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REPORT

ON FREEDOM OF ASSEMBLY, CONTENT AND MAIN PRINCIPLES FLOWING FROM THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

by

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FREEDOM OF ASSEMBLY, CONTENT AND MAIN PRINCIPLES FLOWING FROM THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

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ABSTRACT:

Freedom of assembly and of association are among the paramount values in a democratic society. In its case-law, the European Court of Human Rights (the COURT) has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association. Still the right to freedom of assembly and of association is not absolute. It may be subjected to restrictions and limitations, provided that any interference is (a) 'prescribed by law', (b) serves a 'legitimate aim', and (c) can be considered to be 'necessary in a democratic society' in order to achieve that aim.

A) THE LEGAL BASIS

1. THE AZERBAIJAN CONSTITUTION (adopted on 12 November 1995 and amended on 24 August 2002)

ARTICLE 49 Freedom of meetings

(1) Everyone has the right for meetings.

(2) Everyone has the right, having notified respective governmental bodies in advance, peacefully and without arms, meet with other people, organize meetings, demonstrations, processions, place pickets.

ARTICLE 58 Right for joining

(1) Everyone is free to join other people.

(2) Everyone has the right to establish any union, including political party, trade union and other public organization or enter existing organizations. Unrestricted activity of all unions is ensured.

(3) Nobody may be forced to joint any union or remain its member.

(4) Activity of unions intended for forcible overthrow of legal state power on the whole territory of the Azerbaijan Republic or on a part thereof is prohibited. Activity of unions which violates the Constitution and laws might be stopped by decision of law court.

2. UNITED NATIONS

2.1 Universal Declaration of Human Rights (UDHR) of 10 December 1948.

ARTICLE 20:

1. Everyone has the right to freedom of peaceful assembly and association. 2.No one may be compelled to belong to an association.

ARTICLE 21 : 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (.)

ARTICLE 23 :

(.) 4. Everyone has the right to form and to join trade unions for the protection of his interests.

2.2 International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966.

ARTICLE 21 :

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

ARTICLE 22 :

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This ARTICLE shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this ARTICLE shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

3. COUNCIL OF EUROPE - THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR) of 4 November 1950.

ARTICLE 11 : Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This ARTICLE shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

4. THE EUROPEAN UNION - CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (CHARTER) 7-9 December 2000.

ARTICLE 12. Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels,

in particular in political, trade union and civic matters, which implies the right of everyone to form and

to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the

Union.

This ARTICLE proclaims the freedom of peaceful assembly, an individual freedom that includes the right to form associations and trade unions. These freedoms contribute to the reality of freedom of thought, conscience and religion (ARTICLE 10 of the Charter) and freedom of expression and information (ARTICLE 11 of the Charter). The wording used is intended to designate in particular professional organisations, non-governmental organisations (NGOs) and political parties. In substance, the rights are the same as those guaranteed by ARTICLE 11 of the ECHR and the only restrictions allowed are those mentioned therein. Their scope differs, however, insofar as ARTICLE 12 of the Charter incorporates the European dimension, recognising the right to freedom of assembly and of association "at all levels".

B) THE IMPLEMENTATION – THE EUROPEAN CASE-LAW

1. GENERAL

1.1 RELATION TO OTHER TREATIES

ARTICLE 12 (1) of the Charter protects the right to freedom of peaceful assembly and to freedom of association at all levels.

Already in the case of *Bosman* did the Court of Justice of the European Communities (ECJ) accept that the freedom of association, enshrined in ARTICLE 11 of the ECHR and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which are protected in the Community legal order.¹ The official explanations to the Charter confirm that ARTICLE 12 (1) of the Charter corresponds to ARTICLE 11 ECHR; its scope may be somewhat wider in that it includes associations at the European level as well. Related provisions at the international level are ARTICLE 20 of the Universal Declaration of Human Rights (1948) and ARTICLEs 21 and 22 of the International Covenant on Civil and Political Rights (1966).

¹ ECJ, Case C-415/93, Union royale belge des sociétés de football association a.o., v. Bosman a.o., [1995] ECR I-5065 (judgment of 15 December 1995), para. 79.

