and reporting duties regarding an association or a company for public benefit, the main source of financial support of which comes from a Foreign State Entity: the supported entity should submit an annual report to the Registrar, stating that its main financial support comes from a Foreign State Entity and it should state that its main financial support comes from a Foreign State Entity on its publications. In the Russian Federation, associations which receive cash funds or other property from foreign governments or their governmental bodies, international and foreign organisations, foreign citizens, stateless persons or other entities authorised by them, and/or from Russian legal entities receiving cash funds and other property from the indicated sources and which take part in the political activity performed in the territory of the Russian Federation, are considered “non-profit organisations performing the functions of a foreign agent”. Non-profit Organisations (“NCOs”) that are so designated are subject to an enhanced monitoring system, with a duty to submit more frequent reports on their financial resources and an annual

47. Some states impose specific taxation rules on foreign funding.<sup>60</sup>

48. Some States impose an obligation on the associations to transfer foreign funds via a government fund or bank accounts designated by the government<sup>61</sup> with the consequence that the funds may remain blocked in the State bank accounts affecting the ability of associations to use the foreign fund to carry out their activities.

49. In some states, prior authorization<sup>62</sup> or notification<sup>63</sup> from the authorities is necessary for an NGO to use funding coming from abroad.<sup>64</sup>

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mandatory auditing. All materials issued or distributed by such NCOs must indicate that they are issued by a foreign agent (Article 24(1)). In case of a failure to fulfil any of the obligations imposed by that same Law, the organisation as well as its representatives may be sanctioned by a fine. In Hungary, according to the Law on the Transparency of organisations receiving support from abroad, associations and foundations annually receiving money or other assets from abroad reaching 7.2 million forints, or around 24 000 euros (twice the amount specified in Article 6(1) b) of Act CXXXVI of 2007 on the Prevention and Combatting of Money Laundering and Terrorist Financing) must register with the Regional Court as “organisations receiving support from abroad.” They must also label themselves as such on their websites and on all publications. Under the Law, the identity of donors for foreign donations of more than 500 000 forints (around 1 600 euros) must be made public by the association concerned. The Dutch draft Act on Transparency of Civil Society Organizations published in December 2018 by the Ministry for Legal Protection, requires all CSOs to publish overviews of donations that amount to or exceed 15,000 EUR a year, which are to include the names and places of residence of the respective donors. The explanatory memorandum of the draft Act invokes the requirement of transparency in order to prevent terrorism financing and money laundering as a justification.

<sup>60</sup> In the Russian Federation, 2008 Presidential Decree No. 485 reportedly radically shortened the list of international organisations whose grants to NGOs benefit from tax exemptions approved by the Government (there is no tax exemption for funds received from organisations not included in this list). Section 253 of the Hungarian Law on amending certain tax laws and other related laws and on the immigration tax imposes a 25% tax on financial support to associations provided for conducting any “immigration supporting activity” in Hungary or for the operations of any Hungarian organisation that “carries out activities to promote immigration”. The tax provision in current Section 253 covers all funding regardless of whether of foreign or domestic origin.

<sup>61</sup> Uzbekistan, Bangladesh.

<sup>62</sup> Azerbaijan, Algeria, Belarus and Egypt.

<sup>63</sup> Turkey.

<sup>64</sup> In Algeria, the Law of 12 January 2012 on associations in principle prohibits foreign funding “other than within the framework of international cooperation with foreign associations and international NGOs”. Cooperation with foreign associations and receiving foreign funding within the framework of this cooperation are both subject to prior authorisation of the “competent authority”. In Egypt, Article 64 of the Law No. 70 of 24 May 2017 on Associations and Other Foundations Working in the Field of Civil Work prohibits foreign NGOs from sending, moving or transferring any funds or donations allocated for implementing activities or projects in Egypt to any person, organisation, authority or entity inside or outside unless an authorisation was obtained from the National Regulatory Agency for the Work of Foreign Non-Governmental Organisations, which Agency works under the supervision of the Prime Minister. Failure to obtain prior authorisation from the authorities can lead to criminal prosecution. In Belarus, according to Article 21 of the Law on Public Associations, associations are prohibited from keeping monetary funds, precious metals and other valuables in banks and non-bank finance and credit organisations located in the territories of foreign states. In addition, all foreign funding must be registered and approved by the authorities<sup>64</sup> and failure to do so may lead to administrative (confiscation of unauthorised funds and the payment of a fine equal to the amount of the unauthorised fund) and criminal sanctions (prison terms) for NGOs and their management personnel. In Azerbaijan, according to Article 24(1) of the Law on Non-Governmental Organisations and Article 2(5) of the Law on Grants, foreign legal persons may act as a donor only if their branches and representations are registered in Azerbaijan (donations from foreign sources are thus excluded) and after obtaining permission to give a grant implied in a positive opinion on financial-economic responsibility of the grant by the relevant domestic authority. Coupled with cumbersome registration procedures for associations, the authorisation systems drastically constrain the ability of those associations to finance their activities with funding from abroad. In Turkey,



50. Some countries restrict foreign funding for certain activities.<sup>65</sup>

51. The prohibition of foreign funding of associations may also apply to some specific associations, for example of religious nature.<sup>66</sup>

#### **IV. Previous Opinions of the Venice Commission concerning the funding of associations from foreign sources**

52. The Venice Commission has dealt with the legal status of civil society organisations more generally, and with the issue of foreign funding of associations in particular in a number of previous opinions.

53. In its 2013 Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, the Venice Commission acknowledged that prevention of money-laundering and terrorism financing may be considered legitimate aims for a State to restrict the foreign funding of associations. It held that although those legitimate aims can be an acceptable justification for stricter control of funding from foreign donors, such control should not be excessive or so burdensome as to constitute disproportionate interference with the right to freedom of association guaranteed by the Egyptian Constitution and by international instruments. In particular, the Commission considered that the prevention of money-laundering or terrorism financing does not require, or justify, either the prohibition, or a system of prior authorisation by the government, of foreign funding of NGOs<sup>67</sup>.

54. In its 2013 Interim Opinion on the Draft Law amending the Law on Non-Commercial Organisations of the Kyrgyz Republic<sup>68</sup>, although the Venice Commission considered that, in principle, requiring the utmost transparency and openness in matters pertaining to foreign funding may be justified, it found that labelling a non-commercial organisation as a “foreign agent” would most probably cause it to encounter an atmosphere of mistrust, fear and hostility, which would make it difficult to operate. Therefore, the obligation imposed on organisations receiving funds from abroad to place the label “foreign agent origin” on all materials issued by them, together with additional reporting obligations, was excessive and constituted an unjustified interference into the right of freedom of association.

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although prior authorisation from the authorities is not necessary for associations to obtain funds from abroad, a notice by the association concerned has to be served to the local administrative authority on this issue. The cash funds must be collected through the banks (Article 21 of the Law no. 5253 on Associations).

<sup>65</sup> In Ireland, the 1997 Electoral Act prohibits international funding of “third parties” defined as anyone (other than a political party or election candidate) who accepts donations given for “political purposes”. The latter is defined broadly: “*to present, directly or indirectly, the comments of a political party (...), to promote or oppose, directly or indirectly, the interest of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to a policy (...) of the Government or any public authority.*” An NGO engaged in, for example, a campaign to change public policy (political purpose) would be required to register as a “third party” and cannot receive international funding for the purposes of the campaign.

<sup>66</sup> In Austria, according to the Federal Law on the External Legal Relationships of Islamic Religious Societies, the procurement of funds for the usual activity to satisfy the religious needs of its members has to be undertaken inland by the Religious Society, the local communities, respectively, their members.

<sup>67</sup> CDL-AD(2013)023 Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, paras. 40-42.

<sup>68</sup> CDL-AD(2013)030 Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic.

55. In its 2014 Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations of the Russian Federation, in addition to the legitimate aims of preventing money laundering and terrorism financing to impose restrictions on foreign funding of associations indicated in the Opinion on the Draft Law on Civic Work Organisations of Egypt, the Venice Commission also accepted that ensuring transparency of funding from abroad for NGOs in order to prevent the *misuse of the funding for political goals* could also be considered in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

56. In this Opinion, the Venice Commission considered that whereas the authorities have the right to subject NGOs receiving foreign funding to a certain control and to impose upon them certain reporting and auditing obligations, the imposition of the very negative qualification of “foreign agent”<sup>69</sup> and the obligation for the NGOs to use this label on all their materials cannot be deemed to be “necessary in a democratic society” to assure the financial transparency of the NGOs receiving foreign funding.

57. The October 2014 amendments to the Law on Non-Governmental Organisations of Azerbaijan limited the circle of potential donors to “*a citizen of the Republic of Azerbaijan or legal person, as well as branches or representations of foreign legal persons (...) registered in Azerbaijan and not being aimed at profit to a non-governmental organisation*” and therefore excluded donations from foreign sources. Moreover, branches and representations of foreign legal persons registered in Azerbaijan could act as donors only after obtaining an authorisation by the relevant domestic authority, but the Law did not provide any criteria for such an authorisation. In its Opinion adopted in December 2014, the Venice Commission considered that, although foreign funding might give rise to some legitimate concerns, it should never be the object of an outright ban.<sup>70</sup>

58. In its 2017 Opinion on Hungarian Law on Transparency of Organisations Receiving Support from Abroad, the Venice Commission accepted, in its analysis of various reporting and disclosure obligations imposed on organisations receiving funds from abroad, that transparency may reveal the possible illicit origin of the financing, while it may also keep the public informed on the – legitimate – sources of financing of NGOs. It considered thus that such aims can justify proportionate reporting obligations imposed on the associations, but that it cannot be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work.<sup>71</sup>

59. According to this Law, all associations and foundations which receive foreign funding above the threshold of 24 000 euros (7.2 million forints) were required to register as an “organisation receiving foreign funding” and to mention this label on their websites and on all the press products they published. Moreover, such organisations were required to indicate the total sum of foreign financial support they received in the relevant year and to give a list of donors (with name, country and city for natural persons) for donations of more than 500 000 forints (around 1 600 euros). The list was to be made public. Although, compared, for instance, to the label of “Foreign Agent”, as required in the Federal Law N. 121-FZ of the Russian Federation, the label “organisation receiving foreign funding” appeared to be more neutral and descriptive, the Venice Commission took into account the context, in particular the virulent campaign by some state authorities portraying the associations receiving funds from abroad as acting against the

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<sup>69</sup> The term is usually associated in the Russian historical context with the notion of a «foreign spy» or a «traitor» with a negative connotation in large sections of the society. The obligation imposed on foreign funded NGOs to use the term on all the materials issued by them would certainly hamper the free exercise of the activities of these NGOs. See, CDL-AD(2014)0258, para. 54.

<sup>70</sup> CDL-AD(2014)043 Opinion on the Law on non-governmental Organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan.)

<sup>71</sup> CDL-AD(2017)015, Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad of Hungary, paras. 39 and 66.

interest of the country, and concluded that the label risked stigmatising those organisations and affecting their legitimate activities. It moreover recommended that the data included in the register (and made public) should not include all the sponsors but be limited to the major ones.

60. The Romanian Draft Law No. 140/2017 introduced some financial reporting obligations for all associations and foundations irrespective of the origin – foreign or domestic – of the funds received. All associations and foundations had the obligation to publish every six months in the Official Gazette financial statements that outline in detail each item of income while indicating its source (either an individual donor, or an income-generating activity). The initiators of the draft law explained that the new regulation aimed to eliminate any suspicion by the public regarding the legality of the financing of associations and to increase the public trust in non-governmental associational activities.

