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

**THE RUSSIAN FEDERATION**

**DRAFT OPINION**

**ON FEDERAL LAW NO. 129-FZ  
ON AMENDING CERTAIN LEGISLATIVE ACTS**

**(FEDERAL LAW ON UNDESIRABLE ACTIVITIES  
OF FOREIGN AND INTERNATIONAL NON-GOVERNMENTAL  
ORGANISATIONS)**

**on the basis of comments by**

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**Ms Herdis KJERULF-THORGEIRSDOTTIR (Member, Iceland)**  
**Mr Peter PACZOLAY (Honorary President)**

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## I. Introduction

1. By a letter of 2 July 2015, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe requested the opinion of the Venice Commission on the compatibility with international standards on human rights and fundamental freedoms of the Law on “undesirable foreign and international organisations”, adopted by the State Duma of the Russian Federation on 19 May 2015 (Federal Law No. 129-FZ on Amending Certain Legislative Acts of the Russian Federation) (hereinafter, “the Federal Law”)<sup>1</sup>.

2. The Venice Commission appointed Ms Veronika Bílková, Ms Herdis Kjerulf Thorgeirsdottir and Mr Peter Paczolay to act as rapporteurs.

3. On 10-11 May 2016, a delegation of the Venice Commission visited Moscow and held meetings with the representatives of the Institute for Legislation and Comparative Law, of the State Duma, of the Ministry of Justice, of the Ministry of Foreign Affairs, of the Office of the Prosecutor General as well as representatives of a number of civil society organisations. The Venice Commission is grateful to the Russian authorities and to other stakeholders for their excellent co-operation during the visit.

4. This Opinion has been prepared on the basis of the Russian text of the Law and its unofficial English translation.

5. *This Opinion, which was prepared on the basis of the comments submitted by the experts above, was discussed at the Sub-Commission on Fundamental Rights and was subsequently adopted by the Venice Commission at its (...) Plenary Session, in Venice (...).*

## II. Legal Framework

### A. International Standards

6. Non-governmental organisations (hereinafter, “NGOs”) play a crucial role in modern democratic societies, allowing citizens to associate in order to promote certain goals and/or pursue certain agenda. As a form of public engagement parallel to that of the participation in the formal political process, NGOs have to cooperate with public authorities while at the same time keeping their independence. Members of NGOs, as well as NGOs themselves, enjoy fundamental human rights, including freedom of association and freedom of expression.<sup>2</sup> These rights are enshrined in numerous international legal instruments, such as the 1948 Universal Declaration of Human Rights (Articles 19 and 20), the 1966 International Covenant on Civil and Political Rights (Articles 19 and 22), and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 10 and 11). The two latter instruments are binding on the Russian Federation.

7. Freedom of association is “*an essential prerequisite for other fundamental freedoms*”.<sup>3</sup> It is closely intertwined with freedom of expression as well as with other human rights (freedom of religion, right to privacy, the prohibition of discrimination, etc.). It is “*an individual human right which entitles people to come together and collectively pursue,*

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<sup>1</sup> CDL-REF(2016)037.

<sup>2</sup> See 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*, par. 15.

<sup>3</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*, par. 45; and CDL-AD(2012)016, *Opinion on the Federal law on combating extremist activity of the Russian Federation*, par. 64

*promote and defend their common interests*".<sup>4</sup> Freedom of association is at the core of a modern democratic and pluralistic society. It serves "as a *barometer of the general standard of the protection of human rights and the level of democracy in the country*".<sup>5</sup> Although freedom of association is not an absolute right, it can be limited, or derogated from, only under the strict conditions stipulated in human rights instruments (see Articles 22(2) of the ICCPR and 11(2) of the ECHR).

8. In its *Recommendation on the Legal Status of Non-Governmental Organizations in Europe* of 10 October 2007,<sup>6</sup> the Committee of Ministers of the Council of Europe stressed "the essential contribution made by non-governmental organizations (NGOs) to the development and realisation of democracy and human rights, in particular through the promotion of public awareness participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies" (par. 2 of the Preamble).

9. Non-governmental organizations engaged in human rights advocacy are traditionally considered as particularly vulnerable and, hence, in need of enhanced protection. Both at the universal and the European level, special instruments have been adopted over the past decades that codify standards applicable to human rights defenders.

10. *The UN Declaration on Human Rights Defenders* of 8 March 1999<sup>7</sup> confirms that "everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" (Article 1). States have the obligation to adopt measures to ensure the realisation of this right.

11. *The Declaration on Council of Europe action to improve the protection of human rights defenders and promote their activities* of 6 February 2008 stresses the contribution of human rights defenders to the protection and promotion of human rights and calls upon states to "create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the European Convention on Human Rights" (par. 2(i)).