1.2 RELATION TO OTHER FUNDAMENTAL RIGHTS

The freedom of assembly and association is closely connected to the freedom of *thought, conscience and religion* (ARTICLE 10 of the Charter, ARTICLE 9 ECHR) and to the *freedom of expression* (ARTICLE 11 of the Charter, ARTICLE 10 ECHR). The latter rights would be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests.²

On the other hand, representatives of organisations may wish to use the freedom of expression in order to make statements on behalf of their organisation. Where a public demonstration seeks to advance certain views, the freedom of assembly may be seen as a *lex specialis* of the freedom of expression.

The freedom of association is also linked to the *right to a fair trial*, in that proceedings concerning the granting of legal entity status to an association of individuals have been found to determine that association's 'civil rights and obligations' in the meaning of ARTICLE 6 ECHR.³ This implies that the proceedings should comply with all requirements of a fair trial. The same reasoning applies in the case of proceedings concerning re-registration of an association that might potentially result in its being stripped of its legal entity status.⁴ Indeed, in a case where registration procedures lasted for more than six years, a violation of the reasonable time requirement, as laid down in ARTICLE 6 ECHR, was found.⁵

1.3 THE ECHR CASE-LAW

Freedom of assembly and of association are among the paramount values in a democratic society. In its case-law, the COURT has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association.⁶

Still the right to freedom of assembly and of association is not absolute. It may be subjected to restrictions and limitations, provided that any interference is (a) 'prescribed by law',⁷ (b) serves a 'legitimate aim' (i.e. one of aims expressly mentioned in ARTICLE 11 (2) ECHR), and (c) can be considered to be 'necessary in a democratic society' in order to achieve that aim.

⁵ Eur. Ct. H.R. (2nd sect.), Zichy Galéria v. Hungary (Appl. No. 66019/01), judgment of 5 April 2005, para. 25.

² For a discussion of the close link between the freedom of association and, for instance, the freedom of religion, see:

Eur. Ct. H.R. (GC), Hasan & Chaush v. Bulgaria (Appl. No. 30985/96), judgment of 26 October 2000, para. 62.

³ Eur. Ct. H.R. (2nd sect.), APEH a.o. v. Hungary (Appl. No. 32367/96), judgment of 5 October 2000, para. 30 et seq.

⁴ Eur. Ct. H.R (1st sect.), *Moscow branch of the Salvation Army v. Russian Federation* (Appl. No.72881/01), adm. decision of 24 June 2004.

⁶ See, among many authorities: Eur. Ct. H.R. (GC), *United Communist Party of Turkey (TBKP) a.o. v. Turkey* (Appl. No. 19392/92), judgment of 30 January 1998, *Rep.* 1998-I, para. 42 et seq.; Eur. Ct. H.R. (GC), *Socialist Party a.o. v. Turkey* (Appl. No. 21237/93), judgment of 25 May 1998, *Rep.* 1998-III, para. 41 et seq.

⁷ See on the meaning of this requirement in the context of the freedom of association: Eur. Ct. H.R. (GC), *Maestri v. Italy* (Appl. No. 39748/98), judgment of 17 February 2004, *Rep.* 1998, para. 30 et seq.

According to the COURT case-law, these exceptions are to be construed strictly; only convincing and compelling reasons can justify restrictions on the freedom of association.⁸ Thus the term 'necessary' does not have the flexibility of expressions such as 'useful' or 'desirable'. In addition, pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

Under the ECHR, the Member States have only a limited margin of appreciation in determining whether a 'necessity' exists, which goes hand in hand with rigorous supervision by the COURT. That supervision embraces both the law and the decisions applying it, including those given by independent courts. The COURT has also held that the nature and severity of the impugned measure are factors to be taken into account when assessing the proportionality of the interference. On the other hand, it has accepted that the application of radical measures – including the refusal to register an association⁹ and the immediate and permanent dissolution of an organisation and confiscation of its assets¹⁰ – may be justified under ARTICLE 11.

1.4 POSITIVE OBLIGATIONS

At first sight, the right to freedom of assembly and of association may appear to be a classic example of a 'negative' right: a norm introducing a 'State free zone' where the individual may expect, in principle, to be left alone by the authorities. However, it follows from the case-law of the COURT that, although the essential object of ARTICLE 11 ECHR is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these. Thus, whilst acknowledging that a demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote, the COURT has observed: The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of ARTICLE 11 [ECHR]. Like ARTICLE 8 [ECHR], ARTICLE 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.11

⁸ Eur. Ct. H.R., Sidiropoulos a.o. v. Greece (Appl. No. 26695/95), judgment of 10 July 1998, Rep. 1998, para. 40.

