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**EXPERT COUNCIL ON NGO LAW**

**FIRST ANNUAL REPORT**

***Conditions of Establishment of Non-Governmental Organisations***

ADVANCE COPY

## MEMBERS OF THE EXPERT COUNCIL ON NGO LAW

**President** (appointed by the Plenary of the Conference of INGOs):

**Cyril Ritchie**, who was instrumental in the writing of the original Council of Europe Guidelines on the functioning of NGOs in Europe, and represented the Conference of INGOs to the expert committee drafting the Committee of Ministers Recommendation – CM/Rec(2007) 14 – on the legal status of NGOs in Europe. Ritchie was from 2000-2008 President of the NGO Grouping on Civil Society and Democracy in Europe and its predecessors.

Ritchie resides in Geneva.

**Coordinator** (appointed by the Bureau of the Conference of INGOs):

**Jeremy McBride**, an English barrister who is Chair of Interights and who was instrumental in drafting both the Council of Europe « Fundamental Principles on NGOs in Europe » and CM/Rec(2007) 14.

McBride resides in Strasbourg

**Members** (appointed by the Bureau of the Conference of INGOs):

**Dragan Golubović**, from Serbia, a Senior Legal Advisor with the European Centre for Non-profit Law, advising governments, Parliaments, judges, lawyers and NGOs on legal framework for NGOs. He collaborates with the Council of Europe, UNDP and OSCE on projects relating to freedom of association.

Golubović resides in Budapest.

**Mihaela Preslavska**, a Bulgarian NGO activist and lawyer who is responsible for governance and accountability standards in the International Planned Parenthood Federation European Network, a pan-European body covering over 40 countries.

Preslavska resides in Brussels.

**Eric Svanidze**, a lawyer from Georgia heavily engaged in NGO issues. Svanidze also served on the expert committee drafting Recommendation CM/Rec(2007) 14. Svanidze is a member of the European Committee for the Prevention of Torture.

Svanidze resides in Tbilisi.

*In addition, a member of the Secretariat General of the Council of Europe attends the meetings of the Expert Council; and the Expert Council may itself appoint ad hoc members who are specialised on specific issues under examination.*

For the 2008 thematic study on the conditions for the establishment of NGOs, two *ad hoc* members were appointed :

**Mariarosa Cutillo**, Italy

**Marc Leyenberger**, France

Letter of transmission

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## ***Expert Council on NGO Law***

### Letter of transmission

*To the President of the Conference of International NGOs of the Council of Europe,  
Mme Annelise Oeschger*

In October 2007 the Council of Europe Committee of Ministers adopted a forward-looking **Recommendation to member states on the legal status of non-governmental organisations in Europe**. This inspired text – CM/Rec (2007) 14 – is an affirmation and a confirmation of the indispensable role of NGOs in the member states of the Council of Europe that by definition are committed to the rule of law and pluralist democracy.

In January 2008 the Conference of INGOs of the Council of Europe undertook a new ground-breaking initiative, the establishment of the **Expert Council on NGO Law**. This initiative responds to an express will and consensus among NGOs in Europe to take increasing responsibility for determining and monitoring NGO standards and good practices throughout Europe. It also responds to the expectations and challenges implicit in CM/Rec (2007) 14, for the implementation of that Recommendation is the responsibility both of governments and of NGOs themselves.

It is thus with pride and humility that I present to the Conference of INGOs the first annual report called for in the mandate given to us. This report focuses on a first thematic study on the conditions for the establishment of NGOs, a subject touched on in 34 of the Articles of CM/Rec (2007) 14.

I thank the Conference and its President for the confidence and encouragement given to the Expert Council as it takes its first steps on what will surely be a long journey.

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## I INTRODUCTION

1. The EXPERT COUNCIL is the culmination of a long period and a long process of involvement of the Council of Europe and of INGOs in identifying issues concerning the legal personality of NGOs ; and of creating the environment and the conditions for the reaffirmation and the strengthening of the legal status of NGOs. Allied to this concern has been the awareness that laws are only as good as their implementation. Therefore the manifold daily and ongoing work of NGOs to benefit and defend citizens must have the understanding – indeed the tacit support – of public authorities and institutions.
2. The EXPERT COUNCIL is therefore working in the context of the relevant articles of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, of the European Social Charter, of the Framework Convention for the Protection of National Minorities, of the Convention on the Participation of Foreigners in Public Life at local Level. We can also proudly trace our origins to the 1986 European Convention on the Recognition of the Legal Personality of International NGOs.
3. Throughout the 1990s the involvement of the Council of Europe in recognising and affirming the status and validity of NGOs passed through the stages of the formulation of the "Guidelines on the functioning of NGOs in Europe " and the "Fundamental Principles on the Status of NGOs in Europe". Two current members of the Expert Council were at the core of the writing of those texts. And three current members participated fully in the subsequent – and crucial – stage, namely the elaboration of the Council of Europe document that ultimately became Recommendation CM/Rec(2007)14 of the Committee of Ministers, entitled "Recommendation to member states on the legal status of NGOs in Europe" ("Recommendation CM/Rec(2007)14"). This text represents a genuine advance in comprehension of the value of the activities of NGOs, and is a fundamental context for the work of the Expert Council.
4. The EXPERT COUNCIL is an emanation of the will and initiative of NGOs, and illustrates the vitality of intergovernmental/ nongovernmental cooperation. It also marks the growing role of the NGOs of those countries that only became member states of the Council of Europe after 1989. The initiative came from the Warsaw Regional NGO Congress of March 2006, which proposed “the creation of an expert council to evaluate the conformity of national NGO and other relevant legislation and its application with Council of Europe standards and European practice”. This engagement has been confirmed and supported by the Kyiv Regional Congress of November 2007.
5. I pay tribute to the constant attention and impulse given at all stages by the Secretariat of the Council of Europe, notably the Directorate General of Political Affairs (now entitled Directorate General of Democracy and Political Affairs). This particular intergovernmental/nongovernmental cooperation is outstanding.
6. The Conference of International NGOs of the Council of Europe has placed great hopes in the EXPERT COUNCIL ON NGO LAW, by conferring on us the mandate "to contribute to the creation of an enabling environment for NGOs throughout Europe by examining national NGO law *and its implementation* and

promoting its compatibility with Council of Europe standards and European good practice"<sup>1</sup>. That the President of the Expert Council is appointed by the Plenary of the Conference is a political signal on the importance of the "enabling environment for NGOs throughout Europe" which resonates with the Council of Europe 2005 Warsaw Summit statement that "democracy and good governance can only be achieved through the active involvement of citizens and civil society". Competent and responsible NGOs are a principal vehicle for manifesting and deepening that "active involvement"; they must therefore have the legal and societal recognition and conditions that enable them to make their "essential contribution to the development and realisation of democracy and human rights"<sup>2</sup>. As can be seen, the expectations upon the EXPERT COUNCIL are indeed great. May I in this context thank the President of the Conference of INGOs, Annelise Oeschger, for her constant encouragement, leadership and determination in bringing the EXPERT COUNCIL into existence. The President has set the "expectation level" high and I thank her for that.

7. It is evident that the path will not be continually smooth. Creating an enabling environment for NGOs is probably a low priority for many parliaments, for many governments, for many national or local public authorities and bureaucrats. Parliamentarians and governmental officials are certainly in many countries far from absorbing the significance – and the importance for the quality of their own work – of CM/Rec(2007)14's injunction (in paragraph 76) to "ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives *and decisions*"<sup>3</sup>.
8. These are challenges that relate directly to the EXPERT COUNCIL's mandate, for the "enabling environment for NGOs" that we shall seek to foster should make it possible to promote the model legislative texts and the optimum implementing mechanisms that will favour this "dialogue and consultation" with parliaments and governments. The mandate from the Conference of INGOs is specific in stating that the EXPERT COUNCIL "Monitors the legal and regulatory framework in European countries, as well as the administrative and judicial practices in them, which affect the status and operation of NGOs". And even more specifically "The EXPERT COUNCIL pursues a thematic approach with regard to all European countries" and "may prepare reports on problems occurring in a particular country".
9. For our exercise in 2008 we chose the theme CONDITIONS OF ESTABLISHMENT OF NGOs, a subject which is alluded to in 34 of the Articles of CM/Rec(2007)14. We distributed a questionnaire already in February, and although the responses were of different quality, our distinguished Coordinator Jeremy Mc Bride has been able to distil a valuable Thematic Overview that forms the essence of this first report to the Conference of INGOs. The distillation also enabled us to identify six countries on which we have done specific analyses to illustrate the problems, challenges, and hopefully forward steps that could be taken. These six countries are (alphabetically) Azerbaijan, Belarus, France, Italy, Russia, Slovakia. These six Country Studies form the third section.

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<sup>1</sup> Emphasis added.

<sup>2</sup> The quotation is from CM/Rec(2007)14.

<sup>3</sup> Emphasis added.

10. I thank all the Expert Council members for their assiduous work and positive cooperation. All members are committed to doing honour to the mandate entrusted to us by the Conference of International NGOs of the Council of Europe.

Cyril Ritchie,  
President,  
Expert Council on NGO Law

## II THEMATIC OVERVIEW

11. The thematic overview concerning the establishment of NGOs is in two parts. The first reviews the scope of international standards applicable to their establishment, notably in the European Convention on Human Rights ("the European Convention") as elaborated in the rulings of the European Court of Human Rights ("the European Court"). In the second part the responses to a questionnaire concerned with national law and practice concerning establishment are analysed. The former reveals that fairly clear requirements are now in place, while the latter shows that full compliance with them is not yet universal.

### A Applicable standards

12. The ability to establish NGOs is underpinned by the guarantee of the right to freedom of association afforded by Article 11 of the European Convention and many other international legal instruments<sup>4</sup>.
13. It is also reinforced by numerous other commitments made by States, notably Committee of Ministers Recommendation (2007)14 and the Declaration of the Committee of Ministers of the Council of Europe on action to improve the protection of human rights defenders and promote their activities<sup>5</sup>.

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<sup>4</sup> In particular Article 22 of the International Covenant on Civil and Political Rights, Article 5(d)(ix) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 1-3 of the Convention on the Elimination of All Forms of Discrimination against Women, Article 15 of the Convention on the Rights of the Child, Articles 26 and 40 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 29 of the Convention on the Rights of Persons with Disabilities Articles 1, 2 (4,5) and 3 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Article 15 of the Convention relating to the Status of Refugees, Article 15 of the Convention relating to the Status of Stateless Persons and the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations. There are also guarantees concerned specifically with trade unions such as Article 8 of the International Covenant on Economic, Social and Cultural Rights, Article 5 of the European Social Charter, Article 5 of the Revised Charter and the Convention Concerning Freedom of Association and Protection of the Right to Organise of the International Labour Organisation (ILO Convention No 87).

<sup>5</sup> Adopted by the Committee of Ministers on 6 February 2008 at the 1017th meeting of the Ministers' Deputies. See also Article 20 of the Universal Declaration of Human Rights, the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) (GA Res 53/144, 9 December 1998), UN Basic Principles on the Independence of the Judiciary, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Paras 9.3 and 10.3, and undertakings made at several OSCE meetings, namely, Vienna in 1989 (Questions relating to Security in Europe, paras 13.3, 13.6 and 21), Copenhagen (paras 10, 10.1-10.4, 11, 11.2, 32.2, 32.6 and 33) and Budapest (Chapter VIII, para 18), Council of Europe Recommendation R(94)12 'On the Independence, Efficiency and Role of Judges' and the European Charter on the Statute for Judges. Recommendation CM/Rec(2007)14 was preceded by the Council of Europe's Fundamental Principles on the Status of Non-governmental Organisations in Europe of the Council of Europe ("Fundamental Principles") which were noted by the decision of the Deputies at their 837<sup>th</sup> meeting on 16 April 2003



### *Choice of legal status*

14. In order to come within these guarantees an NGO that is membership-based must not simply be a gathering formed with the object of pursuing certain aims but must also have a degree of stability as regards its existence and thus have some kind of institutional structure to which the persons comprising it can really be regarded as belonging<sup>6</sup>.
15. In many instances membership-based NGOs will be bodies with a formal status - namely, one with legal personality - and this will also be what the founders of most of them want. Nevertheless the international guarantees are not limited to such bodies but also apply to groupings of an informal character so long as they have, or are meant to have, more than a fleeting existence. The possibility of establishing informal entities is a necessary consequence of the general freedom of those associating to determine the basis on which they do so. It is thus not open to a State to require that freedom of association only be exercised by the establishment of an entity with legal personality<sup>7</sup>.
16. However, the freedom to establish informal entities does not preclude the possibility that certain institutional forms may be required where either that is seen as essential for the pursuit of pursuing certain activities (such as a trade union or a religious organisation) or that is a prerequisite to certain benefits (such as tax privileges) being enjoyed by an NGO<sup>8</sup> - in practice this is likely to be essential for the establishment of most non-membership-based NGOs - but such a requirement should not create any difficulties regarding the pursuit of an NGO's objectives<sup>9</sup>.
17. In particular the fact an NGO's objectives might be seen as "political" should not necessitate it seeking the status of a political party where this is separately provided for under a country's law. Thus the European Court found a violation of Article 11 of the European Convention where the NGO in *Zhechev v Bulgaria*<sup>10</sup> was refused registration because some of its aims – the restoration of the Constitution of 1879 and of the monarchy – were “political goals” within the meaning of Article 12(2) of the Constitution of 1991 and could hence be pursued solely by a political party.
18. The European Court, in considering whether it was necessary in a democratic society to prohibit NGOs, unless registered as political parties, from pursuing “political goals”, stated that it had to examine whether this ban corresponded to a

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<sup>6</sup> Appl No 8317/78, *McFeeley v United Kingdom*, 20 DR 44 (1980).

<sup>7</sup> This is explicitly recognised in paragraph 3 of Recommendation CM/Rec(2007)14.

<sup>8</sup> This is acknowledged in paragraph 60 of Recommendation CM/Rec(2007)14. However, note the stipulation in paragraph 39 that ‘Decisions on qualification for financial or other benefits to be accorded to an NGO should be taken separately from those concerned with its acquisition of legal personality and preferably by a different body’.

<sup>9</sup> Cf the conclusion in the Chamber judgment in *Gorzeliak and Others v Poland*, no 44158/98, 20 December 2001 that the need to use a procedure not designed for the purpose of being recognized as belonging to a national minority had not had any consequences for the applicants’ rights under Article 11 (para 63). This issue was not addressed in the Grand Chamber judgment of 17 February 2004. See also Appl No 8652/79 *X v Austria*, 26 DR 89 (1981) in which the need for an alternative form of legal organisation for religious communities was not pursued because their apparent exclusion from being registered under the associations law was not actually treated, in principle, as an obstacle to the registration of religious organisations as associations.

<sup>10</sup> No 57045/00, 21 June 2007.

“pressing social need” and whether it was proportionate to the aims sought to be achieved. It held that:

- "55. The first thing which needs to be noted in this connection is the uncertainty surrounding the term “political”, as used in Article 12 § 2 of the Constitution of 1991 and as interpreted by the domestic courts. ... Against this background [of different interpretations by national courts] and bearing in mind that this term is inherently vague and could be subject to largely diverse interpretations, it is quite conceivable that the Bulgarian courts could label any goals which are in some way related to the normal functioning of a democratic society as “political” and accordingly direct the founders of legal entities wishing to pursue such goals to register them as political parties instead of “ordinary” associations. A classification based on this criterion is therefore liable to produce incoherent results and engender considerable uncertainty among those wishing to apply for registration of such entities.
56. If associations in Bulgaria could, when registered as such, participate in elections and accede to power, as was the case in *Gorzelik and Others* ..., it might be necessary to require some of them to register as political parties, so as to make them subject to, for instance, stricter rules concerning party financing, public control and transparency ... However, under Bulgarian law, as it stood at the material time and as it stands at present, associations may not participate in national, local or European elections ... There is therefore no “pressing social need” to require every association deemed by the courts to pursue “political” goals to register as a political party, especially in view of the fact that, as noted above, the exact meaning of that term under Bulgarian law appears to be quite vague. That would mean forcing the association to take a legal shape which its founders did not seek. It would also mean subjecting it to a number of additional requirements and restrictions, such as for instance the rule that a political party cannot be formed by less than fifty enfranchised citizens ..., which may in some cases prove an insurmountable obstacle for its founders. Moreover, such an approach runs counter to freedom of association, because, in case it is adopted, the liberty of action which will remain available to the founders of an association may become either non-existent or so reduced as to be of no practical value ...
57. The Court therefore considers that alleged “political” character of the association's aims was also not a sufficient ground to refuse its registration.