## **B. National Legal Framework**

### **a. National Legal Framework in the NGO sector**

12. The national legal framework for the activities of non-governmental organisations in the Russian Federation encompasses, in addition to the Constitution, a complex set of legal acts (federal laws, government resolutions, executive decrees etc.). The two main federal

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<sup>4</sup> CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan*, par. 40.

<sup>5</sup> CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan*, par. 41.

<sup>6</sup> Recommendation CM/REC(2007)14 *on the Legal Status of Non-Governmental Organizations in Europe*, 10 October 2007.

<sup>7</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.

laws relating to NGOs are the 1995 *Law on Non-Commercial Organizations* (Law No. 7-FZ<sup>8</sup>) and the 1995 *Law on Public Associations* (Law No. 82-FZ<sup>9</sup>).

13. The former law applies to non-commercial organizations (*некоммерческие организации*) (hereinafter, "NCOs"), which are defined as ones "not having profit-making as the main objective of their activity and not distributing the earned profit among the members" (Article 2(1)). The latter law applies to public associations (*общественные объединения*), defined as "voluntary, self-governing, non-profit formations, set up at the initiative of individuals who have united on the basis of the community of interests to realize common goals, indicated in the charter of the public association" (Article 5). About 50% of non-commercial organizations operating in Russia are public associations.

14. The 1995 Law on Non-Commercial Organisations has been amended approximately thirty times<sup>10</sup>. Law No. 121-FZ<sup>11</sup> ("Foreign Agent Law"), which entered into force on 21 November 2012, amended, among others, the Law on Non-Commercial organisations and introduced the legal status of a "foreign agent" which concerns NCOs receiving funding from abroad and participating in "political activities". In its Opinion adopted in June 2014<sup>12</sup>, the Venice Commission called upon the Russian authorities to revise the law as the legitimate aim of ensuring transparency could not justify measures which hampered the activities of organizations operating in the field of human rights, democracy and the rule of law. The Commission recommended reconsidering the creation of a special regime with autonomous registration, special register and a host of additional legal obligations. It referred to reports that indicate that non-commercial organisations have been subject to numerous extraordinary inspections, with the legal ground of these inspections remaining unclear and the extent of documents required during them differing quite substantively. It called upon the Russian authorities to ensure that no inaccuracies or excesses take place in the implementation of the Foreign Agent Law.

15. According to the Opinion of the Commissioner of Human Rights of 9 July 2015 on the legislation and practice in the Russian Federation on non-commercial organisations in the light of Council of Europe standards<sup>13</sup>, as of 29 June 2015, there were eight different applications pending before the European Court of Human Rights (hereinafter, "ECtHR") in relation to the Foreign Agent Law. To date, the ECtHR has not yet rendered any judgment on this issue.

16. In addition to the two specialised laws, a range of more general federal laws are of relevance for NGOs. These encompass *the Civil Code, the Tax Code, the Federal Law on Charitable Activities and Charitable Organisations (Law No. 135-FZ) and the five laws amended by the Law No. 129-FZ. Several of these laws, have been implemented by means of secondary administrative acts, such as the Government Resolution No 212* On measures aimed at implementing certain provisions of the federal laws regulating activities of non-

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<sup>8</sup> *Федеральный закон о некоммерческих организациях*, N 7-ФЗ, принят Государственной Думой 8 декабря 1995 года.

<sup>9</sup> *Федеральный закон об общественных объединениях*, N 82-ФЗ, принят Государственной Думой 14 апреля 1995 года.

<sup>10</sup> See, CDL-AD(2014)025 Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations ("Law on Foreign Agents"), on Federal laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation, adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014), p. 4, note 2.

<sup>11</sup> Law No. 121-FZ on Entering Amendments to Individual Legislative Acts of the Russian Federation in the Part Regulating the Activities of Non-Commercial Organisations Performing the Functions of a Foreign Agent.

<sup>12</sup> CDL-AD(2014)025 Opinion on federal Law N. 121-FZ on Non-Commercial Organisations ("Law on Foreign Agents"), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code ("Law on Treason") of the Russian Federation.

<sup>13</sup> CommDH(2015)17 on the legislation and practice in the Russian Federation on non-commercial organisations in the light of Council of Europe standards: an update, p. 5.

commercial organisations of 15 April 2006 or the Decree of the Ministry of Justice of Russia No 222 On the Procedure of State Control of NCO Activity (including spending of resources) of 22 June 2006.

***b. The Federal Law on Undesirable Activities of Foreign and International non-governmental organisations***

17. On 19 May 2015, the State Duma of the Russian Federation adopted the Federal Law No. 129-FZ on amending certain legislative acts (Federal Law on undesirable activities of foreign and international non-governmental organisations) which entered into force on 3 June 2015 after its publication in the Official Bulletin on 26 May 2015. This Federal Law amended five laws – the Criminal Code, the Criminal Procedure Code, the Code on Administrative Offences, the Law No. 272-FZ on Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation, and Law No. 114-FZ on the Procedure of Exit from the Russian Federation and Entry into the Russian Federation.

