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

**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 99<sup>th</sup> Plenary Session  
(Venice, 13-14 June 2014)**

**on the basis of comments by**

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## I. INTRODUCTION

1. By a letter dated 5 February 2013, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Mr Christopher Chope, requested the opinions of the Venice Commission on the “ Law on Non-Commercial Organisations”, as amended on 13 July 2012, requiring collaborators of NGOs receiving funding from abroad to register as “foreign agents” (hereafter referred to as Law N° 121-FZ or “Law on Foreign Agents”) and the Federal Law on “Treason and Espionage” of 23 October 2012, on making amendments to the Criminal Code of the Russian Federation and widening the scope of the criminal provisions on “treason” (hereafter referred to as Law N. 190-FZ or “Law on Treason”).
2. Ms Veronika Bilkova, Mr Peter Paczolay, Mr Jorgen Steen Sorensen, Ms Herdis Thorgeirsdottir and Mr Jan Velaers acted as rapporteurs on Federal Law N° 121-FZ. They worked on the Russian text of the Law and on its unofficial translation (CDL-REF (2013)037). Mr Jorgen Steen Sorensen and Ms Herdis Thorgeirsdottir also acted as rapporteurs for Federal Law N. 190-FZ. They worked on an unofficial translation of the Law (CDL-REF (2013)036). Certain remarks may result from inaccuracies in the translation.
3. The Rapporteurs, along with Ms Simona Granata-Menghini, Deputy Secretary of the Venice Commission, and Ms Caroline Martin, Legal Officer, visited Moscow on 16-18 September 2013 and met with representatives of the Russian Federation as well as with representatives of several non-governmental organisations. The Rapporteurs decided to join both opinions in the present one.
4. The Ombudsman of the Russian Federation, the Kostroma Center for Support of Public Initiatives and three citizens referred certain provisions of the Law on Non-Commercial Organisations as well as of the Code of Administrative Offences to the Constitutional Court of the Russian Federation. The Commission decided to await the judgment of this Court before adopting its Opinion. The Constitutional Court, after holding a hearing on 6 March 2014, rendered its decision on 8 April 2014; it found that the relevant provisions of the Law on Foreign Agents were in conformity with the Constitution of the Russian Federation, while Article 19.34 of the Code of the Russian Federation on Administrative Offenses that establishes minimum amounts of the administrative penalty both for officers and for legal persons does not conform to the Constitution of the Russian Federation, in so far as it does not allow the law enforcer to properly consider, in all cases, the nature of the offense, the degree of guilt of the person held responsible, his/her property and financial status, as well as other circumstances of significance for the individualisation of administrative responsibility, and thus ensure fair and proportionate administrative punishment.
5. Further amendments to the legislation on NCOs were introduced on 21 February 2014 (Federal Law N. 18-FZ) and on 4 June 2014 (Federal Law N. 147-FZ) (CDL-REF (2014)026).
6. The present opinion was discussed at the Sub-Commission on Fundamental Rights (Venice, 12 June 2014) and was subsequently adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014). With the agreement of the Plenary Session, certain additions relating to the most recent legislative changes were subsequently made to the opinion.

## II. SCOPE OF REVIEW

7. This Opinion analyses Federal Law N.121-FZ of 13 July 2012 introducing amendments to certain legislative acts of the Russian Federation regarding the regulation of activities of non-commercial organisations performing the function of “Foreign Agents”. This Law, which is referred to as the “Foreign Agent Law”, was enacted in November 2012. Further amendments were introduced in February and June 2014. This Opinion will pay special attention to the changes brought in by these laws and will focus mainly on specific issues related to Law N. 121-FZ; it does not constitute a full and comprehensive review of the legislation on NGOs.

8. This opinion examines jointly Federal Law N. 190-FZ, which introduces amendments to the Criminal Code of the Russian Federation and to Article 151 of the Code of Criminal Procedure of the Russian Federation, referred to as “Law on Treason”, which entered into force on 14 November 2012. The Venice Commission decided to join both opinions in the present one, not least due to the possible cumulative effects of the laws. This analysis, however, does not constitute a full review of the legal framework and regulations on treason and espionage in the Russian Federation.

## III. BACKGROUND INFORMATION

9. On 8 December 1995, the State Duma of the Russian Federation adopted the *Law on Non-Commercial Organisations* (Law No. 7-FZ).<sup>1</sup> The Act was signed into law by president Boris Yeltsin on 12 January 1996 and entered into force on the day of its official publication. Since its adoption, the Law has been amended approximately thirty times.<sup>2</sup> One of the recent important amendments is that of 20 July 2012 (*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>3</sup>). The Law No. 121-FZ entered into force 120 days after the day of its official publication, i.e. on 21 November 2012. It amends not only the *Law on Non-Commercial Organisations* but also a series of other federal laws (The Law on Public Associations, the Criminal Code, the Code on Administrative Offences, and the Law on the Laundering of Crime Proceeds to Finance Terrorism).

10. Law No. 121-FZ introduced the legal status of a “foreign agent” (иностраннй агент) which appertains to non-commercial organisations receiving funding from abroad and participating in political activities. The Law sets the conditions of and the procedure for acquiring this status by means of a registration and regulate legal responsibility of non-commercial organisations which fail to register as foreign agents.

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<sup>1</sup> Федеральный закон о некоммерческих организациях, N 7-ФЗ, принят Государственной Думой 8 декабря 1995 года.

<sup>2</sup> See the Amendments of 26 November 1998 (No. 174-FZ), 8 July 1999 (No. 140-FZ), 21 March 2002 (No. 31-FZ), 28 December 2002 (No. 185-FZ), 23 December 2003 (No. 179-FZ), 10 January 2006 (No. 18-FZ), 2 February 2006 (No. 19-FZ), 3 November 2006 (No. 175-FZ), 30 December 2006 (No. 274-FZ and No. 276-FZ), 2 March 2007 (No. 24-FZ), 17 May 2007 (No. 83-FZ), 26 June 2007 (No. 118-FZ), 29 November 2007 (No. 278-FZ), 1 December 2007 (No. 300-FZ), 13 May 2008 (No. 68-FZ), 22 July 2008 (No. 148-FZ), 23 July 2008 (No. 160-FZ), 3 June 2009 (No. 107-FZ), 17 July 2009 (No. 145-FZ and No. 170-FZ), 5 April 2010 (No. 40-FZ), 8 May 2010 (No. 83-FZ), 19 May 2010 (No. 88-FZ), 22 July 2010 (No. 40-FZ), 164-FZ), 29 December 2010 (No. 437-FZ), June 4 2011 (No. 124-FZ), 11 July 2011 (No. 200-FZ), 18 July 2011 (No. 220-FZ, No. 239-FZ and No. 242-FZ), 6 November 2011 (No. 291-FZ), 16 November 2011 (No. 317-FZ), 20 July 2012 (No. 121-FZ), 28 July 2012 (No. 134-FZ), 30 December 2012 (No. 325-FZ), 11 February 2013 (No. 8-FZ).

<sup>3</sup> Федеральный закон Российской Федерации о внесении изменений в отдельные законодательные акты Российской Федерации в части регулирования деятельности некоммерческих организаций, выполняющих функции иностранного агента, N 121-ФЗ, принят Государственной думой 13 июля 2012 года .

11. Federal Law N 190-FZ on making amendments to the Criminal Code of the Russian Federation and article 151 of the Code of Criminal Procedure of the Russian Federation (hereinafter referred to as "Law on Treason") entered into force on 14 November 2012. According to the Russian Federal Security Service (FSS), which proposed the bill (drafted the law), the amendments are aimed at detecting, suppressing and investigating crimes which are punishable under Article 275 (high treason), 276 (espionage) and 283 § 1 (the illegal obtaining of information constituting a state secret) of the Criminal Code of the Russian Federation.

12. The executive summary to the draft federal law maintains that the amendments are necessary, in particular, because the law's current wording places the burden of proof in the cases of treason and espionage on the prosecution – a condition the drafters see as unfairly benefitting defendants.

13. According to FSS the new law is needed to deal with foreign intelligence. The FSS in a rare public comment was quoted by state-run news agency Itar-Tass as saying the law had been unchanged since the 1960s and needed updating as "foreign intelligence agencies' methods and tactics for gathering information have changed".<sup>4</sup> The Russian representatives further underlined that both laws reflect the principle of non-interference into the domestic affairs of a sovereign state and referred in particular to the United Nations Charter, the UN Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty of 1965, the Declaration of the United Nations on the Principles of International Law on Friendly Relations and Co-operation of States in Keeping with the UN Charter of 1970, the Declaration of Principles of Mutual Relations of the Participating States of the Final Act of the Conference in Helsinki of 1975.

14. The adoption of Law No. 121-FZ has stirred comments and criticism both inside the Russian Federation<sup>5</sup> and on the international scene.<sup>6</sup> The criticism mainly relates to the status of a "foreign agent" and the related need for non-commercial organisations labelled as such to undergo a special registration process and assume additional legal obligations. Moreover, the definitions of certain terms, especially that of political activity, and the modalities of the implementation of the *Law on Non-Commercial Organisations* also give rise to certain difficulties.