61. In their 2018 Joint Opinion concerning this Draft Law<sup>72</sup>, the Venice Commission and the OSCE/ODIHR considered first that the new reporting and disclosure obligations could not be justified on the basis of “suspicions” about the honesty of the financing of the NGO sector without any concrete risk analysis having been made concerning the involvement of associations in the commission of crimes such as corruption and money laundering. The Joint Opinion also clarified, following the Guidelines on Freedom of Association, that “enhancing transparency” of the NGO sector does not appear to be by itself a legitimate aim for restricting the freedom of association. It rather can be a means to achieving the legitimate aims of combating fraud, embezzlement, corruption, money laundering or terrorism financing. Such measures may, in principle, be justified as being in the interest of national security, public safety or public order within the meaning of article 11(2) ECHR and article 22(2) ICCPR. The Joint Opinion based its recommendation concerning the financial reporting obligations on the distinction between “reporting obligations” (which involve reporting the amount and the origin of the funding to a regulatory body) and disclosure obligations (which would involve publishing in the official Gazette the identity of the individual donor). The Opinion concluded that the regulation of funding sources should either be limited to reporting to a regulatory body at reasonable intervals, or the obligation to disclose the identity of donors should be limited to main sponsors.

62. In a 2018 Joint Opinion, concerning two draft laws of Ukraine on transparency of financing of public associations,<sup>73</sup> the Venice Commission and the OSCE/ODIHR observed that the new reporting and disclosure requirements on financing of the NGO sector<sup>74</sup> were being justified based on the declared legitimate aim of preventing money laundering. However, there lacked any concrete analysis of a risk or threat posed by certain associations that would justify the measures. The Joint Opinion recalled that restrictions on the freedom of associations can only

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<sup>72</sup> CDL-AD(2018)004 Romania - Joint Opinion on Draft Law No. 140/2017 on amending Governmental Ordinance No. 26/2000 on Associations and Foundations adopted by the Venice Commission at its 114th Plenary Session (Venice, 16-17 March 2018).

<sup>73</sup> CDL-AD(2018)006 Ukraine - Joint Opinion on Draft Law No. 6674 "On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance" and on Draft Law No. 6675 "On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance" adopted by the Commission at its 114th Plenary Session (Venice, 16-17 March 2018).

<sup>74</sup> Requirement of submitting and publishing information including the number of members and amount of membership fees, **the total amount of income and a list of physical and legal persons who contributed with more than 50 subsistence minimums (approximately 2400 euros) to the organisation**, a list of ten employees who were paid the largest amounts of wages in the reporting year, the total amount of funds used to pay third parties, as well as a detailed list of the entities that received payments exceeding 50 subsistence minimums, the personal composition of the organisation governing bodies, the participation of its executives in the governing bodies of other public associations and in other legal entities.

be justified if they are necessary to avert a real, and not only a hypothetical danger. With respect to disclosure obligations, i.e. publication on the Internet of information concerning associations' managers, certain employees, donors and beneficiaries, the Joint Opinion concluded that those obligations interfere with the right to privacy and in the absence of any substantiated risk, the pre-existing legislation may hamper the investigation of criminal offences, were not "necessary in a democratic society".

63. In the opinions concerning Ukraine and Hungary, the Venice Commission also indicated that reporting and disclosure obligations that focus in particular on foreign funding of associations might be problematic with regard to the prohibition of discrimination enshrined in Article 14 ECHR and Article 26 ICCPR. Accordingly, restrictions such as requirements that associations submit more reports and information than other legal entities, such as businesses;<sup>75</sup> the fact that laws single out some associations as the subjects of reporting obligations, whereas other organisations, such as charitable organisations, foundations, professional and creative unions or religious or sport organisations<sup>76</sup> are not addressed, and impose specific reporting obligations only addressing funding from donors of international technical assistance (i.e. provided in accordance with the international agreements of Ukraine), give rise to concern and seem to be a breach of the prohibition of discrimination.

64. The proportionality of sanctions imposed in case of breach of reporting and/or disclosure obligations has been another focus of the Venice Commission in its opinions on funding, and in particular on foreign funding, of associations. Following ECtHR case-law which states that "a mere failure to respect certain legal requirements or internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution"<sup>77</sup>, as well as the requirement of proportionality under Article 22 ICCPR, the Commission considered that failure to fulfil reporting or disclosure obligations could not be qualified sufficiently serious misconduct to justify the sanction of dissolution. It pointed to the importance of having a gradual process of sanctioning, the requirement that any sanction be necessary and proportionate, and to the requirement that all important decisions in this respect be taken by a judicial organ.<sup>78</sup>

## V. Analysis

### A. Legality of the interference with the right of associations to seek financial and material resources

65. Any limitation of the right of associations to seek financial and material resources must be prescribed by law in clear and precise terms. A limitation needs to have a basis in domestic law, i.e. the disputed measure should be based on a legal rule, originating from a competent (by virtue of attribution or delegation) legislative authority. In addition, the legal basis needs to be accessible. Lastly, the relevant law needs to be foreseeable. A law is "foreseeable" if it is formulated with sufficient precision to enable the person concerned – if need be with appropriate advice – to regulate his/her conduct accordingly. The law must be sufficiently clear and detailed in its terms to give individuals an adequate indication as to the circumstances and conditions in which public authorities are empowered to interfere with the right concerned.

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<sup>75</sup> CDL-AD(2018)006 Ukraine - Joint Opinion on Draft Law No. 6674 and on Draft Law No. 6675, paras. 43-45.

<sup>76</sup> CDL-AD(2017)015, Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad of Hungary, paras. 42-43.

<sup>77</sup> ECtHR, 8 October 2009, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application no. 37083/03; ECtHR, 14 February 2006, *Christian Democratic People's Party v. Moldova* (appl. no. 28793/02), paras. 72 and 73. See also, Recommendation CM/Rec(2007)14, para. 72.

<sup>78</sup> *Ibid.* paras. 57-62.

66. For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.<sup>79</sup> The level of precision required of domestic legislation depends to a considerable degree on the content of the instrument in question and the field it is designed to cover.<sup>80</sup>

67. Throughout its Opinions, the Venice Commission pointed to problematic, unclear provisions concerning the scope of various reporting or public disclosure obligations imposed on associations with regard to their financial resources, either domestic or foreign. Thus, the Commission considered that the restriction imposed on associations in relation to “political activities” under the Federal Law n° 121-FZ of the Russian Federation was not clear and “foreseeable”. The term “political activity” is crucial for determining the status of non-commercial organisation exercising the function of a “foreign agent”. However, the law resorted to other equally vague and unclear terms such as “political actions” or “shaping of public opinion” to define “political activity” and according to the Commission, it was difficult for associations to know which specific actions on their part could be qualified as “political activities” and which activities would be exempted from this qualification.<sup>81</sup>

68. Apart from the wording of legal provisions, the Commission has also due regard to the role of adjudication by courts in clarifying the meaning of a provision and considers that even unclear terms, such as “political activities” can comply with the principle of legality if they are interpreted in a coherent and clear way by the executive and judicial authorities. However, this clearly was not created in the case-law of the Russian Constitutional Court in the absence of any uniformity as to the meaning of this term.

69. Consequently, the Venice Commission considers that in such an important matter as the scope of restrictions imposed on the right of associations to seek and secure financial and material resources, the provisions –imposing for instance reporting obligations as to the sources of funding- should use very clear and precise terms in order to give the associations to understand their liabilities and obligations and in order therefore to meet the criteria of “legality” under Articles 10(2) and 11(2) ECHR and Articles 19 and 22 ICCPR.

## **B. Legitimate aims for interference with the right of associations to seek financial and material resources**

### **1. General remarks**

70. Article 11(2) ECHR only allows restrictions which pursue 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. As the ECtHR stated “*exceptions to the rule of freedom of association are to be construed strictly.*”<sup>82</sup>

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<sup>79</sup> See, ECtHR, *Hasan and Chaush v. Bulgaria* [GC], application no. 30985/96, para. 84.

<sup>80</sup> See, ECtHR, *Hashman and Harrup v. the United Kingdom* [GC], application no. 25594/94, para. 31.

<sup>81</sup> See also, CDL-AD(2013)030, para. 30. See also, concerning the discussion on the meaning of the term “indirect support to migration” and its conformity to legality principle, CDL(2018)040 Draft joint opinion on section 253 on the special immigration tax of act XLI of 20 July 2018 amending certain tax laws and other related laws and on the immigration tax, paras. 60 *et seq.*

<sup>82</sup> ECtHR, 17 February 2004, *Gozelik and others v. Poland*, application no. 44158/98, para. 95. See also, CDL-AD(2011)036, *Opinion on the compatibility with universal human rights standards of article*

71. The legitimate grounds for the restrictions listed in Article 11(2) are formulated in rather general, vague terms and often touch upon the most fundamental interests of the State, such as national security or public safety. For this reason, the Human Rights Committee and the ECtHR have construed these concepts very narrowly. But in the practice, measures interfering with the right to freedom of association tend to be rejected as failing the necessity and proportionality (and legality) requirements. Nevertheless, this does not mean that Contracting States may take any measures they deem appropriate for the protection of national security, public security or any other legitimate aims for restriction listed in the second paragraph of Article 11 ECHR and 22 ICCPR.

72. In the case of *İzmir Savaş Karşıtları Derneği v. Turkey*, the then-existing requirement under the Associations Act that associations request authorisation from the Ministry of Interior in order to invite members of associations and organisations from foreign countries to Turkey and to visit foreign countries at the invitation of foreign associations, was justified by the Government by the need to diplomatically protect Turkish citizens abroad and foreign nationals in Turkey and thereby by ensuring national security and public safety. The ECtHR reiterated that Contracting States cannot, in the name of protection of national security and public safety, simply take any measure they deem appropriate. It concluded that the restriction in question (requiring authorisation) could not be regarded as pursuing the legitimate aims indicated by the Government, since, inter alia, the “protection” only applied to members of associations.

73. Some of the laws imposing restrictions on foreign funding of associations in the Council of Europe that have been previously considered by the Venice Commission have been brought for consideration before the ECtHR. The relevant cases pending before the ECtHR are in an early stage of proceedings and it is not clear yet what grounds will be invoked by the States to justify restrictions imposed on foreign funding of associations.<sup>83</sup>

74. Despite the absence of any case-law dealing specifically with restrictions imposed on foreign funding of NGOs, the ECtHR has dealt, in the case of *Parti Nationaliste Basque – Organisation Regionale D’Iparralde v. France*,<sup>84</sup> with the prohibition of foreign funding of political parties in France. In this case, the applicant complained that its request for authorisation of the funding of the association it had set up had been refused on the ground that most of its resources derived from financial support from the Spanish Basque Nationalist Party, a foreign legal entity. This had affected its finances and its capacity to pursue its political activities, especially in relation to elections.

75. The Government argued that the restriction pursued two legitimate aims: the prevention of disorder and the prevention of crime. With respect to the former aim, it stressed that “*in prohibiting foreign States and foreign legal entities from funding national political parties, the*

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193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, 18 October 2011, para. 63.

<sup>83</sup> In the case of *Ecodefence and others v. Russia* (and 48 other applications) (No. 9988/13, decision of 22 March 2017) challenging implementation of the “foreign agent law” of the Russian Federation, the applicant associations complained under Articles 10 and 11 ECHR about the use of the label ‘Foreign Agent’ under the Foreign Agent Act, their persecution for failing to register as foreign agents, and excessive State control on foreign funding of the civil society sector. In its communication decision of 22 March 2017, the ECtHR raised the issue of legitimate aims pursued by the new reporting and labelling obligations imposed by the Foreign Agent Law and specifically asked the parties to address whether the reasons for the interference advanced by the State were “relevant” and “sufficient”, and whether the restrictions were being imposed by the State for purposes other than those envisaged by Articles 10 and 11 of the ECHR.

<sup>84</sup> *Parti Nationaliste Basque – Organisation Regionale D’Iparralde v. France*, Application No. 71251/01, 7 June 2007.

legislature [had] sought to preclude the possibility of creating a relationship of dependency which would be detrimental to the expression of national sovereignty".<sup>85</sup> The Government contended that the prohibition took into account "national security interests" in seeking to protect "the expression of national sovereignty", to which political parties contributed under the French Constitution. The principle of national sovereignty was inextricably linked with that of national independence, which prohibited foreign interference in the operation of national politics. The restriction, according to the Government, was thus aimed at protecting institutional order and, as such, pursued the legitimate aim of "the protection of order" (*la défense de l'ordre*), the term corresponding in the French version of the ECHR to the "prevention of disorder" in the English version. With respect to the aim of prevention of crime, the Government argued that it was more difficult to verify the origin and the legality of funds from abroad.