18. The 2012 Law No. 272-FZ is supplemented with a provision under which the operation (activities) of a foreign or international non-governmental organisation on the territory of the Russian Federation may be recognized as undesirable (Article 1 of the Federal Law), if those activities “*threaten the foundation of the constitutional order of the Russian Federation, the country’s defence capability, or the security of the state*” (Article 5 of the Federal Law).

19. Article 5(2)4 of the Federal Law entrusts the power to recognise the activities of a foreign or international organisation as “undesirable” to the General Prosecutor of the Russian Federation or his/her deputies in coordination with “*the federal executive power body exercising the functions of formulation and implementation of state policy and normative legal regulation in the sphere of international relations of the Russian Federation*”. During the meetings in Moscow, the authorities explained that this “federal executive power body” is the Ministry of Foreign Affairs.

20. The decision taken by the General Prosecutor or his/her deputies shall be communicated to “*the federal executive power body exercising the functions of formulation and implementation of state policy and normative legal regulation in the sphere of registration of not-for-profit organisations*” (Article 5(2)), i.e. the Ministry of Justice. The foreign or international organisations whose activities are recognised as “undesirable” are included in a list administrated and maintained by the Ministry of Justice.

21. The List shall be made public on the website of the Ministry of Justice and published in a nationwide Russian Periodical determined by the Government (Article 5(2)7) which is the Russian Gazette (Российская газета). The decision taken by the Prosecutor General or his/her deputies enters into force on the date of publication of the information about the relevant foreign or international organisation (Article 3<sup>1</sup>(2) introduced to the Federal Law no. 272-FZ by Article 5 of the Federal Law).

22. The Federal Law does not provide for any specific procedure for the maintenance of the list by the Ministry of Justice. This procedure, according to Article 5(2)8, is to be determined by the Ministry of Justice.

23. The decision on the recognition of the activities of a foreign or international organisation as undesirable may be repealed by the Prosecutor General or his/her deputies in coordination with the Ministry of Foreign Affairs and the NGO may then be taken off the List on the official web-site of the Ministry of Justice.

24. The decision on the “undesirability” entails the following consequences:
- Prohibition to establish structural units on the territory of the Russian Federation and termination of the activities of structural units previously established on the territory of the Russian Federation (Article 3<sup>1</sup>(3)1 introduced to the Federal Law no. 272-FZ by Article 5 of the Federal Law);
  - Prohibition to distribute information materials issued by a foreign or international NGO whose activities are declared “undesirable” and/or to disseminate thereby, including through the media and/or with the use of the Internet information and telecommunication network, as well as to produce or store them for purposes of distribution (Article 3<sup>1</sup>(3)3 introduced to the Federal Law no. 272-FZ by Article 5 of the Federal Law);
  - Prohibition to implement projects or programs on the territory of the Russian Federation (Article 3<sup>1</sup>(3)4 introduced to the Federal Law no. 272-FZ by Article 5 of the Federal Law);
  - Suspension of the rights as a founder of a mass media organ and prohibition to organise and conduct any mass action and public events and to take part in them (Article 3(3) of the Federal Law no. 272-FZ introduced by Article 5 of the Federal Law);
  - Prohibition to use bank accounts and deposits for purposes other than settling for business operations and work contracts, compensating for losses caused by its actions, and paying taxes, duties and fines (Article 3(3) of the Federal Law no. 272-FZ introduced by Article 5 of the Federal Law);
  - Obligation for all credit and non-credit financial organisations to carry out operations with funds and other property, one of the parties to which is a foreign or international NGO included in the List (Article 3<sup>2</sup> (1) of the Federal Law no. 272-FZ introduced by Article 5 of the Federal Law) and provide information about the refusal to the Ministry of Finances (Article 3<sup>2</sup> (2) of the Federal Law no. 272-FZ introduced by Article 5 of the Federal Law). The Ministry of Finances shall submit this information to the Office of the General Prosecutor as well as to the Ministry of Justice (Article 3<sup>2</sup> (3) of the Federal Law no. 272-FZ introduced by Article 5 of the Federal Law).
25. In addition, Article 4 of the Federal Law introduced a new Article 20.33 to Chapter 20 of the Code on Administrative Offences, which established an administrative offence consisting of carrying out of, or “participating in” activities of an NGO included in the List and of violating any of the above mentioned prohibitions. The offence entails the imposition of an administrative fine of 5000 to 15 000 rubles for citizens, 20 000 to 50 000 rubles for officials and 50 000 to 100 000 rubles for legal entities.
26. The Federal Law introduced also a new Article 284<sup>1</sup> to Chapter 29 of the Criminal Code. According to the new Article 284<sup>1</sup>, directing of activities on the territory of the Russian Federation of an NGO included in the List “participating in” such activities by a person who has been subject to the administrative responsibility for committing an analogous offence twice in the course of one year qualifies as a new criminal offence (Article 284<sup>1</sup> of the Criminal Code). The offence is punishable by a fine of 300 000 to 500 000 rubles or a fine in the amount of the salary or other income of the offender for a period of two to three years; or by compulsory work up to 360 hours; or by forced labour for up to five years with or without restriction of liberty for up to two years; or by deprivation of liberty of two to six years with or without deprivation of the right to occupy certain positions or engage in certain activities for up to ten years.