#### *Possible founders*

19. The ability to form and join associations is something that Article 11 of the European Convention provides as being open to “everyone” within a State’s jurisdiction and the scope for imposing limitations on this capacity is quite limited. “Everyone” certainly means legal as well as natural persons as association is not one of the rights or freedoms that are capable of being exercised only by human beings<sup>11</sup>. The only exception in this regard would be public bodies since these are a part of the State which is bound to secure freedom of association rather than beneficiaries of this right.
20. The unqualified nature of the formulation in all instruments means that the freedom should be exercisable by children as much as by adults, without needing to rely on the specific guarantee in respect of the former in the Convention on the

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<sup>11</sup> This is recognised by paragraph 16 of Recommendation CM/Rec(2007)14.

Rights of the Child. Nevertheless this would not preclude the adoption of protective measures to ensure that they are not exploited or exposed to moral and related dangers, so long as the total exclusion of the ability to associate did not result<sup>12</sup>. Such measures, insofar as they are proportionate and meet the requirements of legal certainty, could be justified as a restriction on their freedom pursuant to provisions such as Article 11(2). However, in judging the appropriateness of any such measures account would have to be taken of the need stipulated by the Convention on the Rights of the Child to respect 'the evolving capacities of the child'<sup>13</sup> which would mean that the effect of any restrictions that might be adopted would undoubtedly have to be diminished as those affected grow older<sup>14</sup>.

21. The inclusive nature of "everyone" would also mean that freedom of association can, in principle, be exercised by people who are not actually citizens of the country concerned (whether they are citizens of another country or stateless persons)<sup>15</sup>. Although Article 16 of the European Convention does accept the possibility of some restrictions being imposed on the political activity of those who are not citizens and this is defined to cover freedom of association, such restrictions ought to be compatible with the Convention's overall objectives of political democracy, freedom and the rule of law and they ought not to be disproportionate.
22. It might, therefore, be possible to justify the exclusion of persons who are not citizens from membership of national political parties but it would certainly be harder to do so where the body was concerned only with local or non-party issues, particularly if those affected were established residents there.
23. There is also likely to be a reluctance to accept restrictions as being justified under Article 16 where they relate to persons from a country with which the one imposing them has close political and institutional links<sup>16</sup>.
24. Moreover restrictions on non-citizens forming or joining NGOs with no political objectives - such as those concerned with sport and culture - could hardly be defended by invoking Article 16<sup>17</sup>.

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<sup>12</sup> See the recommendation of the Committee on the Rights of the Child that Belarus 'guarantee to all children the full implementation of the rights to ... freedom of association' (CRC/C/15/Add.180, 13 June 2002, para 34), that Georgia 'amend its legislation to ensure that youth are allowed to join political parties and that they fully enjoy their right to freedom of association' (CRC/C/15/Add.124, 28 June 2000, para 31). See also its concern that in Turkey 'persons under 18 cannot form associations' (CRC/C/15/Add.152, 9 July 2001, para 37).

<sup>13</sup> Article 5. This is acknowledged in paragraph 45 of the Explanatory Memorandum to Recommendation CM/Rec(2007)14.

<sup>14</sup> Restrictions on the ability of persons who are mentally ill or incapacitated could undoubtedly be justified on a similar basis but a failure when applying them to take due account of the capacities of those affected would breach the principle of proportionality.

<sup>15</sup> Paragraph 16 of Recommendation CM/Rec(2007)14 lists non-nationals as potential founders of an NGO.

<sup>16</sup> See *Piermont v France*, nos 15773/89 and 15774/89, 27 April 1995 where Article 16 was not accepted as justifying restrictions on the exercise of freedom of expression by someone from another European Union member State and who was also a Member of the European Parliament. It is at least arguable that a similar approach would be appropriate where the country imposing the restriction and the country of those affected are both members of the Council of Europe.

<sup>17</sup> See *Moscow Branch of the Salvation Army v Russia*, no 72881/01, 5 October 2006, in which, following refusal of re-registration of the applicant because of its "foreign origin", the European Court found there to be no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as

25. A person's imprisonment is likely to be a constraint on his or her ability to take a full part in the activities of an NGO but this should not generally be an obstacle to his or her becoming a founder of one. Certainly it would be very difficult to demonstrate that a restriction on freedom of association which went beyond the inevitable impracticality of attending meetings was something really needed for the purposes of confinement and that is the test by which the impact of a deprivation of liberty on other human rights must be judged<sup>18</sup>.
26. Nevertheless it is possible that some limits could be imposed on a person's exercise of freedom of association as a penalty for certain conduct, provided that a legitimate aim for them could be demonstrated and that they were sufficiently carefully drawn to avoid being challenged for a lack of proportionality.
27. Thus one of the penalties imposed on a Belgian newspaper editor who had collaborated with the German occupying authorities during the Second World War was a prohibition for life on involvement in the administration, management or direction of a professional or non-profit making association or the leadership of a political association. The principle of such a penalty was not specifically dealt with by the former European Commission of Human Rights ("the European Commission") in *De Becker v Belgium* but it did consider other such indefinite restrictions affecting the applicant's freedom of expression could not be justified in so far as they covered non-political matters; the scope of the restriction was simply too broad<sup>19</sup>.
28. It is evident that the European Court will require very cogent justification for such restrictions on the exercise of freedom of association and it is unlikely that they would be seen as acceptable where their scope did not correspond to the

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regards their ability to exercise their right to freedom of religion through participation in the life of organised religious communities and that this ground for legal refusal had no legal foundation. In the case of refugees and stateless persons there is an obligation with respect to freedom of association that is probably narrower than that under the general guarantees in that it requires that those who are lawfully in the country concerned be given the most favourable treatment accorded to a foreign national in the same circumstances but only as regards 'non-political and non-profit-making associations and trade unions'; Convention relating to the Status of Refugees, Article 15 and Convention relating to the Status of Stateless Persons, Article 13. However, the minimum standards in the instruments concerned would not prevent refugees and stateless persons, as much as any foreign nationals, from enjoying the less-restricted freedom conferred by the general guarantees.

<sup>18</sup> See *Golder v United Kingdom*, no 4451/70, 21 February 1975 and *Hirst v United Kingdom (No 2)*, no 74025/01, 6 October 2005 [GC]. The observation in the dissenting opinion of Judge Gölcüklü in *Djavit An v Turkey*, no 20652/92, 20 February 2003 that 'a person in police custody or detention pending trial cannot claim to be the victim of the infringement of ... his freedom of association' (para 17) in the context of obstacles to attending meetings in a part of Cyprus ought to be regarded as an over-simplification of the position of such a person.

<sup>19</sup> The issue never went before the European Court as the applicant applied to have the case struck off after the restrictions on his civil and political rights had been withdrawn and the law permitting such penalties had been modified so that they would apply only for fixed periods determined according to the seriousness of the offence. In these circumstances it was not surprising that the Commission did not object to the case being struck off. Cf the upholding by the European Commission in Appl No 6573/74 *X v The Netherlands*, 1 DR 87 (1974) of a ban, albeit permanent, which affected only participation in public life (including the right to vote) for those who had been convicted of 'uncitizenlike' conduct during the Second World War.

nature of the offence giving rise to them or they lasted for an undue length of time<sup>20</sup>.

#### *Number of founders*

29. There is no indication in case law or other practice in respect of treaties guaranteeing freedom of association as to the acceptability of imposing a minimum number of founders before an NGO can be established. However, Recommendation CM/Rec(2007)14, while stating that 'Two or more persons should be able to establish a membership-based NGO', does accept the possibility that a higher number might be required

"where legal personality is to be acquired, but this number should not be set at a level that discourages the establishment of an NGO"<sup>21</sup>.

This qualification took account of the fact that higher numbers were in fact required in the law of some of the States involved in the adoption of the Fundamental Principles.

30. However, while a certain threshold might be appropriate where the entity then became eligible for certain exceptional benefits, it seems questionable whether a requirement of more than two – even where legal personality is being acquired – is a restriction that is really compatible with freedom of association, especially since incorporation in a commercial context can often be undertaken by an individual and

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<sup>20</sup> The ban on the founders and managers of three political parties from holding similar office in any other political body was an important consideration in the finding in both *United Communist Party of Turkey and Others v Turkey*, no 19392/92, 30 January 1998, *Socialist Party and Others v Turkey*, no 21237/93, 25 May 1998 and *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, nos 22723/93, 22724/93, 22725/93, 9 April 2002 that their dissolution was disproportionate and thus a violation of Article 11. Equally, where a dissolution was upheld, such a ban on five of the party's leaders but none on its other 152 MPs was the basis for a finding that this measure was not disproportionate in *Refah Partisi (The Welfare Party) and Others v Turkey*, nos 41340/98, 41342/98, 41343/98, 31 July 2001 (Chamber) and 13 February 2003 (Grand Chamber). Furthermore in *Sadak and Others v. Turkey (No 2)*, nos 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, 11 June 2002, *Kavakci v Turkey*, no. 71907/01, *Silay v Turkey*, no. 8691/02 and *Ilıcak v Turkey*, no. 15394/02, 5 April 2007 the forfeiture of parliamentary seats following the dissolution of the applicant's party was found to violate Article 3 of Protocol No 1. See also the European Court's condemnation in *Labita v Italy*, no 26772/95, 6 April 2000 [GC] of a comparable ban involving the disenfranchisement for two years of a suspected Mafioso because it had been imposed only after his acquittal of the offences which had initially led to his being placed under a special supervisory regime; it would have accepted a temporary suspension of voting rights where there was evidence of Mafia membership. However, see the previous footnote for the upholding of a permanent ban in very special circumstances. Apart from improper activities of a 'political' nature, the most likely justification for a restriction on this aspect of freedom of association would be some form of financial misconduct by the person concerned; this would probably support limitations on his or her becoming an office-holder in an association where this involved financial responsibility but it is doubtful if this would justify anything more extensive than that. Paragraph 30 of Recommendation CM/Rec(2007)14 reflects this approach in providing that "Persons can be disqualified from forming NGOs with legal personality following a conviction for an offence that has demonstrated that they are unfit to form one. Such a disqualification should be proportionate in scope and duration".

<sup>21</sup> Paragraph 17.

no particular case other than control has been identified as the rationale for insisting upon it<sup>22</sup>.

### *Establishing NGOs abroad*

31. Although in practice most of the NGOs which are formed or joined are likely to be in the State where the persons concerned reside or are present, the freedom guaranteed by Article 11 would also extend to the creation and membership of NGOs in other countries<sup>23</sup> and this could be restricted by reference only to the same considerations that govern regulation.

### *Admissible objectives*

32. Apart from the instruments concerned with trade unions or devoted to particular groups of person, no substantive limitations are expressly placed on the type of objectives that might be pursued by NGOs. However, while none of the guarantees are framed in absolute terms, the starting point with respect to objectives is actually quite clear; an NGO should be able to pursue any activity which individuals alone are able to pursue since a grouping of individuals with the same objective does not thereby make that objective inherently objectionable. Indeed to accept the latter view would be to negate the very concept of freedom of association as a means for like-minded persons to come together. So it follows from this that, so long as the activities or objects are lawful, then it should be possible for an NGO to be formed to undertake or pursue them<sup>24</sup>.
33. Any limits imposed on the permissible objectives of an NGO must correspond to a "pressing social need" as otherwise a refusal of legal personality by reference to them will not be regarded as being for reasons that are relevant and sufficient<sup>25</sup>.

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<sup>22</sup> See also the concern of the European Court in *Zhechev v Bulgaria*, no 57045/00, 21 June 2007 that precluding an NGO with "political" objectives from acquiring legal personality other than as a political party would entail complying with a requirement to have fifty founders which could prove insurmountable.

<sup>23</sup> See *Cyprus v Turkey*, no 25781/94 10 May 2001 [GC] (in which it was not established that there had been attempts to prevent Turkish Cypriots living in northern Cyprus from establishing associations with Greek Cypriots in the southern part of Cyprus) and *Djavit An v Turkey*, no 20652/92, 20 February 2003 and *Adali v Turkey*, no 38187/97, 31 March 2005 (in which a violation of Article 11 was found because the applicants had respectively been refused permission to cross from northern to southern Cyprus to attend bi-communal meetings and to attend a meeting organised by a radio station).

<sup>24</sup> See the recognition by the European Court that 'the fact that their activities form part of a collective exercise of freedom of association in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention'; *United Communist Party of Turkey and Others v Turkey*, no 19392/92, 30 January 1998, para 43 (emphasis added).

<sup>25</sup> See *Koretsky and Others v Ukraine*, 40269/02, 3 April 2008 in which the European Court observed that there had been no explanation for, or even an indication of the necessity of the existing restrictions on the possibility of associations to distribute propaganda and lobby authorities with their ideas and aims, their ability to involve volunteers as members or to carry out publishing activities on their own. Furthermore, it did not see why the managing bodies of such associations (as opposed to a separate legal entity established for this purpose) were prohibited from carrying out everyday administrative activities, even if such activities are essentially of an economic character. Moreover, as regards a territorial limitation on the activities of associations with local status, the Court did not discern any threat to the system of State registration of associations in local associations having their branch offices in other cities and towns of Ukraine, especially given the burdensome requirement for associations wishing to have pan-Ukrainian status to set up local branches in the majority of the twenty-five regions of Ukraine.

34. Furthermore, although an NGO cannot be formed to pursue specifically unlawful objectives, it should be borne in mind, when determining what conduct is unlawful in this context<sup>26</sup>, that the permitted restrictions on internationally guaranteed rights and freedoms must also not be exceeded and thus make it impossible for an NGO to be established to pursue objects that are entirely legitimate. No blank cheque is thus given to States that would allow them to make unlawful anything to which they object<sup>27</sup>.
35. Even where a particular activity is rendered unlawful without meeting the objection that this is through an improper use of State power, this characterisation does not necessarily mean that the activity cannot still in some way shape the objectives of a would-be NGO. Certainly it is, in principle, perfectly proper for a body to be established to pursue a change in the law<sup>28</sup>, so long as the intention is to do this only by lawful means. Recognition of this can be seen in *X v United Kingdom*<sup>29</sup> in which it was found that the scope of certain offences concerned with

<sup>26</sup> See, e.g., Appl No 23892/94, *A C R E P v Portugal*, 83 DR 57 (1995), in which an association claiming prerogatives normally within the exclusive domain of States and intending to carry out its activity under a previous (monarchical) constitution without regard to the one now in force was found by the European Commission to have an aim that could not be considered compatible with Portuguese public policy.

<sup>27</sup> Thus in *Sidiropoulos and Others v Greece*, no 26695/95, 10 July 1998, the European Court was not persuaded that the upholding of a country's cultural traditions and historical and cultural symbols fell within one of the legitimate aims listed in Article 11(2) and so a restriction having this purpose would not be justified. However, it accepted that the restriction imposed in that case could also be regarded as being intended to protect national security and to prevent disorder in view of the alleged intention of the association concerned to dispute Greek identity in Macedonia and to undermine Greek territorial integrity (paras 37-39). The Court also observed that 'even supposing that the founders of an association like the one in the instant case assert a minority consciousness, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 and the Charter of Paris for a New Europe of 21 November 1990 – which Greece had signed – allow them to form associations to protect their cultural and spiritual heritage' (para 44). This underlines the need for the parameters of what is lawful to take account of international proclamations as to the legitimacy of certain objectives for particular types of organisation; e.g., the development, discussion and advocacy of human rights ideas (Article 7 of the UN Declaration on Human Rights Defenders and para 10.3 of the Document of the Copenhagen Meeting), the protection of the environment (Aarhus Convention, Article 3(4)) and the safeguarding of judicial independence (principle 9 of the UN Basic Principles on the Independence of the Judiciary, and principle IV of the Council of Europe Recommendation R(94)12 'On the Independence, Efficiency and Role of Judges'). See also *Zhechev v Bulgaria*, no 57045/00, 21 June 2007 in which the European Court held, in finding the refusal to register an association was in violation of Article 11, that it did not seem that the proposed "abolition" or "opening" of the border between "the former Yugoslav Republic of Macedonia" and Bulgaria, found to be contrary to Article 2 § 2 of the Constitution of 1991, could jeopardise in any conceivable way those countries' territorial integrity or national security. Firstly, it does not appear that it truly amounted to a request for territorial changes. Secondly, even if it was so, the mere fact that an organisation demands such changes cannot automatically justify interferences with its members' freedoms of association and assembly" (para 48). Furthermore see *Zvozskov et al v Belarus*, communication no 1039/2001, Views of the UN Human Rights Committee, 17 October 2006, in which it was held that there had been a violation of Article 22 of the International Covenant on Civil and Political Rights where no argument was advanced as to why it would be *necessary* ... to condition the registration of an association on a limitation of the scope of its activities to the exclusive representation and defence of the rights of its own members" (para 7.4).

