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

**RUSSIAN FEDERATION**

**OPINION**

**ON THE COMPATIBILITY  
WITH INTERNATIONAL HUMAN RIGHTS STANDARDS  
OF A SERIES OF BILLS  
INTRODUCED BY THE RUSSIAN STATE DUMA  
BETWEEN 10 AND 23 NOVEMBER 2020  
TO AMEND LAWS AFFECTING “FOREIGN AGENTS”**

**Adopted by the Venice Commission  
at its 127<sup>th</sup> Plenary Session  
(Venice and online, 2-3 July 2021)**

**On the basis of comments by**

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Ms Herdis KJERULF-THORGEIRSDÓTTIR (Member, Iceland)  
Ms Angelika NUSSBERGER (Member, Germany)  
Mr Jan VELAERS (Member, Belgium)**

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## I. Introduction

1. By a letter dated 18 December 2020, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Mr. Boriss Cilevičs, requested an opinion on the compatibility with international human rights standards of a series of bills introduced to the Russian State Duma between 10 and 23 November 2020 to amend laws affecting “foreign agents”.

2. Ms Veronika Bílková, Ms Angelika Nussberger, Ms Herdís Kjerulf Thorgeirsdóttir and Mr Jan Velaers acted as rapporteurs for this opinion.

3. On 7 and 17 May 2021, Ms Veronika Bílková, Ms Angelika Nussberger, Ms Herdís Kjerulf Thorgeirsdóttir and Mr Jan Velaers, assisted by Mr Schnutz Dürr and Ms Sophia Wistehube from the Secretariat, had online meetings with representatives of the Federation Council, the State Duma, the General Prosecutor's Office, the High Commissioner for Human Rights, the Ministry of Justice and the Federal Service for Supervision of Communications, Information Technology and Mass Media (*Roskomnadzor*), as well as with civil society. The Commission is grateful to the Institute for Legislation and Comparative Law under the Government of the Russian Federation for the excellent organisation of the virtual meeting.

4. This opinion was prepared in reliance on the original version in Russian as well as on English translations of the draft laws ([CDL-REF\(2021\)047-e](#), [CDL-REF\(2021\)048-e](#), [CDL-REF\(2021\)049-e](#), [CDL-REF\(2021\)050-e](#), [CDL-REF\(2021\)051-e](#) and [CDL-REF\(2021\)052-e](#)). The translations may not accurately reflect the original versions on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings. Following an exchange of views with Mr Andrey Klishas, Chairman of the Committee on Constitutional Legislation and State Construction of the Federation Council of the Russian Federation, and with Ms Olga Vorobyeva, Deputy Director of the Department for Non-Profit Organisations of the Ministry of Justice, the opinion was adopted by the Venice Commission at its 127<sup>th</sup> Plenary Session (Venice and online, 2-3 July 2021).

## II. Scope and background information

6. Since 2012, the Russian government has used the “foreign agent” legislation to regulate civil society. The central aspect of this legislation is the requirement that specific actors of civil society engaging in political activity and receiving foreign funding must register as “foreign agents”. Since 2012, Russia’s “foreign agent” legislation has been widely criticised within and outside of Russia, including by the Venice Commission,<sup>1</sup> the United Nations Human Rights Committee,<sup>2</sup> and the Council of Europe Commissioner for Human Rights.<sup>3</sup> Over 60 organizations have challenged the application of “foreign agent” provisions to them at the European Court of Human Rights, with

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<sup>1</sup> Venice Commission, [CDL-AD\(2014\)025](#), Opinion on Federal Law n. 121-fz on non-commercial organisations (“law on foreign agents”), on Federal Laws n. 18-fz and n. 147-fz and on Federal Law n. 190-fz on making amendments to the criminal code (“law on treason”) of the Russian Federation.

<sup>2</sup> United Nations Human Rights Committee, Concluding observations on the seventh periodic report of the Russian Federation, 28 April 2015, CCPR/C/RUS/CO/7, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhstWB5OJfDOQhMEkiX20XNhfwS44vVjDCG9yOfCaGgJ%2B4aMVruPFpyUaMYJvfEOEBQCPhWJdUArBGIBJo5DzI4ZqOZa12FMGUZJqFSjwclYP> (last accessed 5 July 2021).

<sup>3</sup> Third party intervention by the Council of Europe Commissioner for Human Rights, Application n° 9988/13, *ECODEFENCE and others v. Russia and 48 other applications*, 5 July 2017, CommDH(2017)22, available at: <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680731087> (last accessed 5 July 2021).

consideration still pending. As of July 2021, the “foreign agent” register listed 76 organizations,<sup>4</sup> and an additional media register listed 20 media outlets and individual persons.<sup>5</sup>

7. While the current opinion focusses only on the most recent amendments concerning the Russian “foreign agent” legislation that were introduced to the Russian State Duma in November 2020, the Venice Commission is aware that these amendments are a further tightening of the measures previously assessed by the Commission.

### A. The scope of the present opinion

8. In November 2020, four amendments to the Russian “foreign agent” legislation were introduced to the Russian State Duma and have all been passed into law with minor changes by the time of the adoption of this opinion:

- Draft Law No. 1052523-7 “Amending the Federal Law ‘On non-commercial organisations’ as regards improving the legal regulation of the activities of non-commercial organisations performing the functions of a foreign agent and structural subdivisions of foreign non-commercial non-governmental organisations” (adopted as Federal Law No. 75-FZ of 5 April 2021);<sup>6</sup>
- Draft Law No. 1057892-7 “Amending the Federal Law ‘On fundamental guarantees of electoral rights and the right to participate in referendums of Russian Federation citizens’” (adopted as Federal Law No. 91-FZ of 20 April 2021);<sup>7</sup>
- Draft Law No. 1057914-7 “Amending individual legislative acts of the Russian Federation as regards establishing additional measures to counteract threats to national security” (adopted as Federal Law No. 481-FZ of 30 December 2020);<sup>8</sup> and
- Draft Law No. 1060950-7 “Amending the Russian Federal Code of Administrative Infringements as regards specifying liability for breaches of the procedure governing the activities of persons performing the functions of a foreign agent” (adopted as Federal Law No. 14-FZ of 24 February 2021).<sup>9</sup>

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<sup>4</sup> See, Ministry of Justice of the Russian Federation, Register of non-commercial organisations performing the functions of a foreign agent, available at: <http://unro.miniust.ru/NKOForeignAgent.aspx> (last accessed 5 July 2021).

<sup>5</sup> See, Ministry of Justice of the Russian Federation, Register of foreign media performing the functions of a foreign agent, available at: <https://minjust.gov.ru/ru/documents/7755/> (last accessed 5 July 2021).

<sup>6</sup> Draft Law No. 1052523-7 was introduced to the Russian State Duma on 10 November 2020 (available at: <https://sozd.duma.gov.ru/bill/1052523-7> (last accessed 5 July 2021)). The law was passed by the President of the Russian Federation and published as Federal Law No. 75-FZ of 5 April 2021 “On Amendments to the Federal Act on Non-Commercial Organisations” (available at: <http://publication.pravo.gov.ru/Document/View/0001202104050015> (last accessed 5 July 2021)).

<sup>7</sup> Draft Law No. 1057892-7 was introduced to the Russian State Duma on 18 November 2020 (available at: <https://sozd.duma.gov.ru/bill/1057892-7> (last accessed 5 July 2021)). The law was passed by the President of the Russian Federation and published as Federal Law No. 91-FZ of 20 April 2021 “On Amendments to Certain Legislative Acts of the Russian Federation” (available at: <http://publication.pravo.gov.ru/Document/View/0001202104200045> (last accessed 5 July 2021)).

<sup>8</sup> Draft Law No. 1057914-7 was introduced to the Russian State Duma on 18 November 2020 (available at: <https://sozd.duma.gov.ru/bill/1057914-7> (last accessed 5 July 2021)). The law was passed by the President of the Russian Federation and published as Federal Law No. 481-FZ of 30 December 2020 “On Amendments to Certain Legislative Acts of the Russian Federation Establishing Additional Measures to Counter Threats to National Security” (available at: <http://publication.pravo.gov.ru/Document/View/0001202012300001> (last accessed 5 July 2021)).

<sup>9</sup> Draft Law No. 1060950-7 was introduced to the Russian State Duma on 23 November 2020 (available at: <https://sozd.duma.gov.ru/bill/1060950-7> (last accessed 5 July 2021)). The law was passed by the President of the Russian Federation and published as Federal Law No. 14-FZ of 24 February 2021 “On Amendments to the Code of Administrative Offences of the Russian Federation” (available at: <http://publication.pravo.gov.ru/Document/View/0001202102240001> (last accessed 5 July 2021)).

9. Any significant changes that have been made to the draft laws prior to adoption will be pointed out in the summary of the amendments below.

10. The Venice Commission also takes note of Federal Law No. 525-FZ of 30 December 2020 “Amending Article 330-1 of the Criminal Code of the Russian Federation”,<sup>10</sup> which introduces criminal sanctions for violations of the “foreign agent” legislation.

## **B. The “foreign agent” legislation prior to the November 2020 amendments**

11. In 2012, the *Law on Non-Commercial Organisations* introduced the notion of “foreign agents” for non-commercial organisations (“NCOs”).<sup>11</sup> It defines an NCO performing the functions of a foreign agent as:

*“a Russian non-commercial organisation that receives money and (or) other property from foreign states, their state bodies, international and foreign organizations, foreign citizens, stateless persons, or persons authorized by them and (or) from citizens of the Russian Federation or Russian legal entities who receive funds and (or) other property from these sources or act as intermediaries in receiving such funds and (or) other property (with the exception of open joint stock companies with state participation and their subsidiaries) (hereinafter referred to as foreign sources), and which participates, including in the interests of foreign sources, in political activities carried out on the territory of the Russian Federation.”<sup>12</sup>*

12. The notion of “political activities” has been broadly defined as any activity that aims at influencing the decision making of public authorities or influencing public opinion for the purpose of *changing* public policy.<sup>13</sup> The Constitutional Court of the Russian Federation has upheld a broad interpretation of the term “political activity”.<sup>14</sup> Moreover, the law does not require that the foreign funding be actually used to pay for the political activities. Neither is it always a precondition that the recipients act on behalf or in the interest of a foreign entity.

13. Exceptions exist for activities of NCOs in such areas as science, culture, art, health, social support, sports, environmental protection, as well as the promotion of charity and volunteerism. Activities in these areas are not supposed to constitute “political activities” which may serve as a basis for the recognition of such an organization as performing the functions of a foreign agent, even if they aim to influence the decisions and policy of state authority, so long as their goals do

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<sup>10</sup> Available at: <http://publication.pravo.gov.ru/Document/View/0001202012300043> (last accessed 5 July 2021).

<sup>11</sup> Art. 2(1) of the 1995 Federal Law on Non-Commercial Organisations (Federal Law No. 7-FZ) defines a non-commercial organisation as “one not having profit-making as the main objective of its activity and not distributing the earned profit among the participants”.

<sup>12</sup> Art. 2(6) of Federal Law No. 121-FZ.