27. On 28 July 2015, the first non-governmental organisation, the National Endowment for Democracy (NED), a Washington-based organisation funded largely by the US Congress saw its activities declared “undesired” by the office of the Prosecutor General.<sup>14</sup> The decision was based on the alleged “*participation by the NED in declaring the results of electoral campaigns illegitimate, in organizing political actions aimed at influencing decisions adopted by the public organs, in discrediting the service in the Military Forces of Russia*”.<sup>15</sup>

28. On 3 September 2015, the Ministry of Justice of the Russian Federation adopted a regulation relating to the administration of the List.<sup>16</sup> The Ministry of Justice has also put in place the online version of the List.<sup>17</sup> At the moment of the adoption of the present Opinion, the List includes the National Endowment for Democracy, Open Society Institute Assistance Foundation, Open Society Foundation, U.S. Russia Foundation for Economic Advancement and the Rule of Law and National Democratic Institute for International Affairs.

29. In November 2015, the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe adopted an Opinion on the Federal Law.<sup>18</sup> The Opinion criticised the broad formulation of the grounds for deeming activities of an NGO “undesirable” which would be prone to “arbitrary application”, the lack of clarity as to a number of fundamental concepts in the Federal Law such as “non-governmental organisations” and the lack of foreseeability as to whether or not certain conduct will entail criminal responsibility for individuals associated with the activities of a listed NGO.

### III. Analysis

30. The Federal Law interferes with the freedom of association by prohibiting the activities of certain NGOs and by introducing administrative and criminal sanctions linked to these activities. It is necessary to consider to what extent it complies with the requirements of legality, legitimacy and necessity in a democratic society, as set forth in Article 11(2) of the European Convention on Human Rights in order to decide whether this interference is lawful under the European standards.

#### A. Organisations covered by the Federal Law

31. The Federal Law applies to “*foreign and international non-governmental organizations in respect of whose activities the decision has been made to deem them undesirable on the territory of the Russian Federation*” (Article 1).

32. The notion of non-governmental organisation (неправительственная организация) is not common in the Russian legal order which has so far mostly worked with the notions of “non-commercial organisations” and “public associations” (see above, para. 13).

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<sup>14</sup> Генеральная прокуратура Российской Федерации, *Заместитель Генерального прокурора Российской Федерации Владимир Малиновский подписал решение о признании нежелательной на территории Российской Федерации деятельности иностранной неправительственной организации «Национальный фонд в поддержку демократии», 28 июля 2015.*

<sup>15</sup> *Ibidem.*

<sup>16</sup> *Приказ Минюста России «О порядке ведения Перечня иностранных и международных неправительственных организаций, деятельность которых признана нежелательной на территории Российской Федерации, включения в него и исключения из него иностранных и международных неправительственных организаций», 3 сентября 2015 года.*

<sup>17</sup> Перечень иностранных и международных неправительственных организаций, деятельность которых признана нежелательной на территории Российской Федерации, <http://minjust.ru/ru/activity/nko/unwanted>

<sup>18</sup> OING Conf/Exp (2015) 1, Expert Council on NGO Law, Opinion on Federal Law of 23 May 2015 #129-FZ “On Introduction of Amendments to Certain Legislative Acts of the Russian Federation” (Law on “Undesirable” Organisations).



33. The notion of “non-governmental organisation” is not defined under the Federal Law and it is not clear whether it should be interpreted as synonymous with that of “non-commercial organisations” (the term used in the Law on Foreign Agents for instance) or whether it covers a broader category, including the commercial organisations. In an interview, one of the co-authors of the Federal Law, the Duma deputy Mr Aleksandr Tarnavsky, stated that the law had been “*a response to concrete actions taken by a number of states against Russia, against our companies that do business abroad*”<sup>19</sup> and that it primarily targeted foreign commercial or transnational companies. This would suggest that the notion of “non-governmental organisation” under the Law No. 129-FZ should be broader than that of “non-commercial organisation” under the Law No. 7-FZ.