15. At the Council of Europe's level, the Commissioner for Human Rights issued an Opinion on the legislation of the Russian Federation on non-commercial organisations in light of Council of Europe standards.<sup>7</sup> The Standing Committee on behalf of the Conference of INGOs of the Council of Europe adopted a Recommendation, on 30 September 2013.<sup>8</sup>

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<sup>4</sup> <http://www.reuters.com/article/2012/11/14/russia-treason-idUSL5E8ME4Y620121114>

<sup>5</sup> *Заключение Совета при Президенте Российской Федерации по развитию гражданского общества и правам человека на проект Федерального закона N109968-6, 4 октября 2012 года*

<sup>6</sup> CommDH(2013)15, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards*, 15 July 2013; UN Doc. CAT/C/RUS/CO/5, *Concluding observations on the fifth periodic report of the Russian Federation, adopted by the Committee at its forty-ninth session (29 October-23 November 2012)*, 11 December 2012, par. 12.

<sup>7</sup> CommDH(2013)15,

<https://wcd.coe.int/ViewDoc.jsp?id=2086667&Site=COE&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

<sup>8</sup> [http://www.coe.int/t/ngo/articles/conf\\_ple\\_2013\\_rec5\\_expert\\_council\\_russia\\_EN.asp](http://www.coe.int/t/ngo/articles/conf_ple_2013_rec5_expert_council_russia_EN.asp), CONF/PLE(2013)REC5.

## IV. ANALYSIS AND RECOMMENDATIONS

### A. Applicable International Standards

16. Freedom of association is guaranteed in several international human rights treaties the Federal Republic of Russia has ratified. More specifically in article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) ratified in 1996, and in article 22 of the International Covenant on Civil and Political Rights, ratified by Russia in 1991.

17. Freedom of association is “an essential prerequisite for other fundamental freedoms”.<sup>9</sup> It is closely intertwined with freedom of expression, and assembly, 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, promote and defend their common interests”.<sup>10</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>11</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 11.2 ECHR and Articles 4 and 22 (2) of the ICCPR).

18. Non-governmental organizations (NGOs) play a crucial role in modern democratic societies, allowing citizens to associate in order to promote certain principles and goals. Such public engagement, parallel to that of participation in the formal political process, is of paramount importance and represents a crucial element of a healthy civil society. According to the ECtHR, members of NGOs, as well as NGOs themselves, enjoy fundamental human rights, including freedom of association and freedom of expression.

19. In several of its judgments, the European Court of Human Rights has underlined that the public watchdog role that NGOs exercise is essential to a democratic society and of similar importance to that of the press.<sup>12</sup>

20. Non-governmental organisations engaged in human rights advocacy are traditionally considered as particularly vulnerable and, hence, in need of enhanced protection. Both at the universal and regional levels, special instruments have been adopted over the past decades codifying the standards applicable to human rights defenders. 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 (Human Rights Defenders)<sup>13</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

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<sup>9</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 45; and CDL-AD(2012)016, Opinion on the Federal law on combating extremist activity of the Russian Federation, para 64.

<sup>10</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, para 40.

<sup>11</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, para 41.

<sup>12</sup> ECtHR, case of Vides Aizsardzibas Klubs v. Latvia, Application No. 57829/00, Judgment of 27 May 2004, par. 42; Case Animal Defenders International v. The United Kingdom, Application No. 48876/08, Judgment of 22 April 2013, par.103.

<sup>13</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; the full text of the Declaration is available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.res.53.144.en?opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.res.53.144.en?opendocument).

fundamental freedoms at the national and international levels” (Article 1) and stipulates that States have to adopt measures to ensure this right.<sup>14</sup>

21. The UN Declaration on Human Rights Defenders provides specifically (Article 13) 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 in accordance with Article 3 of the present Declaration”. The right of access to funding is to be exercised within the juridical framework of domestic legislation – provided that such legislation is consistent with international human rights standards

22. Specific standards which relate to the ability of associations to access financial resources can be found in the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (General Assembly Resolution 36/55), which in Article 6 (f) explicitly refers to the freedom to access 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”.

23. Also of relevance in this context is the Human Rights Council resolution 22/6 (adopted on 21 March 2013), which 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.”

24. In the areas of soft law, it may be noted in addition that 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>15</sup> The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has consequently considered that fundraising activities are protected under Article 22 of the ICCPR, and funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with this Article.<sup>16</sup>

25. A series of recent reports by UN Special Rapporteurs (on the right to freedom of peaceful assembly and of association, and on human rights defenders respectively) have also expressly stated that the right to freedom of association also includes the ability of NGOs to seek, receive and use resources from domestic, foreign and international sources;<sup>17</sup> that “Governments must allow access by NGOs to foreign funding as a part of international co-operation, to which civil society is entitled to the same extent as Governments”;<sup>18</sup> and that “legislation limiting foreign funding to registered associations only, [...] violates international human rights norms and standards pertaining to freedom of association”.<sup>19</sup>

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<sup>14</sup> UN Declaration on Human Rights Defenders), adopted by the General Assembly resolution 53/144 (A/RES/53/144) on 8 March 1999.

<sup>15</sup> Human Rights Committee, communication No. 1274/2004, *Korneenko et al. v. Belarus*, Views adopted on 31 October 2006, para 7.2.

<sup>16</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.

<sup>17</sup> A/HRC/23/39, para 8.

<sup>18</sup> A/59/401, para 82. The Report adds that “The only legitimate requirements of such [foreign-funded] NGOs should be those in the interest of transparency”.

<sup>19</sup> A/HRC/23/39, para 17.

26. The Council of Europe has also issued Fundamental Principles on the Legal Status of Non-governmental Organisations in Europe<sup>20</sup> (“the Fundamental Principles”) which, though not binding by nature, are valuable tools for the interpretation of international treaty norms touching on freedom of association. Recommendation CM/Rec(2007)14 of the Committee of Ministers to Member States on the Legal Status of Non-governmental Organisations in Europe<sup>21</sup> (hereinafter “Recommendation CM/Rec(2007)14”) stresses “the essential contribution made by non-governmental organisations (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”.

27. It further states that “*governmental and quasi-governmental mechanisms at all levels should ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives and decisions. Such participation should ensure the free expression of the diversity of people’s opinions as to the functioning of society.*” (§76). As to the funding of the activities of non-governmental organisations, the Recommendation stresses “*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*”. The Explanatory memorandum further explains: “*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*”.

28. The Declaration (2008) of 6 February 2008 on the “*action to improve the protection of human rights defenders and promote their activities*”<sup>22</sup> calls on member 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*” (point 2. i.) and “*to take effective measures to protect, promote and respect human rights defenders and ensure respect for their activities*”. (point 2. ii)

## **B. The national legal framework**

29. Articles 19, 28, 29 and 30 of the Constitution of the Russian Federation are relevant. They refer to equality before the law and courts, and non-discrimination and equal enjoyment of rights and freedoms. Guaranteed are freedom of conscience, freedom of religion, including the right to profess individually or together with others any religion or to profess individually or together with others views, freedom of ideas and speech, to freely look for, receive, transmit, produce and distribute information by any legal means, freedom

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<sup>20</sup> CoE Fundamental Principles on the Status of Non-governmental Organisations in Europe and explanatory memorandum. The Fundamental Principles in English or Russian are available at [http://www.coe.int/T/E/NGO/public/Fundamental\\_Principles/Fundamental\\_principles\\_intro.asp](http://www.coe.int/T/E/NGO/public/Fundamental_Principles/Fundamental_principles_intro.asp)

<sup>21</sup> Adopted on 10 October 2007; the full text is available at <https://wcd.coe.int/ViewDoc.jsp?id=1194609&Site=CM&BackColorInternet=9999CC&BackColorIntranet>

<sup>22</sup> Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities (*Adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers’ Deputies*).



of mass communication as well as the right to association as well as the freedom of activity of public association.

30. The national legal framework for the activity of non-commercial, or more generally non-governmental organizations in the Russian Federation encompasses a complex set of legal acts (federal laws, government resolutions, executive decrees etc.). The two main federal laws relating to NCOs/NGOs are the 1996 *Law on Non-Commercial Organisations* (Law No. 7-FZ), under scrutiny in this opinion, and the 1995 *Law on Public Associations* (Law No. 82-FZ).<sup>23</sup>

31. The latter law applies to public associations (общественное объединение), 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). Religious organisations, commercial organisations and non-property unions are excluded from the scope of the application of the Law. About 50% of non-commercial organizations operating in Russia are public associations. Prior to the amendments made to the Law on Non-Commercial Organisations in 2006, the legal regime of NCOs and of public associations differed in that the former were subject to a simple notification only, while the latter needed to register. Since 2006, the obligation of registration is in place for all NCOs.

32. In addition to the two specialised laws, a range of more general federal laws are of relevance for non-commercial organizations. These encompass: the Constitution of the Russian Federation, the Civil Code, the Criminal Code, the Code of Administrative Penalties, the Tax Code, the Federal Law on Charitable Activities and Charitable Organisations (Law No. 135-FZ), the Federal Law On Free of Charge Assistance (Law No. 95-FZ, and the Federal Law On the Procedure of Establishment and Use of Endowments of Non-commercial Organisations (No. 275-FZ).