⁹ See, e.g., Eur. Ct. H.R. (GC), *Gorzelik a.o. v. Poland* (Appl. No. 44158/98), judgment of 17 February 2004, para. 97 et seq., where the Grand Chamber essentially confirmed the previous Chamber judgment.

¹⁰ Eur. Ct. H.R. (3rd sect.), *Refah Partisi [Welfare Party] a.o. v. Turkey* (Appl. No. 41340/98), judgment of 13 February 2003, para. 98 *et seq.*, where again the Grand Chamber confirmed the previous Chamber judgment.

¹¹ Eur. Ct. H.R., *Plattform 'Ärzte für das Leben' v. Austria* (Appl. No. 10126/82), judgment of 21 June 1988, para. 32.

The COURT continued by pointing at that it is the duty of the Member States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully. But it was accepted that the authorities cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under ARTICLE 11 of the ECHR is an obligation as to measures to be taken and not as to results to be achieved.

The ECJ, for its part, acknowledged in the case of *Schmidberger* that the exercise of the right to freedom of assembly may pose obstacles to, for instance, the free movement of goods. In this case the Austrian authorities had allowed a demonstration on the Brenner motorway, which as a consequence could not be used for international transports. The ECJ considered that the national authorities had a wide margin of appreciation when striking the balance between the free movement of goods and the freedom of assembly, and that in the circumstances of the instant case no breach of ARTICLE 30 EC Treaty (now ARTICLE 29 EC) had occurred.¹²

1.5 STATE OFFICIALS

Under ARTICLE 11 ECHR a special position is accorded to members of the armed forces, the police and the administration of the State. The last sentence of ARTICLE 11 (2) ECHR entitles Member States to impose 'lawful restrictions' on their exercise of these rights. It remains to be decided whether these specific restrictions are subject to the usual conditions ('necessary in a democratic society' et cetera). The COURT did indicate, however, that the notion of 'administration of the State' should be interpreted narrowly, in the light of the post held by the official concerned.¹³

2. THE FREEDOM OF ASSEMBLY

In its judgment the COURT emphasised that the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively. As such this right covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individuals and those organising the assembly. The COURT noted in addition that the authorities must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable *indirect* restrictions upon that right.¹⁴

It is also clear that the freedom to take part in a peaceful assembly includes the right to a demonstration that had not been prohibited. This right is, according to the COURT, of such importance that it cannot be restricted in any way, so long as the person concerned does not himself commit any reprehensible act on such an occasion.¹⁵ At the same time the COURT has emphasised that ARTICLE 11 of the ECHR only protects the right to *peaceful* assembly. That notion 'does not cover a demonstration where the organisers and participants have violent intentions'.¹⁶ Yet the fact that a group of persons calls for autonomy or even requests secession of part of the country's territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies.¹⁷

¹⁷ Ibid., para. 97.

¹² ECJ, Case C-112/00, *Schmidberger*, [2003] *ECR* I-05659 (judgment of 12 June 2003), paras. 65-94.

¹³ Eur. Ct. H.R., Vogt v. Germany (Appl. No. 17851/91), judgment of 26 September 1995, Ser. A, vol. 323, para. 67.

¹⁴ Eur. Ct. H.R., *Djavit An v. Turkey* (Appl. No. 20652/92), judgment of 20 February 2003, paras. 56-57.

¹⁵ Eur. Ct. H.R., *Ezelin v. France* (Appl. No. 11800/85), judgment of 26 April 1991, Ser. A, vol. 202-A, para. 53.

¹⁶ Eur. Ct. H.R., Stankov, cited above, para. 77.

3. THE FREEDOM OF ASSOCIATION

3.1 THE PROTECTED ASSOCIATION

While in the context of ARTICLE 11 ECHR the COURT has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes – including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness – are also important to the proper functioning of democracy. In this connection the Grand Chamber observed in the case of *Gorzelik*: pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society is functioning in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue collectively common objectives.¹⁸

Indeed ARTICLE 7 of the Framework Convention for the Protection of National Minorities (1995) confirms expressly that every person belonging to a national minority has the right, *inter alia*, to freedom of peaceful assembly and freedom of association.