34. During the meetings in Moscow, the authorities stated that the notion of “non-governmental organisation” is similar to that of “non-commercial organisations” and that during the discussions before the State Duma on the Draft of the Federal Law, both terms “non-governmental” and “non-commercial” were used interchangeably, in a similar manner. They underlined that the commercial organisations, as business companies, are not covered by the Federal Law and that in any case, “*the federal executive power body exercising the functions of formulation and implementation of state policy and normative legal regulation in the sphere of registration of not-for-profit organisations*” (i.e. the Ministry of justice) (Article 5(2) of the Federal Law) is not competent to include the business companies in the List. Other interlocutors stated that for the sake of legal certainty, the notion of “non-governmental organisation” should be defined in the Federal Law.

35. The International Center for Non-Profit Law in its analysis of the Law No. 129-FZ expressed the view that the Law should not be apply to governmental agencies and multilateral organisations<sup>20</sup>. The example of the National Endowment for Democracy (“NED”) currently listed, shows however that organisations with a close link to governments are not immune for the application of the Federal Law.

36. Under these circumstances and in the light of the explanations given by the authorities in Moscow, the Venice Commission recommends that either the notion of “non-governmental organisations” be defined under the Federal Law or this notion be replaced by that of “non-commercial organisations”.

## **B. Grounds for inclusion of a foreign or international NGO into the “List”**

37. The grounds on which an NGO may be included in the “List” are formulated in particularly broad terms: “*threatening the foundation of the constitutional order of the Russian Federation, the country’s defence capability, or the security of the state*” (Article 5 of the Federal Law). The Ombudsman of the Russian Federation noted in his comment on the Federal Law that “*clear legal criteria of the status of “undesirability” in the territory of the Russian Federation (...) do not exist; legal grounds for finding that an NGO constitutes a threat for the foundations of the constitutional order of the Russian Federation, its defence capacity or the security of the State are not indicated*”.<sup>21</sup>

38. The formulation of the grounds is borrowed from Article 55(3) of the Constitution of the Russian Federation, which foresees the conditions under which fundamental rights and freedoms granted by the Constitution may be limited.<sup>22</sup> However, as the Ombudsman also

<sup>19</sup> <https://meduza.io/en/feature/2015/05/21/pure-pragmatism-nothing-personal>

<sup>20</sup> ICNL, Overview of Restrictions on Non-Commercial Organisations Imposed by the Law on “Undesirable Organizations”, 27 May 2015, p. 2.

<sup>21</sup> Заключение Уполномоченного на Федеральный закон от 23.05.2015 № 129-ФЗ «О внесении изменений в отдельные законодательные акты РФ», 25 мая 2015.

<sup>22</sup> Article 55(3) of the Constitution reads as follows: “*The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles*

noted, these grounds only serve to indicate the “final aims”<sup>23</sup>, or the legitimate aims of the legal regulation and would require specification if concrete restrictive measures are to be adopted on its basis.

39. Such specification, however, is not provided in the Federal Law. This is problematic, given the consequences of being included in the List for the relevant NGOs and for those participating in their activities (see paras. 23-26 of the present Opinion).

40. During the meetings in Moscow, the authorities explained that Article 13(5) of the Constitution<sup>24</sup> gives more detailed explanations on those grounds and that the NGOs may be included in the List only if the “threat” they created is real and that the grounds indicated in the Federal Law should be based on “legalised evidence”, i.e. sufficient evidence that can be used by the courts. The authorities also underlined that in a number of judgments, the Constitutional Court clarified the grounds indicated in Article 55(3) of the Constitution which would serve the foreseeability of the application of those grounds in the context of the Federal Law.

41. The Venice Commission recalls that according to the ECtHR’s case-law “*a norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct*”.<sup>25</sup> The law must be accessible to those it applies to and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>26</sup> Despite the explanations given by the authorities, the Venice Commission is of the opinion that because of the lack of specific criteria/prohibitions for misconduct of NGOs and the vague and imprecise terms as to the grounds on the basis of which the activities of a foreign or international NGO may be deemed “undesirable”, the Federal Law cannot be considered as in compliance with the requirement of legality under Article 11(2) ECHR.

42. Consequently, the Federal Law should be amended in order to introduce specific prohibitions and concrete criteria concerning the grounds on whose basis foreign and international NGOs can be included in the List kept by the Ministry of Justice. It is recommended in addition to provide in the Federal Law references to the specific provisions of the Criminal Code related to the acts of “threatening the foundation of the constitutional order of the Russian Federation, the country’s defence capability, or the security of the state” which would justify the inclusion of the NGO concerned in the List.

### C. Procedural aspects of the Federal Law

43. The decision to deem the activities of a non-governmental organization undesirable on the territory of the Russian Federation is made by the Prosecutor General or his deputies in co-ordination with the Ministry of Foreign Affairs.