76. The ECtHR found it unnecessary to discuss the latter aim, as it accepted the argument concerning the legitimate aim of prevention of disorder. Thus, the ECtHR "*acknowledged the legitimacy of the aim pursued*"<sup>86</sup> and, moreover, it found that the interference was prescribed by law and could be regarded as necessary in a democratic society. It concluded that no violation of Article 11 (or any other provision of the ECHR) had taken place.<sup>87</sup> In the opinion of the Venice Commission, the judgment suggests that the ECtHR is ready to accept that restricting or even totally prohibiting foreign funding of political parties may be legitimate, if this funding could interfere with national politics and affect the outcomes of national elections. This seems to apply regardless of who the foreign sponsor is and what agenda he/she promotes.

77. In the same vein, the Venice Commission had considered, in its 2006 Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources<sup>88</sup> that there could be a number of reasons for the prohibition of contributions from foreign sources to political parties if this undermines the fairness or integrity of political competition or leads to distortions of the electoral process or poses a threat to national territorial integrity.<sup>89</sup> The Venice Commission had also previously considered that "*it is perfectly understandable that a state should be reluctant to allow a foreign country to interfere with its domestic politics by making funds available on a discretionary basis to certain of its political parties.*"<sup>90</sup>

78. The previous statements were made in the context of political parties. The situation is very different when the restrictions are imposed on NGOs, because NGOs do not participate in elections, including through the presentation of candidates to elections.<sup>91</sup> A comparative law overview of restrictions imposed on the right of associations to seek financial and material resources shows that, in most of the countries in the world, foreign funding of associations is not prohibited. Rather, it is allowed, although some States may impose additional reporting and/or disclosure obligations on foreign funding for associations. These may include obligations such as declaring foreign funding, including the name of the NGO in a specific register, using a specific label (foreign sponsored NGO, foreign agent *etc.*) in official communications and publications, giving details on foreign sponsors to national authorities and/or publishing these details, or undergoing additional financial audit in regular intervals (see paras. 45-50 above).

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<sup>85</sup> *Ibidem.*, para. 43.

<sup>86</sup> *Ibidem.*, para. 43.

<sup>87</sup> *Ibidem.*, paras. 42 and 52.

<sup>88</sup> CDL-AD(2006)014. See also CDL-AD(2006)014 English 31/03/2006 - Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources (amicus curiae opinion for the European Court of Human Rights) adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006).

<sup>89</sup> *Ibidem.*, para. 33.

<sup>90</sup> CDL-INF(2001)8 Guidelines and Report on the Financing of Political Parties.

<sup>91</sup> See paras. 41 *et seq* of the present Report.

79. In its opinions, the Venice Commission has observed three main justifications that are typically advanced by States<sup>92</sup>:

a. Ensuring openness and transparency: Virtually all the examined States that have adopted laws imposing restrictions, including reporting/public disclosure obligations, on the foreign financing of associations, justify these acts by the need to ensure transparency of financing of the NGO sector.<sup>93</sup>

b. A second justification invoked by States is contributing to the prevention of terrorism and money laundering.<sup>94</sup>

c. A third justification pertains to the protection of the State and its citizens from disguised interference by foreign countries or other foreign entities.<sup>95</sup>

<sup>92</sup> The present report is limited to the examination of particular justifications that were in practice advanced by the States. Additional justifications might be invoked by States in the future and these will deserve a separate examination.

<sup>93</sup> In the Russian Federation, the preparatory works relating to the Foreign Agents Law speak about an attempt to “ensure openness and publicity in the activities of non-commercial organizations, exercising the function of a foreign agent, and exercise the organization of the needed social control of the work of non-commercial organizations, participating in political activities in the territory of the Russian Federation and financed from foreign sources”. (Cit. in. M. A. Федотов, К вопросу о понятии „иностранный агент“ в российском праве, *Труды по интеллектуальной собственности*, No. 2 (том XI), 2012, p. 6.) In Israel, the 2016 amendment to the *Foreign Political Entity Act* was justified in order to “increase the transparency of the activity of associations and public benefit companies the primary funding of which comes from donations they received from foreign political entities”. (Israel, Proposed legislation: *Obligation to Disclose Support by a Foreign Political Entity Act (Amendment) (Increasing transparency for supported entities whose primary financing comes from support by foreign political entities)*, 57762016.) In Romania, the initiators of draft law no. 140/2017 claimed that the draft regulation was motivated by public concerns regarding the legality and honesty of financing of the NGO sector. In Hungary, the Explanatory Note of the Law on Transparency of Organisations receiving support from abroad (adopted on 13 June 2017) also emphasized that the transparency of financing of associations and foundations, given the social role they play, is of great public interest. (CDL-REF(2017)031 Law on Transparency of Organisations Receiving Support from Abroad.) In Ukraine, the Explanatory Notes to draft law No. 6674 (on introducing changes to some legislative acts to ensure public transparency of information on finance activity of public associations and of the use of international technical assistance) stated that the draft was aimed at introducing a transparent reporting system for public associations regarding their income and expenditures, increasing the transparency in their activities and eliminating a number of shortcomings in the Law on Prevention of Corruption. (CDL-AD(2018)006 Opinion on draft law no. 6674 on introducing changes to some legislative acts to ensure public transparency of information on finance activity of public associations and of the use of international technical assistance and on draft law no. 6675 on introducing changes to the tax code to ensure public transparency of the financing of public associations and of the use of international technical assistance, para. 28.)

<sup>94</sup> With respect to other crimes which may have a transnational dimension, the reasoning of the 2017 Hungarian Transparency law notes that “[transparency] of support provided by unknown sources to organisations established under the freedom of association (...) might contribute to the international efforts to combat money laundering” and that “it is also important to pay due consideration to the challenges caused by financial transactions of non-transparent sources regarding money laundering and terrorism. It cannot be disregarded that the resulting danger does not threaten the for-profit sector only, but may also appear in the civil sector”. (Explanatory Note to the *Draft Law on the Transparency of Organisations Supported from Abroad* (Bill T/14967), submitted on 7 April 2017). The Venice Commission also noted that the stated purpose of the Draft Law on Civic Work Organisations of Egypt was to combat terrorist activities, and especially through cautious control of money transfers. (CDL-AD(2013)023 Interim opinion on the draft law on civic work organisations of Egypt.)

<sup>95</sup> Hungary, again, is the most explicit on this point declaring, in the preamble to the 2017 *Draft Law*, that “funding from unknown foreign sources to organisations established based on the freedom of association



80. In its previous opinions, the Venice Commission accepted that the latter two justifications may, in principle, fall under the legitimate grounds for imposing restrictions on the right to freedom of association enlisted in Article 11(2) of the ECHR and Article 22(2) of the ICCPR. Thus, the Venice Commission confirmed that there may be various reasons for a State to restrict foreign funding, including the prevention of money-laundering and terrorism financing<sup>96</sup>. Concerning the aim of ensuring transparency, the Commission considered that this aim would not by itself appear to be a legitimate one, but may be a means to achieve one of the legitimate aims under the second paragraph of Article 11 ECHR. Therefore, the Commission considered that ensuring transparency of NGOs receiving funding from abroad in order to prevent them from being misused for foreign political goals can be considered to be “necessary in a democratic society.”<sup>97</sup>

81. The Commission recalled however that restrictions on the freedom of association can, however, be considered to pursue legitimate purposes only if they aim to avert a real, and not only hypothetical danger. Any restrictions therefore can only be based on a prior risk assessment indicating “plausible evidence” of a sufficiently imminent threat to the State or to a democratic society. Abstract “public concern” and “suspicions” about the legality and honesty of financing of NGO sector, without pointing to a substantiated concrete risk analysis concerning any specific involvement of the NGO sector in the commission of crimes, such as corruption or money-laundering cannot constitute a legitimate aim justifying restrictions to this right.<sup>98</sup> The Human Rights Committee added that the reasons prompting the authorities to restrict foreign funding should thus be case-specific and evidence-based.<sup>99</sup>

## **2. Reporting obligations v. Public disclosure obligations**

82. As previously mentioned, restrictions on the right of associations to seek financial and material resources take many forms. The identification of the interference and the legitimate aim pursued by this interference are of importance, because an interference which might be appropriate in view of one aim will not necessarily be appropriate to another. In other words, the measure which restricts the right concerned should be *relevant/appropriate* to the declared legitimate aim pursued by the interference.

83. The Venice Commission deems it necessary to distinguish between “*reporting obligations*” and “*public disclosure obligations*” imposed on associations concerning their financial resources.<sup>100</sup> A “*reporting obligation*” consists in reporting the amount and the origin of the funding to the relevant authorities. In contrast, a “*public disclosure obligation*” consists in

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*might enable foreign interest groups to enforce their own interests instead of public interest in the political and social life of Hungary, through the societal influence of these organisations, and (...) this may endanger the political, economic interests of the country as well as the operation of statutory institutions”.* (Preamble to the *Draft Law on the Transparency of Organisations Supported from Abroad* (Bill T/14967), submitted on 7 April 2017). This motive is closely linked to the first one, as ensuring openness and transparency is rarely seen as an end in itself. Rather, it should help to understand which interests various NGOs serve, and identify NGOs which may be dependent on sponsors whose interests contradict those of the State in which the NGO operates. The Russian Foreign Agent Law reflects, according to the Russian representatives, “*the principle of non-interference into the domestic affairs of a sovereign state*”. (CDL-AD(2014)025, para. 13.)

<sup>96</sup> CDL-AD(2013)023, para. 40, CDL-AD(2017)015, para. 39.

<sup>97</sup> See para. 87 below. CDL-AD(2014)025, para. 58.

<sup>98</sup> CDL-AD(2018)006, para. 36.

<sup>99</sup> Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, CCPR/C/111/D/1993/2010 (July 2014), para. 7.3; *Lee v. Republic of Korea*, CCPR/C/84/D/1119/2002 (July 2005), para. 7.2; Communication No. 2001/2010, *Q v. Denmark*, Views adopted on 1 April 2015, para. 7.3.

<sup>100</sup> See, also, Conf/Exp(2018)3 Expert Council on NGO Law, International standards relating to reporting and disclosure requirements for non-governmental organisations, 27 November 2018.

making public, for instance on the website of the association concerned or in the press or the official journal, the source of funding (either domestic or foreign) and potentially, the identity of donors. The goal of a public disclosure obligation is not to inform the authorities but to inform the public. Disclosure duties normally add up to already existing reporting obligations.

84. The Venice Commission has examined various provisions imposing “public disclosure obligations” on associations, in particular those receiving funding from foreign sources.

85. It noticed that public disclosure obligations of receipt of foreign funding were often designed to subject associations receiving such funding to public opprobrium and to increase the difficulties for the organizations in achieving their intended work. On occasion, they have even been accompanied by smearing campaigns against associations which receive foreign funding.

86. There may nonetheless be cases where even a “public disclosure obligation” (i.e. informing the public) may be considered as pursuing one of the legitimate aims under the second paragraph of Article 11 ECHR/Article 22 ICCPR. However, when discussing the legitimate aims of restrictions of the right of associations to seek financial and material resources, the character of the measure (i.e. reporting or disclosure) should be taken into account, since the measure may be deemed as pursuing a specific legitimate aim only if it is relevant and appropriate to reach this aim.

### **3. Ensuring transparency in order to fight terrorism financing and money laundering**

87. Concerning the justification of **ensuring openness and transparency** of funding, the Commission accepted in respect of Hungary that ensuring transparency is a legitimate means to identify the possible illicit origin of financing<sup>101</sup>, but added in respect of Romania that “*enhancing transparency would by itself not appear to be a legitimate aim (...); rather, transparency may be a means to achieve one of the (...) aims set out in Article 11(2) ECHR*”. Thus, transparency may be an important means for combating fraud, embezzlement, corruption, money-laundering or terrorism financing,<sup>102</sup> but can be abused as a pretext for establishing extensive scrutiny over associations, as recognized by the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association.<sup>103</sup> Certain disclosure requirements in the interest of transparency can also raise privacy concerns. Thus, as stated in the *Guidelines on Freedom of Association*, “*the state shall not require but shall encourage and facilitate associations to be accountable and transparent*”.<sup>104</sup> Therefore, “transparency” should not be understood as a legitimate aim in itself, but rather is to be accepted as a means to achieving a legitimate aim. When a State invokes transparency as a justification, its link with one of the legitimate aims indicated in the second paragraph of Article 11 ECHR must be established.