<sup>13</sup> Art. 2(6) of Federal Law No. 121-FZ states that: “A non-commercial organisation, except for a political party, shall be deemed participating in political activities exercised in the territory of the Russian Federation, 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.”

<sup>14</sup> In 2014, the Constitutional Court held that “a non-commercial organization may be recognized as performing the functions of a foreign agent if it participates in political activities carried out on the territory of the Russian Federation, i.e., regardless of the goals and objectives specified in its constituent documents, by organizing and conducting political actions, including financing, in order to influence the decisions of state authority and change state policy, as well as in forming public opinion for these purposes. The forms can be very diverse and include meetings, rallies, demonstrations, processions and picketing, etc. Political activities may be conducted through pre-election and referendum campaigning, appeal to the authorities, distribution of assessments of state authority and its decisions, including through modern information technologies, as well as other actions, an exhaustive legislative list of which is impossible.” (Resolution No. 10-P of 8 April 2014, para. 72).

not go beyond the relevant field of activity.<sup>15</sup> However, in practice these exceptions seem to have been narrowly interpreted.<sup>16</sup>

14. The original “foreign agent” legislation subjected NCOs that are obliged to register as “foreign agents” to administrative burdens additional to those that affect all NCOs. These burdens included an obligation to submit regular reports on their funding, objectives, activities, and the structure of their managing bodies, as well as to undergo an annual audit. Designated NCOs were further subject to regular yearly inspections as well as unscheduled inspections. The legislation further required NCOs to clearly mark their “foreign agent” status in all publications and restricted the activities they may undertake. Administrative and criminal sanctions for non-compliance included administrative fines of up to 500,000 roubles<sup>17</sup> for entities and imprisonment of up to two years for individuals.

15. The 2012 “foreign agent” legislation covered only NCOs. In the subsequent years, the Law on NCOs and other legal acts were gradually amended to toughen the legal regime applicable to “foreign agent” NCOs. For instance, in 2014, the legal grounds for conducting unplanned inspections were widened.<sup>18</sup> In 2015, the Code of Administrative Offences of the Russian Federation was amended to extend the statute of limitations for the imposition of administrative sanctions for non-compliance with the “foreign agents” legislation from three months to one year.<sup>19</sup>

16. Amendments in 2017 and 2019 extended the “foreign agent” designation to mass media outlets<sup>20</sup> and to certain private individuals, respectively. The 2017 amendments allowed the authorities to designate any foreign media outlets<sup>21</sup> that receive funding from a foreign source as “foreign media performing the functions of a foreign agent.”<sup>22</sup> These “foreign agent” media outlets were subjected to the same kinds of reporting and public disclosure obligations as “foreign agent” NCOs.

17. The 2019 amendments enabled authorities to also designate private individuals as “foreign agents” if they disseminate information to an unspecified number of people and receive funding for this from abroad. This definition mostly covers bloggers and independent journalists who may receive grants, salaries, or payment for specific pieces of work from any foreign source.<sup>23</sup> Individuals who fall under the law are required to register with the Ministry of Justice, and those living abroad also have to create and register a legal entity inside Russia in order to publish in Russia. All information they publish must refer to their “foreign agent” status.

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<sup>15</sup> Art. 2(6) of Law No. 7-FZ.

<sup>16</sup> See, e.g., Amnesty International, “Agents of the People. Four Years of ‘Foreign Agents’ Law in Russia: Consequences for the Society”, November 2016, pp. 9-13, available at: <https://www.amnesty.org/download/Documents/EUR4651472016ENGLISH.PDF> (last accessed 5 July 2021). See also, Yulia Gorbunova, “Combating Domestic Violence is Dangerous Work in Russia”, 16 December 2020, available at: <https://www.hrw.org/node/377424/printable/print> (last accessed 5 July 2021).

<sup>17</sup> Approximately EUR 5,815 on 18 June 2021.

<sup>18</sup> Federal Law No. 18-FZ of 21 February 2014 “Amending Article 32 of the Federal Law ‘On Non-Commercial Organisations’”, available at: <https://rg.ru/2014/06/06/nko-dok.html> (last accessed 5 July 2021).

<sup>19</sup> Federal Law No. 304-FZ of 3 November 2015 “Amending Articles 4.5 and 23.1 of the Code of Administrative Offences of the Russian Federation”, available at: <https://rg.ru/2015/11/06/fz304-dok.html> (last accessed 5 July 2021).

<sup>20</sup> Federal Law No. 327-FZ of 25 November 2017 “Amending Articles 10.4 and 15.3 of the Federal Law on Information, Information Technology and Information Protection and Article 6 of the Russian Federation Law on Mass Media”, available at: <https://rg.ru/2017/11/25/fz327-site-dok.html> (last accessed 5 July 2021).

<sup>21</sup> The law defines mass media performing the functions of foreign agents in Russia as legal entities registered abroad, or foreign structures without legal entity formation, distributing printed, audio-visual, and other materials and financed from foreign sources.

<sup>22</sup> Art. 2 of Federal Law No. 327-FZ.

<sup>23</sup> Federal Law No. 426-FZ of 2 December 2019 “Amending the Russian Federation Law on Mass Media and the Federal Law on Information, Information Technology and Information Protection”, available at: <https://rg.ru/2019/12/04/smi-dok.html> (last accessed 5 July 2021).

18. Following the extension of the “foreign agents” to mass media outlets and journalists, the Code of Administrative Offences was amended again in December 2019, introducing a new administrative offence consisting of the “violation of the operating procedure” of “foreign agents” media outlets.<sup>24</sup>

### C. Comparative law perspective

19. In their meetings with the rapporteurs, the Russian authorities repeatedly invoked the foreign agent legislation of the USA, Israel and Hungary as examples for their own legislation. Without endorsing the foreign agent laws of these countries, which are not the subject of this opinion, the Venice Commission notes several key differences with the Russian “foreign agent” legislation that serve to underline some of the main deficiencies of the Russian law.

20. As concerns the USA, most notably, the Foreign Agents Registration Act (FARA) requires that a foreign agent must act “in the interests of” the foreign principal. Specifically, a foreign agent is defined as “any person who acts as an agent, representative, employee, or servant [...] of a foreign principal”<sup>25</sup> and either engages in political activities,<sup>26</sup> acts as public relations,<sup>27</sup> raises or distributes funds,<sup>28</sup> or represents the foreign entity’s interests before the U.S. government<sup>29</sup> in “the interest[s] of such foreign principal.” In contrast, the Russian legislation in most cases does not require any specific evidence that a “foreign agent” individual or entity actually act in the interest of a particular foreign entity. It is only in the case of the newly introduced category of physical individual “foreign agents” that the Russian legislation requires that the individual act “in the interests of a foreign state, its government agencies, international or foreign organization, foreign citizens or stateless persons”.<sup>30</sup>

21. Israel’s “foreign agent” legislation does not require evidence of an actual agency relationship like the US FARA. However, it does set out a minimum threshold for foreign funding which triggers special reporting and public disclosure obligations. In Israel, only NGOs that receive more than half their funds from foreign governments or state agencies are required to disclose that fact in their public reports, advocacy material and interactions with government officials.<sup>31</sup> In contrast, no such minimal threshold exists in the Russian legislation. Moreover, Israel’s foreign agent legislation relates only to donations from a “foreign political entity”, that is, foreign states or state related institutions.<sup>32</sup> In contrast to the Russian legislation, it does not relate to donations from individuals or private entities.

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<sup>24</sup> Art. 19.34.1. of Federal Law No. 443-FZ of 16 December 2019 “Amending the Code of Administrative Offences of the Russian Federation”, available at: <https://rg.ru/2019/12/19/codex-dok.html> (last accessed 5 July 2021).

<sup>25</sup> 22 U.S.C. § 611(c)(1).

<sup>26</sup> *Ibid.* § 611(c)(1)(i).

<sup>27</sup> *Ibid.* § 611(c)(1)(ii).

<sup>28</sup> *Ibid.* § 611(c)(1)(iii).

<sup>29</sup> *Ibid.* § 611(c)(1)(iv).

<sup>30</sup> Art. 5 of Draft Law No. 1057914-7.

<sup>31</sup> Specifically, an association whose main financial support is received from a foreign political entity must publish this information in its publications and in any application to a public employee or elected. A representative of an association whose main financial support is received from a foreign political entity, when appearing actively in a Knesset committee meeting, must advise the chairman of the committee of this representation.

In Israel, any association whose annual turnover exceeds 300,000 NIS must declare in its financial report whether it received a donation or donations exceeding a total of 20,000 NIS. If it received such donations, it should specify the identity of the donor, the amount received and the objective for which it has been received, and any condition or obligation attached to it. This information should be published also in the association’s internet site (if there is one) and will also be published in the internet site of the Ministry of Justice. If a donation is given for a special public campaign, this information should be mentioned in this campaign.

<sup>32</sup> A “foreign political entity” is defined as a foreign state, including a union or an organization of foreign states, an organ, authority or representation of foreign states, the Palestinian Authority and derivatives of these.

22. Similarly, the Hungarian foreign agent legislation set out a minimum threshold of foreign funding, which would require associations to register as “organisations receiving support from abroad” and label themselves as such on their websites as well as on any press products and other publications. The Venice Commission criticised the Hungarian law in an Opinion of 2017.<sup>33</sup> In April 2021, the Hungarian government submitted a draft bill to government to repeal the law,<sup>34</sup> which was adopted on 18 May 2021.<sup>35</sup>

23. In their meetings with the rapporteurs, the Russian authorities have also invoked proposals of similar legislation in Estonia. To the best of the Venice Commission’s knowledge, the Estonian Ministry of Justice abandoned its work on such a proposal in 2018 after it became public.

### III. International Standards

24. This opinion assesses whether the most recent amendments to the Russian “foreign agent” legislation are compatible with international human rights standards.<sup>36</sup> In particular, it assesses their compatibility with the rights to freedom of association<sup>37</sup> and expression,<sup>38</sup> the right to privacy,<sup>39</sup> the right to participate in public affairs,<sup>40</sup> as well as the prohibition of discrimination.<sup>41</sup> These rights protect individuals and entities, including legal persons such as NGOs, and are codified in international human rights treaties, including the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), to which the Russian Federation is a party and which it is bound to implement in good faith.

25. Although these rights are not absolute, they can only be interfered with under the strict conditions stipulated in the respective human rights instruments. Such interference is only permissible if it is adequately prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society. In addition to serving a pressing social need, the restriction must also be proportionate to its aim.<sup>42</sup> Legitimate types of reasons for interfering with these rights are explicitly listed in the ECHR and ICCPR and include: (1) national security or public safety; (2) public order; (3) public health or morals; or (4) the rights and freedoms of others.<sup>43</sup> The State must demonstrate

<sup>33</sup> Venice Commission, [CDL-AD\(2017\)015](#), Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad.

<sup>34</sup> Draft Law No. T/15991 of 20 April 2021, available at: <https://www.parlament.hu/irom41/15991/15991.pdf?fbclid=IwAR0PfgT-Z5kf-KgH17sGsyn5qLZGEr5QDqT63xxkPsSkyvE7gQK5k0na5Kq> (last accessed 5 July 2021).