44. **First**, due to the lack of clarity of the concept of “undesirable activities of foreign and international NGOs” (see, titles A and B above), the Office of the Prosecutor General enjoys wide discretion when making its decision on this status. The Russian Ombudsman noted in

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*of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.”*

<sup>23</sup> Заключение Уполномоченного, *op. cit.*

<sup>24</sup> Article 13(5) of the Constitution states: « *The creation and activities of public associations whose aims and actions are aimed at a forced change of the fundamental principles of the constitutional system and at violating the integrity of the Russian Federation, at undermining its security, at setting up armed units, and at instigating social, racial, national and religious strife shall be prohibited.* »

<sup>25</sup> ECtHR, *The Sunday Times v. the United Kingdom*, Application No. 6538/74, 26 April 1979, par. 49.

<sup>26</sup> ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application No. 37083/03, 8 October 2009.

this respect that: *“the legal uncertainty of Article 3<sup>1</sup> of the Law No. 272-FZ (...) not only does not exclude the adoption by the Office of the General Prosecutor of arbitrary decisions on undesired organisations (...) but factually presupposes it”*.<sup>27</sup> The Commissioner for Human Rights of the Council of Europe also criticized *“the wide discretionary powers granted to the Prosecutor’s Office and the executive authorities combined with the absence of prior judicial review”*.<sup>28</sup>

45. As the European Court of Human Rights (ECtHR) held in the case of *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, for domestic law to meet the requirement of legality, *“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>29</sup> Law No. 129-FZ fails to meet this requirement as far as the discretionary power of the Office of the Prosecutor General is concerned.

46. **Secondly**, there is no mandatory prior involvement of the judiciary in the process. Moreover, the Federal Law does not foresee explicitly any possibility of a judicial appeal against the decision of the Office of the Prosecutor General. The Russian authorities explained that the general constitutional regulation of Article 46(2) of the Constitution, according to which *“decisions and actions (or inaction) of bodies of state authority and local self-government, public associations and officials may be appealed against in court”*, applies to the procedure established by the Federal Law; the review exercised by the courts on the decision taken by the Office of the Prosecutor General is not limited to the procedural aspects of the decision, but concerns also the grounds on the basis of which the decision on the inclusion of the organisation concerned into the List.

47. However, the Federal Law does not provide for any notification procedure of the NGO concerned about the decision taken by the Prosecutor General or his deputies on its inclusion in the List. The NGO concerned cannot therefore challenge the steps taken by the Office of the Prosecutor General. During the meetings in Moscow, the authorities informed the Commission delegation that, in practice, the Prosecutor General’s Office has the possibility to issue a warning to the organisation concerned before taking a decision on its inclusion in the List. However, it appears that this is not an obligation for the Prosecutor General’s Office and in any case, the Federal Law does not provide, in any of its provisions, for a prior warning procedure. Therefore, the only way for the organisation concerned to learn that its activities have been deemed “undesirable” is to follow the web-site of the Ministry of Justice and/or the Russian Gazette. This situation bears the potential risk of diminishing the effectiveness of the judicial review under Article 46(2) of the Constitution and is potentially in conflict with Article 13 ECHR granting the right to an effective remedy.

48. **Thirdly**, there is no indication in the Federal Law as to whether or not the Prosecutor General’s Office is under an obligation to give reasons for the decision on the “undesirability” of the activities of the concerned NGOs. The Venice Commission delegation learned during the meetings in Moscow that the reasons of the decision are not published on the web-site of the Minister of Justice and there is no notification of those reasons to the concerned organisation. It was explained that the concerned NGO should apply to the General

<sup>27</sup> Заключение Уполномоченного, *op. cit.*

<sup>28</sup> CommDH(2015)17, *Opinion of the Commissioner for Human Rights, Legislation and Practice in the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards: An Update*, 9 July 2015, par. 19.

<sup>29</sup> ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application No. 37083/03, 8 October 2009, par. 57.

Prosecutor's Office in order to learn about the reasons of its inclusion in the List. This situation amplifies the impression of arbitrariness, the lack of transparency of the process and also bears the risk of diminishing the effectiveness of the judicial review under Article 46(2) of the Constitution, since the right to know the reasons for curtailment of one's fundamental rights extends to all pre-trial proceedings under international human rights standards.

49. **Consequently**, the Venice Commission recommends first that the Federal Law be amended in order to introduce therein a procedure of prior judicial review. The power of the Office of the Prosecutor General should then be limited to applying to the domestic courts with a request to include the concerned organisation in the "List" and the decision should be taken by the courts following an assessment of the proportional balance between the measure restricting the right to freedom of association and the legitimate aims pursued by the restriction.