<sup>28</sup> Apart from the case law to be discussed, this possibility is implicit in the right to participate in rule-making recognized in Article 7 of the Aarhus Convention and the right to participate in public affairs recognized in Article 8 of the UN Declaration on Human Rights Defenders. It is also expressly recognized in paragraph 12 of Recommendation CM/Rec(2007)14.

<sup>29</sup> Appl No 7525/76, 11 DR 117 (1978).

homosexual relations was not such as to prevent the advocacy of reform of the criminal law<sup>30</sup>. On the other hand an NGO which wanted to promote the use of cannabis in Finland where such use was at the time a crime was seen as crossing the line between promoting a change in the law and promoting a breach of it were raised with respect to an NGO since it could be regarded as amounting to no more than a conspiracy to commit this very crime and thus could be seen as going well beyond advocacy of change<sup>31</sup>.

36. The protection for the ability to propose changes in the established position can even extend to, and include, the very nature of the existing constitutional structure of a State. Thus in *The Socialist Party and Others v Turkey*<sup>32</sup> the European Court was prepared simply to accept that objection could be taken to the applicant party's proposal for a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis - because this would change the existing constitutional arrangements. Its reluctance to find such an objective inadmissible stemmed from the importance to be attached to political pluralism in applying the European Convention (and indeed other international human rights guarantees). On this basis it concluded that the fact that

“such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself”<sup>33</sup>.

37. It is thus generally impossible to immunise matters from change through according them constitutional status<sup>34</sup>.

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<sup>30</sup> Furthermore the European Commission emphasised that the material submitted to it did not support a claim that the mere existence of an “explicit association” in groups, clubs or societies by homosexuals could be illegal’ (*ibid*, p 131) and thus demonstrated how limited is the scope for using criminal offences to restrict the objectives of associations; the fact that certain conduct can legitimately be criminalised does not mean that there cannot be some form of grouping of persons linked with that conduct, so long as the aim is not to promote it.

<sup>31</sup> Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997). However, the principal concern was the detrimental consequences for health of what was being promoted and thus the case should be seen more as involving an inadmissible objective.

<sup>32</sup> No 21237/93, 25 May 1998.

<sup>33</sup> Para 47. This ruling reinforced the European Court's earlier refusal in *United Communist Party of Turkey and Others v Turkey*, 19392/92, 30 January 1998 to accept that the dissolution of a political party could be justified solely by reference to the assertion that the party's constitution and programme called Turkey's constitutional order into question; such a restriction on freedom of association had still to be shown in the particular circumstances of the case to be necessary in a democratic society. A similar stance was also taken in *Freedom and Democracy Party (ÖZDEP) v Turkey*, no 23885/94, 8 December 1999, *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, nos 22723/93, 22724/93, 22725/93, 9 April 2002, *Selim Sadak and Others v Turkey*, nos 25144/94, 26149/95, 26150/95, 11 June 2002, *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, no 25141/94, 10 December 2002 and *Socialist Party of Turkey (STP) and Others v Turkey*, no 21237/93, 12 November 2003.

<sup>34</sup> In finding a violation of Article 11 in *Sidiropoulos and Others v Greece*, 26695/95, 10 July 1998, the European Court observed that the refusal of registration to an association had been based only on a mere suspicion that the applicants intended to undermine Greece's territorial integrity but it seems unlikely that the advocacy of a boundary change is something that could in itself be seen as objectionable; this is, after all, a matter about which States are prepared to negotiate and the real concern must, therefore, be with the manner in which such a change is promoted. The absence of anything more than a suspicion in that case



38. However, there is an important qualification on the freedom to campaign for change in the legal and constitutional basis of the State in that both the means used and the proposed change itself must not actually be anti-democratic. This qualification is both a corollary of the requirement that restrictions on freedoms such as that of association must be necessary in a democratic society and a reflection of the unambiguous stipulation in Article 17 of the European Convention that nothing in that instrument is to be interpreted as implying 'any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' set forth in it<sup>35</sup>.
39. This qualification on the freedom to advocate change was made clear by the European Court in *Refah Partisi (The Welfare Party) and Others v Turkey*<sup>36</sup> and has been endorsed in Recommendation CM/Rec(2007)14<sup>37</sup>.
40. The European Court concluded in the *Refah Partisi* case that the qualification had been breached where the applicants' objective was anti-secular and thus anti-democratic, in that they had advocated setting up a plurality of legal systems, the introduction of discrimination between individuals on the ground of their religious beliefs and the operation of different religious rules for each religious community, in which Sharia would be the applicable law for the Muslim majority of the country and/or the ordinary law.
41. On the other hand the refusal to register a political party which advocated a policy of breaking the legal continuity with totalitarian regimes was found by the European Court to be contrary to Article 11 in *Linkov v Czech Republic*<sup>38</sup> because this policy was not one that could have undermined the democratic regime in the country and because the party had not urged or sought to justify the use of force for political ends<sup>39</sup>.

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was particularly emphasized by Judges Costa, Zupančič and Kovler in their concurring opinion in *Gorzelik and Others v Poland*, no 44158/98, 17 February 2004 [GC] when explaining that the refusal to register a 'minority' association in that case was not directed against the ability of its members to associate but against their acquiring an electoral advantage.

<sup>35</sup> There are provisions to similar effect in the International Covenant (Article 5(1)) and the UN Declaration on Human Rights Defenders (Article 19). See also the deep concern of the UN Human Rights Committee at the tendency in the Republic of Congo 'of political groups and associations to resort to violent means of expression and to set up paramilitary structures that encourage ethnic hatred and incite discrimination and hostility... [calling upon the State party] to impose on all actors and political forces rules of conduct and behaviour that are compatible with human rights, democracy and the rule of law'; CCPR/C/79/Add.118, 25 April 2000, para 18.

<sup>36</sup> 13 February 2003, para 98, reiterating such a statement in para 47 of the previous ruling by a Chamber on 31 July 2001. Such a statement is also to be found in cases such as *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, nos 22723/93, 22724/93, 22725/93, 9 April 2002, para 49, *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, no 25141/94, 10 December 2002, para 46 and *Socialist Party of Turkey (STP) and Others v Turkey*, no 21237/93, 12 November 2003, para 38.

<sup>37</sup> Paragraph 11.

<sup>38</sup> No 10504/03, 7 December 2006.

<sup>39</sup> See also *Partidul Communistilor (Nepecearisti) and Ungureanu v Romania*, no 46626/99, 3 February 2005 (in which the programme and constitution of a new communist party refused registration was not shown to be contrary to the country's constitutional and legal order and to fundamental principles of democracy), *Zhechev v Bulgaria*, no 57045/00, 21 June 2007 (in which policies of repealing that Constitution, reinstating the Constitution of 1879, and restoring the ancient coat of arms and the monarchy were found not to be incompatible with fundamental democratic principles. It was also noted that, as in *Yazar, Karatas, Aksoy and the Peoples' Labour Party (HEP) v Turkey*, nos 22723/93, 22724/93,

42. The insistence on the means being democratic entails a process that respects political pluralism and in particular one that does not involve recourse to violence. However, it is not generally going to be self-evident that the objectives of an NGO are necessarily anti-democratic<sup>40</sup> and thus inherently objectionable.
43. Certainly the case law of the European Court shows that over-simplistic conclusions can be drawn too readily about the possible threat posed by an NGO's stated objectives, especially where the latter use terms or concepts which are open

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22725/93, 9 April 2002 and *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*, no 59489/00, 20 October 2005, it did not appear that the association had any real chance of bringing about changes which would not meet with the approval of everyone on the political stage) and *Bekir-Ousta and Others v Greece*, no 35151/05, 11 October 2007 (the European Court considered that spreading the idea that there was an ethnic minority living in the country - even assuming that this had been the true aim of the association - did not alone amount to a threat to democratic society, especially as there was nothing in its articles of association suggesting that its members advocated the use of violence or anti-democratic or anti-constitutional methods). Cf *Artyomov v Russia* (dec.), no 17582/05, 7 December 2005 (in which a bar on political parties having an affiliation with a certain ethnic group was considered acceptable but, in so doing, the European Court placed emphasis on the fact that this bar did not apply to other forms of public association) and *Kalifatstaat v Germany* (dec.), no 13828/04, 11 December 2006 (in which the European Court did not object to the dissolution of an association whose object was the restoration of the caliphate and the creation of an Islamic State founded on Sharia Law and whose members by their statements and conduct had not ruled out the use of force in order to attain its objectives).

<sup>40</sup> Including anything that undermines internationally guaranteed rights and freedoms. It would also include anything anti-pluralist; a societal model which introduced 'into all legal relationships a distinction between individuals grounded on religion [which] would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement ... cannot be considered compatible with the Convention system ... Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned ... Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs'; *Refah Partisi (The Welfare Party) and Others v Turkey*, nos 41340/98, 41342/98, 41343/98, 31 July 2001, para 70 and endorsed in the Grand Chamber judgment of 13 February 2003 at para 119. It would also include the introduction of Sharia (Islamic law) as the ordinary law since this was a regime 'which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts' *ibid*, para 72). Furthermore, bearing in mind that 'pluralism, tolerance and broadmindedness are hallmarks of a "democratic society" ... [and that] democracy does not simply mean that the views of the majority must always prevail; a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'; *Gorzelik and Others v Poland*, no 44158/98, 17 February 2004 [GC], para 90. However, 'the State's duty of neutrality and impartiality ... is incompatible with any power on the State's part to assess the legitimacy of religious beliefs, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group'; *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, 13 December 2001, para 123.

to a pejorative construction but that is not their only possible meaning or where the NGO had not yet started to carry out its activities<sup>41</sup>.

44. Article 17 of the European Convention would also afford a justification for prohibiting the establishment of an NGO which aims to promote racism or anti-Semitism<sup>42</sup>.

#### *Acquisition of legal personality*

45. The essence of freedom of association is the pursuit of the common objectives of a group of persons (natural or legal). This may be achievable through the individual legal capacities of those persons but in practice the objectives may be best pursued through the body concerned having a distinct legal personality from those persons who seek to establish or belong to it.
46. Although in some countries the acquisition of legal personality can be the automatic consequence of forming an association and thus not be subject to any further formalities<sup>43</sup>, it is in principle compatible with freedom of association to insist that an entity go through some form of recognition or registration process before such legal personality is achieved<sup>44</sup>.
47. Such a personality will certainly entail certain basic legal capacities and possibly some others essential for the pursuit of its objectives but it certainly does not follow that NGOs should enjoy all the rights which might prove useful for the pursuit of them. Moreover the fact that some of these additional rights are conferred on certain types of NGOs is not inherently objectionable so long as the principle of non-discrimination is respected.

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<sup>41</sup> See *United Communist Party of Turkey and Others v Turkey*, 19392/92, 30 January 1998 (name and reference in programme about Kurds as a 'nation', 'people' and 'citizens'), *The Socialist Party and Others v Turkey*, no 21237/93, 25 May 1998 (references to self-determination of the Kurdish nation), *Sidiropoulos and Others v Greece*, 10 July 1998 (suspicions about real intentions of founders), *Freedom and Democracy Party (ÖZDEP) v Turkey*, no 23885/94, 8 December 1999 (reference to independence and freedom for the Kurdish peoples), *Partidul Communistilor (Nepeceristi) and Ungureanu v Romania*, no 46626/99, 3 February 2005 (programme and constitution of a new communist party not contrary to fundamental principles of democracy), *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, 13 December 2001 (supposed risk to national security and territorial integrity), *Democracy and Change Party and Others v Turkey*, nos. 39210/98 and 39974/98, 26 April 2005 (supposed aim of creating minorities to the detriment of territorial integrity and Turkish national unity, thereby encouraging separatism and the division of the Turkish nation), *Emek Partisi and Senol v Turkey*, no 39434/98, 31 May 2005 (on pretext of promoting the development of the Kurdish language, the aim was to create minorities, to the detriment of the territorial integrity and national unity of the Turkish State, thus promoting separatism and the division of the Turkish nation), *IPSD and Others v Turkey*, no 35832/97, 25 October 2005 (an analysis in the memorandum of association of the country's economic and social situation and criticism of Government policy in that area taken as undermining the principle of the indivisible unity of the nation and insulted the Turkish State), *Tiim Haber Sen an Çinar v Turkey*, no 28602/95, 21 February 2006 and *Demir and Baykara v Turkey*, no 34503/97, 21 November 2006 (trade union activities by civil servants), *Bekir-Ousta and Others v Greece*, no 35151/05, 11 October 2007 (mere suspicion as to the founders' true intentions) and *Bozgan v Romania*, no 35097/02, 11 October 2007 (mere suspicion that the association's intention was to set up parallel structures to the courts which had no basis in its articles of association or its activities)..

<sup>42</sup> *W P and Others v Poland* (dec.), no 42264/98, 2 September 2004.

<sup>43</sup> Unless certain exceptional benefits or capacities are being sought.

<sup>44</sup> It is the nature of the process rather than the term used for it that is significant.

48. Given the likely importance of legal personality for the pursuit of common objectives, it is not surprising that the European Court readily accepted in *Sidiropoulos and Others v Greece* that the refusal to register the applicants' association – with the result that it was denied legal personality – was an interference with freedom of association. In its view

"The refusal deprived the applicants of any possibility of jointly or individually pursuing the aims they had laid down in the association's memorandum of association and of thus exercising the right in question"<sup>45</sup>.

49. The fundamental importance of legal personality being granted for NGOs was further underlined by the European Court when it went on to state that

"The most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning"<sup>46</sup>.

50. It is essential, therefore, that the option of acquiring legal personality be available to those who wish to establish an NGO unless it can clearly be demonstrated that the lack of such personality will not impede the pursuit of its activities<sup>47</sup>, with the latter being potentially of particular significance while an

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<sup>45</sup> 10 July 1998, para 31.

<sup>46</sup> *Ibid*, para 40. This view was reaffirmed by a Chamber of the European Court in *Gorzelik and Others v Poland*, no 44158/98, 20 December 2001, para 55 and by the Grand Chamber in its judgment of 17 February 2004, para 88, with the latter also stating that 'forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights' (para 93). Similar considerations to those underpinning the essential importance of legal personality established in *Gorzelik* and *Sidiropoulos* led the European Court to find in *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, 13 December 2001 that the failure to recognise the applicant church was an interference with freedom of religion; 'not being recognised, the applicant church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practice their religion and, not having legal personality, it is not entitled to judicial protection of its assets' (para 105). However, having taken Article 11 into account in finding a violation of Article 9, the Court considered that it was unnecessary to deal separately with the denial of recognition as a violation of freedom of association. The issue of recognition had previously been left open by the European Commission in Appl No 14223/88, *Lavis v France*, 70 DR 218 (1991), Appl No 23892/94, *A C R E P v Portugal*, 83 DR 57 (1995), Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997), Appl No 18874/91, *X v Switzerland*, 76 DR 44 (1994) and Appl No 28973/95, *Basisan for 'Liga Apararii Drepturilor Omului Din Romania' v Romania*, 91 DR 29 (1997), having decided instead to address the issue of whether any interference with Article 11 was justified. The need to accord appropriate recognition to bodies promoting environmental protection is also stipulated in Article 3(4) of the Aarhus Convention but the provision in para 43 of the Document of the OSCE Moscow Meeting, 1991 that recognition should be 'according to existing national practices' (para 9) is potentially less exacting than the duty identified by the European Court.