3.2 FORMS OF ASSOCIATIONS

ARTICLE 11 ECHR protects *private* associations – a notion which includes political parties.¹⁹ On the other hand, public-law institutions, such as in many countries the Bar Association or the Ordre des médecins, are not covered by it.²⁰ The term 'association' possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point.

3.3 ESTABLISHMENT AND DISSOLUTION OF ASSOCIATIONS

It must be presumed that the protection afforded by ARTICLE 12 Charter lasts for an association's entire life. The COURT has clarified that the right to *form* an association is an inherent part of the right set forth in ARTICLE 11 ECHR, even if that ARTICLE (like ARTICLE 12 Charter) only makes express reference to the right to form trade unions. That citizens should be able 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 freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned.

¹⁸ Eur. Ct. H.R., *Gorzelik*, cited above, para. 92.

¹⁹ Eur. Ct. H.R., TBKP, cited above, para. 24.

²⁰ Nor can public-law institutions and governmental entities lodge a complaint under ARTICLE 34 ECHR; see, e.g., Eur. Ct. H.R., *Gouvernement de la Communauté Autonome du Pays Basque c. Espagne* (Appl. No. 29134/03), adm.dec. of 3 February 2004.

Conversely, the dissolution of an association by a country's authorities must also satisfy the requirements of ARTICLE 11 ECHR: the right would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the ECHR.²¹

3.4 POLITICAL PARTIES

When it comes to political parties, it should be noted at the outset that the ECHR does not protect the right to form associations based on National Socialist ideas: National Socialism is a totalitarian doctrine incompatible with democracy and human rights and its adherents undoubtedly pursue aims of the kind referred to in ARTICLE 17 of the ECHR. In these circumstances, the Court concludes that it derives from ARTICLE 17 that the applicant's conviction was necessary in a democratic society within the meaning of the second paragraph of ARTICLE 10.²²

Also the historical background, such as a country's experience of totalitarian communism prior to 1989, cannot by itself justify a refusal to register for instance a political party on account of its communist program. Although the COURT is prepared to take the historical context into account, it also bears in mind that communist parties adhering to Marxist ideology are present in a number of countries that are signatories to the ECHR.²³

The COURT considered that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the ECHR and democracy, even though the danger of that policy for democracy is sufficiently established and imminent.

The COURT's overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a 'pressing social need' must concentrate on the following points: (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a 'democratic society'.

3.5 THE RIGHT NOT TO JOIN AN ASSOCIATION

The freedom of association protects both associations and individuals wishing to join them. Unlike the Universal Declaration of Human Rights, neither the Charter nor the ECHR mentions the right *not* to join an association.

²¹ Eur. Ct. H.R., *TBKP*, cited above, para. 33.

²² Eur. Ct. H.R., *Schimanek v. Austria* (Appl. No. 32307/96), adm. Dec. of 1 February 2000. See also ARTICLE 20 ICCPR and Human Rights Committee, General Comment 11, ARTICLE 20 (Nineteenth session, 1983), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 133 (2003).

²³ Eur. Ct. H.R., *Partidul Comunistilor*, cited above.

Over the years, however, the COURT has come to accept that ARTICLE 11 ECHR does protect this 'negative' right, at least to a certain extent. In the case of *Chassagnou*, the COURTobserved that an individual does not enjoy the right to freedom of association 'if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value'.

As was noted above, **ARTICLE 11 ECHR protects** *private* associations but does not **extend to public-law institutions.** This implies that the right *not* to join an 'association' does not include the right to object to compulsory membership of a public-law institution such as the Bar Association or, as the case may be, a Tourism Federation.²⁴

4. REFERENCES:

- Commentary created by the EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS²⁵

RÉSEAU UE D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX http://ec.europa.eu/justice_home/doc_centre/rights/charter/docs/network_commentary_final%2 0_180706.pdf

- Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950

The text of the Convention had been previously amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with ARTICLE 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) had lost its purpose.

- CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Official Journal of the European Communities, (2000/C 364/01)

²⁴ Eur. Ct. H.R., Köll v. Austria (Appl. No. 43311/98), adm. dec. of 4 July 2003.

²⁵ The EU Network of Independent Experts on Fundamental Rights had been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. It was composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary),Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia),Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network was coordinated by Olivier De Schutter, with the assistance of Valérie Van Goethem.

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