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<sup>101</sup> As according to the Opinion, transparency may on the one hand reveal the possible illicit origin of the financing (whether it is a result of a criminal activity or not), but also keep the public informed of the legitimate sources of financing of NGOs. CDL-AD(2017)015, para. 39.

<sup>102</sup> CDL-AD(2018)004 Romania – Joint Opinion on Draft Law No. 140/2017 on amending governmental ordinance No. 26/2000 on associations and foundations (adopted by the Venice Commission at its 114<sup>th</sup> Plenary Session, Venice, 16-17 March 2018), para.62.

<sup>103</sup> CDL-AD(2018)006 Opinion on draft law no. 6674 on introducing changes to some legislative acts to ensure public transparency of information on finance activity of public associations and of the use of international technical assistance and on draft law no. 6675 on introducing changes to the tax code to ensure public transparency of the financing of public associations and of the use of international technical assistance, para. 35.

<sup>104</sup> Para. 224. The Commission adopted the same approach concerning the aim of ensuring transparency in its Opinion on Draft Laws No. 6674 and 6675 of Ukraine.

88. One of the most common motives invoked by governments concerns security measures against **terrorism financing and money-laundering**. The Venice Commission has previously recognised that, preventing of terrorism financing or money laundering was recognised in principle as a legitimate aim that can justify oversight of funding of associations and other entities from foreign sources.

89. The Guidelines of the Committee of Ministers on Human Rights and the Fight against Terrorism (11 July 2002) reaffirmed that States are under the obligation to take measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts. Combating terrorism implies long-term measures with a view to preventing the causes of terrorism, including bringing the sponsors of terrorist acts to justice. It is thus incumbent on the State authorities to research and study the intelligence concerning terrorist/money laundering activities and to take all measures to fight the crime while respecting human rights and excluding arbitrariness. According to the Financial Action Task Force (“FATF”) (on International Standards on Combatting Money Laundering and the Financing of Terrorism) *“the ongoing international campaign against terrorist financing has identified cases in which terrorists and terrorist organisations exploit some Non-Profit Organisations (“NPO”) in the sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organisations and operations. As well, there have been cases where terrorists create sham charities or engage in fraudulent fundraising for these purposes. This misuse not only facilitates terrorist activity, but also undermines donor confidence and jeopardises the very integrity of NPOs. Therefore, protecting NPOs from terrorist financing abuse is both a critical component of the global fight against terrorism and a necessary step to preserve the integrity of NPOs and the donor community.”*<sup>105</sup>

90. Moreover, as stated in Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005, *“money laundering and terrorist financing are frequently carried out in an international context. Measures adopted solely at national or even Community level, without taking account of international coordination and cooperation, would have very limited effects. The measures adopted by the Community in this field should therefore be consistent with other action undertaken in other international fora”*.<sup>106</sup>

91. Consequently, measures taken against terrorism financing or money laundering in the context of financing of the NGO sector can be seen as part of the international obligations of the State concerned and indeed in many cases, the governments justify new restrictive regulations on foreign grants stating that their purpose is to enforce international obligations in the area of combatting money laundering or terrorism financing.<sup>107</sup> However, measures directed exclusively at foreign funding of NGOs, and not of other entities, for example, may raise concerns regarding whether combating crime is the interest actually being advanced.

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<sup>105</sup> FATF Recommendations on International Standards on Combatting Money Laundering and the Financing of Terrorism, updates February 2018 (<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>)

<sup>106</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

<sup>107</sup> This was for instance the case for Azerbaijan, which justified the 2014 amendments to the NGO Law with its international obligations in the area of combatting money-laundering. See, Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, International Journal of Not-for-Profit Law, vol. 17, no. 1, March 2015, p. 27.

92. Protecting the society against terrorism financing and money laundering and thereby ensuring national security or public safety may therefore be considered in principle as an acceptable ground for imposing supervision of funding from foreign donors.<sup>108</sup>

93. Under these circumstances, a “reporting obligation” which consists of reporting the amount and the origin of the funding (either foreign or domestic origin) to the authorities or to a regulatory state body to allow state authorities to fight against crime in an efficient manner appears in principle to be relevant/appropriate to the legitimate aim of fight against terrorism financing/money laundering.

94. Nevertheless, for the Venice Commission, the same conclusion cannot be drawn concerning a “public disclosure obligation”. Combatting terrorism is a duty incumbent upon the State, not upon the general public. The mere fact of letting the general public know what are the sources of financing of a given association does not seem to add to the effectiveness of the action of the authorities.

95. In conclusion, the Venice Commission considers that the reporting obligations imposed on associations concerning the origin of their financing can be considered as pursuing the legitimate aim of ensuring national security and prevention of disorder and crime under Article 11(2) ECHR and Article 22(2) ICCPR, since their aim is to provide the state with the necessary information to fight against crime, including terrorism financing and money laundering. To the contrary, the obligation to make public the information about the source of the funding (public disclosure obligation) does not appear to be capable of pursuing the same objective.

96. It should also be stressed that, under some strict conditions laid down by the ECtHR in its case-law<sup>109</sup>, the public may also have a right to access to state-held information (for instance concerning the origin of the financing of associations) if access to information is instrumental for the exercise of the applicant’s right to receive and impart information, as is the case when information is considered a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of public debate. For the European Court, the information, data or document to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention.

#### **4. Ensuring transparency in order to prevent foreign political influence**

97. Several States have invoked the protection of State sovereignty against foreign political influence. This motive pertains to protection of the State against attempts to influence official decision-making or to shape public opinion.<sup>110</sup> The underlying claim here is that foreign funded NGOs may be dependent on sponsors whose interest contradict those of the State or the public in which they operate.

98. The identification of “foreign funding” with “foreign intervention into domestic affairs” seems to be based on the idea that foreign funding generates “dependency” because other, economically stronger countries can employ funding to exploit the NGO sector for their own political interests and purposes. Consequently, foreign funding would promote the interests of the external forces at the expense of the domestic constituency.<sup>111</sup> Another argument is based

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<sup>108</sup> As was stated by the Venice Commission in the CDL-AD(2013)023 Interim opinion on the draft law on civic work organisations of Egypt (Venice, 14-15 June 2013), para. 42.

<sup>109</sup> See, ECtHR, 8 November 2016, *Magyar Helsinki Bizottsag v. Hungary* (18030/11), paras. 145-176.

<sup>110</sup> UN Doc. A/HRC/23/39, para. 27.

<sup>111</sup> Pratt, Nicola. (2006) 7. Human Rights NGOs and the “Foreign Funding Debate” in Egypt. In A. Chase & A. Hamzawy (Eds.), *Human Rights in the Arab World*. Philadelphia: University of Pennsylvania Press. <https://doi.org/10.9783/9780812208849.114>. The preamble of the Hungarian 2017 Draft Law on the

on essential differences in social characteristics of the country concerned and of the foreign state or entity which provide funding to local associations.<sup>112</sup> At the outset, a distinction should be made between foreign States and international organisations: if a risk of inappropriate political influence in the pursuit of foreign interests may at times be argued with respect to financial contributions to associations by the first, the same may not be said to be true in respect of international organisations to which the recipient State is a party or of which it is actively seeking membership. By joining an international organisation, a State proclaims to share its values and objectives and participates in the definition of the strategies and actions, including possibly through financing of eligible NGOs. Allocations of funds by an international organisation to a domestic NGO cannot therefore be seen, in this context, as pursuing “alien” interests.

99. Concerning the funding of political parties, the Venice Commission has previously observed that Central and Eastern European countries in particular, due to their recent history, are sensitive to *external political influence* and for this reason, the process of nation-state building or liberalisation leads to particular regulations concerning the foreign funding of political parties. Moreover, those states which introduced restrictive regulations on funding of political parties by foreign States justify those restrictions on the basis that they could lead to distortions of the electoral process: for example, due to economic problems, parties receiving support from abroad could have advantages in the pre-election campaign compared to other national parties without such support.<sup>113</sup> Consequently, the prohibition of contributions by foreign States to political parties may be justified if they undermine the fairness or integrity of political competition, lead to distortions of the electoral process or pose a threat to national territorial integrity.<sup>114</sup> Therefore, the Commission stated that “*it is perfectly understandable that a state should be reluctant to allow a foreign country to interfere with its domestic politics by making funds available on a discretionary basis to certain of its political parties*”.<sup>115</sup>

100. In the case of *Parti Nationaliste Basque – Organisation Régionale D’Iparralde v. France*,<sup>116</sup> which dealt specifically with the prohibition of foreign financing of political parties by foreign political parties, the French Government argued before the ECtHR that “*in prohibiting foreign States and foreign legal entities from funding national political parties, the legislature [had] sought to preclude the possibility of creating a relationship of dependency which would be detrimental to the expression of national sovereignty*”.<sup>117</sup> In its judgment, the ECtHR, following the Guidelines on the financing of political parties of the Venice Commission,<sup>118</sup> made a clear distinction between funding of political parties by foreign States and funding of political parties by foreign political parties.<sup>119</sup> It stated that although it had no difficulty in accepting that the prohibition on the funding of political parties by foreign States was necessary for the preservation of the national sovereignty, it was not so easily persuaded with regard to the prohibition on funding by foreign political parties. The ECtHR acknowledged, however, in the

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Transparency was explicit as to the aim of the Draft Law preventing foreign political influence: “*funding from unknown foreign sources to organisations established based on the freedom of association might enable foreign interest groups to enforce their own interests instead of public interest in the political and social life of Hungary (...)*”. The Russian Foreign Agent Law reflects, according to the Russian authorities, the principle of non-interference into the domestic affairs of a sovereign State (CDL-AD(2014)025, para. 13).

<sup>112</sup> Pratt, Nicola, op. cit.

<sup>113</sup> CDL-AD(2006)014, para. 10.

<sup>114</sup> *Ibidem.*, para. 33.

<sup>115</sup> CDL-INF(2001)8 Guidelines and Report on the Financing of Political Parties, adopted by the Venice Commission at its 46<sup>th</sup> Plenary Meeting (Venice, 9-10 March 2001).

<sup>116</sup> *Parti Nationaliste Basque – Organisation Regionale D’Iparralde v. France, Application No. 71251/01, 7 June 2007.*

<sup>117</sup> *Ibidem.*, para. 43.

<sup>118</sup> CDL-INF(2001)8.

<sup>119</sup> See para. 47 of the judgment.

specific circumstances of the case, the legitimacy of the aim pursued by the prohibition and its judgment suggests that it is ready to accept that restricting or even totally prohibiting, foreign funding of political parties may be legitimate, if this funding could interfere with national politics and affect the outcomes of national elections. In particular, the Court acknowledged that the concept of “order” within the meaning of the French version of Articles 10 and 11 ECHR encompasses the “*institutional order*”, although the expression “*défense de l’ordre*” (protection of order) refers essentially to the prevention of disorder, as can be seen from the English version of Articles 10 and 11, which uses that term.

101. In some countries, foreign funding is restricted in relation to “political activities”<sup>120</sup> This category may be problematic if not adequately precise (see Section V.A Legality of the interference with the right of associations to seek financial and material resources). The Commission has previously criticised that the targeted “political activities” were defined by resorting to other, equally vague and unclear terms such as “political actions”, “state policy”, or “shaping of public opinion”<sup>121</sup>, in the absence of any uniformity in the interpretation of the notion<sup>122</sup>, and in the light of the broad construction of this notion in the case-law of the Constitutional Court<sup>123</sup>.