50. In case the current procedure without prior judicial review should be maintained, then all the procedural guarantees should be clearly indicated in the Federal Law: the Office of the Prosecutor General should be under the obligation to provide detailed reasons for the decision, a notification procedure of the concerned NGO should be provided for in the Federal Law and the notification should not be limited to informing the concerned party about the decision, but the reasons of the decision should also be indicated in a detailed manner in this notification.

51. Moreover, despite the clear wording of Article 46(2) of the Constitution, the possibility of judicial appeal against the decision of the Office of the Prosecutor General should be unequivocally indicated in the Federal Law. The authorities may consider giving a "suspensive effect" to the judicial appeal, with respect to the decision taken by the Office of the Prosecutor General. In any case, the scope of the judicial review should consist of a full review (as to the grounds and the procedure) and this scope should also be clearly specified in the Federal Law.

#### **D. Restriction imposed on the "Listed" NGOs and on Individuals associated with their activities**

52. The decision on the undesirability of activities of a foreign or international non-governmental organisation has negative legal consequences for this NGO, as well as, potentially, for natural and legal persons associated with the activities of such an NGO.

53. The listed NGO is prohibited from operating on the territory of the Russian Federation through structural units; from implementing programs (projects) on the territory of the Russian Federation; from distributing information materials; from organizing and conducting mass actions and public events and taking part in them; and from using any bank accounts and deposits for other purposes than those stipulated in the Law (see above, para. 23).

54. The suspension of some of the organisation's activities is a "blanket" one in the sense that it is an automatic legal consequence of the inclusion of a foreign or international NGO in the List and no proportionality assessment is required in the implementation of those prohibitions. It is true that the right of NGOs to disseminate information and distribute materials is not unlimited. The same holds true concerning the organisation of mass actions and public events and participation in them. Freedom of assembly is not an absolute right. However, there appears to be no assessment of proportionality between the prohibition on taking part in mass actions and public events or on distributing information materials after a foreign or international NGO has been included in the List on the one hand, and the existence of a genuine threat and a pressing social need to restrict the fundamental right of freedom of peaceful assembly and the expression of political speech on the other hand.

These rights can only be limited if a pressing social need so requires and if the interference is proportionate to the legitimate aim pursued by it.<sup>30</sup>

55. In principle, a suspension of some of the activities of an NGO following its inclusion in the List -provided that it is done 1. On the basis of clear and detailed criteria 2. On the basis of a judicial decision or subject to a meaningful judicial appeal- may seem not unreasonable, considering the serious character of the legitimate aims pursued by the inclusion of an NGO in the List (*“threatening the foundation of the constitutional order of the Russian Federation, the country’s defence capability, or the security of the state”*) and considering also that the inclusion in the List may be lifted, so it is a temporary measure.<sup>31</sup> However, under the Federal Law in its current form, the suspension of a listed NGO appears as a discretionary ban, with no guarantee of respect of the proportionality test.

56. The Federal Law provides for administrative fines for individuals and legal entities carrying out, or taking part in activities of a “listed NGO” and violating any of the prohibitions imposed by the Law” (Article 4(2) of the Federal Law). Individuals directing activities of a “listed NGO” or individuals participating in such activity and who have been subject to the administrative responsibility for committing an analogous offence twice in the course of one year, are liable for criminal prosecution, punishable by a fine, forced labour, or deprivation of liberty.

57. The new provisions added to the Code of Administrative Offences and the Criminal Code lack precision. As the Commissioner for Human Rights noted in his report, Law No. 129-FZ does not specify which forms of participation in the activities of undesired NGOs are penalised and this absence *“could qualify virtually any action as falling under the scope of this law”*.<sup>32</sup> Under Article 7 ECHR, *“no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed”* (*nullum crimen sine lege* principle). The provision requires not only that a specific offence be foreseen in the legislation at the time of its commission but also that the offence be sufficiently defined and precise. Those provisions of the Federal Law cannot be seen as satisfying those requirements and are in potential conflict with Article 7 ECHR.

58. Further, the severe administrative fines and in particular criminal sanctions may have a potential to deter those involved in civic activity, and the public at large from participating in an open debate on social media, for instance.<sup>33</sup> The chilling effect of the severe penalties is further amplified by the vaguely-worded legislation which fails to give a precise legal definition for what constitutes “participation in the activities” and what actions constitute a breach of law in case of an individual associated with the conduct of a “listed NGO”.

59. Consequently, the Venice Commission considers that unless the Federal Law is changed in respect of the grounds for declaring an activity as undesirable, of the prior judicial decision for an NGO to be included in the List and of meaningful judicial appeals, the prohibitions imposed on listed NGOs constitute an interference with several rights guaranteed under the Convention i.e. freedom of expression, freedom of assembly or the right to property (concerning the prohibition of using bank accounts) which does not appear to be proportionate. Further, the Federal Law should clarify and limit the forms of “directing

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<sup>30</sup> ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Application No. 29221/95, 2 October 2001, para. 87.