<sup>35</sup> Act XLIX of 2021 on the transparency of non-governmental organisations engaged in activities likely to influence public life, available at: <https://njt.hu/jogszabaly/2021-49-00-00> (last accessed 5 July 2021).

As of 1 July 2021, the registry of civil organisations shall not mention that a civil organisation is financed from abroad. Any such remarks in the registry shall be deleted and all the pending procedures shall be terminated without application of any sanctions. Moreover, there is a new rule prescribing that the State Audit Office, which is responsible to Parliament, annually prepares a report on civil organisations and foundations (with some exceptions, including churches, sports clubs, etc.) if their annual financial balance is more than 20 million forints (approximately 56,000 euros). The rule is applied irrespective of the source of income.

<sup>36</sup> For an extensive analysis of the applicable standards, see, [CDL-AD\(2014\)025](#), *op. cit.*, paras. 16-28.

<sup>37</sup> The right to freedom of association is protected *inter alia* in Article 20 (1 and 2) of the Universal Declaration of Human Rights, Article 22 (1) of the International Covenant on Civil and Political Rights and Article 11 (1) of the European Convention on Human Rights (ECHR).

<sup>38</sup> The right to freedom of expression is protected *inter alia* in Article 19 UDHR, Article 19 (1 and 2) of the ICCPR and Article 10 of the ECHR.

<sup>39</sup> The right to privacy is protected *inter alia* in Article 12 UDHR, Article 17 of the ICCPR and Article 8 of the ECHR.

<sup>40</sup> The right to participate in public affairs is protected *inter alia* in Article 21 UDHR and Article 25 of the ICCPR.

<sup>41</sup> The prohibition of discrimination is protected *inter alia* in Article 7 UDHR, Article 26 of the ICCPR and Article 14 of the ECHR.

<sup>42</sup> See, e.g., Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 6 (“Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”).

<sup>43</sup> Cf. Art. 10 and 11 ECHR, and Art. 19 and 22 ICCPR.



that a restriction is necessary to avert a real, and not only hypothetical danger and that less intrusive measures would be insufficient to achieve this purpose.<sup>44</sup>

26. Non-governmental organisations (NGOs) play a crucial role in modern democratic societies, allowing citizens to associate in order to promote certain ideas and goals. In its 2019 *Report on Funding of Associations*, the Venice Commission considers that “NGOs should be free to undertake research, education and advocacy on issues of public debate and that such ‘political’ activities are an inherent part of ordinary activities, even the *raison d’être*, of NGOs.”<sup>45</sup> According to Principle 6 of the Venice Commission/OSCE/ODIHR *Guidelines on Freedom of Association*, “associations [...] shall have the right to participate in matters of political and public debate, regardless of whether the position taken is in accord with government policy or advocates a change in the law.”<sup>46</sup> NGOs engaged in human rights advocacy are traditionally considered as particularly vulnerable and, hence, in need of enhanced protection.<sup>47</sup>

27. The freedom of association protects entities from unwarranted state interference, including access to foreign funding. The Venice Commission recalls that the freedom to seek, receive and use resources from any available lawful public or private source is one of the main principles guiding the interpretation of the right to freedom of association.<sup>48</sup> In its 2019 *Report on Funding of Associations*, the Venice Commission considers that “in such an important matter as the scope of restrictions imposed on the right of associations to seek and secure financial and material resources, the provisions – imposing for instance reporting obligations as to the sources of funding – should use very clear and precise terms in order to [enable] associations to understand their liabilities and obligations”.<sup>49</sup>

28. The Commission recalls that “restrictions on the freedom of association can [...] be considered to pursue legitimate purposes only if they aim to avert a real, and not only hypothetical danger. Any restrictions therefore can only be based on a prior risk assessment indicating ‘plausible evidence’ of a sufficiently imminent threat to the State or to a democratic society. Abstract ‘public concern’ and ‘suspicions’ about the legality and honesty of financing of NGO sector, without pointing to a substantiated concrete risk analysis concerning any specific involvement of the NGO sector in the commission of crimes, such as corruption or money-laundering cannot constitute a legitimate aim justifying restrictions to this right.”<sup>50</sup>

29. In its 2019 *Report on Funding of Associations*, the Commission considered that “ensuring transparency [...] would not by itself appear to be a legitimate [aim].”<sup>51</sup> The Venice Commission

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<sup>44</sup> Cf. Venice Commission, [CDL-AD\(2019\)002](#), *Report on Funding of Associations*, para. 62.

<sup>45</sup> *Ibidem*, para. 102.

<sup>46</sup> Venice Commission, [CDL-AD\(2014\)046](#), *Joint Guidelines on Freedom of Association*, para. 31. See, also, UN Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, CCPR/C/111/D/1993/2010 (July 2014), para. 7.3; *Lee v. Republic of Korea*, CCPR/C/84/D/1119/2002 (July 2005), para. 7.2.

<sup>47</sup> See, for instance, 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, A/RES/53/144, 8 March 1999, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx> (last accessed 5 July 2021); see also, Declaration of the Committee of Ministers on Council of Europe on the “action to improve the protection of human rights defenders and promote their activities” (adopted on 6 February 2008), available at: <https://www.ohchr.org/Documents/Issues/Defenders/DeclarationHRDCoECommitteeMinisters.pdf> (last accessed 5 July 2021).

<sup>48</sup> [CDL-AD\(2014\)046](#), *op. cit.*, paras. 32, 220-222. See also, Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 24 April 2013, paras. 8 and 16, available at: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39\\_EN.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf) (last accessed 5 July 2021); see also, United Nations General Assembly, Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, A/59/401, 1 October 2004, para. 82.

<sup>49</sup> [CDL-AD\(2019\)002](#), *op. cit.*, para. 69.

<sup>50</sup> [CDL-AD\(2019\)002](#), *op. cit.*, para. 81. See also, Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, CCPR/C/111/D/1993/2010, July 2014, para. 7.3; *Lee v. Republic of Korea*, CCPR/C/84/D/1119/2002, July 2005, para. 7.2; Communication No. 2001/2010.

<sup>51</sup> [CDL-AD\(2019\)002](#), *op. cit.*, para. 80.

further stated that “such a drastic measure, as ‘public disclosure obligation’ (i.e. making public the source of funding and the identity of the donors) may only be justified in cases of political parties and entities formally engaging in remunerated lobbying activities”, but may not be applied to associations in general.<sup>52</sup>

30. Freedom of expression protects the right to impart and receive information and ideas without interference by public authority and regardless of frontiers. The Human Rights Council has stated that restrictions on freedom of expression should never be applied to: “Discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.”<sup>53</sup>

31. The freedom of expression is particularly important in the context of elections. The Venice Commission recalls that “freedom of the press is more vital in campaigning [...] than in any other moment of political life, since it permits to express opinions on candidate programs and to criticize public powers”.<sup>54</sup> Restrictions imposed on campaigning “do not appear as justified concerning members of the press”.<sup>55</sup> Moreover, a provision which “imposes neutrality on public or private media and prohibits any comments or information given on election campaigning events” would constitute a disproportionate interference with the freedom of expression.<sup>56</sup>

32. Both entities and individuals enjoy the right to privacy.<sup>57</sup> The mere collection and storing of data relating to the private life of an individual amounts to an interference with the right to privacy.<sup>58</sup> 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”, but “NGOs should not be subject to search and seizure without objective grounds for taking such measures and appropriate judicial authorisation”.<sup>59</sup> Moreover, the right to privacy protects the reputation of a person.<sup>60</sup>

33. The right to participate in public affairs, voting rights and the right of equal access to public service lies at the core of democratic government based on the consent of the people.<sup>61</sup> In addition to protecting the right of every citizen to take part in the conduct of public affairs and to

<sup>52</sup> *Ibidem*, para. 106.

<sup>53</sup> United Nations Human Rights Council, Resolution 12/16, Freedom of Opinion and Expression, A/HRC/RES/12/16, 12 October 2009, para. 5(p) available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G09/166/89/PDF/G0916689.pdf?OpenElement> (last accessed 18 June 2021).

<sup>54</sup> Venice Commission, [CDL-AD\(2012\)002](#), Opinion of the Federal Law on election of the Deputies of the State Duma of the Russian Federation, para. 84. See also, ECtHR, *Orlovskaya Iskra v. Russia*, no. 42911/08, § 110, 21 February 2017; see also Council of Europe, Committee of Ministers, Recommendation No. R (99)15 on Measures concerning media coverage of election campaigns, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805e3c6b](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e3c6b) (last accessed 5 July 2021).

<sup>55</sup> [CDL-AD\(2012\)002](#), *op. cit.*, para. 90.

<sup>56</sup> *Ibidem*, para. 86.

<sup>57</sup> See, e.g., ECtHR, *Société Colas Est and Others v. France*, no. 37971/97, § 41, 16 April 2002; ECtHR, *Association for European Integration and Human Rights and Ekimdzhiiev v. Bulgaria*, no. 62540/00, § 69, 28 June 2007.

<sup>58</sup> ECtHR, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 67, 4 December 2008.

<sup>59</sup> Recommendation CM/Rec(2007)14, *op. cit.*, paras. 68-69. See also A/HRC/23/39, *op. cit.*, para. 37; Venice Commission, [CDL-AD\(2013\)030](#), Joint Interim Opinion on the Draft Law amending the Law on Non-Commercial Organisations and other Legislative Acts of the Kyrgyz Republic, para. 70.

<sup>60</sup> Art. 17(1) ICCPR states that “No one shall be subjected to [...] unlawful attacks on his honour and reputation.” See also, ECtHR, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; ECtHR, *Chauvy and Others v. France*, no. 64915/01, § 70, 29 June 2004; ECtHR, *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; ECtHR, *Petrina v. Romania*, no. 78060/01, § 28, 14 October 2008; ECtHR, *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010.

<sup>61</sup> United Nations, Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev.1/Add.7, 27 August 1996, para. 1, available at: <https://digitallibrary.un.org/record/221930?ln=en> (last accessed 5 July 2021).

vote and to be elected, this right also protects the right to have access to public service. States have an obligation to ensure equal access to public service for all citizens.<sup>62</sup>

34. In general, only differences in treatment that are devoid of any objective or reasonable justification will constitute discrimination.<sup>63</sup> The Council of Europe Committee of Ministers recommends 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.*”<sup>64</sup> In *Moscow Branch of the Salvation Army v. Russia*, the European Court for Human Rights did not accept the foreign origin of an NCO as a legitimate reason for differential treatment.<sup>65</sup> As the Venice Commission concluded in its previous Opinion on the Russian “foreign agent” legislation, the same reluctance would *a fortiori* be in place in case of mere foreign funding.<sup>66</sup>

#### IV. Analysis of the November 2020 Amendments

35. The recent amendments to the Russian “foreign agent” legislation are expansive and complex. Thus, it is beyond the remit of this opinion to present a detailed analysis of all its provisions.