102. Indeed, the Commission considers that NGOs should be free to undertake research, education and advocacy on issues of public debate and that such “political” activities are an inherent part of ordinary activities, even the *raison d’être*, of NGOs.<sup>124</sup> As the Human Rights Committee has stated, the existence and operation of a plurality of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society.<sup>125</sup> According to Principle 6 of the Venice Commission/OSCE/ODIHR Guidelines on Freedom of Association, “associations shall have the right to freedom of expression and opinion through their objectives and activities (...) They shall have the right to participate in matters of political and public debate, regardless of whether the position taken is in accord with government policy or advocates a change in the law.”<sup>126</sup> They are entitled to promote changes to the law or to the constitutional order so long as they do so by employing peaceful means in the exercise of their freedom of expression.<sup>127</sup> Therefore, an association should not be prohibited, dissolved or otherwise penalised simply because it peacefully promotes a change in the law or constitutional order.<sup>128</sup> Unduly restrictive laws<sup>129</sup> and practices may produce a chilling effect on the exercise of rights and have an adverse effect on the freedom of association and democracy itself.<sup>130</sup>

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<sup>120</sup> Federal Law N. 121-FZ on Non-Commercial Organisations (“Law on Foreign Agents”) of the Russian Federation. In Ireland, there exists a prohibition of international funding on “third parties” which is defined as anyone (other than a political party or election candidate), including thus NGOs, who accept donations given for “political purposes”. However, “political purposes” are broadly defined as “*to present, directly or indirectly, the comments of a political party (...), to promote or oppose, directly or indirectly, the interest of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to a policy (...) of the Government or any public authority.*” Concerns have been expressed for the Irish system that an NGO engaged in, for example, a campaign to change public policy (political purpose) would be required to register as a “third party” and cannot receive international funding for the purposes of the campaign.

<sup>121</sup> CDL-AD(2014)025, para. 78.

<sup>122</sup> *Ibid.*, para. 75.

<sup>123</sup> *Ibid.*, para. 72.

<sup>124</sup> See, ECtHR, 17 February 2004, *Gorzelik and others v. Poland*, application no. 44158/98, para. 91 *et seq.*

<sup>125</sup> Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, CCPR/C/111/D/1993/2010 (July 2014), para. 7.3; *Lee v. Republic of Korea*, CCPR/C/84/D/1119/2002 (July 2005), para. 7.2.

<sup>126</sup> CDL-AD(2014)046, Joint Guidelines on Freedom of Association, p. 18.

<sup>127</sup> *Ibid.*, para. 89.

<sup>128</sup> *Ibid.*, para. 90.

103. It is true that as the Parliamentary Assembly stated in its Resolution 1744(2010) on Extra-Institutional actors in the democratic system, traditional state and political institutions – parliaments, governments, the judiciary, as well as political parties – are not the sole participants in the democratic political process. In modern democracies, there are a variety of other actors which do not stem from the traditional branches of institutional power, but exert influence on the process of formation of those institutions and on the political decision-making therein.<sup>131</sup> While pluralism of interests is an important feature of democracy and it is perfectly legitimate for members of the society to organise and lobby for their interest, secrecy may undermine the democratic principle of good governance. The decision-making process needs to be more transparent: *“people have a democratic right to know those actors who have access to government decision making for the purposes of influence. All kinds of influence which are not exercised in full transparency should be considered as being suspicious and harmful to democracy.”*<sup>132</sup> Further, in its 2013 Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying),<sup>133</sup> the Commission pointed to the very unequal means and resources of different actors: *“this may become a source of concern since resources do matter. It is usually the case that lobbyist with the ‘most money’ to dedicate to their lobbying activities (...) are usually the ones that are able to exercise relatively more and sustained political pressure.”*

104. For these reasons, information on lobbying activities in the context of public decision-making process should be disclosed and that the rules on disclosure should be proportionate to the importance of the subject matter of the public decision-making process.<sup>134</sup>

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<sup>129</sup> For instance, because of vagueness of definitions provided in the legislation such as “political activity”. In its Opinion CDL-AD(2014)025 on federal law n. 121-fz on non-commercial organisations (“law on foreign agents”), the Venice Commission considered that the definition of “political activities” needs to be carefully *reformulated* – and consistently applied – so as not to target human rights defenders and NCOs advocating, by lawful means and within the limits of the national legislation, peaceful changes of governmental policy.

<sup>130</sup> This is the reason why in some countries, for instance in Slovenia, the law exempts activities aimed at promoting democracy, human rights and the rule of law from registration and reporting requirements on lobbying (Slovenia, Act amending the integrity and Prevention of Corruption Act, 1 June 2011, cited by FRA Report on Challenges facing civil society organisations working on human rights in the EU, p. 23.) In Germany, the removal of tax exemption of an association because of the association’s activities which were deemed “political” by the authorities was invalidated by courts, which concluded that the term “political activities” was to be understood as activities supporting political parties, not political activities in general (Germany, Fiscal Court (*Finanzgericht*), Kassel, 4. Senat (2016), Press Release, 10 November 2016, cited by FRA Report on Challenges facing civil society organisations working on human rights in the EU, p. 23.)

<sup>131</sup> PACE, Resolution 1744(2010) on Extra-Institutional actors in the democratic system, 23 June 2010, para. 3.

<sup>132</sup> *Ibid.*, paras. 15 and 16.

<sup>133</sup> CDL-AD(2013)011, Report on the Role of Extra-Institutional Actors in the Democratic System (8-9 March 2013).

<sup>134</sup> CM/Rec(2017)2, Committee of Minister’s Recommendation on Legal Regulation of lobbying Activities in the context of public decision making, paras. 4-6. In the United Kingdom, the 2014 Lobbying Act requires campaigners, including charities, to register with the Electoral Commission if their spending during an election period passes a certain threshold, and if their activities could be perceived as intended to influence how people vote. The “regulated activities” (public activity intended to influence voting behaviour) are regarded *“as intended to influence voters to vote for or against political parties or categories of candidates, including political parties or categories of candidates who support or do not support particular policies or issues”* (The Electoral Commission, *Introduction to non-party campaigners*, [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0008/169451/intro-campaigner-npc-ukpge.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0008/169451/intro-campaigner-npc-ukpge.pdf), p. 6.) The Electoral Commission guidance further explains that *“Campaign activity can meet the purpose test even if it does not name a particular party or candidate. For example, campaigning for a policy that is closely and publicly associated with one or more political parties can meet the purpose test. Even if you intend your campaign activity to achieve something else, such as raising*

105. For the Venice Commission, lobbying activities fall therefore in between the political party activities and ordinary NGO activities.<sup>135</sup> As indicated in the above-mentioned standards, the public has a clear interest in knowing the lobbying actors who have access to government decision making process for the purpose of influence, including their financial sources whether domestic or foreign.

106. Therefore, the Venice Commission is of the opinion that such a drastic measure, as “public disclosure obligation” (i.e. making public the source of funding and the identity of the donors) may only be justified in cases of political parties and entities formally engaging in remunerated lobbying activities. In the latter case, the public disclosure obligation may be seen as pursuing the aim of ensuring transparency of the – political – influence exerted by lobbying groups on the process of formation of political institutions and on the political decision-making process (therefore, protection of the representative democracy) which may be considered as falling within the scope of the legitimate aim of “prevention of disorder” under the second paragraph of Article 11 ECHR which encompasses according to the ECtHR case-law, “the institutional order”<sup>136</sup>. In the case of *Vona v. Hungary*, the ECtHR considered that “*Social movements may*

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*awareness of an issue, it can still meet the purpose test if it can also reasonably be regarded as intended to influence how people vote.”* (The Electoral Commission, Overview of non-party campaigning, [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0003/165963/to-activities-npc.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0003/165963/to-activities-npc.pdf)).

A survey among NGOs indicated that 63% of the respondents felt that compliance with the Act would make “*some or all of their organisational or charitable objectives harder to achieve*”, mostly as a result of a lack of clarity as to what was covered by the Act. (UK, Commission on Civil Society and Democratic Engagement (2014), *Impact of the Lobbying Act on civil society and democratic engagement*, p.6, cited by European Union Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, p. 23.).

As an example of a disclosure requirement for lobbying activities, in the U.S., the Foreign Agents Registration Act (FARA), 22 U.S.C. § 611 et seq., as amended, imposes a disclosure requirement only, which is limited to situations in which an individual or entity acts as a legal *agent* of a foreign principal, in that it acts at the specific direction of the principal, and engages in political activities on the principal’s behalf. FARA requires persons acting as agents of foreign principals in a political or quasi-political capacity to make periodic public disclosure of their relationship with the foreign principal, as well as of activities, receipts and disbursements in support of those activities. (FARA provides that an “agent” which acts under the direction or control of a foreign government, entity, or person, and engages in political activities in the United States “for or in the interests of” such foreign entity, must register with the Justice Department and make periodic disclosure of the foreign principal for which the agent works, as well as of activities, receipts, and disbursements in support of those activities.)

The Law primarily focuses on the activities of lobbyists and publicity agents acting on behalf of foreign governments. The Law has been significantly narrowed by amendments over time, in part in response to decisions of the U.S. courts, and requires a very high degree of control between the foreign entity and the agent. FARA does not apply to news or press organisations not owned or controlled by a foreign entity. (For more information, see U.S. Department of Justice, *Foreign Agents Registration Act*, available at <https://www.fara.gov>; and *Foreign Agents Registration Act Enforcement*, available at <https://www.justice.gov/usam/criminal-resource-manual-2062-foreign-agents-registration-act-enforcement>.) In 2015, there were 353 active registrations under FARA, primarily law firms, lobbyists, public relations firms, and tourism agencies. FARA is almost never applied to NGOs. (U.S. Dep’t of Justice, *Report of the Atty Gen. to Congress on Admin. of the Foreign Agents Registration Act of 1938, as amended, for the six months ending June 30, 2015* (2016), available at [https://www.fara.gov/reports/FARA\\_JUN\\_2015.pdf](https://www.fara.gov/reports/FARA_JUN_2015.pdf).) The United States does not otherwise restrict foreign funding of NGOs that do not engage in lobbying activities.

<sup>135</sup> See the US Foreign Agents Registration Act (FARA), 22 U.S.C. § 611.

<sup>136</sup> *Parti Nationaliste Basque – Organisation Régionale D’Iparralde v. France*, cited above. In the same vein, in its decision 2018-773 of 20 December 2018, the French *Conseil Constitutionnel* examined the constitutionality of anti-misinformation law which introduced amendments to the Electoral Code and imposed on online platform operators an obligation of transparency, i.e. the obligation of disclosure of key information in relation to sponsored content considered by the judge as false allegations that is “massively, deliberately, artificially” spread online. The information which should be disclosed includes



*play an important role in the shaping of politics and policies, but compared with political parties such organisations usually have fewer legally privileged opportunities to influence the political system. However, given the actual political impact which social organisations and movements have, when any danger to democracy is being assessed, regard must be had to their influence.*<sup>137</sup> On the other hand, in case the association concerned does not perform any remunerated lobbying activities, the imposition of a blanket “disclosure obligation” concerning the financial sources and the identity of the donors cannot be justified with the broadly defined political nature of the activities conducted by the association. Admittedly, it might not always be easy to determine what constitutes “formal lobbying” in the absence of a clear legal definition. In such cases, this notion should be interpreted restrictively.

#### **5. Ensuring transparency of associations receiving public support**

107. Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe states that NGOs should be assisted in the pursuit of their objectives through public funding and adds that NGOs which have been granted any form of public support can be required to have their accounts audited by an institution or person independent of their management.

108. Like the Committee of Ministers, the Venice Commission is of the view that some “public disclosure obligations” can be imposed on associations with public utility status, but those obligations should be limited to information on how the public funds obtained by the association concerned are spent. The disclosure obligations should not be extended to all financing, including from private donors. In addition, all reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect business confidentiality.<sup>138</sup>

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also the identity of individuals and organisations that financed the promotion of the misinformation and the amount of the financing in case it is above a certain threshold. Considering that the obligation of disclosure is only valid during the three months period prior to the elections (legislative or presidential) and that it covers only information related to the electoral campaign, the *Conseil Constitutionnel* concluded that the obligation of transparency imposed by the anti-misinformation law is intended to provide citizens with the means to evaluate the value and the scope of the sponsored information during election period and thereby contributes to ensure the clarity of the electoral debate. Ensuring the fairness of elections is therefore considered by the *Conseil Constitutionnel* as a legitimate aim which may justify proportionate restrictions to the freedoms of expression and communication.