<sup>31</sup> As the OSCE/Venice Commission Guidelines on Freedom of Association underlined, *“sanctions amounting to the effective suspension of activities (...) of an association, are of exceptional nature (...) [and] should be applied in cases where the breach gives rise to serious threat to the security of the state (...) or to fundamental democratic principles.”*, p. 66, para. 239.

<sup>32</sup> CommDH(2015)17, *op. cit.*, para. 19.

<sup>33</sup> See for instance case of *Navalnyy and Yashin v. Russia*, 20 April 2015 judgment.

of” and “participating in” the activities of a listed NGO for the sake of the principle of legal certainty.

#### IV. Conclusion

60. The Venice Commission fully recognises the right of states to monitor the activities of NGOs on their territory and to “*introduce administrative, civil and criminal sanctions for associations, (...), in case they are in violation of relevant regulations. These may take the form of fines, the withdrawal of state subsidies or, in extreme cases, the suspension of their activities or their de-registration or dissolution*”.<sup>34</sup> However, it also recalls that “*any sanctions introduced must always be consistent with the principle of proportionality*”<sup>35</sup> and it needs to respect the international standards enshrined in the ECHR and other international instruments.

61. The Federal Law interferes with several human rights protected under the European Convention, especially freedom of association (Article 11), freedom of assembly (Article 11), freedom of expression (Article 10), the right to an effective remedy (Article 13) and the principle of *nulla poena sine lege* (Article 7). The rights guaranteed under Articles 10 and 11 can be limited, if the conditions of legality, legitimacy, and necessity in a democratic society are met.

62. The Federal Law fails to meet these conditions in two main respects:

- The vague definition of certain fundamental concepts, such as “non-governmental organisations”, grounds on the basis of which the activities of a foreign or international NGO may be declared undesirable, “directing of” and “participating in” the activities of a listed NGO, coupled with the wide discretion granted to the Office of the Public Prosecutor and the lack of specific judicial guarantees in the Federal Law, contradicts the principle of *legality*.
- The automatic legal consequences (blanket prohibitions) imposed upon NGOs whose activities are declared undesirable (prohibition to organise and conduct mass actions and public events or to distribute information materials) may only be acceptable in extreme cases of NGOs constituting serious threat to the security of the state or to fundamental democratic principles. In other instances, the blanket application of these sanctions might contradict the requirement under the ECHR that the interference with the freedom of association and assembly has to respond to a pressing social need and has to be proportional to the legitimate aim pursued. Furthermore, the inclusion of an NGO in the List should be made on the basis of clear and detailed criteria following a judicial decision or at least, the decision should be subject to an appropriate judicial appeal.

63. The Venice Commission formulates the following main recommendations:

- The notion of “non-governmental organisation” should be clarified and defined in the Federal Law. In light of the explanations given by the authorities, it is also recommended to replace this term with that of “non-commercial organisations”. Further, it should be clarified in the Federal Law what constitutes “directing of” and “participating in” the activities of a listed NGO;

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<sup>34</sup> OSCE/Venice Commission, *Guidelines on Freedom of Association*, 2015, par. 235.

<sup>35</sup> OSCE/Venice Commission, *Guidelines on Freedom of Association*, 2015, par. 237.

- Concrete criteria as to the grounds on the basis of which foreign and international can be included in the List, should be introduced in the Federal Law. The vague wording of the grounds in the Federal Law as it currently stands, does not meet the criteria of legality (“prescribed by law”);
- The decision on the inclusion of a foreign or international NGO in the List should be taken by a judge (prior judicial review) and not by the Office of the Prosecutor General. The role of the Prosecutor would then be to request from the competent court to include the concerned organisation in the List. In case the current procedure without prior judicial review should be maintained, then all the procedural guarantees should be clearly indicated in the Federal Law: the Office of the Prosecutor General should be under the obligation to provide for detailed reasons for the decision, a notification procedure of the concerned NGO should be provided for in the Federal Law and the notification should not be limited to informing the concerned party about the decision, but the reasons of the decision should also be indicated in a detailed manner in this notification;
- The possibility of judicial appeal against the decision of the Office of the Prosecutor General, in parallel to the provision of Article 46(2) of the Constitution, should be unequivocally indicated in the Federal Law. The judicial appeal can be given a “suspensive effect” on the decision of inclusion of an NGO in the List;
- Only if all the above changes are made, and notably if the decision to include an NGO in the List has been taken by a judge or the decision is subject to a meaningful judicial appeal, and is proportionate to the threat the concerned NGO constitutes, may the prohibitions imposed on listed NGOs be considered acceptable.

64. The Venice Commission remains at the disposal of the Russian authorities for any further assistance they may need.