<sup>47</sup> Certainly, although the ability to form a legal entity is clearly fundamental, there could still be situations where the inability to do so will not be regarded as a violation of Article 11. Thus the European Commission did point out in Appl No 26712/95, *Larmela v Finland*, 89 DR 64 (1997) that an unregistered association in Finland 'could engage in certain activities, just as it can possess funds through its members' and this led it to question whether the inability to register had prevented it from pursuing its objectives' (p 69). Furthermore in Appl 8652/79, *X v Austria*, 26 DR 89 (1981) it found that 'the practice even of a non-recognised religion is fully guaranteed in Austria ... independently from any form of registration' (p. 93) and in both Appl No 18874/91, *X v Switzerland*, 76 DR 44 (1994) and Appl Nos 29221/95 and 29225/95, *Stankov and United Macedonian Organisation 'Ilinden' v Bulgaria*, 94 DR 68 (1998) it considered that the refusal of registration of an association would not be a violation of Article 11 if the association is able to perform its activities without registration; in the former the association was found not to have proved that it could not exercise its functions but in the latter the ability to function was used to support the competence

application for recognition is being processed<sup>48</sup>. This personality should, of course, be clearly distinct from that of any or all of its members and officers and thus they should not be personally liable for its debts and other obligations<sup>49</sup>.

51. The formulation of the law governing the requirements to be fulfilled in order to acquire legal personality must be sufficiently “foreseeable” for the persons concerned and not grant an excessively wide margin of discretion to the authorities in deciding whether a particular NGO may be registered<sup>50</sup>. Recommendation

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of an unregistered body to submit a complaint under Article 11. See also *Artyomov v Russia* (dec.), no 17582/05, 7 December 2006 in which it was found that legal status or activities of the public movement “Russian All-National Union”, which took the decision to re-organise itself into a political party under the same name, had not been affected by the refusal to register that party because it would have promoted the interests of a particular ethnic group, the Russians, since it had lawfully existed since 1998 and its activities or membership had not been restricted in any way. Only political parties were prevented from having an affiliation with a certain ethnic group and thus the European Court concluded that the authorities had not prevented the applicant from forming an association to express and promote the specific aims embraced by it but from creating a legal entity which, following its registration, would have become entitled to stand for election. Cf the finding in *Moscow Branch of the Salvation Army v Russia*, 72881/01, 5 October 2006 and *Kimlya, Sultanov and Church of Scientology of Nizhnekamsk v. Russia* (dec.), nos. 76836/01 and 32782/03, 9 June 2005 that a loss of legal entity status following a refusal of re-registration meant that the applicants could not exercise, in community with their fellow believers, many rights that the law only grants to registered religious organisations. Furthermore see the concern of the UN Human Rights Committee that in Uzbekistan ‘The legal requirement for registration, subject to the fulfilment of certain conditions, provided for in article 26 of the Constitution and the Public Associations in the Republic of Uzbekistan Act of 1991 operates as a restriction on the activities of non-governmental organisations. The State party should take the necessary steps to enable the national non-governmental human rights organisations to function effectively’; CCPR/CO/71/UZB, 26 April 2001, para 22.

<sup>48</sup> See the urging by the UN Human Rights Committee that legislation in Azerbaijan ‘should clarify the status of associations, non-governmental organisations and political parties in the period between the request for registration and the final decision; such status should be consistent with articles 19, 22 and 25 of the Covenant’; CCPR/CO/73/AZE, 12 November 2001, para 23. See also the European Court’s conclusion in *Ramazanov and Others v Azerbaijan*, no 44363/02, 1 February 2007 that delayed registration meant “that, even assuming that theoretically the association had a right to exist pending the state registration, the domestic law effectively restricted the association’s ability to function properly without the legal entity status. It could not, *inter alia*, receive any “grants” or financial donations which constituted one of the main sources of financing of non-governmental organisations in Azerbaijan (see Article 3 of the Law *On Grant*). Without proper financing, the association was not able to engage in charitable activities which constituted the main purpose of its existence. It is therefore apparent that, lacking the status of a legal entity, the association’s legal capacity was not identical to that of state-registered non-governmental organisations” (para 57).

<sup>49</sup> This is recognised in paragraphs 26 and 75 of Recommendation CM/Rec(2007)14, although this does preclude them being held liable for their personal misconduct such as misuse of powers as an officer of the association (paragraph 75) and their acts may be evidence of the actual objectives of an association.

<sup>50</sup> *Koretsky and Others v Ukraine*, no 40269/02, 3 April 2008, which concerned the stipulation in section 16 of the Associations of Citizens Act that “the registration of an association may be refused if its articles of association or other documents submitted for the registration contravene the legislation of Ukraine”. In the European Court’s view the Act did not specify whether that provision refers only the substantive incompatibility of the aim and activities of an association with the requirements of the law, in particular with regard to the grounds for the restrictions on the establishment and activities of associations contained in section 4 of the same Act, or also to the textual incompatibility of the articles of association with the relevant legal provisions. Given the changes to the text of the articles of the applicants’ association on which the authorities were insisting, the Court noted that the provision at issue allowed a particularly broad interpretation and could be read as prohibiting any departure from the relevant domestic regulations of

CM/Rec(2007)14 also requires that the process involved in acquiring legal personality should be "easy to understand and satisfy"<sup>51</sup>.

52. Legal personality can, however, be refused where the applicants fail to comply with a legal requirement that is compatible with the European Convention<sup>52</sup>. However, other than in those situations in which the objectives and activities of an association are properly found to be contrary to the constitution or the law<sup>53</sup>, there are likely to be only a limited number of circumstances in which a refusal of recognition or registration might be justified. They would certainly include such a refusal in cases where the proposed name of the association belonged to that of another body or could be confused with it or was in some other way damaging to it<sup>54</sup> or could in some way be genuinely regarded as misleading to the public<sup>55</sup>.

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associations' activities. In such a situation, the judicial review procedure available to the applicants could not prevent arbitrary refusals of registration.

<sup>51</sup> Paragraph 29.

<sup>52</sup> *W P and Others v Poland* (dec.), no 42264/98, 2 September 2004, in which the applicants had failed to comply with the requirement that persons intending to form an association whose activity will be directly related to defence or State security or the protection of public order shall agree the scope of such activity with the Minister of Defence or the Minister of Internal Affairs respectively.

<sup>53</sup> Although the European Court accepted in *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, 13 December 2001 that a refusal of recognition could have had the legitimate aim of protecting public order and public safety, the consequence for the applicant church's freedom of religion – an ability to organise itself or operate, as well as intimidation – could not be regarded as proportionate to it.

<sup>54</sup> As regards the former, see Appl No 18874/91, *X v Switzerland*, 76 DR 44 (1994) (in which it was found that a refusal of registration under the national designation – as opposed to an absolute refusal – could be regarded as necessary in a democratic society for the prevention of disorder and the protection of the rights and freedoms of others where a third person might confuse the applicant association's name with that of a chamber of commerce and another body responsible for bilateral trade relations between Switzerland and Australia; the body 'lacked the necessary integration into national foreign trade policy' (p 49)) and Appl No 28973/95, *Basisan for 'Liga Apararii Drepturilor Omului Din Romania' v Romania*, 91 DR 29 (1997) (in which the only difference between the name of the applicant association and the already existing 'League for the Defence of Human Rights' was the addition of 'in Romania' and the European Commission considered that, having regard to the possibility of confusion, the refusal of registration could be viewed as unreasonable). An instance of both considerations can be seen in *Apeh Uldozotteinek Szovetsege, Ivanyi, Roth and Szerdahelyi v Hungary* (dec.), no 32367/96 31 August 1999, in which the Court did not consider there to be an excessive interference with freedom of association in the refusal of a request for a registration by an association whose name in English was the Alliance of APEH's Persecutees (APEH being the abbreviated name of the Hungarian Tax Authority) when there was no obstacle to the formation and registration of an association to promote taxpayers' interests other than the choice of a name that implied a risk of confusion and that was defamatory; it is, however, questionable whether anyone might have imagined a body with such a name was an official one and the ready acceptance of the defamation objection is possibly at odds with the protection given to value judgements under Article 10. The body concerned need not be one that is already recognized or registered as the freedom of association of those belonging to an association without legal personality could also be harmed by the usurpation of its name.

<sup>55</sup> See *Gorzelik and Others v Poland*, no 44158/98, 17 February 2004, in which it was accepted that an application by the 'Union of People of Silesian nationality' could be rejected because its memorandum of association referred to it as being an 'organisation of a national minority' which was a concept found in the parliamentary elections law governing participation in the distribution of seats and thus gave the misleading impression that the association and its members would enjoy certain 'electoral privileges to which they were not entitled' (para 103). It was significant that such doubts could have been dispelled by only a slight change in the association's memorandum of association and without having any harmful consequences for its existence as an association or preventing the achievement of its objectives. In such circumstances the restriction could hardly be regarded as disproportionate to the legitimate aim being pursued. In the

Certainly, no matter how well-intentioned, the process of approval should not generally be used to impose constraints on the ability of associations to draw up their own rules, to administer their own affairs or to make links with other bodies as these are essential elements of freedom of association. Any interference with that freedom would be admissible only if it was capable of being justified under the limitation clause, such as the imposition of requirements that are necessary to preclude unjustified discrimination or to protect the legitimate interests of members<sup>56</sup>.

53. The formal requirements considered appropriate by Recommendation CM/Rec(2007)14 are simple and straightforward, namely:

31. Applications in respect of membership-based NGOs should only entail the filing of their statutes, their addresses and the names of their founders, directors, officers and legal representatives. In the case of non-membership-based NGOs there can also be a requirement of proof that the financial means to accomplish their objectives are available.

32. Legal personality for membership-based NGOs should only be sought after a resolution approving this step has been passed by a meeting to which all the members had been invited.

33. Fees can be charged for an application for legal personality but they should not be set at a level that discourages applications.

54. An application for legal personality in which alleged irregularities appear should not be rejected without first informing the applicants of them or giving them an opportunity to remedy them<sup>57</sup>. This should not, however, be used as a device to delay a grant of legal personality and there may, therefore, have to be a limit on the number of times documents can be returned for rectification<sup>58</sup>.

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Chamber judgment the requirement of a slight change in the association's name as a condition for registration was also considered unobjectionable but this issue was not specifically addressed in the Grand Chamber. Only the grounds cited above, together with the failure to submit 'all clearly prescribed documents' are recognised in paragraph 34 of Recommendation CM/Rec(2007)14.

<sup>56</sup> Appl No 10550/83, *Cheall v United Kingdom*, 42 DR 178 (1985) in which it was considered that the State could protect an individual against exclusion or expulsion from a trade union where the membership rules 'were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship such as job loss because of a closed shop [i.e. where union membership was obligatory]' (p186). Cf *Associated Society of Locomotive Engineers & Firemen (ASLEF) v United Kingdom*, no 11002/05, 27 February 2007, in which it was held that a bar on expelling a member for advocating views incompatible with those of the applicant trade union was a violation of the latter's freedom of association.

<sup>57</sup> See *Bozgan v Romania*, no 35097/02, 11 October 2007, in which the European Court considered that requiring an applicant to start the registration procedure again from scratch was to impose too heavy a burden, especially as the law provided for him to remedy any irregularities as part of the initial application process. See also *Church of Scientology Moscow v Russia*, no 18147/02, 5 April 2007 in which there was held to be bad faith in a refusal of re-registration where there had been a failure to specify what document or information had been missing when refusing to process four applications for re-registration on account of the applicant's alleged failure to submit a complete set of documents.

<sup>58</sup> There was none in *Ramazanov and Others v Azerbaijan*, no 44363/02, 1 February 2007, in which the Ministry of Justice was found to have arbitrarily prolonged the whole registration procedure without issuing a final decision by continuously finding new deficiencies in the registration documents and returning them to the founders for rectification. The absence of sufficient protection was also found by the European Court in *Ismayilov v Azerbaijan*, no. 4439/04, 17 January 2008.

55. A requirement to enclose original documents with an application will be regarded as unjustified in the absence of any obligation to return them<sup>59</sup>.
56. No specific deadline for dealing with an application for legal personality is prescribed in international instruments but the European Court has found significant delays in doing so to be contrary to Article 11 of the European Convention because it resulted in the prolonged inability of the NGO concerned to acquire the status of a legal entity, was in breach of the time-limits prescribed by national law and there was insufficient protection against arbitrary delays in the handling of applications<sup>60</sup>. Recommendation CM/Rec(2007)14 provides that a "reasonable time limit should be prescribed for taking a decision to grant or refuse legal personality"<sup>61</sup>.
57. It is also stipulated in Recommendation CM/Rec(2007)14 that:  

"36. The body responsible for granting legal personality should act independently and impartially in its decision making. Such a body should have sufficient, appropriately qualified staff for the performance of its functions.

38. All decisions should be communicated to the applicant and any refusal should include written reasons and be subject to appeal to an independent and impartial court."
58. The importance of judicial review procedure to prevent arbitrary refusals of registration has been underlined by the European Court in *Koretskyy and Others v Ukraine*<sup>62</sup> and the absence of reasons for a refusal will necessarily result in the conclusion that there is no relevant and sufficient basis for it<sup>63</sup>.
59. In addition, given the potential significance of such decisions for associations and those forming them, the possibility of bringing a legal challenge to a refusal must be something that can be speedily pursued. If these conditions are not met

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<sup>59</sup> *Church of Scientology Moscow v Russia*, 18147/02, 5 April 2007.

<sup>60</sup> See *Ramazanov and Others v Azerbaijan*, no 44363/02, 1 February 2007 (a delay of almost four years in the association's registration was found attributable to the Ministry of Justice's failure to respond in a timely manner where each time the registration documents were returned to the applicants, they rectified the deficiencies noted in the Ministry's letters and re-submitted a new registration request in a prompt manner (usually within less than one month after receiving the Ministry's comments) but the Ministry delayed the response to each of the applicants' registration requests for several months despite a statutory deadline of 10 days. Furthermore the law did not specify a limit on the number of times the Ministry could return documents to the founders "with no action taken", thus enabling it, in addition to arbitrary delays in the examination of each separate registration request, to arbitrarily prolong the whole registration procedure without issuing a final decision by continuously finding new deficiencies in the registration documents and returning them to the founders for rectification) and *Ismayilov v Azerbaijan*, no. 4439/04, 17 January 2008 (in which an application for registration was similarly treated).

<sup>61</sup> Paragraph 37. A useful point of comparison in judging what is reasonable might be the time taken to register corporations or businesses. These also have objectives which need to be checked and in most countries these can still be registered in a matter of days rather than of months. There is, therefore, no clear need for a significantly longer period to be needed for the process of recognising or registering an NGO.

<sup>62</sup> No 40269/02, 3 April 2008, in which it was frustrated by the breadth of the language used in the legislation governing applications for legal personality.

<sup>63</sup> The absence of an explanation for restrictions on permitted activities was significant in the conclusion that they were not justified in the *Koretskyy* case. See also the friendly settlement of the petition about the unreasoned refusal to register a religious association in Appl No 28626/95, *Khristiansko Sdruzhenie 'Svideteli Na Iehova' (Christian Association Jehovah's Witnesses) v Bulgaria*. 92 DR 44 (1998), pursuant to which the association would be registered.



then it is likely that there will be not only a violation of the right to freedom of association but also, in many instances, violations of the rights to a fair hearing and to an effective remedy<sup>64</sup>.

60. A requirement that existing NGOs must seek a renewal of its status as a legal entity following a change in law governing them is not in itself contrary to Article 11 of the European Convention. Nevertheless this provision will be breached where the authorities do not act in good faith in dealing with an application for renewal<sup>65</sup>.