36. Draft Law No. 1052523-7 “Amending the Federal Law ‘On non-commercial organisations’ as regards improving the legal regulation of the activities of non-commercial organisations performing the functions of a foreign agent and structural subdivisions of foreign non-commercial non-governmental organisations”:

- broadens the concept of “foreign sources” of NCOs to include funding received from Russian legal entities whose beneficial owners are foreign citizens or stateless persons;<sup>67</sup>
- obliges “foreign agent” NCOs and structural subdivisions of foreign NCOs to submit programmes and other documents providing a basis for the conducting of events and a report on their implementation to the Russian Ministry of Justice;<sup>68</sup>
- empowers the Ministry of Justice to decide whether an NCO may implement these programmes<sup>69</sup> and provides for the liquidation of “foreign agent” NCOs or structural subdivisions of foreign non-commercial non-governmental organisation by the decision of a court in case of non-compliance with the decision;<sup>70</sup>
- requires structural subdivisions of foreign NCOs to report on their “political activities” and how they spend their foreign funds to the Ministry of Justice twice a year;<sup>71</sup> and
- bans structural subdivisions of foreign non-commercial non-governmental organisations from registering on residential premises.

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<sup>62</sup> *Ibidem*, para. 23.

<sup>63</sup> Cf. [CDL-AD\(2019\)002](#), *op. cit.*, para. 63.

<sup>64</sup> Council of Europe: Committee of Ministers, Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, para. 76, available at <https://wcd.coe.int/ViewDoc.jsp?id=1194609> (last accessed 5 July 2021).

<sup>65</sup> ECtHR, *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, 5 October 2006, paras. 81-86.

<sup>66</sup> [CDL-AD\(2014\)025](#), *op. cit.*, para. 92.

<sup>67</sup> Art. 1(1) Draft Law No. 1052523-7.

<sup>68</sup> Art. 1(3)(a) of Draft Law No. 1052523-7.

<sup>69</sup> Art. 1(3)(d) of Draft Law No. 1052523-7.

Although the law determines that the decision has to be a reasoned one, it does not provide any criteria for prohibiting a programme or allowing it to be carried out. If the Ministry prohibits implementation, the NCO must comply, or be forced to close by court order.

<sup>70</sup> Art. 1(3)(d) of Draft Law No. 1052523-7.

<sup>71</sup> Art. 1(3)(b) of Draft Law No. 1052523-7.

37. Draft Law No. 1057914-7 “Amending individual legislative acts of the Russian Federation as regards establishing additional measures to counteract threats to national security”:

- introduces the additional ground for carrying out unscheduled inspections of NCOs in the case of authorities receiving information that an NCO’s activities “do not correspond to the statutory aims and tasks of its activities”;<sup>72</sup> the inspections may last up to 45 days;<sup>73</sup>
- broadens of the concept of “foreign sources” of NCOs to include indirect funding that was received from Russian nationals or organizations who themselves received the funds from foreign sources or persons acting in the capacity of intermediaries;<sup>74</sup>
- requires unregistered public associations that receive foreign funding and participate in political activities to register as “foreign agents” or even if they merely intend to receive foreign funding and to participate in political activities,<sup>75</sup> obliges them to inform the federal state registration authority every quarter of the amount and purposes of foreign funding and the actual spending,<sup>76</sup> and requires them to label their materials with a reference to their “foreign agent” status;<sup>77</sup>
- expands the grounds for designating individuals as “foreign agents” to include receipt of foreign “organisational and methodological support” while engaging in political activities;<sup>78</sup>
- expands the grounds for designating individuals as “foreign agents” to include the gathering of information on military and military-technical activities of the Russian State and empowers the Federal Security Service (FSB) to determine a list of information the receipt of which would serve as a ground for becoming a “foreign agent”;<sup>79</sup>
- exempts diplomatic personnel as well as “representatives of foreign state authorities and international organisations which are on the territory of the Russian Federation by official invitation”,<sup>80</sup> accredited foreign journalists,<sup>81</sup> unless they engage in political activities “incompatible with their professional journalistic activities”,<sup>82</sup> as well as other unspecified individuals;<sup>83</sup>
- requires “foreign agent” individuals to report on their “political activities” and how they spend their foreign funds to the Ministry of Justice twice a year;<sup>84</sup>
- requires “foreign agent” individuals to label their materials with a reference to their “foreign agent” status;<sup>85</sup>
- establishes the procedure for removal of individuals from the “foreign agent” register;<sup>86</sup> and

<sup>72</sup> Art. 4(4)(c) of Draft Law No. 1057914-7.

<sup>73</sup> Art. 4(4)(e) of Draft Law No. 1057914-7.

<sup>74</sup> Art. 4(a) of Draft Law No. 1057914-7. An intermediary is defined as “a Russian physical individual or legal entity effecting the transfer of monetary funding and/or other property from a foreign source or a person authorized by it to a Russian non-commercial organization participating in political activities on the territory of the Russian Federation.” (Art. 4(1)(a) Draft Law No. 1057914-7).

<sup>75</sup> Art. 3 Draft Law No. 1057914-7.

<sup>76</sup> Art. 3(1) of Draft Law No. 1057914-7.

<sup>77</sup> Art. 3(1) of Draft Law No. 1057914-7.

<sup>78</sup> Art. 5(1)(1) of Draft Law No. 1057914-7.

<sup>79</sup> Art. 5(1)(1) of Draft Law No. 1057914-7.

<sup>80</sup> Art. 5(4)(1) of Draft Law No. 1057914-7.

<sup>81</sup> Art. 5(4)(2) of Draft Law No. 1057914-7.

<sup>82</sup> Art. 5(5) of Draft Law No. 1057914-7.

<sup>83</sup> Art. 5(4)(3) of Draft Law No. 1057914-7.

<sup>84</sup> Art. 5(1)(6) of Draft Law No. 1057914-7.

<sup>85</sup> Art. 5(1)(7) of Draft Law No. 1057914-7.

<sup>86</sup> Individuals who have registered as foreign agents or who have been placed in that registry by the authorities and who want to be removed from that registry must submit an application to the Ministry of Justice. They must be able to show that they are no longer engaging in political activities and are not receiving any foreign support (financial or methodological). The Ministry of Justice shall review the application within 60 days. It must offer a “reasoned refusal” if it rejects to move the individual from the list, which can be challenged in court (Art. 5(1)(9) of Draft Law No. 1057914-7).

- requires foreigners who intend to “carry out activities linked to the performance of the functions of a foreign agent after their arrival” to notify the public authorities prior to their entry.<sup>87</sup>

38. Draft Law No. 1057892-7 “Amending the Federal Law ‘On fundamental guarantees of electoral rights and the right to participate in referendums of Russian Federation citizens’”:

- expands the prohibition of militating for or against the nomination of candidates or otherwise participating in electoral or referendum campaigns to unregistered public associations and foreign media outlets performing the functions of a foreign agent as well as Russian legal entities set up by foreign media outlets performing the functions of a foreign agent;<sup>88</sup>
- obliges candidates who are “foreign agents” or “affiliated with a person performing the functions of a foreign agent”<sup>89</sup> to state this information in their declaration to stand for election,<sup>90</sup> in signature lists, where “foreign agent” designation will be listed next to any previous criminal convictions in the signature list,<sup>91</sup> and in their campaign material,<sup>92</sup> where the reference must cover at least fifteen percent of the material’s surface;<sup>93</sup> Federal Law No. 91-FZ of 20 April 2021 adopting Draft Law No. 1057892-7 extends most of these requirements to candidates who are merely nominated by an electoral association (usually a political party) that has also nominated a candidate who is a “foreign agent” or “affiliated with [...] a foreign agent”;<sup>94</sup>
- prescribes that this information be displayed on information stands on the premises of the precinct electoral commissions and stated on the ballots;<sup>95</sup> and
- prescribes that campaign donations by “foreign agent” citizens shall indicate this information in the payment document.<sup>96</sup>

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<sup>87</sup> Art. 5(1)(2) of Draft Law No. 1057914-7.

<sup>88</sup> Art. 1(2) of Draft Law No. 1057892-7.

<sup>89</sup> Art. 1(1)(a) of Draft Law No. 1057892-7 defines “a candidate affiliated with a person performing the functions of a foreign agent” as: “a candidate who, during the two-year period prior to the official promulgation/publication of the decision to hold elections and/or during the period of electoral campaigning for the corresponding elections,: a) [“a” in the original Cyrillic text] is/was a member of an organ of a non-commercial organisation performing the functions of a foreign agent and/or is/was a founder, member, participant, leader or staff member thereof; b) [“б” in the original Cyrillic text] is/was a member of an organ of an unregistered public association performing the functions of a foreign agent and/or is/was a founder, member, participant or leader thereof; c) [“в” in the original Cyrillic text] is/was a founder, manager or staff member of a foreign media outlet, performing the functions of a foreign agent or a founder, manager or staff member of a Russian legal entity (or is/was a member of its governing bodies) set up by a foreign media outlet performing the functions of a foreign agent; d) [“е” in the original Cyrillic text] carries out/has carried out political activities and receives/has received monetary funding and/or other property-related assistance from a non-commercial organisation, unregistered public association or physical individual performing the functions of a foreign agent, including via intermediaries, for the carrying out of political activities.”

<sup>90</sup> Art. 1(3)(a) of Draft Law No. 1057892-7.

<sup>91</sup> Art. 1(12)-(17) of Draft Law No. 1057892-7. These amendments have been adopted as Art. 1(13)-(18) of Federal Law No. 91-FZ of 20 April 2021. Art. 2(13)-(15) and 3 of Federal Law No. 91-FZ of 20 April 2021 introduce a similar requirement into Federal Law No. 20-FZ of 22 February 2014 on the Election of Deputies to the State Duma of the Federal Assembly of the Russian Federation and Federal Act of 22 December 2020 No. 437-FZ on the Federal Territory of Sirius.

<sup>92</sup> Art. 1(6), (8) and (9) of Draft Law No. 1057892-7.

<sup>93</sup> Art. 1(9) of Draft Law No. 1057892-7.

<sup>94</sup> Art. 1(4), (6)-(9) and (13)-(18) of Federal Law No. 91-FZ of 20 April 2021.

Art. 2 of Federal Law No. 91-FZ of 20 April 2021 introduces a similar requirement into Federal Law No. 20-FZ of 22 February 2014 on the Election of Deputies to the State Duma of the Federal Assembly of the Russian Federation.

<sup>95</sup> Art. 1(3)(b), (6), (10) and (11) of Draft Law No. 1057892-7. These amendments have been adopted as Art. 1(3)(b), (6), (11) and (12) of Federal Law No. 91-FZ of 20 April 2021. Art. 2 of Federal Law No. 91-FZ of 20 April 2021 introduce a similar requirement into Federal Law No. 20-FZ of 22 February 2014 on the Election of Deputies to the State Duma of the Federal Assembly of the Russian Federation.

<sup>96</sup> Art. 1(10)(b) of Federal Law No. 91-FZ of 20 April 2021 (amending Draft Law No. 1057892-7).