<sup>137</sup> ECtHR, 9 July 2013, *Vona v. Hungary*, application no. 35943/10, para. 56.

<sup>138</sup> Recommendation CM/Rec(2007)14, para. 64. The issue of transparency of public support to NGOs has been discussed in the context of the Romanian Draft Law No. 140/2017 on associations and foundations. (CDL-AD(2018)004, paras. 57-60) In this Opinion, the Commission and the OSCE/ODIHR have accepted, when discussing the financial reporting obligations for all associations and foundations (regardless of whether or not they have public utility status) that it is understandable that the public has an interest in knowing how public funds are spent. There was no apparent “pressing need” however, for the public to obtain detailed information with respect to private funding sources of associations’ activities.

## **C. Necessity and Proportionality of the interference with the right of associations to seek financial and material resources**

### **1. Proportionality of reporting/public disclosure obligations**

109. In its case-law related to Articles 10 and 11 of the ECHR, the ECtHR adopts a rigorous approach to the issues of necessity and proportionality in relation to the measures taken to secure legitimate aims.<sup>139</sup> There are a number of general principles applicable under Article 11 ECHR which are of particular relevance for the present report. The exceptions set out in Article 11 are to be construed strictly and only convincing and compelling reasons can justify restrictions to the freedom of association. The ECtHR does not confine itself to ascertaining whether the State exercised its discretion reasonably, carefully and in good faith, but it looks at the measures (interference) complained of in the light of all the concrete circumstances of the case and determine whether the reasons adduced by the national authorities to justify it are “*relevant and sufficient*” which presupposes the existence of a “*pressing social need*”.<sup>140</sup>

110. First, the principle of proportionality requires that, at the legislative stage, an assessment be made on whether the interference in the exercise of the right to freedom of association is the least intrusive of all possible means that could have been adopted. The authorities therefore bear the burden of proving that any restriction pursues a legitimate aim and that this aim cannot be fulfilled by any less intrusive actions.<sup>141</sup> The required level of detail and the existence of unrealistically short and strict deadlines for submitting the information are other examples of onerous reporting obligations. Moreover, a concrete risk analysis should be made concerning the involvement of associations in the commission of crimes such as corruption and money laundering in order to justify the measures imposed.

111. Secondly, the cumulative effect of all legal rules on the freedom needs to be assessed, since the overlap of additional reporting obligations with other already existing reporting obligations (whether they are of a fiscal nature or otherwise) is likely to create an environment of excessive State monitoring over the activities of NGOs, which could hardly be conducive to the effective enjoyment of freedom of association.<sup>142</sup>

112. In the same vein, States have at their disposal alternative instruments such as banking laws or financial surveillance mechanisms to fight against money laundering and criminal laws, including specific anti-terror legislation, to address terrorism and terrorism financing threat. Therefore, the priority, in the fight against crime, should be given to the already existing relevant legislation and mechanisms, before resorting to additional cumbersome regulations concerning financing, including foreign financing, of associations.<sup>143</sup> As the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association rightly considered “(...) *by their direct*

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<sup>139</sup> Cf. “States have, for example, been allowed a wide margin of appreciation with respect to interferences with rights defended on national security grounds” (Human Rights File No. 17 ‘The margin of appreciation: interpretation and discretion under the European Convention on Human Rights’), p.10.

<sup>140</sup> See, for example, *United Communist Party of Turkey and Others v. Turkey*, para. 47. See also, Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, CCPR/C/111/D/1993/2010 (July 2014), para. 7.3. See also Communication No. 2001/2010, *Q v. Denmark*, Views adopted on 1 April 2015, para. 7.3.

<sup>141</sup> CDL-AD(2018)006, para. 47.

<sup>142</sup> CDL-AD(2018)004, para. 62; CDL-AD(2018)006, para. 38.

<sup>143</sup> For instance, in their Joint Opinion CDL-AD(2018)006, the Venice Commission and ODIHR criticised the e-declaration requirements for anti-corruption activists introduced by Law of Ukraine No. 1975-VIII of 23 March 2017, as foreseen by draft law No. 6674, to file electronic asset declaration in the same from envisaged for public officials, for being disproportionate and discriminatory, see paras. 60 and 61.

*connections with the population and their prodigious work in, inter alia, poverty reduction, peace building, humanitarian assistance, human rights and social justice, including in politically complex environments, civil society plays a crucial role against the threat of terrorism. Unduly restrictive measures, which can lead donors to withdraw support from associations operating in difficult environments, can in fact undermine invaluable CSO initiatives in the struggle against terrorism and extremism, and ultimately have adverse consequences on peace and security.*<sup>144</sup>

113. Lastly, the necessary measures should not be used to restrain dissenting views and to justify repressive practices against the political opposition. As the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stated, “*Vague and broad definitions of terrorism, or the absence of such a definition, inhibit the work of associations that do not pursue terrorist tactics. While some control over the existence and work of associations is necessary for the State, as a measure to prevent terror, the State must not disproportionately obstruct the work of all associations.*”<sup>145</sup>

## **2. Proportionality of sanctions imposed in case of violation of reporting/public disclosure obligations**

114. Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe accepts that since NGOs, like everyone else, are subject to the law, sanctions may be imposed on them for failing to observe its requirements. However, it is essential that the principle of proportionality be respected in both framing and applying sanctions for non-compliance with a particular requirement. Moreover there should always be a clear legal basis for any sanctions that are imposed in a given case.

115. When assessing the proportionality of interference, apart from the assessment on whether the administrative requirements (reporting/public disclosure obligations) imposed on NGOs by the law, are or are not excessively burdensome, the nature and severity of the sanctions imposed in case of breach of those requirements must be taken into account.<sup>146</sup> The sanctions provided for in the law must be proportionate to the gravity of the wrongdoing.

116. The Venice Commission has, in recent years, dealt with laws directed at NGOs receiving foreign funding,<sup>147</sup> in which it assessed *inter alia* the proportionality of sanctions imposed on NGOs in case of breach of the rules concerning the reporting and disclosure obligations in relation to their funding laid down in laws. The principle of proportionality gains increased significance when assessing whether an association may be prohibited or dissolved,<sup>148</sup> as such measures should always be a means of last resort, i.e. in cases where an association has engaged in conduct causing an imminent danger of violence or other serious breach of the law. The ECtHR has stated that involuntary dissolution is the most drastic sanction possible in respect of an association and, as such, should be applied only in exceptional circumstances of

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<sup>144</sup> A/HRC/23/39 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 24 April 2013, para. 26.

<sup>145</sup> UN A/61/267, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, paras. 20-24. see also, CDL-AD(2016)002, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey (11-12 March 2016), paras. 95-121.

<sup>146</sup> ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, app. no. 37083/03, 8 October 2009, para. 82. In the Opinion CDL-AD(2017)015, the Venice Commission welcomed the gradual process of sanctioning introduced by the Law on Transparency (see, para. 59).

<sup>147</sup> See Section IV of the Present Report on Previous Opinions of the Venice Commission concerning the funding of associations from foreign sources.

<sup>148</sup> Guidelines on Freedom of Associations, paras. 113-115.

very serious misconduct.<sup>149</sup> Therefore, the authorities may never resort to such measures as prohibiting or dissolving an association on the basis of minor law-breaking. A mere failure to respect certain legal requirements or irregularities in internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution. Domestic law should thus delimit precisely the circumstances in which such drastic sanctions could be applied.

117. The Venice Commission also generally assessed that “*the dissolution of an NGO is an extreme measure, which needs to be based on a well-founded rationale and it is well established under the international case-law that it can only be resorted to in exceptional situations.*”<sup>150</sup>

118. Similarly, the automatic imposition of sanctions excludes any discretion by the judge which would allow him/her to make an appropriate proportionality assessment of the sanction imposed on the association based on the seriousness of the breach of the reporting obligations. Such an automatic sanction seems contrary to the requirement that it needs to be assessed whether a particular sanction is proportionate in the given circumstances.<sup>151</sup>

119. The authorities must take care to apply the measure that is the least disruptive and destructive of the right to freedom of association. There should thus be a range of sanctions which are proportionate to the gravity of the wrongdoing<sup>152</sup>. Irregularities as regards reporting obligations or minor unintentional mistakes, for example, should lead to lighter sanctions.<sup>153</sup>

120. Moreover, as stated in the Guidelines on the freedom of association, sanctions should be preceded by a warning with information as to how a violation may be rectified. In this case, the association concerned should be given ample time to rectify the violation or omission. The

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<sup>149</sup> ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov*, para. 62. The Court considered that a mere failure to respect certain legal requirements on internal management of NGOs cannot be considered such serious misconduct as to warrant outright dissolution (para. 82).

<sup>150</sup> See, CDL-AD(2011)035, Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, para. 107. In the same vein, in its Opinion on the Hungarian draft Law on the transparency of organisations receiving support from abroad, the Venice Commission criticised the draft Law for imposing the sanction of dissolution on associations in case of breach of one of the transparency obligations, as laid down in the draft Law, *regardless of the nature of the obligation* breached (CDL-AD(2017)015, para. 60). Considering that it was not convinced that any failure to fulfil the reporting or disclosure obligations stemming from the draft Law could be qualified as “serious misconduct” which would justify the imposition of the sanction of dissolution, the Commission stated that the dissolution of an association can only be proportionately pronounced by courts in cases where an association is engaged in criminal activity; however, the dissolution appears as a disproportionate measure in case of simple failure to fulfil the reporting obligations stemming from the law (CDL-AD(2017)015, para. 62).

<sup>151</sup> The automatic imposition of the sanction of exclusion of the association concerned from the register of non-profit institutions with the result that the association becomes payer of profit tax for breach of any reporting obligation stemming from the Ukrainian draft laws no. 6674 and 6675 or the suspension of the activities of the association concerned for a period of 30 days and its subsequent dissolution, as was the case in the Romanian draft Law on associations and foundations, have been considered by the Commission to be disproportionate to the legitimate aims pursued by the reporting obligations (See, CDL-AD(2018)006, para. 52; CDL-AD(2018)004, paras. 74 et s.)

<sup>152</sup> See e.g. CDL-AD(2014)025, paras. 101f. See instead CDL-AD(2017)015, para. 59 in which the Commission welcomed the gradual nature of the sanctions.

<sup>153</sup> CDL-AD(2018)006, Ukraine - Joint Opinion on Draft Law No. 6674 "On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance" and on Draft Law No. 6675 "On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance", para. 52.

Venice Commission has suggested in the past that, even before the issuance of a warning, the association should be offered the possibility to seek clarifications about the alleged violation.<sup>154</sup>

121. The principle of proportionality also requires that the judge involved in the sanction procedure should have sufficient discretion in order to be able to make an appropriate proportionality assessment of the sanction to be imposed on the association based on the seriousness of the breach of obligation stemming from the legislation.<sup>155</sup> This is the reason why any rigid and automatic sanction procedure, such as blanket restrictions, with no discretion granted to the prosecutor or to the judge to decide whether to initiate the procedure and which sanctions to impose, or any automatic dissolution for breaching the reporting/disclosure obligations without recourse to a court, are deemed to lead to disproportionate sanctions on associations.<sup>156</sup>

#### **D. Discriminatory nature of restrictions on foreign funding of associations**

122. The right to freedom of association is also a collective right in the sense that the association itself and/or the collectively of its members are entitled to the rights and freedoms implied therein. This means that associations shall themselves enjoy other human rights, including the right to be protected from discrimination.<sup>157</sup> In its resolutions 22/6 and 22/L.13, the UN Human Rights Council called upon the States to ensure that reporting requirements placed on individuals, groups and organs of society do not inhibit functional autonomy, and that restrictions are not discriminatorily imposed on potential sources of funding (...) other than those ordinarily laid down for any other activity unrelated to human rights within the country to ensure transparency and accountability, and that no law should criminalise or delegitimise activities in defence of human rights on account of the geographic origin of funding thereto. It should also be reminded that in the case of *Moscow Branch of the Salvation Army v. Russia*, the ECtHR was reluctant to accept the foreign origin of an NGO as a legitimate reason for a differentiated treatment;<sup>158</sup> the same reluctance would *a fortiori* apply in case of mere foreign funding.