33. Moreover, several of the federal laws, adopted by the Duma, have been implemented by means of derivative acts, adopted by executive organs. These acts include: the Government Resolution No 212 *On measures aimed at implementing certain provisions of the federal laws regulating activities of non-commercial organisations* of 15 April 2006; Government Resolution No 485 *Regarding the list of international organisations whose grants (free aid) obtained by Russian organisations shall be tax exempt and shall be accounted for as taxable income of taxpayers – recipients of such grants* of 28 June 2008; and 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.

### **C. Comparative material**

34. During their meetings with the rapporteurs, the Russian authorities declared that the “Foreign Agent” law was modelled on the 1938 US Foreign Agent Registration Act (FARA law).

35. The Foreign Agents Registration Act (FARA), 22 U.S.C. § 611 et seq., has undergone several changes since its adoption in 1938, when it was mainly targeted at pre-WWII Nazi activity in the US. As amended, it requires 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 to disclose the relationship with the foreign entity and provide information about related activities and finances. It primarily focuses on the activities of lobbyists and publicity agents acting on

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<sup>23</sup> *Федеральный закон об общественных объединениях*, N 82-ФЗ, принят Государственной Думой РФ 14 апреля 1995.

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 relationship of agency and control between the foreign entity and the agent. It also exempts news or press organisations not owned by the foreign entity.

36. The FARA law does not prevent US NGOs from receiving financial support from foreign organisations and countries and these NGOs are not required to be registered under the FARA Law.

37. In Kyrgyzstan, a draft law “On Introducing Amendments and Changes into some Legislative Acts of the Kyrgyz Republic”, very similar to the Russian Foreign Agent Law, was submitted to parliament in September 2013. The Venice Commission gave an opinion on it in October 2013<sup>24</sup>. The draft law has not been adopted.

#### **D. Analysis of the key provisions of Federal Laws N. 121- FZ (“Law on Foreign Agents”), N. 18-FZ and N. 147-FZ**

38. The *Law on Non-Commercial Organisations*, as amended on 13 July 2012, 21 February 2014 and 4 June 2014, regulates the legal status of non-commercial organisations (NCOs).

39. The Law applies to various legal forms of NCOs but does not extend to religious associations (item 4 of Article 1), state corporations and state companies, as well as to the non-profit organisations, state and municipal (in particular budget-finance) institutions established by them (item 6 of Article 2); associations of employers and chambers of commerce and industry (item 7 of Article 1).

40. A non-commercial organisation is defined as “one not having profit-making as the main objective of its activity and not distributing the earned profit among the participants” (Article 2(1)). NCOs may pursue various goals, such as protecting rights and legitimate interests of citizens, protecting the environment, exercising sports, rendering legal aid etc. (see Article 2(2)). Depending on their goals and nature, NCOs are divided by the Law into six categories, subject to a somewhat different legal regime. These categories are: social and religious organisations, funds, non-profit partnership, private institutions, autonomous non-profit associations, and associations (unions). There are currently over 674.000 non-commercial organisations in the Russian Federation as of 1<sup>st</sup> January 2014.

41. The *Law on Non-Commercial Organisations* determines the legal status of NCOs, regulates the procedure of their creation, activities and liquidation, sets the rights and duties of their founders and members and defines the relationship between NCOs and public authorities (see Article 1(1)).

42. All NCOs, regardless of their form, are subject to state registration in compliance with the *Law on the State Registration of Legal Entities and Individual Businessmen* (Law No. 129-FZ)<sup>25</sup> of 8 August 2001. The registration procedure is very bureaucratic, with extensive documentation requirements.<sup>26</sup> Once registered, NCOs “may carry out one type of activity or several types of activity which are not prohibited by the legislation of the Russian Federation and which correspond to the objectives of the activity of the non-profit organisation stipulated by its constituent documents” (Article 24(1)). They remain subject to the control by public

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<sup>24</sup> CDL-AD(2013)030.

<sup>25</sup> *Федеральный закон о государственной регистрации юридических лиц и индивидуальных предпринимателей*, N 129-ФЗ, 8 августа 2001 г.

<sup>26</sup> See NGO Law Monitor: Russia, 20 August 2013, *online* at <http://www.icnl.org/research/monitor/russia.pdf> (downloaded 21 August 2013).

authorities; the control implies extensive reporting obligations. NCOs may be liquidated based on the decision of their founders/ participants or by the decision of “the competent public authority”. In the *Golos Case*, the Supreme Court of the Russian Federation held that the liquidation of a NCO “*is not allowed only on the formal grounds of violations of the federal law, the liability for infringement must be used in compliance with the general legal principles of the legal liability and be proportional to violations and their consequences*”.<sup>27</sup>

43. The *Law on Non-Commercial Organisations*, as amended on 13 July 2012, 21 February 2014 and on 4 June 2014, is a complex instrument and it is beyond the remit of this opinion to present a detailed analysis of all its provisions. The opinion therefore focuses solely on the most problematic provisions and institutions foreseen in this piece of legislation. Those include: the introduction of the legal status of a “foreign agent”; the definition of “political activities”; the practical implementation of the Law which implies additional reporting requirements, additional inspections and oversights by authorities, a specific system of sanctions and penalties if a breach of legislation is detected. Most of these provisions and institutions result from the amendment by Law 121-FZ.

#### a. The status of a Foreign Agent

44. Law 121-FZ introduced into the *Law on Non-Commercial Organizations* a new legal status of a “foreign agent” (иностранный агент). Under Article 2(6) of the amended Law on NCOs, a non-commercial organization is considered to exercise the functions of a foreign agent, if **three conditions** are met:

- a) the organisation is registered in the Russian Federation as a NCO;
- b) the organisation receives monetary assets and other property from foreign states, their state bodies, international and foreign organizations, foreign persons, stateless persons or from the persons authorised by them and/or from Russian legal entities receiving monetary assets and other property from the cited sources;
- c) the organisation participates including in the interests of foreign sources, in political activities exercised in the territory of the Russian Federation.

45. Non-commercial organisations fulfilling the condition of a “foreign agent” need to register in a special Register (Article 13(10)). If they fail to apply for registration, they shall be included in this register by the competent body. The decision can be appealed in courts (Article 32(7) as amended in 2014).

46. A repeated failure to register may serve as a ground for the liquidation of a NCO. Following the latest legislative amendments giving the Russian authorities the power to proceed themselves to the registration of a NCO which has failed to do so, it seems unlikely that there could be a case of “repeated failure to register”. Moreover, malevolent evasion of performing duties connected with the submission of documents required for the inclusion in the register of NCOs performing the functions of foreign agents is considered a criminal offence and is punishable by a fine of up to 300,000 Roubles or the size of the salary or other income of the convicted for a period of up to two years, or mandatory community service for a period of up to 480 hours, or correctional labour for up to two years, or limitation of liberty for the same period of time (Article 330 of the Criminal Code<sup>28</sup>).

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<sup>27</sup> Cit. in AGORA, Liquidation of an NGO on the formal grounds is not allowed, 3 April 2008, online at [http://www.yhrm.org/en/news/regions/liquidation\\_of\\_an\\_ngo\\_on\\_the\\_formal\\_grounds\\_is\\_not\\_allowed](http://www.yhrm.org/en/news/regions/liquidation_of_an_ngo_on_the_formal_grounds_is_not_allowed) (downloaded on 21 August 2013). See also Лилия Абдуллина, Павел Коробов. Правозащитникам вернули “Голос”. Верховный суд РФ отказался ликвидировать НКО, *Коммерсант*, № 37 (3854), 6. 3. 2008.

<sup>28</sup> See *Уголовный кодекс Российской Федерации*: Статья 330. Злостное уклонение от исполнения обязанностей, определенных законодательством Российской Федерации о некоммерческих организациях, выполняющих функции иностранного агента.

47. NCOs exercising the function of a “foreign agent” are subject to an enhanced monitoring system, implying the duty to submit more frequent reports and to undertake an annual mandatory auditing (Article 32(10)). Planned inspections of a “foreign agent NCO” shall not take place more than once a year, yet there are several grounds for extraordinary inspections (Article 32(4.2)).

48. The materials issued or distributed by NCOs exercising the function of a “foreign agent” must have indications of their being issued by a foreign agent (Article 24(1)). In case of a failure to fulfil any of the obligations imposed by the Law, the organisation as well as its representatives may be sanctioned by a fine.

49. Several components of this Status call for specific comments.

#### **i. The Registration as “Foreign Agents” and other procedural elements**

50. The law itself does not establish the procedure for registration, specifying only that the registry falls under the scope of a designated authorised body. According to the information conveyed to the delegation of the Venice Commission which travelled to Moscow in September 2013, it appears that the ordinary registration procedure is viewed as overly bureaucratic with excessive documentation requirements.

51. The Law does not determine which authority may decide that the NCO should be liquidated.

52. The Law also seems to be silent on the de-registration process. It thus remains uncertain whether, and how, a NCO may divest itself of the status of a “foreign agent” once it ceases to participate in political activities and/or to receive foreign funding, and whether it can do so without having to first liquidate and then re-establish itself as a NCO.