39. Draft Law No. 1060950-7 “Amending the Russian Federal Code of Administrative Infringements as regards specifying liability for breaches of the procedure governing the activities of persons performing the functions of a foreign agent” introduces administrative fines of:

- up to 30,000 roubles for failure of individuals designated as “foreign agents” to indicate their status as “foreign agents” and up to 50,000 roubles for failing to comply with their reporting obligations;<sup>97</sup>
- up to 30,000 roubles for failure of unregistered public associations designated as “foreign agents” to comply with their reporting obligations;<sup>98</sup>
- up to 500,000 roubles for failure by a “foreign agent” NCO, unregistered public association or individual to label their material with a reference to their “foreign agent” status;<sup>99</sup> and
- up to 2,500 roubles for citizens, 5,000 roubles for officials and up to 50,000 roubles for entities for the dissemination of information about “foreign agents”.<sup>100</sup>

40. Federal Law No. 525-FZ “Amending Article 330-1 of the Criminal Code of the Russian Federation” establishes the following criminal sanctions:

- a fine of up to 300.000 roubles or in the amount of the wages or other income of the convicted person for a period of up to two years, or by compulsory labour for up to 480 hours, corrective labour for a term of up to two years, or the deprivation of freedom of the same term, for failure to comply with the registration and reporting requirements of “foreign agent” NCOs and unregistered public associations<sup>101</sup> and for the “violation of the operating procedures” by “foreign agent” media outlets;<sup>102</sup> and
- a fine of up to 300.000 roubles or in the amount of the wages or other income of the convicted person for a period of up to two years, or by compulsory labour for up to 480 hours, corrective labour for a term of up to five years, or the deprivation of freedom of the same term, for failure of “foreign agent” individuals to comply with the requirement to register or with the various reporting requirements.<sup>103</sup>

41. This opinion proceeds by analysing these amendments according to the following structure: (A) their aims and justifications; (B) the expansion of the scope of individuals and entities that can be designated “foreign agents”; (C) the expansion of administrative requirements and restrictions on “foreign agents”; and (D) the expansion of sanctions for the breach of these requirements and restrictions.

### A. Aims and justifications

42. The introduction of the “foreign agent” designation was originally justified as ensuring transparency of NCOs receiving funding from abroad.<sup>104</sup> In their meetings with the rapporteurs,

<sup>97</sup> The average monthly salary in Russia was 51,083 roubles in 2020 (<https://www.statista.com/statistics/1010660/russia-average-monthly-nominal-wage/> (last accessed 18 June 2021)).

<sup>98</sup> Art. 1(4)(1) of Draft Law No. 1060950-7.

<sup>99</sup> Art. 1(4)(2) and 1(5) of Draft Law No. 1060950-7.

Where the material was produced or disseminated by a founder, member, participant or leader of an unregistered public association designated as a “foreign agent”, when carrying out “political activities”, without labelling it accordingly could be fined with 5,000 roubles (Art. 1(4)(3) of Draft Law No. 1060950-7).

<sup>100</sup> Art. 1(2) of Draft Law No. 1060950-7.

<sup>101</sup> Art. 1(1) of Federal Law No. 525-FZ.

<sup>102</sup> Art. 1(2) of Federal Law No. 525-FZ.

<sup>103</sup> Art. 1(3) of Federal Law No. 525-FZ.

<sup>104</sup> See, e.g., [CDL-AD\(2014\)025](#), *op. cit.*, para. 57; see also Resolution of the Constitutional Court of the Russian Federation No. 10-P, April 8, 2014, “On the Conformity of the Norms of the Legislation on NGOs Performing the Functions of a Foreign Agent to the Constitution of the Russian Federation”, para. 44.

the Russian authorities have also repeatedly invoked transparency as the main aim motivating the amendments.

43. The Explanatory Memorandum of Draft Law No. 1057914-7 “Amending individual legislative acts of the Russian Federation as regards establishing additional measures to counteract threats to national security” states that: *“The proposed amendments will help to ensure more lawful and transparent activities of public associations, non-commercial organisations and private individuals receiving support from abroad and participating in political processes on the territory of the Russian Federation.”* As the Commission considered in its 2019 Report on Funding of Associations, “ensuring transparency [...] would not by itself appear to be a legitimate [aim].”<sup>105</sup> Instead, transparency must serve one of the legitimate aims for restricting human rights, such as national security, and must be necessary to avert a real, and not only hypothetical danger.<sup>106</sup> The Commission observes that the Russian authorities fail to indicate any specific threats to national security that might arise from foreign financial support for the activities of NCOs, unregistered public associations and individuals. Neither do they explain how transparency concerning foreign financial support is supposed to avert these threats.

44. The amendments to the Law on NCOs are justified by “the need to improve” the existing “foreign agent” legislation *“for the purpose of safeguarding human and civil rights and freedoms as well as the legally protected interests of society and the State.”*<sup>107</sup> However, no specific justifications or explanations are provided as to how these amendments are supposed to safeguard human and civil rights and freedoms as well as the interests of society and the State or how they are supposed to counteract threats to national security. They also fail to explain why improvements to the existing legislation were necessary for the purpose of promoting transparency, or to indicate any specific threats to and how the amendments are supposed to counteract these threats.

45. Failure to sufficiently justify additional restrictive regulations is generally problematic in light of the rule of law.<sup>108</sup> The Venice Commission further notes that no amendments have been made that would improve the legislation on NCOs in light of its previous assessment and recommendations. In its 2014 Opinion, the Commission found that the Russian “foreign agent” legislation does not satisfy basic human right standards and recommended ways in which the legislation could be improved for the purpose of safeguarding civil and political rights. The Commission regrets seeing that, instead of improving the legislation, the most recent amendments have exacerbated many of the issues criticised before.

46. In its 2014 opinion, the Venice Commission agreed with the Council of Europe Commissioner for Human Rights that the term “foreign agent” *“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>109</sup> Irrespective of the specific Russian historical context, the term “foreign agent” always has a negative connotation suggesting that an individual or entity acts “on behalf and in the interests of the foreign source” and not in the interest of the domestic society.<sup>110</sup> In their meeting with the rapporteurs, the Russian authorities expressed their view that the “foreign agent” label does not carry this stigma.<sup>111</sup> In their meetings with international and civil

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<sup>105</sup> [CDL-AD\(2019\)002](#), *op. cit.*, para. 80.

<sup>106</sup> Cf. Venice Commission, [CDL-AD\(2019\)002](#), *Report on Funding of Associations*, para. 62.

<sup>107</sup> Explanatory Memorandum of Draft Law No. 1052523-7.

<sup>108</sup> See Venice Commission, [CDL-AD\(2016\)007rev](#), Rule of Law Checklist, p. 13.

<sup>109</sup> Council of Europe, Commissioner for Human Rights, 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, CommDH(2013)15, 15 July 2013, para. 57, available at: <https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-on-the-legislation-of-the/16806da5b2> (last accessed 5 July 2021) (cited in [CDL-AD\(2014\)025](#), *op. cit.*, para. 54).

<sup>110</sup> See also, [CDL-AD\(2014\)025](#), *op. cit.*, para. 55.

<sup>111</sup> Similarly, in 2014, the Russian Constitutional Court held *“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*

society representatives, the rapporteurs have learned that the negative connotations of the “foreign agent” label have arguably increased in recent years.

47. At the same time, the Russian authorities claim that the Russian public is more and more concerned about foreign interference in its internal affairs. The “foreign agent” label was supposed to alert the public to the risk of such foreign interference. The recent amendments were allegedly necessary in order to respond to this increased public concern. The Venice Commission recalls that “[a]bstract ‘public concern’ and ‘suspicions’ [...] without pointing to a substantiated concrete risk analysis [...] cannot constitute a legitimate aim justifying restrictions”.<sup>112</sup> The Commission further notes that the position of the Russian authorities appears contradictory: If the Russian public considers foreign interference with their internal affairs to be a significant threat, they would surely view agents of such foreign interference negatively – presumably as foreign spies or traitors. Therefore, the term still seems to have a very negative connotation in large sections of the population.

48. During meetings with the rapporteurs, the Russian authorities expressed their preference to employ existing legal terms wherever possible instead of introducing new terms into the law. However, in the present context, the notion of “agency” is misleading. Generally, in law – including in the Russian Civil Code<sup>113</sup> – the term “agency” refers to a legal relationship that exists when one person or party (the principal) engages another (the agent) to act on behalf of the principal. Mere support from abroad does not constitute a sufficient indicator of such a principal-agent relationship. In their meetings with the rapporteurs, the Russian authorities admitted that the fact that someone receives foreign support does not necessarily imply that his or her independence has been compromised. By contrast, the US Foreign Agent Registration Act – often invoked by Russia as a model for its own legislation – does not equate receiving foreign support, in part or in whole, with being an agent of a foreign principal.<sup>114</sup> Instead, a “foreign agent” must actually act in the interest of a foreign principal, regardless of whether or not they receive foreign funding.

49. The term “agency” is especially misleading where foreign funding merely constitutes a negligible source of an individual’s or entity’s funds or is not intended to support any specific activity. The definition of “foreign agents” is so broad that it might even lead to the absurd outcomes that individuals might become “foreign agents” inadvertently and against their will. For instance, the current definition exposes entities and individuals to the risk of unknowingly becoming a “foreign agent” through entrapment.<sup>115</sup> Recipients of donations or grants can hardly

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“foreign agent” would be devoid of any constitutional and legal basis” (cited in [CDL-AD\(2014\)025](#), *op. cit.*, para. 55). Already in its 2014 Opinion, the Venice Commission considered that this assessment on the constitutional and legal meaning of the term “foreign agent” does not refute evidence that, in fact, the term has a very negative connotation in large sections of the population (e.g., an opinion poll that found that 62% of the respondents perceived the term negatively, or reports of homeless people who refused the offer of a shelter from representatives of a humanitarian NCO, because they did not want help from “foreign agents” (*ibidem*, paras. 54-55)).

<sup>112</sup> [CDL-AD\(2019\)002](#), *op. cit.*, para. 81. See also, Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, CCPR/C/111/D/1993/2010, July 2014, para. 7.3; *Lee v. Republic of Korea*, CCPR/C/84/D/1119/2002, July 2005, para. 7.2; Communication No. 2001/2010.

<sup>113</sup> Art. 1005 of the Civil Code of the Russian Federation states: “По агентскому договору одна сторона (агент) обязуется за вознаграждение совершать по поручению другой стороны (принципала) юридические и иные действия от своего имени, но за счет принципала либо от имени и за счет принципала.” (“Under an agency agreement, one party (the agent) undertakes to carry out legal and other actions for a fee on behalf of another party (the principal), in its own name but at the expense of the principal or in the principal’s name and at the expense of the principal.”)

<sup>114</sup> The Commission would like to stress that it does not intend to endorse the US FARA as a good example of foreign agent legislation. Instead the comparison is merely intended to highlight an instance of foreign agent legislation that is more likely to accurately track a principal-agent relationship.