123. Throughout its opinions, the Venice Commission has constantly pointed to problematic provisions of legislations submitted to its assessment, when the difference in treatment among different civil society organisations – which are in an analogous situation – concerning the regulation of their funding, is not capable of objective and reasonable justification. However, any difference in treatment does not automatically violate the prohibition of discrimination. Under the ECtHR case-law, it must be established that persons in similar or comparable situations enjoy preferential treatment and that this difference in treatment does not have objective justification and therefore is discriminatory.<sup>159</sup> In particular, States are entitled to favour certain areas of activities which they consider to have priority in the satisfaction of the most important needs of the society and may thus link the recognition of public utility status and of public support to the requirement that the relevant associations pursue activities in those specific areas.<sup>160</sup> Discrimination under Article 26 of the ICCPR arises when a difference in

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<sup>154</sup> *Ibid.*, p. 52 and CDL-AD(2018)004 Romania – Joint Opinion on Draft Law No. 140/2017 on amending governmental ordinance No. 26/2000 on associations and foundations, para. 81.

<sup>155</sup> CDL-AD(2018)004, para. 81.

<sup>156</sup> CDL-AD(2017)015, para. 61: “In principle, the judge involved in the procedure in particular has to have sufficient discretion in order to be able to make an appropriate proportionality assessment of the sanction to be imposed on the association or foundation to the seriousness of the breach of obligation stemming from the Draft Law.”

<sup>157</sup> Guidelines on Freedom of Association, para. 19.

<sup>158</sup> ECtHR, *Moscow Branch of the Salvation Army v. Russia*, Application No. 72881/01, Judgment of 5 October 2006, par. 81-86.

<sup>159</sup> See, for instance, ECtHR, *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy* (no. 2), application no. 26740/02, para. 44.

<sup>160</sup> CDL-AD(2018)035, para. 11.

treatment does not pursue an aim that is legitimate under the Covenant or when the distinction is not based on reasonable and objective criteria in pursuit of that aim (see para. 17, supra).

124. First, the Venice Commission pointed in its opinions to the differentiated treatment among foreign-funded associations on the basis of the nature of the activities carried out; this may be done by applying the restrictions to associations carrying out “political activities”<sup>161</sup>, for example, or by excluding certain types of associations.<sup>162</sup> The authorities should demonstrate convincingly that the legitimate aim pursued by restricting the rights of some associations does not apply to the others. The Commission has found that when the authorities fail to prove the legitimate grounds for exempting some associations, doubt is cast on the legitimacy of the restrictions imposed on the others.

125. Secondly, unequal treatment between the civil society sector and other legal persons/non-state entities, for instance, the business sector, may raise issues when the State fails to provide specific justification for it and demonstrate that there are legitimate grounds for imposing for example additional reporting obligations only to associations.<sup>163</sup>

126. The third case concerns the context in which a draft law regulating foreign funding of associations is submitted and discussed in the country and the ensuing risk of stigmatisation. The use of specific negative labels such as “foreign agent” or the dissemination of disparaging statements through the press or media campaigns clearly pursues an objective of stigmatisation.<sup>164</sup>

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<sup>161</sup> CDL-AD(2014)025, para. 90 *et seq.*, CDL-AD(2013)030, para.44 *et seq.*

<sup>162</sup> CDL-AD(2017)015, para. 8.

<sup>163</sup> Although the Ukrainian draft laws on public transparency of information on finance activity and on amending the tax code (Draft Laws nos. 6674 and 6675) did not specifically concern the issue of foreign funding of associations, some considerations of the Venice Commission on these drafts may also be relevant for the subject matter of the present report. Draft laws nos. 6674 and 6675 required associations to submit detailed information, including the number of members and amount of membership fees, the total amount of income and a list of physical and legal persons who contributed with more than 50 subsistence minimums (2400 euros) to the organisation, a list of ten employees who were paid the largest amounts of wages in the reporting year, the total amount of funds used to pay the third parties etc. However, the declared aim of the draft provisions (introducing a transparent reporting system to prevent of corruption) was not able to sufficiently justify why associations are required to submit more reports and information than other legal entities, such as businesses. This lack of justification for differential treatment between sectors was also due to the absence of any prior risk assessment conducted by the authorities to substantiate the threat specifically posed by the NGO sector that would justify an additional obligation upon them in comparison to other legal entities in other sectors.

<sup>164</sup> One particular example is the obligation imposed on civil society organisations in the Russian Federation to register as “foreign agent” in case they receive monetary assets and other property from foreign states and if they participate in “political activities” in the territory of the Russian Federation. As rightly noticed by the Council of Europe Commissioner for Human Rights, the term “foreign agent” has usually been associated in the Russian context with the notion of a “foreign spy” and/or “traitor” and thus carries with it a negative connotation and may result in ostracism or stigma. In its Opinion adopted in June 2014, the Venice Commission found that the immediate effect of the Law imposing the very negative “foreign agent” label on foreign funded associations is that of stirring the suspicion and distrust of the public with respect to certain NGOs and stigmatising them, thus having a chilling effect on their activities. Recalling that the practical considerations – such as the changing environment in which NGOs operate - should be taken into account and the principle of non-discrimination under Article 14 ECHR and 26 ICCPR should be respected, the Commission recommended to the authorities that the term “foreign agent” is replaced by a more neutral term (CDL-AD(2014)025, paras. 61, 65 and 90). In its Opinion on the Hungarian Draft Law on the Transparency of Organisations receiving Support from Abroad, the Venice Commission was much more explicit as to the discriminatory impact of the negative political context on the environment in which associations operate. It considered that the context surrounding the adoption of the relevant law and specifically a virulent campaign by some state authorities against civil society organisations receiving foreign funding, portraying them as acting against the interest of the

127. Finally, the specific reporting and public disclosure obligations imposed upon foreign funded associations, as opposed to domestic funded associations, and the resulting differentiated treatment between the two categories also needs to be justified with objective and cogent reasons and there should be a relationship of proportionality between the means employed (the scope of reporting and disclosure obligations imposed on foreign funded associations) and the goal pursued by the different treatment. The "motives" which have inspired the Government are to be taken into account in this context. It is true that there exist essentially different factual circumstances surrounding respectively a foreign funded and a domestically funded association. However, the difference between factual circumstances should be able to justify the difference in treatment. For this reason, the response to the complaint under the substantive question (on whether the additional reporting and public disclosure obligations imposed on foreign funded associations are in line with the freedom of association or not) will also be the response to the question on whether there are reasonable and objective justification of the difference in treatment in relation to discrimination under Article 14 ECHR.

#### **E. Guarantee of effective legal protection**

128. The recognition that regulations concerning associations should facilitate the establishment and functioning of associations and provide them with effective protection in order not to make the guarantees of those regulations illusory, makes it of vital importance that the interpretation and application of these regulations, including those that serve to restrict their operations, be open to review by a court or other independent and impartial body in fair and speedy proceedings.<sup>165</sup> Principle 11 of the Guidelines on Freedom of Association states this requirement as follows: *"Associations, their founders and members and all persons seeking to exercise their right to freedom of association shall have access to effective remedies in order to challenge or seek review of decisions affecting the exercise of their rights. This means providing associations and all relevant persons with the right to bring suit or to appeal against and obtain judicial review of any actions or inactions of the authorities that affect their rights, including those actions concerning the establishment of associations and their compliance with charter or other legal requirements. To ensure effective remedy, it is imperative for the judicial procedures, including appeal and review, to be in accordance with fair trial standards. Furthermore, the procedures shall be clear and affordable. Remedies shall be timely and shall include adequate reparation, including compensation for moral and pecuniary loss."*<sup>166</sup>

129. The same holds true for legal protection against discriminatory treatment in regulations and their application to the access to foreign funding. Any difference in treatment must be justified on the basis of the character of the association concerned and/or the circumstances under which it operates. The association that deems itself victim of unequal treatment must have the opportunity to address an impartial and independent court for a judgment on whether the differentiated treatment is justified.

130. Independent and impartial judicial review of legal restrictions imposed upon and of non-legal measures against associations that wish to receive and use foreign funding is all the more important as these regulations or measures may serve a political purpose that is alien to the freedom of association. They may be directed against a particular association or group of associations, or against a particular foreign donor or group of donors. This may result in discriminatory restrictions, in arbitrary measures and in abuse of power. In general, that kind

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society, may render such provisions problematic, raising concern as to whether they breach the prohibition of discrimination, contrary to Article 14 ECHR.

<sup>165</sup> Guidelines on Freedom of Association, para. 25.

<sup>166</sup> Guidelines on Freedom of Association, para. 36.

of governmental behaviour will be against the legal order of the State concerned, but associations in most cases may only find effective protection if they can rely on a legal remedy by an independent and impartial court with adequate powers to annul such legal restrictions or leave them out of application, to prohibit such non-legal measures or take away their effects, or accord damages; and this in fair and speedy proceedings. This confirms the importance of the existence of an independent judiciary in the country. Its absence may create the risk that the discriminatory or unduly restrictive measures will remain in force. Similar considerations are valid in a context where the executive does not respect the decisions of the judiciary.

131. The requirement of “a fair trial” is intended, *inter alia*, “to place the ‘tribunal’ under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessments of whether they are relevant to its decision”.<sup>167</sup> Therefore, the judicial review should not be limited in scope and in principle, the judge involved in the procedure in particular has to have sufficient discretion in order to be able to make a proportionality assessment.<sup>168</sup>

132. It also requires that the association concerned should be allowed to participate in the hearing and given sufficient and equal opportunity to present its own arguments and oppose those of the other party, which also raises the issues of representation and fair access to legal aid if needed.<sup>169</sup> Moreover, the case must be examined “within a reasonable time” as an application of the principle “justice delayed is justice denied”.

133. If the association concerned is of the opinion that the decision in its case was not preceded by a fair trial, this may be a ground for appeal to a higher court. If an appeal is not possible or, in a final instance does not result in finding that complaint well-founded, the association may bring the case before the ECtHR or before the Human Rights Committee of the United Nations, as the case may be.

134. There are, of course, also non-judicial remedies, which do not replace but complement the judicial remedies, of which associations may avail themselves of to combat unjustifiably restrictive regulations and/or their application. They may use their right to freedom of expression and their right to freedom of assembly to bring their grievances to the fore and to mobilise the press, public opinion and the vigilant society. They may also address members of Parliament and ask for legislative or other measures to take care of their grievances.

## VI. Conclusion

135. The protection afforded by Article 11 ECHR and Article 22 ICCPR extends to all activities of associations, including advocacy of positions that are unpopular with the government or with the general public. According to Principle 6 of the Venice Commission/OSCE/ODIHR Guidelines on Freedom of Association, associations have the right to participate in matters of political and public debate, regardless of whether the position taken is in accord with

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<sup>167</sup> ECtHR, judgment of 19 April 1993, *Kraska v. Switzerland*, para. 30.

<sup>168</sup> See, CDL-AD(2017)015, para. 59. See also ECtHR 25 June 1997, *Halford v. United Kingdom*, no. 20605/92, para. 64: “The Court reiterates that the effect of article 13 is to require the provision of a domestic remedy allowing the competent national authority to deal with the substance of the relevant convention complaint and to grant appropriate relief”. A national law limiting the scope of judicial review could therefore be problematic under Article 13 ECHR.