53. The Venice Commission considers that on a procedural level, the law does not provide the necessary legal certainty and falls short of international standards.

#### **ii. The concept of Foreign Agent**

54. Many sources have already commented upon the choice of the term “foreign agent”.<sup>29</sup> The Venice Commission cannot but concur with those who consider this term unfortunate. As rightly noticed by the Council of Europe Commissioner for Human Rights, the term “has usually been associated in the Russian historical context with the notion of a “foreign spy” and/or a “traitor” and thus carries with it a connotation of ostracism or stigma”.<sup>30</sup> The opinion poll carried out by the Levada Centre in September 2012 found that 62% of the respondents perceived the term negatively. The term might seem as a reminiscence of the communist period, in which foreign equalled suspicious, unreliable or even hostile.<sup>31</sup> An NCO labelled as a “foreign agent” would therefore most probably encounter an atmosphere of mistrust, fear and hostility making it difficult for it to operate. It was reported that in winter 2012-2013,

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<sup>29</sup> See, for instance, UN Doc. CAT/C/RUS/CO/5, *Concluding observations on the fifth periodic report of the Russian Federation, adopted by the Committee at its forty-ninth session (29 October-23 November 2012)*, 11 December 2012, par. 12. + opinion INGO.

<sup>30</sup> CommDH(2013)15, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards*, 15 July 2013, par. 57.

<sup>31</sup> See N. A. Kupina, Ideologem: “Foreign Agent”: 3 Days in July 2012, *Политическая лингвистика* 3 (41) 2012, pp. 43-48.

homeless people were refusing the offer of a shelter from representatives of a humanitarian NCO, because they did not want help from “foreign agents”.<sup>32</sup>

55. It follows that being labelled as a “foreign agent” signifies that a NCO would not be able to function properly, since other people and - in particular - representatives of the state institutions will very likely be reluctant to co-operate with them, in particular in discussions on possible changes to legislation or public policy.”<sup>33</sup> The Russian authorities give no explanation or even an indication of the necessity of imposing the qualification “foreign agent” on these NCOs. They only declared that the term “foreign agent” has lost the negative connotation it had in the past. The Constitutional Court also assessed in its judgment on the constitutionality of the Law that “any attempt to find, based on stereotypes of the Soviet era that have effectively lost their meaning under modern conditions, any negative connotation in the phrase “foreign agent” would be devoid of any constitutional and legal basis.”<sup>34</sup> The Venice Commission however is of the opinion that this assessment on the constitutional and legal meaning of the term “foreign agent” does not refute the evidence produced by the above mentioned opinion poll that, in fact, the term still has a very negative connotation in large sections of the population and can therefore be a threat to the free exercise of the activities of these non-commercial organisations. Moreover, even without the specific Russian historical context, the term “foreign agent” always has a negative connotation as it suggests that the organisation acts “on behalf and in the interests of the foreign source” and not in the interest of the Russian society.

56. It is occasionally claimed that the term “foreign agent” is not unfamiliar to the Russian legal order. It is indeed true that the terms “agent” and “foreign” make part of this legal order and are defined under it. The combination of the two terms in “foreign agent” is however, specific to Law on NCOs and has no antecedents in the legal order of the Russian Federation.

57 The rationale for the introduction of the status of a “foreign agent” consists, according to the travaux préparatoires, in 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”. This rationale is prima facie a legitimate one, as states certainly have a right to take steps in order to ensure transparency in matters pertaining to foreign funding of NGOs.

58. The Venice Commission acknowledges 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 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”, as stated in paragraph 2 of Article 11 ECHR.

59. The Venice Commission recalls however that although “states have a right to satisfy themselves that an association’s aim and activities are in conformity with the rules laid down in legislation, /.../ they must do so in a manner compatible with their obligations under the

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<sup>32</sup> CommDH(2013)15, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards*, 15 July 2013, par. 58.

<sup>33</sup> CommDH(2013)15, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards*, 15 July 2013, par. 58.

<sup>34</sup> See Chapter 52 of the Civil Code (“agent”) and Article 2 of Federal Law N. 115-FZ On the Legal Status of Foreign Citizens in the Russian Federation of 25 July 2002 (“foreign”).

*/European/ Convention*<sup>35</sup> and under other international legal instruments. It also recalls that in the *Moscow Branch of the Salvation Army v. Russia* Case, the European Court for Human Rights was reluctant to accept the foreign origin of a NCO as a legitimate reason for a differentiated treatment;<sup>36</sup> the same reluctance would *a fortiori* be in place in case of mere foreign funding.

60. The Venice Commission considers that the imposition of the very negative qualification of “foreign agent” and the obligation for the NCO to use it on all its materials cannot be deemed to be “necessary in a democratic society” to assure the financial transparency of the NCO receiving foreign funding. The mere fact that a NCO receives foreign funding cannot justify it to be qualified a “foreign agent”.

61. In the light of the undisputable, very negative connotation of the label “foreign agent”, the Venice Commission finds that the immediate effect of the law is that of stirring the suspicion and distrust of the public in certain NCOs and of stigmatizing them, thus having a chilling effect on their activities. This effect goes beyond the aim of transparency which is alleged to be the only aim of the law under consideration. It seems significant in this regard that the 4 June legislative amendments empower “individuals or organizations” to inform the authorities about “activities of a non-profit organization acting as a foreign agent which has not submitted a request to be included in a State register as a non-profit organizations acting as a foreign agent”, and this information may prompt the authorities to carry out an unscheduled inspection of the relevant NCO (Article 32 as amended).

62. The 4 June legislative amendments further empower the authorities to proceed with the registration of an NCO as “foreign agent” if it fails to do so itself (Article 32 item 7). It should be recalled in this context that States have a positive obligation to secure genuine respect for freedom of association. Freedom of association in conjunction with freedom of expression encompasses the expectation that an NGO will be allowed to function peacefully in pursuit of its interests, free from arbitrary State intervention. The State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a “pressing social need”; thus, the notion “necessary” does not have the flexibility of such expressions as “useful” or “desirable”.<sup>37</sup>

63. Registering NCOs as foreign agents without their consent amounts to depriving them of the right guaranteed by Article 11 ECHR to form an association in a free manner. This measure is not proportionate to the objective of protecting the public interest of sovereignty of the state, as the authorities always have full discretion to check whether the association's aim and activities are in conformity with the rules laid down in the legislation.<sup>38</sup> In addition, depriving the association of its own discretion to define its aims and objectives when registering impinges on the freedom of expression of its members. Article 10 ECHR prohibits any prior interference with the fundamental rights therein protected; such prior interference amounts to censorship. Authorizing the authorities to register groups in civil society as foreign agents at their discretion and without the prior consent of the relevant groups is a

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<sup>35</sup> ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, Judgment of 10 July 1998, par. 40.

<sup>36</sup> ECtHR, *Moscow Branch of the Salvation Army v. Russia*, Application No. 72881/01, Judgment of 5 October 2006, par. 81-86.

<sup>37</sup> ECtHR, *Church of Scientology Moscow v. Russia*, Application no. 18147/02, Judgment of 5 April 2007, par.73-75.

<sup>38</sup> ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, Judgment of 10 July 1998, par. 40.

very invasive measure which represents a disproportionate interference with the right to freedom of expression.

64. Last but not least, being registered as a foreign agent might lead to espionage charges under the Treason Law (see the analysis below).

65. The Venice Commission is therefore of the view that the Russian authorities should urgently consider replacing the term “foreign agent” with another, more neutral term, and should remove the power of the authorities to proceed with the registration of a NCO as “foreign agent” without that NCO’s consent.

### **iii. The concept of “Foreign Funding”**

66. In its 2007 Recommendation on the Legal Status of Non-Governmental Organizations in Europe the Committee of Ministers of the Council of Europe explicitly confirms 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” (par. 50).

67. Foreign funding of NGOs is at times viewed as problematic by States. There may be various reasons for a State to restrict foreign funding, including the prevention of money-laundering and terrorist financing. However, these legitimate aims should not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work, notably in defence of human rights.

68. The prevention of money-laundering or terrorist financing does not require nor justify the prohibition or a system of prior authorisation by the government of foreign funding of NGOs. None of the Member States of the Venice Commission which has been examined has prohibited foreign funding of NGOs. The possibility of such funding is explicitly allowed in five countries: Armenia, Bulgaria, Finland, Tunisia and Turkey. Italy explicitly allows contributions from international organisations. Only in Algeria has funding from foreign associations and NGOs been subjected to prior authorisation from the competent authorities. In Turkey, the need for prior authorisation was removed in 2004, and, as part of the reform undertaken by the AKP government, now it is only required to inform the competent authorities; foreign funding must be done through a bank. In Morocco, foreign funding must be declared to the government and entails the obligation to keep books and control by inspectors of the Minister of Finances. In Tunisia, foreign funding is generally allowed, with two exceptions: if the donor State in question has no diplomatic relations with Tunisia and if the donor organisations pursue the political interests of such States. In Moldova NGOs and their juridical representatives are not allowed to use financial support from foreign (international) natural or juridical persons for supporting political parties, social-political organizations and particular candidates during the elections. These financial sources shall be confiscated and transferred to the state’s budget following the court’s decision. The FARA law of the United States does not prevent US NGOs from receiving financial support from foreign organizations and countries and these NGOs are not required to be registered under the FARA Law (see para. 33-35 above).