<sup>115</sup> For instance, the journalist Denis Kamalyagin, who has been designated as a “foreign agent”, has donated money to Pskov’s governor, his chief of staff, a regional State Duma deputy, and two media publishers – thereby presumably rendering them “foreign agents” under the most recent amendments – in order to see whether these individuals would adhere to the public disclosure requirements for “foreign agents” (see, Kevin Rothrock, “I don’t want to become a political prisoner”: Three ‘foreign agent’ journalists describe life after designation by Russia’s



protect themselves against the risk of becoming a “foreign agent” even if they devote great attention and efforts to avoid receiving any kind of foreign support. These examples show that no rational connection exists between the legal definition of a “foreign agent” and the kind of relationship it is supposed to reflect. Therefore, the need to introduce a more accurate term seems inevitable.

50. In sum, the legal definition of a “foreign agent” is not sufficiently narrowly tailored to serve as a basis for restrictive measures that would be “necessary in a democratic society” in order to achieve the aims of transparency or national security. With regard to the aim of transparency, the designation is more likely to undermine transparency by stigmatising entities and individuals and misleading the public about their relationship to foreign entities. With regard to the aim of national security, the designation is likely to provoke a climate of distrust, fear and hostility, instead of countering any real threat. Moreover, the reasonable fear of being designated a “foreign agent” will presumably have a chilling effect on Russian civil society by dissuading entities and individuals from engaging in political activities broadly understood. The Commission calls once again on the Russian authorities to reject the “foreign agent” designation in favour of a more neutral and accurate term.<sup>116</sup> Moreover, the scope of the designation should be narrowed significantly in order to serve the alleged aims of transparency and national security. Specifically, the notions of “political activities” and “foreign support” should be abandoned in favour of indicators that would reliably track objectionable forms of foreign interference. Alternatively, the Commission recommends repealing the legislation altogether.

## **B. Expansion of scope**

51. In its 2014 Opinion, the Commission held that several key terms of the legislation were overly vague and broad. While it is true that “many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice”, laws nevertheless have to satisfy the requirement of “foreseeability”. Otherwise they are in violation of the principle of legality.<sup>117</sup> This was especially true of the terms “political activities” and “foreign funding” as well as the interpretation of the former term provided by the Constitutional Court of the Russian Federation in its decision of 8 April 2014.<sup>118</sup> These violations of the principle of legality have now been extended to an even larger set of entities and individuals.

52. The recent amendments further exacerbate the legal uncertainty concerning who could be designated a “foreign agent” because the additional grounds on which entities and individuals could be designated “foreign agents” also fail to comply with the principle of legality. In particular, the notion of “organizational and methodological support”, which serves as an additional ground for designating individuals as “foreign agents”, is so vague and susceptible to broad interpretation that the provision cannot be deemed to be foreseeable. Without additional specification (e.g. through administrative guidelines), this provision violates the principle of the legality.

53. The scope of the exception for foreign journalists is also unclear, since the notion of activities that are “incompatible with [...] professional journalistic activities”, which serves as a ground for designating foreign journalists “foreign agents”, is overly vague. In their exchanges with the rapporteurs, the Russian authorities explained that they consider “[a] journalist [to go] beyond

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Justice Ministry”, *Meduza*, 6 May 2021, available at: <https://meduza.io/en/feature/2021/05/06/i-don-t-want-to-become-a-political-prisoner> (last accessed 5 July 2021)).

<sup>116</sup> *CDL-AD(2014)025*, *op. cit.*, para. 65.

<sup>117</sup> ECtHR, *Huhtamäki v. Finland*, no. 54468/09, § 41, 6 March 2012.

<sup>118</sup> *Ibidem*, paras. 44-106.

The critical remarks made by the Venice Commission have been echoed by the Council of Europe Commissioner for Human Rights in his *Opinion on the legislation and practice in the Russian Federation on non-commercial organisations in light of Council of Europe standards* (CommDH(2013)15, *op. cit.*).

these restrictions when he begins to carry out activities that can be defined as political” under the broad definition of the term established by the “foreign agent” laws. The Venice Commission observes that this definition of the exception renders the exception for foreign journalists moot.

54. The lack of legal certainty also arises regarding the FSB’s apparently unlimited power to determine what information on Russian military activities should serve as a ground of becoming a “foreign agent” if gathered by an individual. The kinds of information that constitute grounds for being designated a “foreign agent” should be clearly determined in the law so that government agencies only apply the criteria defined in the law and are not free in defining the criteria themselves. This applies especially to decisions of intelligence agencies that tend to be classified.

55. Due to the lack of legal certainty concerning the scope of the “foreign agent” designation, the Venice Commission is concerned about the risk of arbitrary implementation and the potential chilling effect on civil society. No administrative guidelines or practice seem to exist that would render the legislation more foreseeable in practice. Moreover, experience with Russia’s “foreign agent” legislation suggests that vague terms are likely to be interpreted broadly in order to expand the reach of the law. As the Commission noted in its 2019 Report on Funding of Associations, *“Apart from the wording of legal provisions, the Commission has also due regard to the role of adjudication by courts in clarifying the meaning of a provision and considers that even unclear terms, such as “political activities” can comply with the principle of legality if they are interpreted in a coherent and clear way by the executive and judicial authorities. However, this clearly was not created in the case-law of the Russian Constitutional Court in the absence of any uniformity as to the meaning of this term.”*<sup>119</sup>

56. In their meetings with the rapporteurs, the Russian authorities seemed to have considered the breadth and vagueness of their “foreign agent” legislation to be a virtue of the legislation, arguing for the need of wide discretion in designating entities and individuals as “foreign agents”. Experience highlights that the “foreign agent” legislation has mostly targeted entities and individuals who are active in the field of human rights, democracy and the rule of law.<sup>120</sup> The Venice Commission further observes that this approach seems to disregard Russian constitutional law. As the Constitutional Court stated *“the violation of the requirement of certainty of a legal norm, which gives rise to the possibility of its arbitrary interpretation by a law enforcement officer, is, as a rule, by itself sufficient for it to be found inconsistent with the Constitution of the Russian Federation”*.<sup>121</sup> The Venice Commission therefore recommends rendering the legislation more foreseeable and ensure that adequate safeguards against arbitrary application exist. In particular, any amendments should ensure that the legislation cannot be applied against human rights defenders and NCOs advocating, by lawful means and within the limits of the national legislation, peaceful changes of governmental policy – activities, which the Commission reiterates cannot be deemed to be “in the interest of foreign sources”, but are generally in the interest of an open democratic system, constituting the *raison d’être* of associations and deserving enhanced protection under the freedom of association and expression.<sup>122</sup>

57. In its 2014 Opinion, the Commission found that the overly broad definition of “foreign funding” was “obviously extremely problematic and [that] it is hardly imaginable that the law is intended to cover all [the] very different situations” that it seems to cover.<sup>123</sup> With regard to NCOs, it is questionable why the definition of “foreign funding” was expanded to include indirect funding that was received from Russian nationals or organizations who themselves received the funds from

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<sup>119</sup> [CDL-AD\(2019\)002](#), *op. cit.*, para. 68.

<sup>120</sup> Cf. [CDL-AD\(2014\)025](#), *op. cit.*, para. 83. Cf. Register of non-commercial organisations performing the functions of a foreign agent, *op cit.*

<sup>121</sup> Judgement 31-П/2017 of 22 November 2017 of the Constitutional Court of the Russian Federation.

<sup>122</sup> Cf. [CDL-AD\(2014\)025](#), *op. cit.*, paras. 80 and 86; [CDL-AD\(2019\)002](#), *op. cit.*, para. 102. See also, A/RES/53/144, *op. cit.*

<sup>123</sup> [CDL-AD\(2014\)025](#), *op. cit.*, para. 70.

foreign sources or act in the capacity of intermediaries. The Venice Commission recommends repealing the inclusion of indirect funding that was received from Russian nationals or organizations who themselves received the funds from foreign sources or act in the capacity of intermediaries in the definition of “foreign funding”.

58. More generally, the expansion of the “foreign agent” designation to unregistered public associations and a larger subset of individuals is more likely to increase the risk of entities and individuals becoming “foreign agents” inadvertently or against their will, while further decreasing the reliability with which the designation would indicate the existence of problematic foreign influence. The Venice Commission considers the expansion of the definition of “foreign agents” to be in violation of the principle of proportionality and necessity in a democratic society. It therefore recommends repealing the extension of the “foreign agent” designation to unregistered public associations and a larger subset of individuals.

59. The lack of legal certainty and proportionality with regard to the scope of the “foreign agent” designation is particularly problematic since the entire body of the “foreign agent” legislation – including expansive obligations, restrictions and sanctions – is built upon it. Unless the prior and new breaches of the principles of legality and proportionality that stem from the current definition of the “foreign agent” designation can be remedied, not only the designation but the entire body of “foreign agent” legislation should be repealed.

### **C. Expansion of regulations and restrictions**

60. In 2014, the Commission already criticised the problematic nature of the additional obligations imposed on “foreign agent” NCOs compared to other public associations, which were not justified by the legitimate aim of ensuring transparency and would hamper the activities of NCOs.<sup>124</sup> It thus recommended reconsidering the special regime for “foreign agent” NCOs. The recent amendments have further expanded the obligations and restrictions that apply to NCOs and have also introduced new regulations and restrictions on the new types of foreign agents.

#### **1. Registration requirements**

61. Like other categories of “foreign agents,” individuals and unregistered public associations must register with the authorities if they receive foreign funding and participate in political activities.<sup>125</sup> The register will be published online.<sup>126</sup> The fact that the “foreign agent” designation is fraught with significant legal uncertainty renders the requirement that “foreign agents” should register themselves problematic. Unless individuals or entities can determine with sufficient certainty whether they qualify as “foreign agents”, they cannot be required to register themselves. In the face of hefty sanctions, individuals and entities might be inclined to register as “foreign agents” when in doubt, or to abstain from any activities or support that would raise even the slightest risk of rendering one a “foreign agent”. Therefore, individuals or entities should not be required to self-register as “foreign agents”.

62. The collection and publication of personal data in the registry of “foreign agent” individuals and entities amount to an infringement on the right to privacy of these individuals and entities. The right to privacy protects, *inter alia*, a person’s personal data and reputation. Given that the designation does not seem to serve any legitimate aim, it cannot justify the collection and publication of personal data. Due to the stigmatising nature of the “foreign agent” designation, the public register will likely tarnish the reputation of entities and individuals and seriously hamper

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<sup>124</sup> *Ibidem*, para. 133.

<sup>125</sup> Art. 3 and Art. 5(1)(2) of Draft Law No. 1057914-7.

<sup>126</sup> Art. 3 and Art. 5(1)(3) of Draft Law No. 1057914-7.

their activities.<sup>127</sup> Therefore, the Venice Commission recommends abolishing the public register for “foreign agents”.