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<sup>64</sup> See, e.g., *Apeh Uldozotteinek Szovetsege, Ivanyi, Roth and Szerdahelyi v Hungary*, no 32367/96, 5 October 2000, where Article 6(1) was held applicable to non-contentious court registration proceedings and a violation was found because of the failure to provide the applicants with the intervening prosecution authority's submissions and the consequent failure to respect the 'equality of arms' principle. Although registration was treated as a matter of public law in Hungary, the national classification of proceedings is never decisive as to whether a 'civil right or obligation' is involved for the purpose of making Article 6 applicable. In the European Court's view it followed from the fact that the association could obtain its legal existence only through registration that 'an unregistered association constitutes only a group of individuals whose position in any civil-law dealings with third parties is very different from that of a legal entity. For the applicants, it was consequently the applicant association's very capacity to become a subject of civil rights and obligations under Hungarian law that was at stake in the registration proceedings' (para 36) and thus these were concerned with its civil rights and obligations. In *Sidiropoulos and Others v Greece*, no 26695/95, 10 July 1998 there was unfairness regarding the evidence on which registration was refused but, as the Court considered that Article 11 was to be seen in the light of Article 6, it was thus not necessary to address the fair hearing issue separately. However, while civil rights and obligations would be affected by a refusal of recognition or registration in the case of most associations, this provision appears to be inapplicable in the case of a political party as the right involved in the registration process will be seen as primarily a 'political' one; see *Vatan (People's Democratic Party) v Russia* (dec.), no 47978/99, 21 March 2002, which concerned the suspension of the applicant party's activities for six months. Nevertheless such a party, as well as any association, should also have an effective remedy to challenge a refusal of registration considered improper in order to meet the requirements of Article 13. The 'civil rights' qualification does not apply to the fair hearing guarantee in Article 14 of the International Covenant on Civil and Political Rights and paragraph 10 of Recommendation CM/Rec(2007)14 stipulates that 'Acts or omissions by public authorities affecting an NGO should be subject to administrative review and be open to challenge by the NGO in an independent and impartial court with full jurisdiction' and this would include all decisions affecting registration or the grant of legal personality.

<sup>65</sup> See *Moscow Branch of the Salvation Army v Russia*, no 72881/01, 5 October 2006 (following refusal because of the branch's "foreign origin" and its internal structure and religious activities, the European Court firstly found there to be no reasonable and objective justification for a difference in treatment of Russian and foreign nationals as regards their ability to exercise their right to freedom of religion through participation in the life of organised religious communities and that this ground for legal refusal had no legal foundation. Secondly it found that, although organised using army ranks and the wearing of uniforms, it could not seriously be maintained that the branch advocated a violent change of constitutional foundations or undermined the integrity or security of the State. Thirdly it found that findings that the branch had contravened any Russian law or pursued objectives other than those listed in its articles of association lacked evidentiary basis and was arbitrary) and *Church of Scientology Moscow v Russia*, no 18147/02, 5 April 2007 (in which there had been a failure to specify what document or information had been missing when refusing to process four applications for re-registration on account of the applicant's alleged failure to submit a complete set of documents. Furthermore a court's ruling that the applicant had not submitted originals of certain documents was held to have had no foundation in domestic law and such a requirement would have been excessively difficult, even impossible, given that there was no obligation to return them. In any event the originals were in the authorities' possession. In addition there was a failure to explain why a book submitted had not contained sufficient information on the basic creed tenets and practices of Scientology, the failure to secure re-registration within the prescribed time limit had been a direct consequence of the arbitrary rejection of earlier applications and the requirement to submit a certain document had been unlawful).

Moreover Recommendation CM/Rec(2007)14 provides that "NGOs should not be required to renew their legal personality on a periodic basis"<sup>66</sup>.

61. The obligation to grant legal personality to NGOs where this is sought relates only to ones actually being established within the country of the State concerned and does not appear to extend to recognising the personality of NGOs established elsewhere, although a failure to do so could have implications for the association rights of persons in that State as well as the property and fair hearing rights of any NGO whose personality is not recognised.
62. However, there is also a quite distinct obligation under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations. Under this convention a State party is generally obliged to recognize the legal personality of an NGO, foundation or other private institution established under the law of another State party<sup>67</sup>, but only where the body concerned has a non-profit making aim of international utility and is carrying on its activities in at least two States and its statutory office, management and control is in the territory of a State party<sup>68</sup>. However, provision is made for 'restrictions, limitations or special procedures governing the exercise of the rights arising out of the legal capacity' to be recognised when these are 'required by essential public interest'<sup>69</sup>. Furthermore there is provision for excluding the application of the Convention in respect of an NGO if the body invoking it
  - "by its object, its purpose or the activity which it actually exercises:
    - a contravenes national security, public safety, or is detrimental to the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others; or
    - b jeopardises relations with another State or the maintenance of international peace and security."
63. Nonetheless it would be very surprising if either of these possibilities could legitimately be given a broader construction than that seen in the earlier discussion of acceptable objectives for NGOs. It should also be noted that the legitimacy of international human rights NGOs operating within individual countries is increasingly being recognised<sup>70</sup>.

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<sup>66</sup> Paragraph 41.

<sup>67</sup> The proof of such personality is generally to be through presentation of the body's memorandum and articles of association or other basis constitutional instruments, although there is provision for this to be dispensed with under an optional system of publicity; Article 3.

<sup>68</sup> The State parties are Austria, Belgium, Cyprus, France, Greece, Portugal, Slovenia, Switzerland, "the former Yugoslav Republic of Macedonia" and the United Kingdom.

<sup>69</sup> Article 2(2).

<sup>70</sup> See the UN Declaration on Human Rights Defenders and see also the especial concern of the UN Human Rights Committee in respect of Vietnam 'about obstacles placed in the path of national and international non-governmental organisations and special rapporteurs whose task is to investigate allegations of human rights violations in the territory of the State party'; CCPR/CO/75/VNM, 5 August 2002, para 20. Paragraph 45 of Recommendation CM/Rec(2007)14 provides that the establishment of a new entity should not be required of a foreign NGO before it can operate and principle 38 of the Fundamental Principles encourages ratification of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations.

64. Furthermore Recommendation CM/Rec(2007)14 provides that foreign NGOs can be required to obtain approval in a manner consistent with its provisions in order to operate in the host country<sup>71</sup>.
65. It remains to be seen whether the European Court will recognise that the ability of an NGO to establish branches which do not have a distinct legal capacity from it is an inherent aspect of the internal organisational capacity secured by the right to freedom of association and thus - as paragraph 42 of Recommendation CM/Rec(2007)14 provides - not requiring any official authorisation. However, it has noted that in at least some countries branches are automatically subject to registration requirements than can be as problematic as those governing the acquisition of legal personality by the parent NGO<sup>72</sup>.

## **B Review of national practice**

66. In the preparation of its first thematic study a questionnaire on the issue of establishment was sent to NGOs in all member states of the Council of Europe and Belarus. This questionnaire was directed to a broad range of issues relating to the establishment of an NGO, whether formal or informal in terms of its legal status<sup>73</sup>.

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<sup>71</sup> Paragraph 45.

<sup>72</sup> See the observation of the European Court in *Koretskyy and Others v Ukraine*, 40269/02, 3 April about the burdensome requirement for associations wishing to have pan-Ukrainian status to set up local branches in the majority of the twenty-five regions of Ukraine.

<sup>73</sup> The questions asked were as follows:

1. To establish NGOs in your country or for them to undertake any activities, is there a specific requirement to first be registered/acquire legal personality?
2. If there is such a requirement, what (if any) possibility is there for more informal groupings or associations of individuals
  - a) To be established?
  - b) To undertake activities?
3. Where NGOs either must or can be registered/acquire legal personality
  - a) What documents and information must be submitted for this purpose?
  - b) What procedure must be followed?
  - c) What (if any) fees are payable?
4. Are any persons (such as children, convicted persons, non-nationals and corporate bodies) disqualified from
  - a) Seeking registration or legal personality for an NGO?
  - b) Joining in establishing a more informal grouping or association?
5. Where NGOs either must or can be registered/acquire legal personality
  - a) Is there a formal deadline for taking decisions on registration or grant of legal status?
  - b) Are there notable instances of this period being exceeded?
  - c) If there is no specific deadline, what is the normal period for such a decision to be taken?
6. If registration/legal personality is refused
  - a) Are there grounds specified in the law for the refusal?
  - b) Is there a requirement for the relevant authority to substantiate a refusal?
7. What are the opportunities or procedures (if any) to correct an application for registration/legal personality where the relevant authority considers it not to have satisfied the requirements of the law?
8. To what extent is the relevant authority for registration/grant of legal personality independent of government control or influence?
9. If registration or legal personality is refused
  - a) Is it possible for decisions to be challenged in the courts?
  - b) Is it frequent for such challenges
    - i. to be brought

Although the response was not comprehensive, there were replies in respect of 35 of the 48 jurisdictions concerned. However, not all questions were answered by all respondents.

67. This response only provides an overview of the position in the countries in respect of which the questionnaire was answered and certainly does not provide a deep enough appreciation of how formal rules work in practice. Moreover the accuracy of all the information provided by the respondents cannot be confirmed and there may be some inconsistency in the responses summarised, although every effort has been made to resolve this.
68. However, a number of broad conclusions emerged from responses received and these can be seen in the summary of the principal responses set out in the following sub-sections. Some are echoed in the more in-depth analyses of the situation in certain countries that were subsequently made.

#### *Operation of informal groupings*

69. There are countries where the operation of informal groupings is inhibited both as a matter of law and practice and where there are no imminent proposals for reform.
70. Thus in ten countries there is a requirement that NGOs be registered or acquire legal personality before they can undertake any activities<sup>74</sup>. In one of them the requirement will be removed pursuant to a new law that is in the process of being adopted<sup>75</sup>, while the position is under review in another<sup>76</sup>. Moreover in three of the countries concerned some exceptions to the fulfilment of the requirement of being registered or acquiring legal personality were said to be tolerated in practice<sup>77</sup>.
71. In two of the countries where registration or the acquisition of legal personality appears to be the only option for establishing an NGO this is the automatic consequence of having done so; i.e., there is no need for any formal intervention by a state body<sup>78</sup>.

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#### ii. to succeed?

10. Is there any requirement to seek the renewal of registration/grant of legal personality on a periodic basis?
11. What other areas of concern are there in your country about the establishment of NGOs or their registration/acquisition of legal personality?
12. What areas of concern are there in your country about the legal position of NGOs generally?

<sup>74</sup> Azerbaijan, Belarus, Bosnia and Herzegovina, Hungary, Montenegro, Serbia, Slovakia, Sweden, Switzerland and "the former Yugoslav Republic of Macedonia". The response in respect of Bosnia and Herzegovina appears to reflect the uncertain position on the point in the Federation as there is no mandatory registration requirement either at state level or in the Republic of Srpska but no details were provided.

<sup>75</sup> Serbia.

<sup>76</sup> Slovakia.

<sup>77</sup> Azerbaijan (mostly in the human rights defence field organisations are "allowed" to operate without registration but under a recognised name or abbreviation and to receive donations of awarded grants through personal accounts where donors find this acceptable), Montenegro (NGO networks are informally established) and Serbia.

<sup>78</sup> Sweden and Switzerland. However, although there is no need to register in Sweden, an organisation number is needed from taxation authority in order to use the bank giro service - essential for economic

72. On the other hand, in at least eighteen countries there appears to be no requirement for NGOs to be registered or acquire legal personality before they can undertake any activities, albeit that the scope for undertaking activities might be constrained in them by the absence of legal personality<sup>79</sup>.

*Capacity to form NGOs*

73. The disqualification of some persons from being eligible to form NGOs does not seem in some cases to be consistent with the right to freedom of association under Article 11 of the European Convention.
74. Thus, although in eleven countries there are no restrictions as to who can seek registration or legal personality for an NGO<sup>80</sup>, fourteen countries have an age restriction, varying from a requirement that the persons be at least fifteen<sup>81</sup>, sixteen<sup>82</sup> or eighteen years old<sup>83</sup>.
75. Furthermore in three countries the possibility of establishing NGOs is limited to natural or physical persons<sup>84</sup>.
76. Moreover, while in two countries there are no restrictions for foreigners establishing NGOs<sup>85</sup>, many countries do have restrictions in respect of persons who are not citizens. These vary from a requirement that such persons be

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transactions - which requires showing its statutes and a report from the inaugural meeting where it is stated who is authorised to sign documents for the NGO.

<sup>79</sup> Albania, Belgium ((but without legal personality it cannot conclude a contract or open a bank account and its members are personally responsible for its undertakings), Denmark (if the NGO has employees registration with tax authorities is required but this is only a matter of notification), Finland (but lacking legal capacity it cannot acquire property in its own name, be a member of another association. The executive committee cannot act in a way that binds the other members and responsibility is attached to the members participating in the operations giving rise to it), France (members of groups of persons will be personally responsible for its actions), Georgia, Germany (but liability falls on all members and there were unspecified tax problems), Greece, Iceland, Italy (but necessary to obtain public funding), Latvia (but needed to rent premises, undertake economic activities, organise public events involving liabilities and relations to third parties), Luxembourg (but rarely done because of the disadvantages of not having legal personality), Norway(only needed if involved in activities requiring a legal entity such as an employer or a receiver of public grants apart from those for activities related to children/youth/culture or it intends to open a bank account in its name), Poland (these bodies are created by notification subject to power of prohibition exercisable within 30 days; they must have 3 founders, have an aim, territory of activity and headquarters with possessions resulting from membership fees and no business activities), Romania (but not common and there would be problems interacting with public authorities and banks), Russia, Spain, Turkey, Ukraine (but it does involve notification) and United Kingdom.

<sup>80</sup> Azerbaijan, Denmark, Georgia, Iceland, Latvia, Montenegro, Norway, Spain (but children must be represented by their parents or legal guardian), Sweden, Switzerland and “the former Yugoslav Republic of Macedonia”.

<sup>81</sup> Finland.

<sup>82</sup> Romania.

<sup>83</sup> Albania, Armenia, Bosnia and Herzegovina, Croatia France, Germany, Greece, Italy, Luxembourg Poland, Russia, Serbia, Slovakia, Turkey and United Kingdom. In Belgium there is no restriction but parents are held responsible for the acts of children.

<sup>84</sup> Italy, Poland and Serbia.

<sup>85</sup> Albania and Bulgaria.

resident<sup>86</sup>, through the need for them being in a minority<sup>87</sup> to their participation as a founder necessitating that the international organisation type has to be used<sup>88</sup>.

77. In the case of one country non-citizens are excluded from certain types of association<sup>89</sup>, in another they cannot be founders where a decision has been made that their continued presence in the country is undesirable<sup>90</sup> and in yet another they cannot be illegal immigrants<sup>91</sup>.
78. One country does not allow non-citizens to be founders at all<sup>92</sup> and in another they are excluded if they are not citizens of the European Union<sup>93</sup>.
79. Certain countries have restrictions on persons disqualified from public service<sup>94</sup>, persons on the list of money launderers or of those financing terrorism<sup>95</sup>, persons charged with criminal offences pending the investigation<sup>96</sup>, persons in prison<sup>97</sup> and persons in legal prohibition<sup>98</sup>. Some countries have prohibitions applying to convicted persons<sup>99</sup>, persons convicted of certain crimes during a five-year period after completion of sentence<sup>100</sup>, persons with a certain criminal record<sup>101</sup> or persons whose conviction includes a loss of civil rights for a specified period<sup>102</sup>.

*Requirements for registration or acquiring legal personality*

80. The numbers of founders required for an NGO to be registered or to acquire legal personality was not specifically requested in the questionnaire but details were given by a number of respondents. The figures ranged from three<sup>103</sup> through five<sup>104</sup>, seven<sup>105</sup>, ten<sup>106</sup> to twenty or twenty-one members<sup>107</sup>.
81. The possible documents and information that might be required for registration/acquisition of legal personality cover a wide range of matters, with only some points being common to the overwhelming majority of countries, namely

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<sup>86</sup> Bosnia and Herzegovina and France. Cf in respect of France the analysis in para 236 below.

<sup>87</sup> "the former Yugoslav Republic of Macedonia".

<sup>88</sup> Belarus.

<sup>89</sup> Finland (foreigners must be resident in order to belong to associations whose purpose is to have influence on government).

<sup>90</sup> Russia.

<sup>91</sup> France.

<sup>92</sup> Serbia.

<sup>93</sup> Italy.

<sup>94</sup> Italy.

<sup>95</sup> Russia.