69. While in the Russian Federation foreign funding is allowed and does not require prior authorisation or notification, the fact that NCOs which receive cash funds or other property from foreign governments, their government bodies, international and foreign organizations, foreign citizens, stateless persons or other entities authorized 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 as “non-profit organizations performing the functions of a foreign agent” is problematic.

70. Law 121-FZ does not make the legal status of “foreign agent” conditional on any minimal amount of funding received from abroad or on any minimal period of time during which a NCO would have to receive foreign funding<sup>39</sup>. Thus, a single rubel/Euro/dollar sent by a foreign citizen to the bank account of a NCO would turn this NCO, provided the political activities element is present, into a foreign agent and make it subject to a set of additional legal obligations. Moreover, the Law does not distinguish between various forms of “funding and other property”. Thus, a NCO regularly funded from abroad, a NCO which receive an international prize for its activity, or a NCO receiving a laptop from an international business company would, again provided the political activities elements is met, be all considered as “foreign agents”. Such a situation is obviously extremely problematic and it is hardly imaginable that the law is intended to cover all these very different situations. The Venice Commission finds that if foreign funding continues to be viewed as necessitating a specific treatment, the law should at the very least define what features (minimum amounts, duration, sources) it must have for it to fall within the scope of application of the law.

#### **iv. The definition of political activities**

71. Under Article 6(2) of the Law on Non-Commercial Organizations, for a NCO to count as a “foreign agent”, it needs – in addition of being registered as a NCO and receiving foreign funding – to participate in political activities exercised in the territory of the Russian Federation. The same provision specifies that a NCO participates in *political activities “if, regardless of the purposes and tasks cited in the constituent entities thereof, it participates (in particular by way of providing finances) in arranging and conducting political actions for the purpose of influencing the adoption by the state bodies of decisions aimed at changing the state policy pursued by them, as well as in forming public opinion for the cited purposes”*. Do not count as political activities *“activities in the field of science, culture, arts, public health care, citizens’ preventive treatment and health protection, citizens’ social support and protection, protection of motherhood and childhood, social support to disabled people, promotion of healthy lifestyle, physical exercises and sports, protection of flora and fauna, charitable activities, as well as the activities aimed at assisting charitable and volunteers’ activities”*.

72. It appears from the judgment of Constitutional Court that the term political activity has not to be construed restrictively. On the contrary it has a broad scope. The Court assessed: *“Their forms can be very diverse: in addition to meetings, rallies, demonstrations, marches and pickets, political actions include canvassing in connection with elections and referendums; public appeals to government bodies; dissemination, including with the use of modern information technologies, of their assessments of the decisions made and policy pursued by state bodies; as well as other activities, which it would be impossible for legislation to list comprehensively. In listing these or other activities organized and carried out with the participation of non-commercial organizations with political actions subject to aforementioned statutes, their goal of influencing – directly or through the formation of public*

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<sup>39</sup>The Constitutional Court ruled (p. 27-28): “Neither time (duration, systematic or one-off character) nor quantitative (size, amount) or generic (donations, grants, awards, etc.) characteristics of funds or other property received by a non-commercial organization from foreign sources have any legal significance, which essentially blocks the possibility of arbitrary interpretation and application of those provisions in the part relating to conditions of receipt of foreign funding. However, it is important to remember that relevant monetary funds and other property should be not only transferred (sent) to the non-commercial organization but also received by it; if it refuses to receive them and returns them to the foreign source, especially when such actions are undertaken before the beginning of political activity, it is not required to declare itself an organization that performs the functions of a foreign agent



*opinion – decision-making by state bodies and the policy pursued by them and attracting the attention of the government and/or civil society should be of fundamental importance.”*

73. The definition of political activities has been repeatedly criticised as being too broad and vague.<sup>40</sup> The Venice Commission recalls that in its case law, the European Court of Human Rights established that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. Freedom of political opinion and freedom of association, including political association, represent fundamental human rights guaranteed by the European Convention on the Protection of Human Rights and are primordial elements of any genuine democracy as envisaged by the Statute of the Council of Europe.<sup>41</sup> The European Court of Human Rights has further indicated that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest.<sup>42</sup>

74. The fact that Russia must work on the definitions of “Political Activity” was conceded also by President Vladimir Putin, during his meeting with the Secretary General of the Council of Europe, Mr.Thorbjørn Jagland, on 20 May 2013.

75. Although hope has been expressed by the representatives of the Russian Federation that the expression could be clarified by the executive and/or courts applying the law, the existing practice does not indicate any uniformity in the interpretation of the expression. Thus, for instance, a human rights NCO “Shield and Sword” (Щит и меч) from the Chuvash Republic was denied in January 2013 the registration as a “foreign agent” by the Ministry of Justice on the ground that the declared goals of the NCO – promotion of human rights in the Chuvash Republic – were fully in line with the Russian Constitution. The decision was criticised by the Prosecutor’s Office as an abuse of authority.<sup>43</sup> At the same time, the registration – denied to one human rights organisation – has been required from other organizations promoting a similar agenda, with those refusing to undergo the process being threatened with the suspension of their activities or having their activities already suspended by the Ministry of Justice.<sup>44</sup>

76. Similarly, reports indicate that, although the protection of flora and fauna is explicitly excluded from the definition of “political activities”, more than ten environmental organizations have received official warnings from the Prosecutorial Office asking them to register as “foreign agents”. There are also instances in which a warning was first issued to certain NCOs and then revoked, the public authorities having in the meantime reconsidered their view on the status of those NCOs (one of them provides assistance to people suffering of cystic fibrosis, the other is an environmental NCO). The obvious disparateness in the practice indicates that even public authorities do not have a clear and uniform understanding of what “political activities” should encompass.

77. The principles of legal certainty and of legality belong among the most important guarantees of the rule of law. These principles require that any limitations imposed upon freedom of association and other human rights shall have, among other, a clear legal basis.

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<sup>40</sup> CommDH(2013)15, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards*, 15 July 2013, par. 50-56; European Parliament Resolution of 13 June 2013 on the rule of law in Russia (2013/2667(RSP)), par. 4.

<sup>41</sup> Venice Commission, *Guidelines on prohibition of political parties and analogous measures*, CDL-INF (1999)15. CDL-INF(2000)1

<sup>42</sup> ECtHR, *Feldek v. Slovakia*, Application No. 29032/95, Judgment of 12 July 2001, par. 74.

<sup>43</sup> Григорий Туманов, Минюст приводят в соответствие с законом об НКО. Генпрокуратура нашла в действиях ведомства превышение полномочий, *Коммерсант*, № 115 (5146), 4. 7. 2013.

<sup>44</sup> Russia NGO law: Election watchdog Golos suspended, *BBC*, 26 June 2013.

That means that there must a law regulating the limitation and that the law has to be accessible and formulated with sufficient precision to enable citizens to regulate their conduct (test of foreseeability). The requirement of a clear legal basis has been repeatedly emphasised by the European Court of Human Rights<sup>45</sup> and the Constitutional Court of the Russian Federation.<sup>46</sup>

78. In *Zhechev v. Bulgaria*, the European Court of Human Rights rightly claimed that the term “political” is “inherently vague and could be subject to largely diverse interpretations”.<sup>47</sup> Law 121-FZ seeks to define the “political activities”. Yet, when doing so, it resorts to other, equally vague and unclear terms such as “political actions”, “state policy”, or “shaping of public opinion”.

79. Moreover, the scope of the activities which the law deems not to be “political activities” is unclear. “Activities in the field of... science” are excluded, but it is unclear whether a scientific activity can only be conducted by a university or a recognized scientific institute, or also by a NCO which e.g. conducts research on the compliance of the Russian policies with the international human rights treaties. “Activities in the field of ... arts” are equally excluded, but it is uncertain whether an artistic expression of criticism of public authorities is also excluded from the application of the law. Finally “activities in the field of .. the protection of flora and fauna” are excluded, but practice shows that the Russian authorities consider environmental activities as political activities.

80. These activities are guaranteed both in the Russian Constitution and in the international human rights treaties. They cannot be deemed to be “in the interests of foreign sources”, but have to be considered in the interest of Russia and the Russian population. The same applies to the activities of NCOs promoting the compliance of the Russian policy with the international obligations in the field of environmental protection. The Venice Commission recalls that the environmental protection has become an important issue in today’s human rights law.<sup>48</sup>

81. Federal Law n° 121-FZ appears to afford the Russian authorities a rather wide discretion. As a result, it is difficult for NCOs to know which specific actions on their part could be qualified as “political activities” and which activities are exempted from this qualification. In such circumstances the restrictions on the freedom of association cannot be considered to be “prescribed by law”.

82. In view of the Venice Commission, therefore, the *Law on Non-Commercial Organizations*, to the extent to which it speaks about “political activities”, fails to meet the criterion of legality and should therefore be reformulated.