## 2. Reporting and auditing requirements

63. The Venice Commission previously criticised the obligations of NCOs to report on their activities four times a year as disproportionate and discriminatory in its 2014 Opinion.<sup>128</sup> Likewise, the recent amendments oblige designated public associations to report to the authorities four times a year.<sup>129</sup> The effect of similarly burdensome reporting obligations on unregistered public associations is likely to be even more severe since they do not have the same resources as most NCOs. In the case of unregistered public associations, the lack of proportionality is further exacerbated by the fact that, by their very nature, these associations typically lack access to some of the rights and possibilities that are open to NCOs (e.g., access to banking facilities, access to public funding, etc.).<sup>130</sup> Moreover, the reporting obligations imposed on unregistered public associations may constitute a *de facto* obligation to register on these entities. In their 2014 Joint Guidelines on the Freedom of Association, the Venice Commission and OSCE-ODIHR stress that “*legislation should not require associations to go through formal registration processes*”.<sup>131</sup>

64. The lack of proportionality of the reporting requirements is most pronounced in the case of individuals, who are required to submit reports twice a year.<sup>132</sup> Given the broad interpretation of the notion of “political activity” individuals are likely to be deterred from a wide range of activities that are not only fundamental for a healthy society but also for their own development and well-being. The requirement for foreigners to report on their intent to engage in any activities “linked to the performance of the functions of a foreign agent” prior to their arrival in Russia is so broadly phrased as to expose any foreigner to serious risk of arbitrary prosecution, conviction or punishment.

65. Imposing additional bureaucratic burdens on “foreign agents” may also violate the prohibition of discrimination. Entities and individuals have a right to access foreign support and to participate in political activities. Given that the “foreign agents” designation is too broadly defined to serve any legitimate aim, it cannot serve as a reasonable basis for differential treatment that infringes on these rights. Therefore, differential treatment of NCOs, public associations and physical individuals who engage in political activities, solely because they receive foreign funding, cannot be justified.

66. The expansion of the grounds for unscheduled inspections of NCOs and the extension of the duration of inspections to 45 days, without any cap on the number of inspections, are disproportionate because they lack sufficient qualifying criteria (e.g. requiring the allegations to be credible in order to trigger an inspection). The resulting risk of arbitrarily long and repeated inspections raises the risk of paralyzing the functioning of the affected NCOs.

67. Requiring NCOs to report to the Ministry of Justice in advance on their planned projects and events imposes an excessive restriction on the freedom of association. Although the law determines that the decision to prohibit certain projects and events must be a reasoned one, it does not provide any criteria for prohibiting a programme or allowing it to be carried out. The Venice Commission recalls that only very serious violations, for example those which threaten the fundamental principles of democracy, may justify the prohibition of the activities that are

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<sup>127</sup> [CDL-AD\(2014\)025](#), *op. cit.*, para. 61.

<sup>128</sup> *Ibidem*, paras. 88-92.

<sup>129</sup> Art. 3(1) of Draft Law No. 1057914-7.

<sup>130</sup> [CDL-AD\(2014\)046](#), *op. cit.*, para. 195.

<sup>131</sup> *Ibidem*, para. 49.

<sup>132</sup> Art. 5(1)(6) of Draft Law No. 1057914-7.

protected by the freedom of association.<sup>133</sup> Failure of the law to provide any guidance as to what projects and events could be prohibited and on what grounds appears to provide the Ministry of Justice with complete discretionary power. This violates the principle of legality because it makes it impossible for “foreign agent” NCOs to know how to design their programmes to avoid the ban.

68. The Venice Commission concludes that the recently expanded regulations concerning “foreign agents” are unjustifiably burdensome to the point of being oppressive. Moreover, the expanded regulations do not provide sufficient safeguards against arbitrary enforcement. The Venice Commission recalls that the freedom to seek, receive and use resources from any available lawful public or private source is one of the main principles of the right to freedom of association<sup>134</sup> and should not be subject to any special reporting obligations.<sup>135</sup> Consequently, “foreign agent” entities and individuals should not be required to submit additional reports. The Commission calls on the Russian authorities to repeal the special reporting and auditing obligations for “foreign agents”.

### 3. Public disclosure requirements

69. Given that the “foreign agent” designation is stigmatising and misleading, requiring entities and individuals to attach that label to the materials they produce as part of a “political activity” cannot be considered “necessary in a democratic society”, and is consequently disproportionate. The same conclusion applies to the fact that founders, members, leaders or staff of designated unregistered public associations must label all materials they produce or distribute as part of a “political activity” with the stigmatising “foreign agent” label, regardless of whether they were created as part of their work with the unregistered public association. The Venice Commission reiterates that public disclosure requirements are only “*justified in cases of political parties and entities formally engaging in remunerated lobbying activities.*”<sup>136</sup> Therefore, the Commission recommends repealing all public disclosure requirements on designated “foreign agents” that go beyond these specific cases.

70. Public disclosure requirements in the context of elections deserves a specific analysis.

71. The Venice Commission recalls that it is legitimate to limit foreign financing to political parties or individual candidates in the context of elections in order “*to avoid and combat undue or corrupt influence on the political life in the State, including from outside the State.*”<sup>137</sup> However, “*foreign funding of political parties is an area that should be regulated carefully to avoid the infringement of free association in the case of political parties active at an international level*”,<sup>138</sup> and “*every individual case has to be considered separately in the context of the general legislation on financing of parties as well as of the international obligations of a State*”, in order to avoid a violation of Article 11 ECHR.<sup>139</sup>

72. However, the public disclosure requirements applicable to candidates who carry the designation of “foreign agent” or being “affiliated with [...] a foreign agent” do not adequately

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<sup>133</sup> Cf. ECtHR, *Christian Democratic People's Party v. Moldova*, no. 28793/02, § 76, 14 February 2006; cf. ECtHR, *Republican Party of Russia v. Russia*, no. 12976/07, § 102, 12 April 2011; ECtHR, *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*, no. 59489/00, § 56, 20 October 2005.

<sup>134</sup> [CDL-AD\(2019\)002](#), *op. cit.*, para. 9.

For a more detailed analysis of this principle, see [CDL-AD\(2019\)002](#), *op. cit.*

<sup>135</sup> Explanatory Memorandum to Recommendation CM/Rec(2007)14, *op. cit.*, para. 14.

<sup>136</sup> [CDL-AD\(2019\)002](#), *op. cit.*, para. 106.

<sup>137</sup> [CDL-AD\(2019\)002](#), *op. cit.*, para. 41. See also, Venice Commission, [CDL-AD\(2020\)032](#), Joint Guidelines of the Venice Commission and OSCE/ODIHR on Political Party Regulation, para. 229ff; see also, Venice Commission, [CDL-INF\(2001\)8](#), *Guidelines and Report on the Financing of Political Parties*; cf. Art. 7 of Recommendation Rec(2003)4, *op. cit.*

<sup>138</sup> [CDL-AD\(2020\)032](#), *op. cit.*, para. 231.

<sup>139</sup> Venice Commission, [CDL-AD\(2006\)014](#), Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources, para. 34.

address the issue of foreign interference with domestic elections unless, for example, there is clear, specific and demonstrable foreign funding of that candidate's campaign. Given that the "foreign agent" designation is misleading and does not reliably track any kind of relationship that would indicate foreign influence in elections, requiring the label to appear on all election-related materials does not serve any legitimate aim. Instead, printing the stigmatising "foreign agent" label on all election related materials risks deterring voters by prejudicing them against the designated candidate. This prejudicial effect will be exacerbated by the mere size of the label – covering at least 15 % of its surface of campaign materials – which creates the association with a warning sign. The fact that the "foreign agent" designation would be listed next to any previous criminal convictions in the signature list increases that prejudice. The Venice Commission considers the law would effectively disqualify candidates who are designated as "foreign agents" in the eyes of the electorate. This constitutes an unjustified interference in the right to free elections and the freedom of expression, which is particularly vital in the context of campaigning.

73. Similarly, imposing public disclosure requirements on anyone who is "affiliated with [...] a foreign agent" is problematic because the notion of "affiliation" is too broadly defined to reliably track any influence of or alignment with a "foreign agent". Moreover, as argued above, the notion of "foreign agent" itself is too broadly defined to reliably track kind of relationship that would indicate foreign influence. Therefore, imposing public disclosure requirements on candidates "affiliated with [...] a foreign agent" also fails to serve a legitimate aim. The same conclusion applies *mutatis mutandis* to the public disclosure requirements on any candidate who has been nominated by a political party which has also nominated a candidate who is a "foreign agent" or "affiliated with [...] a foreign agent". As a result, these public disclosure requirements constitute an unjustified interference with the right of every citizen to take part in the conduct of public affairs, the right to free elections and the freedom of expression.

74. The definition of "political activities" underlying these designations is too broad and covers activities of NCOs and individuals that are not political in the strict sense. Therefore, these designations are not sufficiently linked to the electoral activity of the candidate and fail to target the issue of foreign interference in elections. Instead of serving any legitimate government interest in protecting the integrity of the electoral process, the stigma associated with the "foreign agent" designation restricts individuals in all aspects of their life – not just when they participate as a candidate in elections.

75. These public disclosure requirements damage electoral integrity because they are likely to deter many voters from supporting or even considering candidates who might have best represented their interests, instead of targeting the issue of foreign funding. Given that broad definition of "foreign agents" and "affiliat[ion] with a foreign agent" does not convey any valuable information to voters, the public disclosure requirements are misleading and prejudicial. Therefore, these public disclosure requirements infringe on free and fair elections by prejudicing voters and misleading them to act against their own interest. They interfere with the free expression of the opinion of the people in the choice of their representatives.

76. The Venice Commission concludes that the extensive public disclosure requirements fail to serve the legitimate aim of protecting the electoral process from foreign interference. Instead, they are likely to undermine the electoral process by misleading the public, and especially voters. Therefore, the Venice Commission recommends that the public disclosure requirements for "foreign agents" and candidates who are "affiliated with [...] a foreign agent" or who have been nominated by political parties that have nominated such candidates should be repealed.

#### 4. Restrictions on speech and access to public service

77. The general prohibition on “foreign agent” NCOs, unregistered public associations and media outlets to “carry out activities militating for or against the nomination of candidates or lists of candidates” or otherwise participate in electoral or referendum campaigns<sup>140</sup> seems to interfere with the freedom of expression, which is vital in the pre-election context. In their meetings with the rapporteurs, the Russian authorities repeatedly claimed that “foreign agents” are not restricted in their speech. However, the prohibition on “foreign agent” associations and media outlets to “militat[e] for or against [...] candidates” or otherwise participate in electoral or referendum campaigns is so broadly drafted that it seems to effectively prohibit “foreign agent” associations and media outlets from speaking out in the context of elections or referendums. In particular, the notion of “activities that promote or hinder nomination of candidates” is so broadly phrased that it seems to imply that civil society groups must abstain from any kinds of political discussions or evaluations of proposed government programmes. In the case of media outlets, it seems to effectively ban “foreign agents” media outlets from reporting on elections and candidates.