<sup>96</sup> Serbia.

<sup>97</sup> Russia and Ukraine.

<sup>98</sup> Greece.

<sup>99</sup> Greece, Luxembourg and Russia.

<sup>100</sup> Serbia.

<sup>101</sup> France.

<sup>102</sup> Belgium.

<sup>103</sup> Armenia, Belgium, Croatia, Finland and Romania.

<sup>104</sup> Georgia and "the former Yugoslav Republic of Macedonia".

<sup>105</sup> Bulgaria and Germany.

<sup>106</sup> Belarus (for local - i.e., city - organisation but no details given for national or international ones), Hungary and Serbia.

<sup>107</sup> Greece.

- an application or letter of interest<sup>108</sup>;
- the protocol of establishment or the minutes of the founding meeting<sup>109</sup> or the date of the confirmation of its charter<sup>110</sup>;
- the decision to initiate registration proceedings<sup>111</sup>;
- the list and personal details of the founders<sup>112</sup>;
- the object of its activity<sup>113</sup>
- the statutes<sup>114</sup>;
- an explanatory report on the activities carried out or to be carried out<sup>115</sup>;
- a notice with the NGO's name, municipality of residence and address<sup>116</sup>, telephone number<sup>117</sup> and email address<sup>118</sup>;
- the decision on the establishment of the management bodies<sup>119</sup> or the protocols of members' and board meetings<sup>120</sup>;
- the decision appointing certain office-holders and representatives<sup>121</sup>;
- the members of its board or those with authority to represent association<sup>122</sup>, as well as sample signatures of representatives<sup>123</sup>
- a "no jail bird" declaration for board leaders<sup>124</sup>;

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<sup>108</sup> Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Finland, Georgia, Germany, Italy, Latvia, Montenegro, Poland, Romania, Russia, Serbia and Ukraine.

<sup>109</sup> Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, France, Germany, Latvia, Montenegro, Norway, Poland, Russia, Serbia, Spain, "the former Yugoslav Republic of Macedonia" and Ukraine.

<sup>110</sup> Georgia.

<sup>111</sup> Croatia, "the former Yugoslav Republic of Macedonia" (must be authenticated) and Serbia.

<sup>112</sup> Albania, Armenia, Azerbaijan, Belgium (not for an AISBL), Croatia, Georgia, Greece, Hungary, Luxembourg, Serbia, Turkey and Ukraine. Usually this entailed providing a copy of each person's identity card.

<sup>113</sup> Albania, France, Georgia and Serbia.

<sup>114</sup> Albania, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Finland, France, Georgia, Greece, Hungary, Italy, Latvia, Luxembourg, Montenegro, Norway, Poland, Romania, Russia, Serbia, Slovakia, Spain, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and United Kingdom.

<sup>115</sup> Italy and "the former Yugoslav Republic of Macedonia".

<sup>116</sup> Finland, Georgia, France, Norway, Poland, Romania (certificates for owner or tenant status), Russia, Serbia and Turkey.

<sup>117</sup> France and Russia.

<sup>118</sup> Russia.

<sup>119</sup> Serbia.

<sup>120</sup> Albania and Georgia.

<sup>121</sup> Bosnia and Herzegovina (the president, other persons in the bodies of the organisation and the giving of authorisation for representing and advocating), Croatia (the president's consent to govern the NGO was needed) and Ukraine.

<sup>122</sup> Albania, Belgium (including details of foreign members with copies of their passports and their social security numbers), Croatia, Finland, France, Georgia, Germany, Italy, Latvia, Luxembourg, Poland, Russia, Serbia and "the former Yugoslav Republic of Macedonia".

<sup>123</sup> Poland.

<sup>124</sup> Hungary.

- proof of the NGO's patrimony<sup>125</sup> or a report on its economic/financial situation with relevant documentation regarding end-use, size and value of real property and of movable capital assets<sup>126</sup>;
- the budgets and balance sheets approved in the previous three years or in the period preceding the application if it has already worked as a non-officially recognised body<sup>127</sup>;
- an indication of the number of members if it is an association<sup>128</sup>;
- the fees payable by members<sup>129</sup>;
- approval or permission of the authorised body of the public administration for undertaking certain activities when that is prescribed by special law as a condition for registration of the association<sup>130</sup>;
- proof issued by the Ministry of Justice regarding the availability for the denomination of the association<sup>131</sup> or approval to use personal name of a citizen or of a symbolism protected by law<sup>132</sup>;
- a declaration that the NGO's purposes are not against the law<sup>133</sup>;
- a completed form for publication in official journal<sup>134</sup>; and
- an extract from the register confirming the NGO's legal status where its founder is a foreign juridical person<sup>135</sup>.

82. The need to notarise the documents that are to be submitted was specified in the case of two countries<sup>136</sup> and one country required a deposit of money<sup>137</sup>.
83. The detailed information needed in some instances in order to secure registration or legal personality does not seem to correspond to any significant fiscal advantages that might provide an appropriate justification for the burden thereby imposed.
84. The procedure invariably entailed submission to the relevant authority, with one respondent emphasising that submission in the country's capital was the only option<sup>138</sup>.
85. This authority involved is often a ministry, whether the provincial body of the Ministry of Internal Affairs<sup>139</sup> the Ministry of Justice<sup>140</sup>, the Ministry of Public

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<sup>125</sup> Romania (bank account balance, expertise for assets, etc).

<sup>126</sup> Italy.

<sup>127</sup> Italy.

<sup>128</sup> Italy.

<sup>129</sup> Germany (has to be in statute) and Norway.

<sup>130</sup> Croatia.

<sup>131</sup> Romania.

<sup>132</sup> Russia.

<sup>133</sup> Greece.

<sup>134</sup> France.

<sup>135</sup> Russia.

<sup>136</sup> Azerbaijan and Germany.

<sup>137</sup> "the former Yugoslav Republic of Macedonia" (5,000 EUR in denars but only for foundations)

<sup>138</sup> Azerbaijan.

<sup>139</sup> France (the Prefecture), Italy and Slovakia.



Administration and Local Self Government<sup>141</sup> or one that is not specifically identified<sup>142</sup>.

86. In some instances it is a specific register of associations<sup>143</sup>, in another it is the Authority of Justification<sup>144</sup> and in others it is the tax department<sup>145</sup>.
87. In eight countries the authority for registration or granting legal personality is a court (or a body under its jurisdiction)<sup>146</sup>, while in one it apparently varies according to type of association but no details were given<sup>147</sup>. In the case of one country the body was not specified<sup>148</sup>.
88. Only five countries have no fee for the purpose of registration or acquiring legal personality<sup>149</sup>,
89. In the countries where a fee is payable, the level differs quite considerably, ranging from less than 10 EUR<sup>150</sup>, through amounts such as 10 EUR<sup>151</sup>, 12 EUR<sup>152</sup>, 15 EUR<sup>153</sup>, 18.26 EUR plus VAT and the cost of publication of details in the official journal<sup>154</sup>, 20-25 EUR<sup>155</sup>, 39.06 EUR<sup>156</sup>, 50 EUR<sup>157</sup>, 54 EUR<sup>158</sup>, 60 EUR<sup>159</sup>, 75-100 EUR<sup>160</sup>, 125 EUR<sup>161</sup> to 150 EUR<sup>162</sup>.
90. There is a variable fee system in one country, depending on whether the NGO is established at the national or international level<sup>163</sup>, another only charges

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<sup>140</sup> Armenia, Azerbaijan, Belarus (in the case of republican and international NGOs; it is the municipality for local ones), Belgium (in the case of an AISBL), Bosnia and Herzegovina and Croatia (Register of Associations).

<sup>141</sup> Serbia.

<sup>142</sup> Montenegro.

<sup>143</sup> Finland, Latvia, Luxembourg, Norway (body under Ministry of Trade and Industry), Spain (regional or national), Russia and Turkey.

<sup>144</sup> Ukraine.

<sup>145</sup> Georgia and Germany (only if tax exemption is being sought).

<sup>146</sup> Albania, Belgium (in the case of an Association Sans But Lucratif ("ASBL")), Bulgaria, Germany (registry in district or county court), Greece, Hungary, Poland, Romania and "the former Yugoslav Republic of Macedonia" (Central Registry Office).

<sup>147</sup> Slovakia.

<sup>148</sup> Croatia.

<sup>149</sup> Albania, Hungary, Montenegro (except for the cost of the lawyer doing the registration work), Norway and "the former Yugoslav Republic of Macedonia".

<sup>150</sup> Azerbaijan (11 AZN).

<sup>151</sup> Croatia and Latvia.

<sup>152</sup> Ukraine (85 UAH).

<sup>153</sup> Italy.

<sup>154</sup> Luxembourg; the cost for the official journal is 2 EUR per page of the statute.

<sup>155</sup> Armenia and Georgia.

<sup>156</sup> France.

<sup>157</sup> Romania.

<sup>158</sup> Russia (2000 RUR).

<sup>159</sup> Finland (unless a preliminary check is made when it is only 15 EUR) and Serbia.

<sup>160</sup> Belgium (this includes the cost of publication in the official journal) and Germany (this seems to include the cost of a notary).

<sup>161</sup> Poland.

<sup>162</sup> Bosnia and Herzegovina.

<sup>163</sup> Belarus but no specific details were provided.

half the fee for political parties and their branches<sup>164</sup> and in two countries certain types of NGO are entirely exempt from paying the fee<sup>165</sup>.

91. In respect of one country the cost of registration was not specified<sup>166</sup> and in the case of another it was stated that court fees are minimal but the need to use a lawyer makes total cost of the process in the region of 1,500-2,000 EUR<sup>167</sup>.

*Deadline for determining application for registration or legal personality*

92. The time-frame for reaching decisions on registration or the grant of legal personality does not always have appropriate safeguards against prevarication and abuse.
93. Of the countries that have a formal process of registration or granting legal personality to NGOs, nine countries have a formal deadline<sup>168</sup>.
94. There is, however, a considerable variation in the period prescribed. The shortest period is three days<sup>169</sup> and the longest is one hundred and twenty days with the apparent possibility of an additional sixty days for responding to comments<sup>170</sup>. In ascending order the other deadlines are: ten days with the possibility of prolongation to sixty days where all requisite documents not submitted<sup>171</sup>; fifteen days<sup>172</sup>; fifteen to thirty days<sup>173</sup>; twenty-one days<sup>174</sup>; thirty days<sup>175</sup>; thirty days with the possibility of a further eight days to deal with clarifications of questions asked<sup>176</sup>; forty working days with the possibility of a further twenty working days to deal with clarifications of questions asked<sup>177</sup>; and three months<sup>178</sup>. The deadline was not specified in the case of two of the countries that have one<sup>179</sup>.
95. Apart from the instance cited, it is not clear whether the days in the various deadlines listed are regular or working days.
96. The deadlines were said to be observed in six countries<sup>180</sup> but in one of them this appears to be done in an abusive way so that decision-making is excessively prolonged<sup>181</sup>.

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<sup>164</sup> Russia (1000 RUR).

<sup>165</sup> Belarus (youth public associations) and Croatia (founders).

<sup>166</sup> Spain.

<sup>167</sup> Greece.

<sup>168</sup> Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Romania, Russia, Serbia and Slovakia

<sup>169</sup> Georgia and Ukraine.

<sup>170</sup> Italy..

<sup>171</sup> Montenegro.

<sup>172</sup> Albania.

<sup>173</sup> Serbia (the answers of the two respondents differed).

<sup>174</sup> Armenia.

<sup>175</sup> Latvia, Russia (for public associations but only 14 for other non-commercial organisations) and “the former Yugoslav Republic of Macedonia”.

<sup>176</sup> Croatia.

<sup>177</sup> Azerbaijan.

<sup>178</sup> Poland.

<sup>179</sup> Romania and Slovakia.

<sup>180</sup> Azerbaijan, Bosnia and Herzegovina (except where there was a lack of documentation within the application), Georgia, Latvia (usually done within 10-15 days rather than the 30 allowed), Poland, Russia (many instances of it being exceeded).

97. However, observance is effectively enforced in two others in which there is either a presumption of acceptance if the deadline reached without decision<sup>182</sup> or registration becomes effective after passing of the deadline if request is submitted with all necessary and valid documents and proofs<sup>183</sup>. It is not clear whether these formulations are in substance the same; the latter would seem to leave open the possibility of a supposed registration being challenged.
98. In one country there is a presumption of denial if not decided within deadline, thereby allowing for an appeal before a court against that decision<sup>184</sup>.
99. There were considered to be instances of the deadline being exceeded in the case of four countries<sup>185</sup> but no details were given in the case of one of them<sup>186</sup>.
100. In ten countries there is no deadline<sup>187</sup> but in one of these there is a presumption of refusal where there is no decision within two months so that judicial proceedings can then be brought<sup>188</sup> and the issue is not relevant in two others where there is no process or legal personality is acquired automatically<sup>189</sup>.
101. Where there is no deadline the period normally taken to get a decision also varied considerably. It ranges from two to three days (although publication in the official journal from which legal personality becomes effective could then take several months<sup>190</sup>) to between six and twelve months<sup>191</sup>. The other periods specified were: five to ten days<sup>192</sup>; between one week and a month<sup>193</sup>, some weeks<sup>194</sup>; thirty days<sup>195</sup>; one month<sup>196</sup> or more<sup>197</sup>; sixty days<sup>198</sup>; and six months<sup>199</sup>.
102. In the case of one country it varies according to type of organisation involved<sup>200</sup>.
103. In another the period was given as the rather vague "time taken to complete paperwork"<sup>201</sup> and in yet another it was not known<sup>202</sup>.

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<sup>181</sup> Azerbaijan (the practice is to return applications just before the deadline for corrections so that the process has to start all over again and this can be repeated several times)

<sup>182</sup> Italy.

<sup>183</sup> Croatia.

<sup>184</sup> Serbia.

<sup>185</sup> Armenia, Belarus (it depends on the kind of organisation), Romania (the average time was said by one respondent to be a month) and Slovakia.

<sup>186</sup> Armenia.

<sup>187</sup> Finland, France, Germany, Greece, Hungary, Luxembourg, Norway, Spain, Switzerland (as regards bodies required to be entered on the Commercial Register) and United Kingdom.

<sup>188</sup> France.

<sup>189</sup> Denmark and Sweden.

<sup>190</sup> Luxembourg.

<sup>191</sup> Greece.

<sup>192</sup> France.

<sup>193</sup> Bulgaria.

<sup>194</sup> Germany.

<sup>195</sup> Slovakia.

<sup>196</sup> Norway.

<sup>197</sup> Spain.

<sup>198</sup> Bosnia and Herzegovina.

<sup>199</sup> Finland.

<sup>200</sup> Belgium (a few days for an ASBL - it depends on the appearance of the official journal as it is otherwise a formality - and several weeks for an Association Internationale Sans But Lucratif (AISBL)).

<sup>201</sup> United Kingdom.

*Refusal and reasoning*

104. Some countries do not specify any grounds for refusing registration or the grant of legal personality and/or do not require such a decision to be reasoned.
105. Furthermore not all the grounds recognised as the basis for refusing registration or the grant of legal personality seem to be drawn with sufficient precision and may thus not be applied in a manner consistent with the right to freedom of association or the promotion of civil society.
106. The grounds specified included:
- non-conformity with the constitution<sup>203</sup> or the law<sup>204</sup>;
  - threatening the stability of the country<sup>205</sup>;
  - being racist or anti-Semitic<sup>206</sup>;
  - being anti-republican<sup>207</sup>;
  - being against territorial integrity<sup>208</sup>;
  - being against public morals<sup>209</sup>;
  - having "undemocratic structures"<sup>210</sup>
  - not being founded for a non-profit purpose<sup>211</sup>;
  - having a name that does not differ clearly from one already registered<sup>212</sup> or one that injures morality or the national and religious feelings of citizens<sup>213</sup>;

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<sup>202</sup> Switzerland (as regards bodies required to be entered on the Commercial Register).

<sup>203</sup> Bosnia and Herzegovina, Croatia, France, Serbia (in particular paramilitary or secret organisation, violent destruction of public order, destruction of territorial integrity, violation of guaranteed rights and liberties of others, incitement of national, racial, religious or other intolerance and hatred) and Russia.