83. However, the unclear meaning of the term is not the only problematic aspect of the provisions relating to “political activities”. The experience of the application of the law during the first months after its entry into force shows that the NCOs which have been subject to law enforcement measures were mostly active in the field of human rights, democracy and the rule of law. Moreover the activities of the NCOs which were taken into account as “political activities” very often only related to the exercise of the right of each individual or

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<sup>45</sup> ECtHR, *Sunday Times v. United Kingdom*, Application No. 6538/74, Judgment of 26 April 1979, par. 49; *Silver and Others v. United Kingdom*, Applications Nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, Judgment of 25 March 1983, par. 88-89.

<sup>46</sup> Decisions of the Constitutional Court of the Russian Federation No. 3-P, 25 April 1995; No. 11-P, 5 June 2001; No. 7-P, 6 April 2004; No. 16-P, 11 November 2003; No. 1-P, 21 January 2010; etc.

<sup>47</sup> ECtHR, *Zhechev v. Bulgaria*, Application No. 57045/00, Judgment of 21 June 2007, par. 55.

<sup>48</sup> See the case-law of the European Court of Human Rights, on the basis of article 2, 3 and 8 of the ECHR, See also art. 12 of the ICESCR which calls on States parties to take steps for “the improvement of all aspects of environmental and industrial hygiene and the prevention, treatment and control of epidemic, endemic, occupational, and other diseases”, and the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (1998), also known as the Aarhus Convention.

group to express critical opinions on the public authorities and their policies and to promote respect for the values of a democratic society, which also prevail in Russia. The instances in which the activities of NCOs have been found “political” are equally controversial. As the Commissioner for Human Rights indicates in his report, these instances encompass: providing information to the UN Committee Against Torture on Russia’s compliance with the UN Convention Against Torture; bringing cases to and litigating before the European Court of Human Rights; advocating on environmental issues, including with state authorities; monitoring human rights violations and raising public awareness on the results of the monitoring; organising seminars, round table discussions and other events to discuss governmental policies and foreign policy; providing state officials with ideas, opinions and recommendations on public interest policy and similar activities.<sup>49</sup> All of these activities belong among the classical activities exercised by NGOs and, especially, by human rights defenders and the engagement in them should therefore not entail any negative consequences for NCOs, including additional legal obligations.

84. In addition, the scope of “political activities” is limited to activities carried out *“for the purpose of influencing the adoption by the state bodies of decisions aimed at changing the state policy pursued by them, as well as in forming public opinion for the cited purposes”* (Article 6(2) of the Law on NCOs). Thus, two NCOs receiving foreign funding and engaging in the same type of activities would or would not count as a “foreign agent” depending on whether their actions are or are not in line with the state policy.

85. The Venice Commission recalls that in accordance with the Recommendation CM/Rec (2007)14, *“NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law”* (par. 12).

86. The Venice Commission is therefore of the opinion 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.

87. In conclusion, the Venice Commission considers that it cannot be deemed to be “necessary in a democratic society” to stigmatize NCOs for the sole reason that they receive foreign funding and are politically active, by imposing on them the very negative qualification of “foreign agent”.

88. The Russian authorities certainly have the right to submit non-commercial organizations receiving foreign funding to a certain control and to impose upon them reporting and auditing obligations. However, the current Law lacks minimum requirements in the amount of the used money and the length of operation.

89. The Venice Commission refers, in relation to financial reporting and accountability, to the statement of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association that “associations should be accountable to their donors, and at most, subject by the authorities to a mere notification procedure of the reception of funds and the submission of reports on their accounts and activities.”<sup>50</sup>

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<sup>49</sup> CommDH(2013)15, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards*, 15 July 2013, par. 52.

<sup>50</sup> See A/HRC/23/39, second report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, par 37; ODIHR-Venice Commission Joint Opinion on the draft law amending the law on non-commercial organisations and other legislative acts of the Kyrgyz Republic, CDL-AD(2013)030, § 70.

## **b. Differential Treatment**

90. Moreover, it is not clear whether the legitimate interest of the Russian Federation in supervising NCOs and ensuring transparency of their financing truly requires a special, additional registration and a separate Register of NCOs meeting the conditions of a “foreign agent”. The benefits of such a special regime need to be carefully weighed against the impact that its creation can have upon NCOs and their operation. The principle of non-discrimination, enshrined in Article 26 of the ICCPR, Article 14 of the European Convention and Protocol 12 to this Convention, has to be respected. Practical considerations – such as the changing environment in which NCOs operate and which may force them to change sources of funding quite frequently – should be taken into account as well.

91. Under the law the NCO which has been registered as a “foreign agent” is submitted to an enhanced monitoring system. These NCOs “shall keep separate records of incomes (expenses) received (made) within the framework of receipts from foreign sources and of the incomes (expenses) received (made) within the framework of other receipts.” (art. 32.1) They shall be submitted to extensive reporting obligations:

- every six months, they have to submit reports on their activities and on the personal composition of their governing bodies (art. 32.3) and place on the Internet or give the mass media for publication a report about their activity (art. 32.3.2)
- on a quarterly basis, they have to submit the documents on the purposes of spending monetary assets and of using other property, in particular those received from foreign sources, (art. 32.3)
- every year, the annual financial reports of the NCO will be subject to mandatory auditing (art. 31.1 and 32.3).

92. These additional requirements, which lay a heavy administrative burden (and additional costs) on the NCOs exercising the function of a so-called “foreign agent”, are not imposed on other non-commercial organisations which receive foreign funding. It is unclear to the Venice Commission on what grounds they can be deemed to be “necessary in a democratic society” (art. 11, § 2 ECHR), and how they can be justified in the light of the principle of non-discrimination. (art. 14 ECHR, Protocol 12 to the ECHR and art. 26 ICCPR). The Venice Commission recalls that in the *Moscow Branch of the Salvation Army v. Russia* Case, the European Court for Human Rights was reluctant to accept the foreign origin of an NCO as a legitimate reason for a differentiated treatment;<sup>51</sup> the same reluctance would a fortiori be in place in case of mere foreign funding.

93. Similarly, the Law is silent as to why materials issued or distributed by “foreign agents” should have special indications of their origin. The link between this obligation and the declared aim of Law 121-FZ remains unclear.

## **c. Additional Supervision and Oversight**

94. The *Law on Non-Commercial Organisations*, together with other laws,<sup>52</sup> contains relatively clear provisions relating to inspections. NCOs exercising the function of a “foreign agent” can only once in a year be subject to planned inspections (art. 32 (4.5)), but extraordinary inspections are allowed on grounds which are exhaustively determined in article 32 (4.2) of the law, more specifically in case of 1) non-compliance with an official

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<sup>51</sup> ECtHR, *Moscow Branch of the Salvation Army v. Russia*, Application No. 72881/01, Judgment of 5 October 2006, par. 81-86.

<sup>52</sup> *Федеральный закон Российской Федерации о защите прав юридических лиц и индивидуальных предпринимателей при осуществлении государственного контроля (надзора) и муниципального контроля*, N 294-ФЗ, 26 декабря 2008 г.

warning to remedy a violation; 2) signs of extremism; 3) information about violation of the legislation on the activities of the NCO and 4) a request from the prosecutor's office.

95. Recommendation CM/Rec(2007)14 states that "NGOs can be required to submit their books, records and activities to inspection by a supervising agency where there has been a failure to comply with reporting requirements or where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent" (par. 68), and "NGOs should not be subject to search and seizure without objective grounds for taking such measures and appropriate judicial authorisation" (par. 69).<sup>53</sup>

96. The way in which the law is applied in practice does not seem to be consistent with this standard. More than 200 extraordinary inspections of NCOs were carried out in 2011-2012; other inspections followed after the entry into force of Law 121-FZ. The reasons and legal grounds for these inspections in many cases did not appear to be clearly defined. The extent of the inspections differed. The Commissioner for Human Rights noted: "Inspectors generally requested to be provided with statutory and operational documentation, as well as financial and tax reports and documentation for years 2010-2013. In those cases where the prosecutors were accompanied by representatives of other federal oversight bodies, the scope of documents requested was much broader. In St. Petersburg, for example, inspectors asked to produce documents such as a rat control certificate, results of chest X-rays of NGO employees, rubbish disposal arrangements etc. Consequently, several NGOs have questioned the legality of the inspections and brought their cases to domestic courts."<sup>54</sup>

97. Under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, NCOs and their members enjoy the right to privacy, which can only be limited under the conditions set in Article 8(2). In *Ernst and others v. Belgium*, the European Court for Human Rights held that Article 8 could be interpreted as including the right for a company to respect for its seat, office or professional premises and that any search in premises of a private actor needed to have a clear legal basis and be proportionate to the legitimate aims pursued by the action.<sup>55</sup> In the case of *Niemietz v Germany*, the European Court stated: The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.<sup>56</sup>

98. The Venice Commission recommends that the practice of inspections be brought in line with international standards. Extraordinary inspections should not take place unless there is suspicion of a serious contravention of the legislation or any other serious misdemeanour. Inspections should only serve the purpose of confirming or discarding the suspicion and should never be aimed at molesting NCOs and preventing them from exercising activities consistent with the requirements of a democratic society.