<sup>169</sup> For these reasons, the provision of the Hungarian Law on Transparency of Organisations which provides for a “simplified procedure” (i.e. without hearing) for the cases of dissolution of an organisation for not fulfilling its reporting obligations was criticised by the Venice Commission (CDL-AD(2017)015), para. 62). The simplified cancellation procedure was designed by the 2011 Act CLXXV for basic breaches, i.e. where an NGO is dissolved without successor or has no assets. As such, the procedure did not provide for adequate procedural safeguards.



government policy or advocates a change in the law, and they are entitled to promote changes to the law or to the constitutional order so long as they do so by employing peaceful means in the exercise of their freedom of expression and association.

136. In order to allow associations to have at their disposal the necessary means to pursue their activities, these provisions also guarantee freedom of the fundraising activities of associations. In the Guidelines on Freedom of Association, the Venice Commission and the OSCE/ODIHR accordingly affirmed that freedom of association would be deprived of its meaning if individuals wanting to associate did not have the ability to access resources of different types, including financial, in-kind, material and human resources, and from different sources, including public or private, domestic, foreign or international. Therefore, the ability to seek, secure and use resources, including foreign resources, is essential to the existence and operation of any association<sup>170</sup> and an inherent part of the right to freedom of association.

137. The right to freedom of association, including therefore the right of associations to seek resources, may be restricted only under the three cumulative conditions foreseen in, inter alia, Article 11(2) of the ECHR and Article 22(2) of the ICCPR, i.e. the restriction must be prescribed by law (condition of legality, including the requirements of foreseeability and accessibility); the restriction must pursue at least one of the legitimate aims indicated in Article 11(2) ECHR and Article 22(2) ICCPR (the condition of legitimacy), and the restriction must be necessary in a democratic society to achieve that legitimate aim (the condition of necessity requiring also proportionality).

138. The Venice Commission has dealt in a number of opinions with various reporting/ public disclosure obligations imposed on associations concerning the origin of their funding, with a special focus on obligations imposed on foreign-funded organisations. In those opinions, the Venice Commission accepted that the aim of ensuring transparency in order to prevent terrorism financing and money laundering, which is one of the most commonly invoked motives used by governments in order to justify such obligations could be a legitimate and acceptable ground for imposing stricter control on funding of NGOs. The Venice Commission also accepted that, while “enhancing transparency’ of the NGO sector does not appear to be by itself a legitimate aim for restricting the freedom of association, it can be a means to achieving the legitimate aims of combating fraud, embezzlement, corruption, money laundering or terrorism financing.”

139. The resources received by associations may therefore legitimately be subject to some reporting and transparency requirements which, however, should not be unnecessarily burdensome, and must be proportionate to the size of the association and the scope of its activities.<sup>171</sup>

140. The Venice Commission considers however that the legitimacy of the aim pursued by the transparency requirements depends on the nature of the obligation imposed on associations. In this context, “reporting obligations” should be distinguished from “public disclosure obligations” imposed on associations concerning their financial sources. A “*reporting obligation*” consists in reporting to the relevant authorities the amount and the origin of the funding. A “*public disclosure obligation*” consists in making public, for instance on the website of the association concerned or in the press or the official journal, the source of funding (either domestic or foreign) and potentially, the identity of donors.

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<sup>170</sup> Guidelines on Freedom of Association, para. 200. See also the Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/23/39, of 24 April 2013, para. 8, and Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers’ Deputies, para. 50.

<sup>171</sup> Joint Guidelines on Freedom of Association, para. 104.

141. The aim of combating terrorism financing and money laundering implies pursuing long-term measures with a view to preventing the causes of terrorism, including bringing sponsors of terrorist acts to justice to answer for all consequences of their acts. The duty of researching and studying information concerning the commission of those crimes, and taking all necessary and proportionate measures to combat them, is incumbent on the state authorities. Consequently, “reporting obligations” consisting in reporting the amount and the origin of funding to the authorities to allow them to fight crime in an efficient manner, can in principle be considered as pursuing the legitimate aim of fighting against terrorism financing and money laundering, since the character of the measure is relevant to this declared legitimate aim.

142. The same conclusion cannot however be drawn concerning “public disclosure obligations” which aim at informing the public about the origin and the amount of the financing. It is not the public’s duty to combat crime, in particular terrorism financing and money laundering, which requires specific instruments that are at the disposal of the state authorities. Consequently, the obligation to make public the information about the source of funding (public disclosure obligation) does not appear to be a relevant measure to pursue the legitimate aim of combating terrorism financing and money laundering.

143. It should however be stressed that, under some strict conditions laid down by the ECtHR in its case-law<sup>172</sup>, when the state-held information is considered a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of public debate and meets therefore a public-interest test in order to prompt a need for disclosure, the public’s right to access to the state-held information is protected under Article 10 ECHR.

144. As to the aim of “preventing NGOs from being misused for political goals”, the Venice Commission deems it necessary to emphasise in the first place that no legal regulation should, in any form or manner whatsoever, infringe upon the democratic rights of individuals to express their opinions, conduct advocacy activities and campaign for political change. Thus, restrictions on association activities for merely advancing “political goals” are illegitimate. At the same time, the Commission considers that the narrow category of formal lobbying activities, 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*”,<sup>173</sup> may justify the imposition of transparency requirements concerning the funding of associations to the extent that they engage in formal lobbying activities because the public may have a clear interest in knowing the lobbying actors who have access to government decision-making processes for the purpose of influence, including their financial sources.

145. Consequently “public disclosure obligations” (i.e. making public the source of funding and the identity of the donors) imposed on associations performing lobbying activities, as narrowly defined above, may be seen as pursuing the aim of ensuring transparency of the *political* influence exerted by lobbying groups on the process of formation of political institutions and on the political decision-making process. This purpose appears to be covered by the legitimate aim of “prevention of disorder” under the second paragraph of Article 11 ECHR, which also protects according to the ECtHR case-law, “the institutional order”.

146. However, restrictions on the freedom of association can be considered as pursuing legitimate purposes only if they aim to avert a real, and not only hypothetical danger. Any restrictions therefore can only be based on a prior risk assessment indicating “plausible evidence” of a sufficiently imminent threat to the State or to a democratic society. Abstract

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<sup>172</sup> See, ECtHR, *Magyar Helsinki Bizottság v. Hungary* (18030/11), 8 November 2016, paras. 145-176.

<sup>173</sup> CM Recommendation CM/Rec(2017)2 Legal Regulation of Lobbying Activities in the context of Public Decision Making.

“public concern” and “suspicions” about the legality and honesty of financing of the NGO sector, without pointing to a substantiated concrete risk analysis concerning specific involvement of the NGO sector in the commission of crimes, cannot justify the restrictions to this right. Any claimed legitimate aim for restricting foreign funding should thus be case-specific and evidence-based.

147. As to the necessity and proportionality of measures taken to secure the above-mentioned aims, interference with the right of associations to seek and obtain financial and material resources should be the least intrusive of all possible means that could have been adopted. The authorities should be able to prove that the legitimate aim pursued by the measure cannot be reached by any less intrusive measures. In particular, an outright ban on foreign funding, or requiring prior authorisation from the authorities to receive or use such funds, is not justified. Moreover, the authorities are also under an obligation to assess the cumulative effect of all legal rules combined, since the overlap of additional reporting obligations with other already existing reporting obligations is likely to create an environment of excessive State monitoring over the activities of NGOs. Further, in the fight against crimes, in particular against terrorism financing and money laundering, States should give priority to the already existing alternative instruments such as banking laws or financial surveillance mechanisms, before resorting to additional cumbersome regulations concerning financing, including foreign financing, of associations.

148. The sanctions imposed on associations in case of a violation of obligations stemming from legislation on foreign funding also must be proportionate. In particular, irregularities regarding the fulfilment of reporting or public disclosure obligations cannot be qualified as “serious misconduct” which would justify the dissolution of the NGO concerned.

149. Discrimination concerns also arise when civil society organisations that are in an analogous situation, are treated differently concerning the regulation of their funding, without objective and reasonable justification. Different categories of discrimination have been examined in the present study, including different treatment among foreign-funded associations, unequal treatment between the civil society sector and other sectors, such as the business sector, and differential treatment through a negative political context (for instance virulent campaigns against associations receiving foreign funding) in which a draft law regulating foreign funding of associations is submitted and discussed in the country.<sup>174</sup> Finally, the report also emphasises the importance of effective legal remedies to allow the associations to challenge or seek review of decisions affecting the exercise of their rights, including the right to seek, receive and use resources from any available sources.

150. In the light of the foregoing, the following main conclusions are drawn and recommendations are made:

- States must create an enabling environment in which associations can effectively operate and facilitate access of associations to funding, including foreign funding, in order to achieve their aims;

*Legitimate aims of interference with the right of associations to seek financial and material resources:*

- Any measure restricting the right of associations to seek, secure and use resources, including foreign resources, must pursue one of the legitimate aims under Article 11(2) ECHR and 22(2) ICCPR;

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<sup>174</sup> See, Section V. D. of the present report “Discriminatory nature of restrictions on foreign funding of associations”.

- Reporting obligations may be considered to pursue the legitimate aim of preventing terrorism financing and money laundering by enhancing transparency as regarding financing of such activities; public disclosure obligations are not suitable for this purpose;
- “Public disclosure obligations” could pursue the legitimate aim of prevention of disorder only as concerns formal lobbying activities (and funding of political parties) carried out by associations. Lobbying as a professional remunerated activity should be clearly defined in the legislation and be clearly distinguished from ordinary advocacy activities of civil society organisations, which should be carried out unhindered;

*Proportionality of interference with the right of associations to seek financial and material resources:*

- Any reporting obligations should be based on a prior risk assessment concerning the specific involvement of the NGO sector in the commission of crimes such as terrorism financing and money laundering;
- At the legislative stage, an assessment should be made of whether the interference is the least intrusive of all possible means that could have been adopted. State authorities should consult those associations whose interests might be affected during the drafting process;
- The authorities should ensure that the overlap of additional reporting/public disclosure obligations with other already existing measures does not create an environment of excessive state monitoring; in the fight against crime, priority should be given to already existing instruments (banking laws, anti-terror legislation) before resorting to new cumbersome reporting obligations;
- The sanctions imposed on associations in case of violation of obligations stemming from legislation on foreign funding should be proportionate and the sanction of dissolution should never be imposed solely for violation of those obligations, but only in cases of “serious misconduct” such as terrorism financing and money laundering;
- There should be a range of sanctions to be imposed along a gradual scale of punishment. Minor mistakes should lead to lighter sanctions;
- Sanctions should be preceded by a warning with information as to how a violation may be rectified. The association concerned should be given sufficient time to rectify the violation or omission. Before the issuance of a warning, the association should be offered the possibility to seek clarifications about the alleged violation;

*Discrimination:*

- Any difference in treatment among civil society organisations concerning the reporting/public disclosure obligations on their funding, should be justified on the basis of objective and reasonable grounds;
- Any difference in treatment between the civil society sector and other legal persons/non-state entities, such as the business sector concerning the reporting/disclosure obligations on their funding, should be justified on the basis of objective and reasonable grounds;

- States should refrain from imposing negative labels on foreign-funded associations which may stir distrust of the public in those associations and have a chilling effect on their legitimate activities;
- State authorities should refrain from conducting negative campaigns against civil society organisations receiving foreign funding, such as portraying them as acting against the interest of the society;

*Guarantee of effective legal protection:*

- Legal provisions concerning the funding of associations and any limitations implied therein should be clear, precise and certain, and should be interpreted and applied in a manner that enhances the effective exercise of the right to freedom of association to ensure that the enjoyment of that right is practical and effective, and not theoretical or illusory;
- The interpretation and application of any regulation concerning foreign funding of associations should be subject to judicial review by an independent and impartial court;
- The association concerned should be allowed to participate in the hearing in fair proceedings and be given sufficient and equal opportunity to present its own arguments and oppose those of the other party;
- Judicial review should not be limited in scope and the judge involved in the procedure should have sufficient discretion in order to be able to make a proportionality assessment of the measure interfering with the rights of the association concerned;
- The association concerned is entitled to a judicial decision within a reasonable time.

151. The Venice Commission remains at the disposal of the Secretary General and of the national authorities of its member states for any further assistance in this matter.