<sup>204</sup> Belgium, Croatia, Finland (this also covers proper behaviour), France, Germany, Greece, Russia, Spain and "the former Yugoslav Republic of Macedonia".

<sup>205</sup> Ukraine.

<sup>206</sup> France.

<sup>207</sup> France.

<sup>208</sup> France.

<sup>209</sup> France.

<sup>210</sup> Germany.

<sup>211</sup> Finland.

<sup>212</sup> Finland, Latvia and Russia.

<sup>213</sup> Russia. In this regard see Moscow Helsinki Group's 2007 annual report, entitled 'Discrimination based on sexual orientation and gender identity in Russia' regarding the refusal of registration to two non-governmental sexual minority organisations – "Raduzhnyi Dom" (Rainbow House, Tyumen). The Federal Registration Service initially ruled that the organisation's activity related to propaganda of non-traditional sexual orientation may undermine the security of the Russian society and state due to the following circumstances: Disruption of the society's spiritual values; Disruption of sovereignty and territorial integrity of the Russian Federation due to the decreasing number of its population. In a further refusal it supplemented these reasons with new "arguments", namely, that the officials considered that "propaganda of non-traditional sexual orientation ... attempts on state-protected family and marriage institutes, which may lead to the incitement of social and religious hatred and hostility". They also saw a serious contravention of the registration procedure not allowing them to register the non-governmental organisation in the fact that in the set of the presented constituent documents "the Statute pages do not have numbers" leading them to be named "unreliable information in the presented documents".

- lacking financial and administrative soundness<sup>214</sup>;
- failing to comply with the registration procedure<sup>215</sup> or to resubmit within given time limit all the necessary and valid documents<sup>216</sup>; and
- having someone as a founder who was not entitled so to act<sup>217</sup>.

107. In addition in one country where registration is a formality it was stated that the NGO's name (i.e., to see if it is already in use) and its objects can be controlled but that this was done in a summary fashion<sup>218</sup>.

108. Although negative decisions with respect to registration and the grant of legal personality have to be reasoned in the case of eighteen countries<sup>219</sup>, such a requirement is not specifically mentioned in law of one country<sup>220</sup> and does not exist in the case of four others<sup>221</sup>.

#### *Scope for correcting an application*

109. However, twelve countries have some possibility of correcting documents during the registration process<sup>222</sup>.

110. The time allowed for this purpose ranges from two<sup>223</sup> to sixty days<sup>224</sup>, with other periods specified being a week<sup>225</sup>, between fifteen and thirty days<sup>226</sup>, twenty days<sup>227</sup> and thirty days<sup>228</sup>. For one country it was reported that a "reasonable" term would be specified for corrections by the decision-maker but it was also stated that the "term is foreseen in the law"<sup>229</sup>.

111. In the case of five countries no time-frame for corrections is specified<sup>230</sup>, in another there is no limit to the possibility of changing and resubmitting an

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<sup>214</sup> Italy.

<sup>215</sup> Finland, Georgia, Germany, Greece, Latvia and Poland.

<sup>216</sup> Croatia, Montenegro, Norway, Serbia, "the former Yugoslav Republic of Macedonia", Russia, Spain and Ukraine.

<sup>217</sup> Russia.

<sup>218</sup> Luxembourg (foundations and associations with a public interest objective - i.e., philanthropic, religious, scientific, artistic, educational, social, sporting and touristic - do require grand-ducal approval by the Minister of Justice).

<sup>219</sup> Azerbaijan, Bosnia and Herzegovina, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Montenegro (specifying how to provide the missing documentation), Norway (specifying the missing documentation), Poland, Romania, Russia, Serbia, Slovakia, Spain and "the former Yugoslav Republic of Macedonia".

<sup>220</sup> Croatia.

<sup>221</sup> Armenia, Belarus, Georgia and "the former Yugoslav Republic of Macedonia".

<sup>222</sup> Albania, Armenia, Azerbaijan, Belgium, Croatia, Finland (if not rejected immediately), Georgia, Norway (to supply missing documentation), Romania, Serbia, Ukraine and United Kingdom.

<sup>223</sup> Georgia and Slovakia.

<sup>224</sup> Italy.

<sup>225</sup> Romania.

<sup>226</sup> Croatia.

<sup>227</sup> Azerbaijan.

<sup>228</sup> "the former Yugoslav Republic of Macedonia".

<sup>229</sup> Albania.

<sup>230</sup> Belgium, Serbia, Slovakia, Ukraine and United Kingdom.

application until it is in accordance with the law<sup>231</sup> and no details were given in the case of three of them<sup>232</sup>.

112. For two countries the making of corrections is not possible where the problem was that the aims and activities of the NGO were contradictory to the law<sup>233</sup>.
113. In one country the possibility of making corrections is frustrated by applications being returned with insufficient time to meet the deadline for clarification, thus necessitating the submission of fresh applications and leading to a process that could last several years<sup>234</sup>.
114. In one country the only possibility of making corrections involves going to court<sup>235</sup> and in seven others it can only be done by submitting a new application<sup>236</sup>.

*Independence of decision-maker and judicial control*

115. Although independence may not be an essential quality for the body deciding on registration or the grant of legal personality, the scope for improper pressures seems evident in some cases and these do not seem to be being corrected through the exercise of judicial control.
116. Thus, where there is a process of registration or granting legal personality, the body concerned was said to be independent in the case of five countries. The reason given for it being independent was that it is a court or operated within one<sup>237</sup> or because the only requirements governing its activities are in the law<sup>238</sup>.
117. There was less certainty in respect of five countries for which respondents said the body was formally independent<sup>239</sup>, generally independent<sup>240</sup>, almost independent<sup>241</sup>, independent as a matter of law but not in practice<sup>242</sup> or independent to a reasonable extent (a court)<sup>243</sup>.
118. It was not considered to be independent in fifteen countries<sup>244</sup>. Furthermore in another one for which the issue was not addressed the body is probably not independent<sup>245</sup>.

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<sup>231</sup> Latvia.

<sup>232</sup> Armenia. Finland and Norway.

<sup>233</sup> Belgium and Bosnia and Herzegovina.

<sup>234</sup> Azerbaijan.

<sup>235</sup> Belarus.

<sup>236</sup> Germany, Greece, Hungary, Luxembourg (only where name has to be changed in the statutes), Poland, Russia and Spain.

<sup>237</sup> Germany, Greece and Poland.

<sup>238</sup> Finland and Russia.

<sup>239</sup> Croatia.

<sup>240</sup> Albania.

<sup>241</sup> Romania.

<sup>242</sup> Armenia.

<sup>243</sup> "the former Yugoslav Republic of Macedonia".

<sup>244</sup> Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, France, Georgia, Italy, Luxembourg (Ministry of Justice), Montenegro, Norway (a government body), Serbia, Slovakia, Spain, Switzerland and United Kingdom.

<sup>245</sup> Latvia (register under supervision of Ministry of Justice).

119. The issue was not considered relevant in the case of one country, possibly because the body concerned is a court<sup>246</sup> and it was also not addressed in another one where the body is also a court<sup>247</sup>.
120. Where there is a process of registration or granting legal personality, the possibility of negative decisions being challenged in the courts existed in twenty-seven countries<sup>248</sup> but in two of these an administrative appeal was required first<sup>249</sup>.
121. The issue was not considered relevant in respect of one country because the NGO will be registered if it submits the required information<sup>250</sup>.
122. The respondent for one country stated that it is frequent for challenges to decisions to be brought and to succeed<sup>251</sup> whereas that for another reported that it is not frequent for them to be brought but that it is frequent for them to succeed<sup>252</sup>.
123. However the respondents for ten countries considered that it is not frequent for challenges to be brought or to succeed<sup>253</sup> and two stated that there were not many since most applications succeeded<sup>254</sup>.
124. In the case of one country it was just stated that success is possible and instanced a case resolved favourably before being considered by the European Court<sup>255</sup>.
125. The respondents for six countries reported that there are not many applications and that it was unknown whether they succeeded<sup>256</sup>, whereas neither the frequency nor the success of challenges was known in the case of five countries<sup>257</sup>.

*Need for renewal of registration/grant of legal personality*

126. There is no requirement to renew registration or the grant of legal personality on a periodic basis in the overwhelming majority of countries<sup>258</sup> but three of them indicated that this would be required in the event of a new law on associations being adopted<sup>259</sup>.

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<sup>246</sup> Hungary.

<sup>247</sup> Bulgaria.

<sup>248</sup> Albania, Armenia, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Croatia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Spain, Switzerland (as regards bodies required to be entered on the Commercial Register) “the former Yugoslav Republic of Macedonia”, Ukraine and United Kingdom.

<sup>249</sup> Croatia and Finland.

<sup>250</sup> Norway

<sup>251</sup> Switzerland (as regards bodies required to be entered on the Commercial Register).

<sup>252</sup> Hungary.

<sup>253</sup> Armenia Belarus, Croatia, Finland, France, Georgia, Italy, Montenegro, Poland and Russia .

<sup>254</sup> Germany and Greece.

<sup>255</sup> Azerbaijan

<sup>256</sup> Albania, Belgium, Latvia, Luxembourg, Romania and Spain.

<sup>257</sup> Serbia, Slovakia, “the former Yugoslav Republic of Macedonia”, Ukraine and United Kingdom.

<sup>258</sup> Belarus, Belgium, Bosnia and Herzegovina, Croatia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Montenegro, Norway, Poland, Romania, Russia, Serbia (but changes to seat and statute must be notified), Slovakia, Spain, Switzerland (as regards bodies required to be entered on the Commercial Register), “the former Yugoslav Republic of Macedonia” and United Kingdom.

<sup>259</sup> Belarus, Montenegro and Slovakia.

127. There was, however, a divergence of view in the case of the respondents from one country as regards the existence of a need to renew registration or legal personality<sup>260</sup>.
128. Furthermore the respondents for another two countries pointed out that amendments to statutes do need approval<sup>261</sup>, whereas notification was only needed for changes to the seat and the statute in the case of a third country<sup>262</sup> and for changes to the board and the statute in the case of two others<sup>263</sup>. It is, of course, likely that others have similar requirements but these were not specifically within the scope of the question.

*Other matters of concern about registration/grant of legal personality*

129. The concerns raised by respondents on issues other than those covered by the questionnaire related to both the content of the law and the process involved in dealing with registration and the grant of legal personality.
130. In the case of one country there is concern about the failure to give a higher priority to reform of the law<sup>264</sup>.
131. In two others there is concern about the minimum number of members to found an NGO<sup>265</sup>, although it was not clear why it should be seen as problematic in the case of one of them where only three persons are required<sup>266</sup>. There is also concern about the prohibition in one country on including in the denomination of associations any words which are specific to public institutions and authorities<sup>267</sup>.
132. However, the respondent from one country suggested that the law there is too liberal, leading to an explosion of NGO registration, with business companies, coffee shops and kindergartens being registered<sup>268</sup>.
133. The process was seen by some as too complicated and too expensive<sup>269</sup> and, undoubtedly linked to this, there is concern about the lack of money to pay a lawyer's services when seeking registration or legal personality<sup>270</sup>.
134. There was also concern in respect of one country about the bureaucracy of the courts and the difficulties faced in registration by those not coming from the capital city, as well as the lack of familiarity by decision-makers with the issues faced by civil party and their corruption and the lack of a consistent practice as regards both registration and dissolution<sup>271</sup>.
135. Nonetheless the problems with the process are in some instances seen as attributable to NGOs themselves, with it being observed that they need to know the

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<sup>260</sup> Armenia.

<sup>261</sup> Greece and Italy.

<sup>262</sup> Serbia.

<sup>263</sup> Germany and Norway.

<sup>264</sup> Serbia.

<sup>265</sup> Armenia and Serbia (at least 10 are required).

<sup>266</sup> Armenia.

<sup>267</sup> Romania.

<sup>268</sup> Montenegro.

<sup>269</sup> Poland.

<sup>270</sup> Russia.

<sup>271</sup> Albania.



procedure<sup>272</sup> and that they suffer from weak information awareness and legal illiteracy on possible organisational forms<sup>273</sup> and have insufficient experience<sup>274</sup>.

136. Concern was expressed in respect of one country about delays due to lack of manpower<sup>275</sup>, of another about the different bodies involved depending on the type of organisation<sup>276</sup> and of a third about the unequal treatment of applicants, with those dealing with sensitive issues facing unjustified delays<sup>277</sup>.
137. There is also concern in one country about more control being exercised by the tax authority than the register of associations as regards general democratic rules in NGOs<sup>278</sup> and in another about the need to present the constitutive act and statute in authentic form<sup>279</sup>.
138. The position was seen as having improved in one country since a change in the law two years ago but it was also noted that some unspecified improvements were still needed<sup>280</sup>.

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<sup>272</sup> Spain.

<sup>273</sup> Russia.

<sup>274</sup> Poland.

<sup>275</sup> Poland.

<sup>276</sup> Belarus.

<sup>277</sup> Azerbaijan.

<sup>278</sup> Germany.

<sup>279</sup> Romania.

<sup>280</sup> Turkey.

### III CONCLUSIONS AND RECOMMENDATIONS

139. It is evident that in many countries in Europe international standards regarding the establishment of NGOs are being observed, either fully or to a very large extent.
140. Nonetheless a number of problems do seem to emerge.
141. Firstly there are countries where the operation of informal groupings is inhibited both as a matter of law and practice and where there are no imminent proposals for reform.
142. Secondly the detailed information needed in some instances in order to secure registration or legal personality - where this is either required or desired - does not seem to correspond to any significant fiscal advantages that might provide an appropriate justification for the burden thereby imposed.
143. Thirdly the disqualification of some persons from being eligible to form NGOs does not seem in some cases to be consistent with the right to freedom of association under Article 11 of the European Convention.
144. Fourthly the time-frame for reaching decisions on registration or the grant of legal personality does not always have appropriate safeguards against prevarication and abuse.
145. Fifthly not all the grounds recognised as the basis for refusing registration or the grant of legal personality seem to be drawn with sufficient precision or to be applied in a manner consistent with the right to freedom of association or the promotion of civil society.
146. Sixthly some countries do not specify any grounds for refusing registration or the grant of legal personality and/or do not require such a decision to be reasoned.
147. Seventhly, although independence may not be an essential quality for the body deciding on registration or the grant of legal personality, the scope for improper pressures seems evident in some cases.
148. Finally many of the problems arise from practice rather than the terms of the applicable law but shortcomings in giving effect to the latter do not seem to be being corrected through the exercise of judicial control.
149. These are all matters which merit continued scrutiny but the following measures seem necessary to begin to remedy the present situation.
150. Firstly legislative restrictions on the establishment of informal groupings should be repealed and their legitimacy should be clearly recognised as a matter of law.
151. Secondly the requirements for securing registration or acquiring legal personality should be simplified both to lighten the burden on those applying and to facilitate the administrative task of determining applications.

152. Thirdly the restrictions on children, convicted persons and non-nationals from being founders of NGOs should be brought into line with the requirements of international standards.
153. Fourthly formal time limits for decision-making should be no more than two or three weeks and steps should be taken to ensure their observance, namely the provision of additional staff and clear consequences for failure to meet them, whether a presumed refusal or positive decision.
154. Fifthly grounds for refusal should be reformulated where they are insufficiently precise and they should be reviewed and modified to ensure their relevance and substantive compatibility with international standards.
155. Sixthly, decision-making with respect to the registration of NGOs or granting them legal personality should be immunised from political influence and those charged with this role should be appropriately trained for the task.
156. Finally, effective and timely judicial control over decisions concerning registration and the grant of legal personality should be assured, with judges and lawyers being trained in the relevant international standards and being confident to rely on them in scrutinising refusals of registration or the grant of legal personality.

## ANNEX 1



### OING Conf/Exp (2008) 1

#### Terms of reference

#### EXPERT COUNCIL ON NGO LAW

**Adopted at the meeting of the Conference of INGOs on 22 January 2008**

#### Background

The initiative for the creation of the Expert Council on NGO Law goes back to the first Regional NGO Congress organised by the Conference of INGOs on 24-26 March 2006 in Warsaw which proposed “the creation of an expert council to evaluate the conformity of national NGO and other relevant legislation and its application with Council of Europe standards and European practice. NGOs could pool their resources and co-operate with the Conference of INGOs and the Council of Europe to this effect.”