#### **d. Sanctions**

99. Law 121-FZ introduces administrative sanctions and criminal penalties for "malevolent" non-compliance with the provisions of the Law. In case of a failure to fulfil any of the obligations imposed by the Law, the organisation as well as its representatives may be sanctioned by a fine. The failure to register as a "foreign agent" can entail the liquidation of

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<sup>53</sup> CM/rec (2007) 14.

<sup>54</sup> CommDH(2013)15, *Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe Standards*, 15 July 2013, par. 62.

<sup>55</sup> ECtHR, *Ernst and Others v. Belgium*, Application No. 33400/96, Judgment of 15 July 2003.

<sup>56</sup> ECtHR, *Case of Niemietz v. Germany*, Application no. 13710/88, Judgment of 16 December 1992, par. 29.

an NCO. Authorities may furthermore freeze the assets of the NCO-foreign agent. The mass media the NCO-foreign agent has founded can be suspended and it can be forbidden “to hold mass events and to exercise public activities, as well as to use bank deposits”. Finally, malevolent non-compliance with the obligations stemming from the Law on Non-Commercial Organisations with respect to NCOs exercising the function of a “foreign agent”, especially the obligation to register, is a criminal offense, punishable by a fine, public work or a sentence of up to two years.

100. It does not seem that the same severity would be applied to other omissions relating to the creation and operation of NCOs, for instance the failure to submit all documents for the regular registration.

101. The sanctions, moreover, are severe and it is questionable whether they are proportional to the gravity of the wrongdoing. The sanctions would also need to comply with the requirements set in Article 22(2) of the ICCPR and Article 11(2) of the European Convention, i.e. the requirements of legality, legitimacy, and the necessity in the democratic society.

102. The European Court of Human Rights considers that the nature and severity of the sanction imposed are factors to be taken into account when assessing the proportionality of the interference.<sup>57</sup> As some of the sanctions, provided in the law, are very severe, it is questionable whether they are proportional to the gravity of the wrongdoing.

103. The European Court of Human Rights stated that the involuntary dissolution “is the most drastic sanction possible in respect of an association and, as such, should be applied only in exceptional circumstances of very serious misconduct. Therefore, the domestic law should delimit more precisely the circumstances in which this sanction could be applied.”<sup>58</sup> In the same sense, the Venice Commission also 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>59</sup> In the *Golos* Case, the Supreme Court of the Russian Federation equally held that the liquidation of a NCO “*is not allowed only on the formal grounds of violations of the federal law, the liability for infringement must be used in compliance with the general legal principles of the legal liability and be proportional to violations and their consequences*”.<sup>60</sup>

104. The Recommendation of the Committee of Ministers “on the legal status of non-governmental organisation in Europe”<sup>61</sup> states:

*“§ 44. The legal personality of NGOs can only be terminated pursuant to the voluntary act of their members – or in the case of non-membership-based NGOs, its governing body – or in the event of bankruptcy, prolonged inactivity or serious misconduct.*

*§ 72. In most instances, the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of*

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<sup>57</sup> ECtHR, Case of *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application No. 37083/03, Judgment of 8 October 2009, par. 82.

<sup>58</sup> ECtHR, Case of *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application No. 37083/03, Judgment of 8 October 2009, par. 63. In this judgment the Court further stated “that a mere failure to respect certain legal requirements on internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution.”

<sup>59</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, §107.

<sup>60</sup> Cit. in AGORA, Liquidation of an NGO on the formal grounds is not allowed, 3 April 2008, online.

<sup>61</sup> CM/rec (2007) 14

*legal personality) should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality.*

*§ 74. The termination of an NGO ... should only be ordered by a court where there is compelling evidence that the grounds specified in paragraph 44 ... above have been met. Such an order should be subject to prompt appeal."*

105. The Venice Commission recommends that sanctions be brought in line with international standards, in order to be in compliance with the principle of proportionality. The Venice Commission endorses the assessment of the Constitutional Court of Russia that "the amounts of administrative fines should correspond to the nature and degree of social danger of offenses and have a reasonable deterrent effect to ensure the enforcement of prohibitions under administrative and tort law. (...), courts should take into account the nature of digressions from the rules of exercise of political activity by a non-commercial organization performing the functions of a foreign agent, the scale and consequences of political actions organized and/or carried out, and other circumstances characterising the degree of social danger of the committed administrative offense, and impose a maximum fine only if a smaller fine would not properly ensure the prevention of new offenses by the same or other offenders." The Court moreover assessed that: "it becomes extremely difficult and sometimes impossible to ensure, as the Constitution requires, an individual approach to imposing an administrative fine with the minimum of one hundred thousand Rubles for officers and three hundred thousand Rubles for legal persons, especially because no alternative is provided for. These shortcomings would not be fraught with the risk of constitutional problems if the establishment of high minimums of fines were accompanied by softer alternative administrative penalties, the possibility to impose an administrative fine below the lower limit provided for by the sanction for the relevant offense, release from administrative responsibility or penalty in case of the offender's active repentance or voluntary removal of the committed violations and their consequences, as well as other legislative acts, which provide bodies and officers of administrative jurisdiction with effective means of fair and proportionate response. At present, however, the Code of the Russian Federation on Administrative Offenses does not provide for such possibilities (...). Thus, the provision of part 1 of Article 19.34 of the Code of the Russian Federation on Administrative Offenses that establishes minimum sizes of the administrative penalty in the amount of one hundred thousand Rubles for officers and three hundred thousand Rubles for legal persons does not conform to the Constitution of the Russian Federation, (...). The federal legislator should – based on the requirements of the Constitution of the Russian Federation and taking into account the legal positions of the Constitutional Court of the Russian Federation set forth in this Ruling – make necessary changes arising from this Ruling to the Code of the Russian Federation on Administrative Offenses. Pending such changes to the Code of the Russian Federation on Administrative Offenses, the size of the administrative fine imposed on officers and legal persons for committing administrative offenses provided for by part 1 of its Article 19.34 may be reduced by the court below the lower limit established by the sanction of this provision, on the basis of requirements of the Constitution of the Russian Federation and taking into account the legal positions of the Constitutional Court of the Russian Federation set forth in this Ruling, in cases where the imposition of an administrative fine within limits stipulated by such sanction does not meet the purposes of administrative responsibility and clearly leads to an excessive restriction of property rights of the person brought to administrative responsibility."

106. The dissolution of a NCO and the prolonged suspension, amounting to its de facto dissolution should be limited to the three grounds recognised by the international standards: bankruptcy; long-term inactivity and serious misconduct. They should only be applied as a last resort, when all less restrictive options have been unsuccessful. Enforced dissolution of an NGO may only be pronounced by an impartial and independent tribunal in a procedure

offering all guarantees of due process, openness and a fair trial. The effects of the decision on dissolution should be suspended pending the outcome of judicial review. Severe criminal sanctions should only be applied in case of serious wrongdoing and should always be proportional to this wrongdoing.

#### **E. Analysis of Federal Law No. 190-FZ on making amendments to the Criminal Code (“Law on Treason”)**

107. Law Nr. 190-FZ amends the Criminal Code with a new article prosecuting illegal access to information considered to be state secrets. It also amends existing articles on state treason, espionage and disclosure of state secrets.

108. The amendments here under scrutiny expand the definition of treason. The first paragraph of Article 275 now reads as follows:

*“High treason, that is committed by a citizen of the Russian Federation acts of espionage, disclosure to a foreign state, an international or foreign organization, or their representatives of information constituting a state secret that has been entrusted or has become known to that person through service, work, study or in other cases determined by the legislation of the Russian federation, any financial, material, technical, consultative or other assistance to a foreign state, an international or foreign organization, or their representatives in activities against the security of the Russian Federation,-“*

109. While the previous law describes treason as activities threatening Russia’s *external security*, the new legislation deems any activity that may threaten Russia’s “national security, constitutional order, state or territorial integrity” as high treason; it adds to the list of actions constituting state treason: “financial, material and technical, consultative or other assistance to a foreign state, an international or foreign organisation; it adds international organizations to the list of subjects to whom Russian citizens can transfer “state secret” information for their action to be qualified as treason in Article 276 (cf., Article 1 § 3 of the Criminal Code); it expands the list of situations in which Russian citizens can be said to have obtained information that constitutes a state secret to include “work, study or in other cases” (previously only “work” was listed in the first paragraph of Article 283); it provides that. illegal obtaining of information constituting a state secret (Art. 283 §1) as through: abduction, deception, blackmail, coercion, threatened violence or through *other illegal way* (in absence of the *corpus delicti* stipulated by Articles 275 and 276 of this code) – “shall be punishable by a fine in the amount of 200,000 to 500,000 Rubles in the amount of wages or salary or any other income of the convicted person for a period from one to three years. (Art. 283 § 2). The same act if connected . . . with the “dissemination of information constituting a state secret, or with the transfer of the carrier of information outside the borders of the Russian Federation, shall be punishable by deprivation of liberty for a term of three to eight years”.

110. An important and contested aspect of the new law on treason is its potential impact on freedom of expression if it is used to silence critics. Due to its vague and broad wording it is feared that it might permit the authorities to brand inconvenient figures as traitors.

111. Article 10 ECHR protects the right to impart and receive information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms carries with it duties and responsibilities which may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.



112. In addition, the law raises issues under Article 9.4 of the UN Declaration of Human Rights Defenders, which states that "...in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms".

113. The language used in the new law is both vague and uncertain. It is contested that the broadened definition of treason (see 4.1. supra) meets the "prescribed by law" test as set forth by the European Court of Human Rights,<sup>62</sup> which is relevant when assessing whether the Russian authorities are acting in accordance with their obligations under the ECHR when setting the law. Excessively broad and vaguely worded provisions may grant scope for arbitrary action as they can lend themselves to discriminatory interpretation and unjustified restrictions on the right of freedom of expression under Article 10 of the ECHR (and respectively Article 19 of the ICCPR). The law should be sufficiently clear to allow individuals to govern their future behaviour.<sup>63</sup>

114. In the case of Pasko against Russia,<sup>64</sup> a naval officer who was also a military journalist had been found guilty of treason through espionage for having collected secret and classified information containing actual names of highly critical and secure military formations and units, with the intention of transferring this information to a foreign national. Mr Pasko complained that the Russian authorities had applied criminal legislation retrospectively and had subjected him to an overly broad and politically motivated criminal persecution as a reprisal for his critical publications.

115. The ECtHR did not find Russia in violation of Article 10 as Mr Pasko had been bound to an obligation of discretion and had imparted information of military nature which had been classified as a State secret and which had been capable of causing considerable damage to national security. Finally, the applicant had been convicted of treason through espionage as a serving military officer and not as a journalist. From the above case law is clear that treason laws are not to be used to prosecute those that have the duty to act as the public's watchdog, i.e. journalists.<sup>65</sup>

116. Protection of national security is a legitimate ground for restricting the right to freedom of expression. However the UN Human Rights Committee in its General Comment on Article 19 of the ICCPR has explicitly referred to the care that States parties to the ICCPR must exercise to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3 of Article 19 ICCPR which states that restrictions provided for by law must be as relevant here – for the protection of national security or public order.

117. Nor is it, according to the UN Human Rights Committee, generally appropriate to include in the remit of treason laws such categories of information as those relating to the commercial sector, banking and scientific progress. Therefore: adding to the list of actions that are "financial" and "material" as in Article 275 is incompatible with Article 19 of the ICCPR.

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<sup>62</sup> ECtHR, Case of Sunday Times v. United Kingdom (1979), Application No. 6538/74, Judgment of 26 April 1979

<sup>63</sup> General Comment No. 34.

<sup>64</sup> ECtHR, Pasko v. Russia, Application No. 69519/01, Judgment of 22.10.2009.

<sup>65</sup> Cf., also UN Human Rights Committee General Comment No. 34.

118. According to the UN Human Rights Committee it is not at all compatible with Article 19 of the ICCPR to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. The broad restrictions and potentially chilling effect on civil rights of the treason law are excessive and conflict with the core role of freedom of expression in a democratic society.

119. Derived from the ECtHR case law is the general principle that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. 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". Add reference to case-law (already in the text, above)

120. As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

121. The Law on Treason covers only Russians who pass secrets to a foreign intelligence service, who offer information or assistance to a foreign state or international group "directed against Russia's security". Almost any conversation between Russian citizens and representatives of foreign organizations could now be considered treasonous, with jail sentences of up to 20 years.

122. To the Venice Commission's understanding the amended treason law could criminalize activities of human rights defenders and activists that are normal practice, routine working meetings (round tables) and discussions with foreign counterparts, for example providing them with information on the situation of human rights.

123. Any member of an NGO or a staff member of a foreign entity subject to a job description (let alone dissenters) risks, under the new law, being considered as a traitor. It might be enough for them to provide consultancy or "other assistance" to a foreign state or international body which is considered as "directed against Russia's security". The definition is so broad that its scope of application is unpredictable.

124. The principle of proportionality requires that there should be a reasonable relationship between the aim sought to be realized with the Law on Treason and the substance of the law.

125. For interferences with the right to freedom of expression to be compatible with the Convention, it is not sufficient for them to be prescribed by law and to pursue legitimate aims, such as the prevention of disorder. They also need to be "necessary" in a democratic society.

126. To the Venice Commission's understanding, prohibiting by law a wide category of actions by a wide category of individuals, from various walks of life, to interact with a wide category of institutions – not even outside the country – as potentially treasonous acts goes far beyond any necessary restraint on freedom of expression and of information and amounts to censorship.<sup>66</sup>

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<sup>66</sup> See ECtHR, *Ürper and Others v. Turkey*, Application No. 55036/07, 55564/07, 1228/08, 1478/08, 4086/08, 6302/08, 7200/08, Judgment of 20.10.2009.

127. Information containing harsh criticism of the State, to take an example, may be of great interest to public opinion and enjoys as such more protection than any other conduct protected by Article 10 – as it constitutes political speech.

128. Furthermore, investigative journalism and the methods it requires to obtain material, is protected Article 10 methods which the Treason law is now including as potential criminal offence (study, research / see also Article 283 supra regarding obtaining information – “through *other illegal way*”.)

129. In the view of the Commission, it is not compatible with paragraph 3 of Article 19 ICCPR, for instance, to invoke treason laws to suppress or withhold from the public information of legitimate public interest that does not harm national security. Restrictions on freedom of expression and information to protect national security are permissible only in serious cases of political or military threat to the entire nation.

130. Therefore, the Venice Commission considers that expanding the list of situations in which Russian citizens can be said to have obtained information that constitutes a state secret to include “work, study or in other cases” (previously only “work” was listed in the first paragraph of Article 283) is not compatible with Article 19 of the ICCPR.

131. Moreover, in the view of the Venice Commission, the treason laws are not crafted in a manner that conforms to the strict requirements of paragraph 2 and 3 of Articles 10 ECHR and 19 ICCPR respectively. These laws may not be invoked to suppress or withhold from the public information and ideas of legitimate public interest. It is therefore in violation of the above standards to prosecute journalists, researchers, human rights defenders or others for having disseminated such information.

## V. CONCLUSIONS

132. The “Law on Foreign Agents” (Law N. 121-FZ) of 13 July 2012, as well as Laws N. 18-FZ of 21 February 2014 and N. 147-FZ of 4 June 2014 raise several serious issues. The use of the term “*foreign agent*” is highly controversial. By bringing back the rhetoric used during the communist period, this term stigmatises the NCOs to which it is applied, tarnishing their reputation and seriously hampering their activities. The Venice Commission therefore recommends that the term be abandoned.

133. The Venice Commission further considers that the legitimate aim of ensuring transparency of NCOs receiving funding from abroad cannot justify measures which hamper the activities of NCOs operating in the field of human rights, democracy and the rule of law. It therefore recommends reconsidering the creation of a special regime with autonomous registration, special register and a host of additional legal obligations.

134. If this specific legal regime is maintained, the power of the authorities to proceed with the registration of a NCO as “foreign agent” (or other term) without that NCO’s consent should be removed. The extent and content of the obligations linked with the special status need to be carefully scrutinized to avoid that they be disproportionately more cumbersome than those to which other NCOs are subject. Finally, legal sanctions should only be applied to NCOs in case of serious wrongdoing on their side and, as ruled by the Constitutional Court of the Russian Federation, shall be always proportional to this wrongdoing. The liquidation of a NCO and the imposition of criminal sanctions may only be resorted to in exceptional cases of extreme misconduct on the part of a NCO and should always be proportional to this wrongdoing. Enforced dissolution of a NGO may only be pronounced by an impartial and independent tribunal in a procedure offering all guarantees of due process, openness and a fair trial. The effects of the decision on dissolution should be suspended pending the outcome of judicial review.

135. Pursuant to the law under examination, the legal status of a “foreign agent” presupposes not only that a NCO receives foreign funding but also that it participates in “**political activities**”. This expression is however quite broad and vague and the practice of its interpretation by public authorities has been so far rather disparate, adding to the uncertainties surrounding the meaning of the term. The Venice Commission therefore calls upon the Russian authorities to work towards a clear definition of “political activities”. It also urges the Russian Federation to ensure that the term is not used to specifically target human rights defenders or that it applies to NCOs based on their political opinions.

136. In addition to its text, the practical **implementation** of the *Law on Non-Commercial Organizations* also gives rise to concerns. Reports indicate that NCOs 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. The Venice Commission calls upon the Russian authorities to ensure that no inaccuracies or excesses take place in the implementation of the Law.

137. The Venice Commission calls upon the Russian authorities to revise the “Law on Foreign Agents” in light of these principles.

138. The new provisions brought in by the “Law on Treason” (Law No 190-FZ) are overly broad and vague and may confer unfettered discretion for limiting freedom of expression on those charged with its execution. While the prosecution of high treason and disclosure of state secrets is legitimate, the Venice Commission considers as imperative that the relevant criminal provisions should be formulated as exactly as possible. It therefore calls upon the Russian authorities to revise the “Law on Treason” accordingly.

139. The Venice Commission finds that Federal Laws N.121-FZ of 13 July 2012, N.18-FZ of 21 February 2014 and N. 147-FZ of 4 June 2014 and Federal Law N. 190-FZ seen in context mutually reinforce the chilling effect on the exercise on freedom of expression along with freedom of association – crucial rights for the viability of an effective political democracy.

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