78. The Venice Commission has consistently emphasized the importance of unrestrained political debate for democracy. As also emphasised by the UN Human Rights Council, restrictions on the freedom of expression should never be applied to discussion of government policies, electoral campaigning, political speech and expression of opinion and dissent.<sup>141</sup> Yet this is exactly the kind of speech that this provision prohibits. Concerning the effective ban on “foreign agent” media outlets from reporting on elections, the Venice Commission recalls that restrictions imposed on campaigning “*do not appear as justified concerning members of the press*”.<sup>142</sup> Although states may generally adopt measures to ensure that media coverage of elections be fair, balanced and impartial,<sup>143</sup> a provision which “*imposes neutrality on public or private media and prohibits any comments or information given on election campaigning events*” would constitute a disproportionate interference with the freedom of expression because the distinction between informing and campaigning is, as a rule, impossible to draw in practice.<sup>144</sup>

79. Moreover, the fact that this prohibition only applies to associations and media outlets that are designated as “foreign agents” renders this restriction incompatible with the principle of non-discrimination as this label alone does not justify a different treatment. While it would be justified to exclude influence on elections by lobbyists representing foreign interests, this is not what the law in the present case does because of the overly broad definition of a “foreign agent”. Therefore, the general prohibition on “foreign agent” associations and media outlets to participate in electoral or referendum campaigns should be repealed.

80. The prohibition of “foreign agent” individuals from access to state and municipal service violates the right of every citizen to take part in the conduct of public affairs. Again, the overly broad definition of a “foreign agent” does not provide a legitimate ground for preventing

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<sup>140</sup> Art. 1(2) of the Draft Law No. 1057892-7.

<sup>141</sup> United Nations Human Rights Council, Resolution 12/16, *op. cit.*

<sup>142</sup> [CDL-AD\(2012\)002](#), *op. cit.*, para. 90.

<sup>143</sup> See, for instance, Venice Commission, [CDL-AD\(2010\)013](#), Joint Opinion on the election code of Georgia as amended through March 2010, para. 49. See also, Council of Europe, Committee of Ministers, Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, 7 November 2007, para. II, 2, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d4a3d](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d4a3d) (last accessed 5 July 2021).

<sup>144</sup> [CDL-AD\(2012\)002](#), *op. cit.*, para. 86. Similarly, in *Orlovskaya Iskra v. Russia*, the ECtHR expressed doubts as to the usability of the distinction between informing and campaigning. It noted that “*it is difficult if not impossible to ascertain whether the content in relation to a candidate should be perceived as a mere ‘negative comment’ or whether it had a ‘campaigning’ goal*”. Relying on the opinion of the Venice Commission, the Court also noted that it did not “*find sufficient basis for upholding the Government’s argument, that the print media should be subjected to rigorous requirements of impartiality, neutrality and equality of treatment during an election period*” (*op. cit.*, §§ 128-29).

designated entities or individuals from participating in public affairs. Instead of targeting actual foreign agents (e.g. spies), the present law excludes politically active individuals and associations from public service on the illegitimate ground that they receive some form of “foreign support”.

81. In their meeting with the rapporteurs, the Russian authorities pointed out that working at the same time for an NCO and in public service is incompatible. However, this does not imply that individuals who are designated as “foreign agents” should *per se* be excluded from public service, since the designation is not based on membership in an NCO. Instead, it excludes any politically active individual who has received some form of “foreign support”. Moreover, individuals should not be excluded from public service because they used to work for an NCO. It would suffice to require them to quit their work for the NCO before entering public service.

82. Because these restrictions do not serve any legitimate aim, they presumably also violate the prohibition of discrimination. The Venice Commission recommends that Art. 5 (1) (8), Art. 2 and 6 of Draft Law No. 1057914-7 prohibiting “foreign agent” entities and individuals to access to public service should be repealed.

#### **D. Expansion of sanctions**

83. The most recent amendments introduce higher and new administrative fines and criminal sanctions for breaches of the “foreign agent” registration, reporting and public disclosure requirements. They also provide for the liquidation of “foreign agent” NCOs or structural subdivisions of foreign NGOs in case of non-compliance with decisions of the Ministry of Justice to ban the implementation of their programmes.

##### **1. Administrative sanctions**

84. Already in its 2014 Opinion, the Venice Commission criticized the severity of sanctions introduced by the original legislation dealing with “foreign agents”.<sup>145</sup> This criticism was partly shared by the Constitutional Court of the Russian Federation, which declared the administrative fines structure unconstitutional, holding that the new Article 19.34 of the Code of Administrative Offences was unconstitutional due to the severity of the foreseen penalty and *“the extent to which in the system of operating legal regulation admitting no prescription of an administrative penalty below the lowest bound established by a respective sanction it does not allow law applicator in all cases to take into consideration in an appropriate way the character and consequences of the committed administrative offence, the degree of guilt of a person made administratively answerable, his property and financial status, as well as other circumstances having essential significance for individualization of administrative responsibility and thereby ensure prescription of a fair and proportionate administrative penalty”*.<sup>146</sup>

85. The Russian Constitutional Court requested the federal legislator to amend the Code of Administrative Offences of the Russian Federation. No such amendments seem to have been adopted so far. Instead, the recent amendments have further expanded sanctions for violations of “foreign agent” regulations and extended their scope to new entities and individuals. In its 2014 Opinion, the Venice Commission also criticized the vague language defining the sanctions for violations of the “foreign agent” legislation.<sup>147</sup> These deficiencies have not been revised.

86. In general, appropriate sanction for the breach of any kind of reporting requirements should merely be the requirement to rectify the omission. In some circumstances, the imposition of an

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<sup>145</sup> [CDL-AD\(2014\)025](#), *op. cit.*, paras. 99-106.

<sup>146</sup> Judgement of the Constitutional Court of the Russian Federation No. 10-P, pp. 45-46. The Venice Commission continues to endorse the assessment of the Constitutional Court (see [CDL-AD\(2014\)025](#), *op. cit.*, para. 105).

<sup>147</sup> [CDL-AD\(2014\)025](#), *op. cit.*, paras. 101-106.



administrative fine that is proportionate to the seriousness of the violation and its consequences might be justified. The hefty administrative fines for breaches of the “foreign agent” registration, reporting and public disclosure requirements exceed the generally appropriate sanctions for violations of this kind. Given that the administrative requirements imposed on “foreign agents” are not proportionate and should be repealed themselves, the consequences of failing to meet them would seem to be negligible. Consequently, the fines seem disproportionate to the seriousness and consequences of the violation. The Venice Commission recommends that the administrative fines for the failure to comply with the special registration, reporting and public disclosure requirements for “foreign agents” should be repealed.

## 2. Criminal sanctions

87. Criminal law sanctions including compulsory labour and deprivation of liberty are an *ultima ratio* instrument and should be generally avoided for breaches of administrative requirements. Therefore, breaches of the “foreign agent” registration, reporting and public disclosure requirements should generally not be punished by imprisonment. Against this background, the deprivation of freedom of up to five years seem disproportionate. Moreover, the fines of up to 300.000 roubles, which the Venice Commission has already criticised as disproportionate in the administrative context seem to be equally disproportionate in the criminal context. Therefore, the Venice Commission recommends that the Russian authorities to repeal Federal Law No. 525-FZ amending Article 330-1 of the Russian Criminal Code.

## 3. Liquidation of NCOs

88. The Venice Commission recalls that “*the dissolution of an NCO 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>148</sup> for instance, where fundamental democratic principles are at stake.<sup>149</sup> Failure to comply with the Ministry of Justice’s decision prohibiting the implementation of certain activities or events does not rise to the level of very serious misconduct which could be considered an exceptional circumstance and which could consequently be addressed by dissolution of the NCO. The risk of liquidation confronts “foreign agent” NCOs with the hard choice between quitting an activity and being forcibly dissolved. Either option would effectively force the NCO out of existence. The penalty of liquidation foreseen can thus hardly be proportionate.

89. This lack of proportionality cannot be rectified by the fact that the decision would be taken by a court. In their 2014 *Joint Guidelines on the Freedom of Association*, the Venice Commission and OSCE-ODIHR stressed that “*involuntary termination of an association, which may take the form of dissolution or prohibition, may only occur following a decision by an independent and impartial court*”. The amendments, however, do not provide courts with criteria to independently determine whether to grant the request for liquidation. If this is indeed so, then the involvement

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<sup>148</sup> See also, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, where the ECtHR held that involuntary dissolution “*is the most drastic sanction possible in respect of an association and, as such, should be applied only in exceptional circumstances of very serious misconduct. Therefore, the domestic law should delimit more precisely the circumstances in which this sanction could be applied*”. (no. 37083/03, § 63, 8 October 2009) In the same vein, in the *Golos* Case, the Supreme Court of the Russian Federation held that the liquidation of an 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*” (cited in [CDL-AD\(2014\)025](#), *op. cit.*, para. 42). In Recommendation CM/Rec(2007)14, the Council of Europe Committee of Ministers stated that “*in most instances, the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of 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*” (*op. cit.*, para. 72).

<sup>149</sup> ECtHR, *Party for a Democratic Society (DTP) and Others v. Turkey*, no. 3840/10 and 6 others, § 101, 12 January 2016.

of the Court does not serve the purpose it is meant to serve, namely engaging in a substantive assessment of the alleged misconduct and choose a sanction proportionate to this misconduct.

90. Therefore, the penalty of liquidation for the mere failure to comply with the Ministry of Justice's prohibition of certain activities is incompatible with the freedom of association and should be reserved for extreme cases of serious violations threatening democracy.

## **V. Conclusion**

91. The recent amendments to Russia's "foreign agent" legislation take a clear direction towards expanding the scope of entities and individuals that qualify as "foreign agents" as well as expanding the obligations and restrictions on these entities and individuals. The recent amendments also significantly raise sanctions (administrative and criminal) for non-compliance with these regulations. At the same time, they tend to use vague and overly broad terminology and fail to have a reasonable relation to the aims allegedly pursued. As a result, they constitute serious violations of basic human rights, including the freedoms of association and expression, the right to privacy, the right to participate in public affairs, as well as the prohibition of discrimination.

92. The Venice Commission is particularly concerned by the combined effect of the most recent amendments on entities, individuals, the media and civil society more broadly. The Commission warns against the significant chilling effect that the recent reforms are likely to have on the free exercise of the civil and political rights which are vital for an effective democracy. The combined effect of the recent reforms enables authorities to exercise significant control over the activities and existence of associations as well as over the participation of individuals in civic life.

93. The Venice Commission recommends that the Russian authorities abandon the special regime of registration, reporting, and public disclosure requirements for associations, media outlets and individuals receiving "foreign support", including the related administrative and criminal sanctions.

94. Alternatively, the Venice Commission calls on the Russian authorities to thoroughly revise not only the most recent amendments but the entire body of its "foreign agent" legislation by significantly narrowing the legal definition of a "foreign agent" in order to serve the stated aim of transparency. Specifically, the notions of "political activities" and "foreign support" should be abandoned in favour of indicators that would reliably track objectionable forms of foreign interference.

95. At a minimum, the stigmatising and misleading "foreign agent" label should be abandoned in favour of a more neutral and accurate designation. This new designation should not be used as a criterion for banning individuals from entering public service. Likewise, NCOs and media outlets so designated should not be prohibited from participating in campaign activities.

95. Criminal sanctions, including especially compulsory labour and the deprivation of liberty, should not be applied to breaches of registration, reporting and public disclosure requirements for "foreign agents", even under the narrow definition of that designation. Further, the penalty of liquidation of NCOs should be reserved for extreme cases of violations threatening democracy.

96. The Venice Commission remains at the disposal of the Russian authorities and the Parliamentary Assembly for further assistance in this matter.