The Expert Council is an initiative by NGOs for NGOs in all Council of Europe member States and Belarus.

The Conference of INGOs decided on 6 October 2006 to take the lead in the creation of the Expert Council.

The Expert Council operates under the authority of the Conference of INGOs of the Council of Europe.

The creation of the Expert Council on NGO Law gives follow-up to both the Warsaw Declaration, adopted at the Third Summit of Heads of State and Government of the Council of Europe member States on 16-17 May 2005, which stated that “democracy and good governance can only be achieved through the active involvement of citizens and civil society”, and Recommendation CM/Rec(2007)14 on the legal status of NGOs.

The Expert Council on NGO Law relates to the implementation of project 2006/DGAP/943 “Relations with INGOs” of the Programme of Activities of the Council of Europe.

#### Mandate

The Expert Council aims to contribute to the creation of an enabling environment for NGOs throughout Europe by examining national NGO law and its implementation and promoting its compatibility with Council of Europe standards and European good practice.

#### Activities

To achieve its aim, the Expert Council:

- Monitors the legal and regulatory framework in European countries, as well as the administrative and judicial practices in them, which affect the status and operation of NGOs,
- Identifies both matters of concern and examples of good practice,

- Provides advice on how to bring national law and practice into line with Council of Europe standards and European good practice,
- Proposes ways in which Council of Europe standards could be developed,
- Encourages and supports NGOs to work together on issues concerning the NGO legislation and its implementation and
- Reports on its activities, its findings and its proposals with regard to Council of Europe standards and European good practice.

The Expert Council pursues a thematic approach with regard to all European countries. It deals in particular with issues addressed in Recommendation CM/Rec(2007)14 on the legal status of NGOs. When considered appropriate, the Expert Council may prepare reports on problems occurring in a particular country for the attention of the Conference of INGOs.

The Conference of INGOs or groups of NGOs can refer issues to the Expert Council, which can also take up issues on its own initiative. It receives information from NGOs, States, the Council of Europe and other intergovernmental institutions. It can carry out its own research.

The Expert Council complements the Council of Europe's assistance to governments on matters pertaining to NGO legislation such as the provision of legislative expertise and assistance activities on drafting or reforming NGO legislation. It therefore works in liaison with relevant Council of Europe bodies and services.

The Expert Council holds annual meetings and its members co-operate throughout the year by electronic means of communication.

### **Reporting**

The Expert Council presents an annual report to the Conference of INGOs on its work. If need be, it may submit ad hoc reports on matters of particular urgency to the Conference of INGOs. The reports will contain recommendations for action by the Conference of INGOs.

### **Follow-up**

The Conference of INGOs decides on the follow-up to be given to the reports of the Expert Council. It publishes the reports, ensures their dissemination to NGOs and relevant Council of Europe, national and intergovernmental bodies. It monitors the implementation of the Expert Council's recommendations.

### **Membership**

The Expert Council is composed as follows:

- President
- Co-ordinator
- Three members
- Ad hoc members

All members act in their personal capacity.

A representative of the Secretariat General of the Council of Europe attends the meetings of the Expert Council.

Members of the Expert Council have all or most of the following qualifications:

- Legal expertise in NGO law (including the regulatory framework), other relevant laws (such as tax legislation), administrative and judicial practices affecting the status and operation of NGOs and human rights,
- NGO experience at national and international level, including experience in managing a NGO and NGO networks,
- Knowledge of European standards and good practice,
- Experience with the issues at stake in more than one European country,
- Availability and
- Proficiency in English.

The Conference of INGOs appoints the President of the Expert Council for a three-year term. The co-ordinator and the other members are appointed by the Bureau of the Conference of INGOs for a three-year term. The Expert Council appoints ad hoc members who are specialised on issues under examination for a one-year term, renewable.

### **Financial aspects**

The budget of the Conference of INGOs (which is essentially funded by the Council of Europe) bears the travel and subsistence expenses for all members attending the meetings of the Expert Council and the cost of small expert fees for the written contributions of the members.

The co-ordinator has a consultant contract.

### **Evaluation**

The Expert Council's operation will be reviewed by the Conference of INGOs in its third year of functioning with a view to determining whether the creation of a permanent structure is necessary.

## ANNEX 2



**Recommendation CM/Rec(2007)14  
of the Committee of Ministers to member states  
on the legal status of non-governmental organisations in Europe**

*(Adopted by the Committee of Ministers on 10 October 2007  
at the 1006th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members and that this aim may be pursued through the adoption of common rules;

Aware of the essential contribution made by non-governmental organisations (NGOs) to the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies;

Taking into consideration the invaluable contribution also made by NGOs to the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe;

Having regard to the Declaration and Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005);

Noting that the contributions of NGOs are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of changes in law and public policy, the provision of assistance to those in need, the elaboration of technical and professional standards, the monitoring of compliance with existing obligations under national and international law, and on to the provision of a means of personal fulfilment and of pursuing, promoting and defending interests shared with others;

Bearing in mind that the existence of many NGOs is a manifestation of the right of their members to freedom of association under Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and of their host country's adherence to principles of democratic pluralism;

Having regard to Article 5 of the European Social Charter (revised) (ETS No. 163), Articles 3, 7 and 8 of the Framework Convention for the Protection of National Minorities (ETS No. 157) and Article 3 of the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144);

Recognising that the operation of NGOs entails responsibilities as well as rights;

Considering that the best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation;

Taking into consideration the case law of the European Court of Human Rights and the views of United Nations human rights treaty bodies;

Taking into account the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, United Nations General Assembly Resolution A/RES/53/144;

Drawing upon the Fundamental Principles on the Status of Non-Governmental Organisations in Europe;

Having regard to the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS No. 124) (hereinafter Convention No. 124) and to the desirability of enlarging the number of its contracting parties;

Recommends that the governments of member states:

- be guided in their legislation, policies and practice by the minimum standards set out in this recommendation;
- take account of these standards in monitoring the commitments they have made;
- ensure that this recommendation and the accompanying Explanatory Memorandum are translated and disseminated as widely as possible to NGOs and the public in general, as well as to parliamentarians, relevant public authorities and educational institutions, and used for the training of officials.

## **I. Basic principles**

1. For the purpose of this recommendation, NGOs are voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members. They do not include political parties.
2. NGOs encompass bodies or organisations established both by individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based.
3. NGOs can be either informal bodies or organisations or ones which have legal personality.
4. NGOs can be national or international in their composition and sphere of operation.
5. NGOs should enjoy the right to freedom of expression and all other universally and regionally guaranteed rights and freedoms applicable to them.
6. NGOs should not be subject to direction by public authorities.
7. NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and should be subject to the administrative, civil and criminal law obligations and sanctions generally applicable to those legal persons.
8. The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation.



9. NGOs should not distribute any profits which might arise from their activities to their members or founders but can use them for the pursuit of their objectives.

10. Acts or omissions by public authorities affecting an NGO should be subject to administrative review and be open to challenge by the NGO in an independent and impartial court with full jurisdiction.

## **II. Objectives**

11. NGOs should be free to pursue their objectives, provided that both the objectives and the means employed are consistent with the requirements of a democratic society.

12. NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law.

13. NGOs should be free to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation. Any such support should also be subject to legislation on the funding of elections and political parties.

14. NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorisation being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned.

15. NGOs should be free to pursue their objectives through membership of associations, federations and confederations of NGOs, whether national or international.

## **III. Formation and membership**

### **A. Establishment**

16. Any person, be it legal or natural, national or non-national, or group of such persons, should be free to establish an NGO and, in the case of non-membership-based NGOs, should be able to do so by way of gift or bequest.

17. Two or more persons should be able to establish a membership-based NGO but a higher number can be required where legal personality is to be acquired, so long as this number is not set at a level that discourages establishment.

### **B. Statutes**

18. NGOs with legal personality should normally have statutes, comprising the constitutive instrument or instrument of incorporation and, where applicable, any other document setting out the conditions under which they operate.

19. The statutes of an NGO with legal personality should generally specify:

- a. its name;
- b. its objectives;
- c. its powers;
- d. the highest governing body;
- e. the frequency of meetings of this body;
- f. the procedure by which such meetings are to be convened;
- g. the way in which this body is to approve financial and other reports;

- h. the procedure for changing the statutes and dissolving the organisation or merging it with another NGO.

20. The highest governing body of a membership-based NGO should be the membership and its agreement should be required for any change in the statutes. For other NGOs the highest governing body should be the one specified in the statutes.

#### C. *Membership*

21. No person should be required by law or otherwise compelled to join an NGO, other than a body or organisation established by law to regulate a profession in those states which treat such an entity as an NGO.

22. The ability of any person, be it natural or legal, national or non-national, to join membership-based NGOs should not be unduly restricted by law and, subject to the prohibition on unjustified discrimination, should be determined primarily by the statutes of the NGOs concerned.

23. Members of NGOs should be protected from expulsion contrary to their statutes.

24. Persons belonging to an NGO should not be subject to any sanction because of their membership. This should not preclude such membership being found incompatible with a particular position or employment.

25. Membership-based NGOs should be free to allow non-members to participate in their activities.

### IV. **Legal personality**

#### A. *General*

26. The legal personality of NGOs should be clearly distinct from that of their members or founders.

27. An NGO created through the merger of two or more NGOs should succeed to their rights and liabilities.

#### B. *Acquisition of legal personality*

28. The rules governing the acquisition of legal personality should, where this is not an automatic consequence of the establishment of an NGO, be objectively framed and should not be subject to the exercise of a free discretion by the relevant authority.

29. The rules for acquiring legal personality should be widely published and the process involved should be easy to understand and satisfy.

30. Persons can be disqualified from forming NGOs with legal personality following a conviction for an offence that has demonstrated that they are unfit to form one. Such a disqualification should be proportionate in scope and duration.

31. Applications in respect of membership-based NGOs should only entail the filing of their statutes, their addresses and the names of their founders, directors, officers and legal representatives. In the case of non-membership-based NGOs there can also be a requirement of proof that the financial means to accomplish their objectives are available.

32. Legal personality for membership-based NGOs should only be sought after a resolution approving this step has been passed by a meeting to which all the members had been invited.

33. Fees can be charged for an application for legal personality but they should not be set at a level that discourages applications.

34. Legal personality should only be refused where there has been a failure to submit all the clearly prescribed documents required, a name has been used that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person in the state concerned or there is an objective in the statutes which is clearly inconsistent with the requirements of a democratic society.

35. Any evaluation of the acceptability of the objectives of NGOs seeking legal personality should be well informed and respectful of the notion of political pluralism. It should not be driven by prejudices.

36. The body responsible for granting legal personality should act independently and impartially in its decision making. Such a body should have sufficient, appropriately qualified staff for the performance of its functions.

37. A reasonable time limit should be prescribed for taking a decision to grant or refuse legal personality.

38. All decisions should be communicated to the applicant and any refusal should include written reasons and be subject to appeal to an independent and impartial court.

39. Decisions on qualification for financial or other benefits to be accorded to an NGO should be taken independently from those concerned with its acquisition of legal personality and preferably by a different body.

40. A record of the grant of legal personality to NGOs, where this is not an automatic consequence of the establishment of an NGO, should be readily accessible to the public.

41. NGOs should not be required to renew their legal personality on a periodic basis.

#### *C. Branches; changes to statutes*

42. NGOs should not require any authorisation to establish branches, whether within the country or (subject to paragraph 45 below) abroad.

43. NGOs should not require approval by a public authority for a subsequent change in their statutes, unless this affects their name or objectives. The grant of such approval should be governed by the same process as that for the acquisition of legal personality but such a change should not entail the NGO concerned being required to establish itself as a new entity. There can be a requirement to notify the relevant authority of other amendments to their statutes before these can come into effect.

#### *D. Termination of legal personality*

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

#### *E. Foreign NGOs*

45. Without prejudice to applicability of the articles laid down in Convention No. 124 for those states that have ratified that convention, foreign NGOs can be required to obtain approval, in a manner consistent with the provisions of paragraphs 28 to 31 and 33 to 39 above, to operate in the host country. They should not have to establish a new and separate entity for this purpose. Approval to operate can only be withdrawn in the event of bankruptcy, prolonged inactivity or serious misconduct.

## **V. Management**

46. The persons responsible for the management of membership-based NGOs should be elected or designated by the highest governing body or by an organ to which it has delegated this task. The management of non-membership-based NGOs should be appointed in accordance with their statutes.

47. NGOs should ensure that their management and decision-making bodies are in accordance with their statutes but they are otherwise free to determine the arrangements for pursuing their objectives. In particular, NGOs should not need any authorisation from a public authority in order to change their internal structure or rules.

48. The appointment, election or replacement of officers, and, subject to paragraphs 22 and 23 above, the admission or exclusion of members should be a matter for the NGOs concerned. Persons may, however, be disqualified from acting as an officer of an NGO following conviction for an offence that has demonstrated that they are unfit for such responsibilities. Such a disqualification should be proportionate in scope and duration.

49. NGOs should not be subject to any specific limitation on non-nationals being on their management or staff.

## **VI. Fundraising, property and public support**

### *A. Fundraising*

50. NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.

### *B. Property*

51. NGOs with legal personality should have access to banking facilities.

52. NGOs with legal personality should be able to sue for the redress of any harm caused to their property.

53. NGOs with legal personality can be required to act on independent advice when selling or acquiring any land, premises or other major assets where they receive any form of public support.

54. NGOs with legal personality should not utilise property acquired on a tax-exempt basis for a non-tax-exempt purpose.

55. NGOs with legal personality can use their property to pay their staff and can also reimburse all staff and volunteers acting on their behalf for reasonable expenses thereby incurred.

56. NGOs with legal personality can designate a successor to receive their property in the event of their termination, but only after their liabilities have been cleared and any rights of donors to repayment have been honoured. However, in the event of no successor being designated or the NGO concerned having recently benefited from public funding or other form of support, it can be required that the property either be transferred to another NGO or legal person that most nearly conforms to its objectives or be applied towards them by the state. Moreover the state can be the successor where

either the objectives or the means used by the NGO to achieve those objectives have been found to be inadmissible.

*C. Public support*

57. NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits.

58. Any form of public support for NGOs should be governed by clear and objective criteria.

59. The nature and beneficiaries of the activities undertaken by an NGO can be relevant considerations in deciding whether or not to grant it any form of public support.

60. The grant of public support can also be contingent on an NGO falling into a particular category or regime defined by law or having a particular legal form.

61. A material change in the statutes or activities of an NGO can lead to the alteration or termination of any grant of public support.

**VII. Accountability**

*A. Transparency*

62. NGOs which have been granted any form of public support can be required each year to submit reports on their accounts and an overview of their activities to a designated supervising body.

63. NGOs which have been granted any form of public support can be required to make known the proportion of their funds used for fundraising and administration.

64. All reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality.

65. NGOs which have been granted any form of public support can be required to have their accounts audited by an institution or person independent of their management.

66. Foreign NGOs should be subject to the requirements in paragraphs 62 to 65 above only in respect of their activities in the host country.

*B. Supervision*

67. The activities of NGOs should be presumed to be lawful in the absence of contrary evidence.

68. 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.

69. NGOs should not be subject to search and seizure without objective grounds for taking such measures and appropriate judicial authorisation.

70. No external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent.

71. NGOs should generally be able to request suspension of any administrative measure taken in respect of them. Refusal of a request for suspension should be subject to prompt judicial challenge.

72. 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.

73. Foreign NGOs should be subject to the provisions in paragraphs 68 to 72 above only in respect of their activities in the host country.

74. The termination of an NGO or, in the case of a foreign NGO, the withdrawal of its approval to operate should only be ordered by a court where there is compelling evidence that the grounds specified in paragraphs 44 and 45 above have been met. Such an order should be subject to prompt appeal.

#### *C. Liability*

75. The officers, directors and staff of an NGO with legal personality should not be personally liable for its debts, liabilities and obligations. However, they can be made liable to the NGO, third parties or all of them for professional misconduct or neglect of duties.

### **VIII. Participation in decision making**

76. 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. This participation and co-operation should be facilitated by ensuring appropriate disclosure or access to official information.

77. NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation.