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2. Political Questions

2.5 Freedom of association

Thematic monitoring report presented by the Secretary General and decisions on follow-up action taken by the Committee of Ministers

PART II – Examples of legislation and practice on freedom of association in member states in application of Council of Europe's principles and standards

Explanatory note

The present report is the first one to be presented under the new thematic monitoring procedure adopted by the Committee of Ministers in July 2004. It thus provides "*an analysis of major issues within the scope of the theme […] based on the work undertaken by existing Council of Europe monitoring mechanisms*" to "*serve as a basis for debate*" and includes "*decisions on follow-up action by the Committee of Ministers*".

The starting point for defining the scope of the report has been the explanatory note presented by the Delegation of the United Kingdom which proposed the theme: *"Freedom of association is a basic fundamental human right, as stated in Article 11 of the European Convention on Human Rights and should form the basis of any pluralist democracy. All groups in society should therefore have the freedom to participate in associative life as this contributes towards the development of a strong democratic civil society" (see doc.* CM/Monitor(2004)8).

The report follows a thematic approach and is divided into three parts, published in three separate volumes:

The first part (Volume I) provides an overview of the work carried out by the Council of Europe (CoE) on the major issues within the scope of the theme. The core legal instruments of relevance to the subject are presented in the first section, namely the European Convention on Human Rights and the case-law of the Strasbourg Court (under A), as well as the European Social Charter and the conclusions of the European Committee of Social Rights (under B). The second section provides a brief overview of work carried out in specific fields with references allowing the reader to look further into certain issues if he/she wishes.

The **second part (Volume II)** provides examples of legislation and practice in member states with reference to CoE principles and standards, putting emphasis on good practices. The first section deals with freedom of association in the political and work spheres, namely political parties (under A) and trade unions (under B), while the second one is devoted to the civil society, namely non-governmental organisations (NGOs) and foundations (under A), as well as more generally the role of civil society in the democratic process in the member states (under B). Issues linked to religious associations have been deliberately left outside since they have been dealt with in a previous thematic monitoring report on the freedom of religion (CM/Monitor(2003)10).

The third part (Volume III) presents conclusions by the Secretary General and decisions on follow-up action taken by the Committee of Ministers with respect to the Organisation's Programme of Activities. These decisions, always in accordance with the new procedure, include instructions or invitations *"to competent Council of Europe mechanisms - in particular Steering Committees - to work" on areas* in which "*gaps*" were revealed.

[1] This document has been classified confidential at the date of issue. It was declassified at the 943rd meeting of the Ministers' Deputies (19 October 2005) (see CM/Del/Dec(2005)943/2.4).

CONTENTS

I. FREEDOM OF ASSOCIATION IN THE POLITICAL SPHERE AND AT WORK

A. Political parties

1. In the terms of the CM Recommendation (2003)4 *on common rules against corruption in the funding of political parties and electoral campaigns*, "*political parties are a fundamental element of the democratic systems of states and are an essential tool of expression of the political will of citizens"*.[2]

2. The Venice Commission's *Guidelines on legislation on political parties* (hereinafter referred to as "*Guidelines*") define a political party as *"an association of persons, one of the aims of which is to participate in the management of public affairs by the presentation of candidates to free and democratic elections"* (doc. CDL-AD(2004)007rev.). As regards the definition of political parties in the national legislations, the Venice Commission noted that the more elaborate the definition is, the greater the danger will be to loose the status of political party and the special constitutional protection of provisions on fundamental freedoms of opinion and association (doc. CDL-DEM (2003)3).

1. Establishment and membership

3. According to the *Guidelines "state authorities have to remain neutral in dealing with the establishment, registration procedures (wherever they exist) or activities of political parties and refrain from any measures that could privilege some political forces and discriminate others".*

4. The establishment of political parties can be enshrined in the Constitution (for example in *Azerbaijan, Bulgaria, Cyprus, Greece, Lithuania, Russian Federation* or *Slovakia*) and regulated (i) in the general legislation on associations (for example *Belgium, France, Finland* or *the Netherlands*); (ii) in the specific legislation on political parties, or (iii) may not be regulated at all (*Iceland, Italy, Malta* or *Switzerland*).

5. The rules on political parties are more (for example in *Ukraine*) or less (for instance in *Belgium, Ireland, Sweden or the United Kingdom*) detailed (see doc. CDL-DEM(2003)3).

6. In the terms of the *Guidelines*, *"registration may be considered as a measure to inform the authorities about the establishment of the party as well as about its intention to participate in elections and, as a consequence, benefit from advantages given to political parties as a specific type of association"*.

7. In many member states, registration is a necessary step for the formal recognition of an association as a political party, including for the purpose of participating in general elections or for financing. Registration may also be required for the acquisition of legal personality or to enable the association to open bank accounts, receive funding from public funds or hold property (for example, in *Azerbaijan, Croatia, Georgia* or *Ukraine;* see doc. CDL-DEM(2003)3).

8. In other states, no registration is required (*Germany* or *Switzerland*) or this procedure has merely technical consequences. In *Sweden*, for example, no registration is needed for the party to take part in elections, but it may however wish to register so as to protect itself from improper use of its name.[3] In *Norway*, registration allows the party to issue electoral lists under the registered name. In *Austria*, registration is a pure formality (see also doc. CDL-AD (2004)004).

9. In cases where registration is required, it is usually done with either the competent ministries (generally the Ministry of Justice or the Ministry of the Interior) or judicial bodies (for example in *Bulgaria, Poland* or *Romania*). In some countries, the political parties are required to register with more than one institution (for example in *Turkey*: the Chief Public Prosecutor of the Court of Cassation and the Ministry of the Interior). If the registration is denied after a period most often of 30 days, a judicial remedy is usually available.

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[2] See also the explanatory memorandum of PACE Recommendation 1680(2004) and Resolution 1407(2004) *on new concepts to evaluate the state of democratic development* which also acknowledges that where "*organisation of political processes in corresponding groups or associations […] is functioning, democracy is functioning in a more stable and efficient manner*" (doc. 10279, 17.09.2004).

[3] See *inter alia* Organization for Security and Co-operation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR), Legislation Online, Elections, Sweden.

10. Some formal conditions can be prescribed by legislation for registration, such as permanent address, payment of registration fees, publication of information on the establishment of the party in the media, adoption of statutes or internal rules, elaboration of a programme, election of a board and/or committees, etc. In most CoE member states, the registration of political parties is also subject to more substantial requirements relative to territorial representation, minimum membership or minimum age. Other member states do not regulate in any manner these questions and leave the matter to self-regulation within each political party's charter or statute (for example *Ireland, Italy*).

11. The *Guidelines* provide that countries applying registration procedures to political parties *"should refrain from imposing excessive requirements for territorial representation of political parties as well as for minimum membership"*. However, the *Guidelines* do not provide any criteria to be applied to assess the excessiveness of these requirements, other than those established under Articles 11 and 10 ECHR. The requirements based on territorial representation and/or on minimum membership have the potential to limit the possibilities of persons belonging to national minorities to organise in political parties (see below, under 3, iv.).

12. As regards territorial representation, in some member states, there are no legislative requirements to maintain branches or offices of political parties (for instance, *Andorra, Belgium, Estonia, Finland, Georgia, Hungary, Latvia, Liechtenstein, Luxembourg,* or *Switzerland*). Nevertheless, such requirements do exist in other CoE member states, such as *Ireland* (to maintain headquarters), *Turkey* (to maintain a national office in the capital), etc. In *Moldova*, political parties are required to establish structural sub-divisions with a minimum number of members in at least half of the administrative territorial units of 2nd level.[4] In *Ukraine*, political parties are required to establish and register regional, city and district organisations in most regions and oblasts of Ukraine, in the cities of Kiev and Sevastopol and in the Autonomous Republic of Crimea, within six months from the date of their registration with the Ministry of Justice.[5] With respect to both *Moldova* and *Ukraine*, the Venice Commission found that the relevant requirements could potentially represent a serious restriction to the political activity at regional and local level and raised issues of compatibility with the freedom of association (doc. CDL-AD (2003)8 and doc. CDL (2002)104).

13. As concerns the minimum membership requirement, registration of political parties is often subject to the number of signatures of founding members required. For example, in *Estonia* and *Azerbaijan,* legislation requires 1,000 signatures, while in *Austria, Spain, Norway*, 5,000 signatures are necessary. In *Moldova*, the minimum 5,000 membership threshold was considered as a serious barrier to the maintenance of political parties (doc. CDL-AD (2003)8; doc. CDL-AD (2002)28). The Moldovan authorities acknowledge that the existing legislation, notably the Law on parties and other socio-political organisations of 19.09.1991, has gaps. In order to fill them in and improve the legal framework regulating the activity of political groupings, a new draft law has been elaborated. This draft, which has already been expertised by the CoE, is currently pending before the Legal Committee of Nominations and immunities of the Parliament. In *Romania*, the signatures of 10,000 founding members are required, accompanied with conditions based on geographical distribution. An increase in the number of minimum membership can also be seen in *Lithuania* with the amendment of the Law on Political Parties in March 2004 (from 400 to 1,000 members). Other countries impose relatively small membership requirements (*Serbia and Montenegro:* 100 members in Serbia and 50 members in Montenegro;[6] *"the former Yugoslav Republic of Macedonia"*: 500 members).

14. In the *Russian Federation,* amendments introduced in late December 2004 to the Law on Political Parties of July 2001 conditioned registration of political parties to the existence of 50,000 members nationwide (instead of 10,000 as previously required), at least 500 representatives in half of the country's regions, and no fewer than 250 members in the remaining regions, as well as branches in at least one-half of the Russian Federation's 89 regions. The Law provides that political parties which fail to meet these requirements by 01.01.2006 will have to dissolve or re-register as public associations.[7]

15. Minimum age for membership is generally 18 years-old (doc. CDL-AD (2004)004).

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[4] Doc. CDL-AD (2003)8.
[5] Doc. CDL-AD (2004)004 and doc. CDL (2002)104.
[6] Initial Report by *Serbia and Montenegro* to the UN Human Rights Committee under the International Covenant on Civil and Political Rights (hereinafter CCPR), doc. CCPR/C/SEMO/2003/1, 24.07.2003, pp. 110-111, 191.
[7] See ODIHR, Legislation Online, 22.12.2004, ACFC/INF/OP/I(2003)005 and below under 3 (iv). The same law on political parties of July 2001 prohibited the creation of inter-regional, regional and local political parties and provided that where such parties existed they would cease to enjoy the status of a political association and continue to function as inter-regional, regional and local public associations; see CM/Del/OJ/DH(2005)922, Vol. II, 28.04.2005, concerning the execution of the ECtHR judgment in the case of *Presidential Party of Mordovia v. Russian Federation*, no. 65659/01, § 21 and 31, 05.10.2004, unreported.

2. Organisational autonomy

16. The control over the statute or charter of a party should be primarily internal and exercised by the members of the party themselves. The members of the party should also have access to judicial control (doc. CDL-AD(2004)007rev.).

17. According to the *Guidelines*, any activity requirement which contributes to the parties' control and supervision has to be assessed following the same criteria set out in the ECHR and its case-law with respect to what is *"necessary in a democratic society"*.

18. In the majority of CoE member states, there are no reported mechanisms to control or supervise the activities of political parties, other than for financial purposes (for instance in *Belgium, Bulgaria, Croatia, Cyprus, France, Georgia, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Slovakia, Sweden* or *Switzerland*). In some other states legislation provides for a system of supervision of political parties' compliance with the existing legislation (for example in the *Russian Federation* and *Ukraine).*[8] More specifically in *Ukraine*, the authorities indicate that there are three types of public activity control of political parties (Article 18 of the Law of Ukraine on Political Parties): the control exercised by the Ministry of Justice with respect to compliance with the Constitution and laws of Ukraine, as well as with the statutes of the political parties; the control exercised by the Central Electoral Committee with respect to compliance with the order of participation of political parties in the election process; and, finally, the control exercised by the Chamber of Counting within the Main Supervisory-Revision Office of Ukraine, with respect to the financing of the political parties. Any decision taken by these control bodies may be appealed before the courts.

19. Finally, in some countries, proceedings can be initiated against a party for non conformity of its programmes and statutes with the Constitution (for example in *"the former Yugoslav Republic of Macedonia" and Romania*) or for non compliance with the political goals presented in its programme (*Bosnia and Herzegovina*) or with its internal statutes (for example in *Latvia*).[9]

3. Restrictions, prohibition or grounds for dissolution

a. In general

20. Any measures leading to restrictions on or refusal of registration, prohibition or dissolution of political parties must be *"necessary in a democratic society and proportionate to the object sought to be achieved"*, in conformity with the ECtHR case-law. Such measures should be regarded as exceptional and may only be justified in cases where the parties concerned *"use violence or advocate the use of violence, threaten civil peace and the democratic constitutional order of the country and undermine the rights and freedoms guaranteed by the Constitution"*.[10]

21. In the context of a refusal of registration, the Court concluded in *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania* that *"there could be no justification for hindering a political group that complied with the fundamental principles of democracy solely because it had criticised the constitutional and legal order of the country and had sought a public debate in the political arena"*.[11]

22. As regards registered political parties, their activities may be ceased through a variety of legal means, such as mainly prohibition or banning, dissolution and liquidation. For example in *Ukraine*, the authorities indicate that prohibition of the activities of a political party – which is possible only on the basis of a judicial decision by the Supreme Court judging at first instance - leads to the suspension of its activities, dissolution of its leading organs, as well as its regional, town and district organisations and closure of its membership. Banning or dissolution of political parties should be considered only as a last-resort measure to be used with restraint, following a judicial finding of unconstitutionality and in accordance with procedures which provide the necessary guarantees to a fair trial.[12]

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[8] CDL-AD (2004)004 and doc. CDL-DEM (2003) 2 rev.
[9] See doc. CDL-DEM (2003) 2 rev.
[10] See PACE Resolution 1308(2002) *on restrictions on political parties in the Council of Europe member states* and the Venice Commission's *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures,* doc. CDL-INF (2000)1 and *Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues*, doc. CDL-AD(2004)007rev.
[11] *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania* judgment, no. 44626/99, § 55, 3 February 2005, unpublished.
[12] See *inter alia* PACE Resolution 1308(2002), doc. CDL-INF(2000)1 and doc. CDL-AD (2004)004.

23. The main grounds for restrictions on the establishment or for dissolution of political parties provided for in national legislations refer to:[13]

i *Discrimination on racial or religious grounds* (for example in *Azerbaijan, Bulgaria* or *France*) or in cases where the incitement to discrimination against ethnic minorities is the main purpose of the activities of the party. In its General policy Recommendation No. 7, ECRI recommends the member states that *"the exercise of freedom of […] association may be restricted with a view to combating racism"* and recommends *inter alia* that national civil and administrative legislation *"provide for the possibility of dissolution of organisations that promote racism"* (§ 17), but only as a result of a court decision.[14] In *the Netherlands,* for instance, a party whose main purpose of activities was the incitement to discrimination against ethnic minorities was declared illegal and dissolved by the Amsterdam District Court.

ii *The extremist nature of political parties*. In this respect, PACE recommends in its Resolution 1344(2003) of 29.09.2003 that the CoE member states *"provide in their legislation that the exercise of […] freedom of association can be limited for the purpose of fighting extremism"*, in compliance with the requirements set by the ECHR and its case-law. Therefore, PACE recommends *inter alia* that legislation should provide for effective penalties in cases where damage caused by an extremist party is established: proportionate and dissuasive penalties against public incitement to violence, racial discrimination and intolerance, suspension or withdrawal of public funding or, as an exceptional measure, the dissolution. Thus, for example, the *Polish* Constitution prohibits nazi, fascist and communist parties.

iii *Promotion of racial hatred (Ukraine) or violence* (*Denmark, Portugal, Spain).* Thus a separatist Basque party was banned by a court decision for having ties with the ETA.[15] The possibility of dissolution of political parties linked to terrorist activities is also provided in the legislation of *Turkey* and of the *United Kingdom*.

iv *In the case of parties seeking violent usurpation of state power* (*Azerbaijan, Bulgaria, Estonia, Ukraine*). The formulations vary in the member states' Constitutions from threats to the existence (*Germany*) or the independence of the state (*Ukraine*), to respect of the national sovereignty (*France*) or territorial integrity of the state (*Bosnia and Herzegovina, Bulgaria, France, Moldova, Russian Federation, Slovakia* or *Turkey*).

24. In some member states, parties can lose their status of political party if they do not have any candidates elected in national elections; however, according to the *Guidelines*, they should be allowed to continue their activities under the general law on associations.

25. The dissolution of political parties, provided for in the *Moldovan* legislation on political parties, as a consequence of the decrease in their membership below a certain threshold, was considered incompatible with the provisions of the ECHR and the *Guidelines*.[16] In *"the former Yugoslav Republic of Macedonia"* the law provides for the obligation of political parties to submit written evidence to the competent court, proving that the number of their founders has not decreased. In case there are less than 1,000 members left, the *Lithuanian* legislation provides for the dissolution or the re-organisation of a political party within 6 months, after informing the Center of Registers. Other practices leading to dissolution or banning of a political party *inter alia* include the time elapsed between two meetings of a party's governing body (*Croatia*) and a failure to publish the party's financial resources (*Albania*).[17]

26. Several ECtHR judgements concerning the dissolution of political parties in *Turkey*, mainly on the basis of their programmes,[18] have led to a series of constitutional and legislative changes. It is reported that the amendments made to the Constitution in 1995 do not subject political parties to any ban on their activities. Additional legislative amendments have also been made in early 2003. In May 2004, the Turkish Constitution was amended to include the precedence of international human rights treaties over the national legislation. Thus, the Turkish Constitutional Court is expected to give direct effect to the ECHR and its case-law.[19]

[13] See *inter alia* doc. CDL-INF (2000)1, doc. CDL-DEM(2003)2 rev and doc. CDL-AD (2004)004.
[14] See also Part I, II, A, 1.
[15] E.U. Network of Independent Experts on Fundamental Rights, Report on the situation in Spain, 2004, p. 19.
[16] See doc. SG/Inf(2002)34, doc. CDL-AD (2003)8, doc. CDL-AD (2002)28.
[17] PACE, doc.9526, 17.07.2002.
[18] Notably Dicle for the Democratic Party (DEP), Freedom and Democratic Party (ÖZDEP), United Communist Party and others, Socialist Party and others, etc., see also above Part I.
[19] See *inter alia* doc. CM/Del/OJ/DH(2004)906 Volume I, 17.11.2004.

27. The liquidation of a political party has to be decided by a court of justice. In *Armenia*, the Law on Political Parties provides for two forms of liquidation: (i) "self-liquidation", i.e. the liquidation of a political party on the basis of its own decision: in this case, the property of this party may be transferred to NGOs, foundations or the state (ii); liquidation on the basis of a court decision: in this case, the property of the party is obligatorily transferred to the state. Despite concerns raised by the Venice Commission, the provision in the draft law which stated that a political party is subject to liquidation if it does not participate in two consecutive parliamentary elections or does not receive at least 1% of the votes cast in one of two consecutive parliamentary elections was maintained and included in the legislation as of March 2005.[20] However, the
Armenian authorities underline in this respect that this provision will only be applied as from 2011, when the second parliamentary elections, coming after the entry into force of the new Law on political parties, will take place. In addition, the authorities note that they pursue their co-operation in this matter with the Venice Commission and do not rule out the possibility to modify the Law, if need be, before the elections. In *Azerbaijan*, the draft Law on Political Parties has been criticised because the only sanction available was the liquidation by a court of justice and this sanction could be invoked even for minor breaches of the party's charter or legislation. The Venice Commission experts concluded that such a sanction should apply only in cases of serious and deliberate violation of the charter or legislation where no other sanction was appropriate.[21]

b. Specific restrictions

i. Members of the armed forces

28. In several member states (*Albania, Bosnia and Herzegovina*, *Croatia*, *Cyprus*, *Estonia, France, Greece, Italy, Latvia, Lithuania, Romania, Serbia and Montenegro, Spain, Turkey* and *United Kingdom)* legislation forbids membership of political parties for members of the armed forces.[22] Specific prohibition to organise political parties within the armed forces is also to be found in *Croatia, France, Poland* and *Serbia and Montenegro.* As concerns *Hungary*, the ECtHR decided on this matter in its *Rekvenyi* judgment in 1999 and concluded that Articles 10, 11 and 14 in conjunction with Articles 10 and 11 had not been violated.[23]

29. However, in other member states - called *"exemplary"* in PACE doc. 9518 of 15.07.2002 - no restrictions are placed on the freedom of association of military personnel: *Austria, Belgium, Denmark, Finland, Germany, the Netherlands, Norway, Sweden* and *Switzerland*.

ii. Police, civil servants and members of the judiciary

30. In *Montenegro*[24], according to the Constitution, professional members of the police cannot be members of political parties, while judges and members of the Constitutional Court and the Public Prosecutor's Office cannot be members of the bodies of political parties. The *Bulgarian* legislation is similar in that sense, but also restricts the association rights of the employees of the Ministry of Foreign Affairs, as well as of the staff of the Presidency of the Republic. Similar provisions can be found in the *Romanian* Constitution. In *Poland*, restrictions imposed *inter alia* on members of the professional armed forces, frontier and prison guards, fire brigades and custom officers were considered by the Constitutional Court, on 09.05.2002, to be acceptable limitations to the freedom of association and not violations of the Constitution.

31. In *Italy*, restrictions on the judiciary or other public servants are permitted by the Constitution. A recent draft legislation dating from the end of 2004 provides for disciplinary sanctions against judges who are members of political parties which can affect the proper exercise of the judicial function or cast a shadow on the public image of the judge.[25]

iii. *Foreigners*

32. Even though restrictions on the political activities of foreign citizens, as well as stateless persons, are possible under international law, this can hardly justify their general exclusion from membership of political parties. In the context of changes occurred in Europe during the past decades, the CoE advocates for the

[20] See *inter alia* doc. CDL-AD (2003)5; see also information provided by the Armenian Ombudsman, 10.03.2005.
[21] Opinion No. 383/2004, doc. CDL(2004)044; see also doc. GT-SUIVI.AGO(2004)12.
[22] Information provided by the European Organisation of Military Associations (hereinafter EUROMIL), 10.03.2005.
[23] *Rekvenyi v. Hungary*, no. 25390/94, ECHR 1999-III; see also above, Part I, I, A, 2, b, including reference to Recommendation 1572(2002) *on the right to association for members of the professional staff of the armed forces* and CM Reply doc. 9885, 21.07.2003.
[24] As part of the *State Union of Serbia and Montenegro.*
[25] See *inter alia* E.U. Network of Independent Experts on Fundamental Rights, Report on the situation in Italy in 2004, p. 45.

promotion of non-citizens' participation in political life, especially at local level.[26] In its *Guidelines,* the Venice Commission assessed that *"general exclusion of foreign citizens and stateless persons from membership in political parties is not justified. Foreign citizens and stateless persons should to some extent be permitted to participate in the political life of their country of residence, at least as far as they can take part in the elections. At the very least, the country of residence should make membership in political parties possible for these persons"* (doc. CDL-AD(2004)007rev).

33. Three main approaches can be identified in the member states with respect to the political activities of foreigners:

- In states with no specific legislation on political parties, there exists no restriction as to aliens or stateless persons' political activities (*Liechtenstein, Malta)* or membership of political parties unless stipulated in the internal statutes of the parties (*Ireland, Italy*; see doc. CDL-DEM(2003)2 rev).

- In the majority of CoE member states, either the Constitution or the law restricts membership of political parties to citizens. In this respect, PACE in its Recommendation 1500(2001) explicitly asked the member states to reconsider the citizenship criteria. [27]

- In other member states, such as in *Finland* and *Spain,* legally residing foreigners enjoy the right to become members of any type of associations, on the same terms as citizens and there are no exceptions concerning political parties. In the *United Kingdom*, there is no legal requirement that members of political parties be citizens, so that foreigners can be active members. In *Germany*, according to the Political Parties Act, membership of a political party is open to foreign citizens, but a political organisation cannot be considered as a political party if the majority of its members or the members of the executive committees are foreign citizens (see doc. CDL-AD(2004)004 and doc. CDL-DEM(2003)2 rev).

34. The CoE's Convention on the Participation of Foreigners in Public Life at Local Level[28] states in its Article 6 that: *"Each Party undertakes […] to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections*." However, the application of this right may be confined to the right to vote only.

35. The CLRAE has adopted a series of recommendations and resolutions aiming at improving the non-citizens' access to the political activities at local level.[29] Notably, in its Recommendation 115 (2002), the CLRAE calls upon the member states and especially the EU member states to re-examine *"their current policies on the participation of foreign residents in public life at local level so as to secure residence-based citizenship for all foreigners whatever their country of origin and grant them the same political rights on the basis of common criteria of residence"*, in conformity with the Convention quoted above.[30]

36. As regards in particular the EU member states, their nationals have the right to elect and be elected to the local public administration bodies of any country of the Union.[31] *Romania* has thus amended its Constitution in this respect in view of its accession to EU (Article 16 (4) of the Constitution as amended on 31.10.2003). In *Lithuania* not only EU citizens, but all permanent residents have the right to elect and be elected in local elections (Law on Elections to Local Authorities, No. I-532/23.08.2004, Article 2, I and II). In *Hungary*, not only EU citizens who are permanent residents, but also non-EU citizens legally residing on the territory have the right to vote in the local elections and referenda, provided that they are adult persons recognised as refugees, immigrants or permanent residents and that they are present in the country at the

[26] See above Part I, I, 2, c and Part I, II, C, 2.
[27] See CDL-DEM(2003)2 rev; see also: for *Lithuania,* Article 5 of the Law on Political Parties; for *Switzerland, Guide de la liberté ssociative dans le monde*, Les législations des sociétés civiles de 138 pays, sous la direction de Michel Doucin (hereinafter referred to as "Le guide"), Haut Conseil de la Coopération Internationale, La Documentation Française, Paris, 2000, p.405; for *Estonia*, the report of the Commissioner for Human Rights on his visit to Estonia, 27-30 October 2003, CommDH(2004)5, para.9, in which he noted that in *Estonia* non-citizens do not have the right to establish political parties or become members of political parties.
[28] See above, Part I, II, C, 2.
[29] See above, Part I, II, C, 2.
[30] See also CLRAE Rec. 153 (2004) and Res. 181 (2004) on a "*Pact for the integration and participation of peoples of immigrant origin in Europe's towns, cities and regions*".
[31] Consolidated version of the Treaty establishing the European Community, Official Journal C 325, 24.12.2002, Article 19.

date of election or referendum (Article 70 (2) and (3) of the Constitution, as of 01.12.1998). Also in *Estonia* all foreigners and non-citizens who have a permanent residence permit and who have lived in the respective rural municipality or city for five years have the right to vote at the elections of local government councils (Local Government Council Election Act). In *Latvia*, the right to vote and stand in local elections is allowed to all EU citizens residing on the territory. However, non-citizens in *Latvia* cannot stand or vote in elections, whether local or national (Article 101 of the Constitution).[32] In other states the right to elect and be elected to local self-government bodies is allowed only to nationals (for example in the *Russian Federation*, Article 32 (2) of the Constitution, unless it is otherwise provided in bilateral treaties, such as for instance with Belarus; see also for *Ukraine* Article 38 of the Constitution).

iv. Members of minorities

37. In few member states, such as *Bulgaria*[33] and the *Russian Federation*,[34] the establishment of political parties on an ethnic basis is expressly prohibited. In *Albania,* legislation restricting the creation of national minorities' political parties was abolished in 2002.[35]

38. In some states, requirements of minimum membership and regional representation are likely to affect the possibilities of persons belonging to national minorities that are regionally concentrated to form political parties and could have a negative impact on their effective participation in public affairs (for example in *Moldova*, *Ukraine* or the *Russian Federation*[36]). The Moldovan authorities, for their part, note that while the conditions of minimum membership and regional representation may partially limit the possibility for national minorities to form ethnically based political parties, the legislation in force does not affect in a substantial manner their capacity to participate in public affairs, as the persons belonging to national minorities are free to adhere to any existing ideological platforms or to create new ones. Furthermore, the Moldovan authorities indicate that, according to the Law of 19.07.2001 on the rights of persons belonging to national minorities and the legal status of their organisations, the persons belonging to national minorities can exercise their rights individually as well as within educational, cultural, religious and charitable associations. By July 2005, 86 ethno-cultural organisations had been registered with the Office of Inter-ethnic Relations.

39. The Advisory Committee of the FCNM has praised the efforts made by several member states to protect the minorities' rights in politics.

40. Measures particularly welcomed are, for example, reserved seats, lower electoral thresholds (for example in *Germany* and in *Serbia and Montenegro*), special parliamentary committees, adapted constituency boundaries, voting rights for non-citizens and constitutionally guaranteed representation of minorities in parliament (for example in *Romania*).[37]

41. Improvement in the legislation and practices ensuring the participation of minorities in the political life is still expected in a number of other countries. For example, in *Hungary*, the representation of minorities in Parliament needs improvement (CommDH(2002)6). In this respect, the Hungarian authorities underline the importance they attach to the reinforcement of the individual and collective rights of national and ethnic minorities living in the country's territory, as demonstrated by the adoption of Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, which called into being *inter alia* the local minority municipalities ten years ago. Both the National Assembly and the Government of Hungary want to see as soon as possible that

[32] See the report of the Commissioner for Human Rights on his visit to Latvia, 5-8 October 2003, CommDH(2004)3, para. 29.
[33] See Article 11(4) of the Bulgarian Constitution which provides that *"there shall be no political parties on ethnic, racial or religious lines […]"*. ECRI noted the banning of the political party of the "*United Macedonian Organisation (UMO) Ilinden – PIRIN*" by the Constitutional Court of Bulgaria in 2000 (CRI (2004)2). On 09.09.2004, the ECtHR declared admissible the application of this party; see *UMO Ilinden – PIRIN and others v. Bulgaria*, no. 59489/00, 9 September 2004, unreported.
[34] See Article 9 § 3 of the 2001 Law on Political Parties of the Russian Federation which prohibits the establishment of political parties *"on* the *grounds of professional, racial, national or religious belonging*" and stipulates that this phrase covers the inclusion in a political party's charter or programme of the goal of protecting professional, racial, national or religious interests and also the reflection of these goals in the designation of a political party. The Advisory Committee of the FCNM regretted the wording of this provision as too broad and considered that the authorities of the *Russian Federation* should review the legislative framework at issue with a view to ensuring that those legitimate activities aimed at protecting national minorities that have a political dimension are protected (see doc. ACFC/INF/OP/I(2003)005). The ban on the establishment of ethnically based political parties was upheld by the Constitutional Court of the Russian Federation in December 2004.
[35] ACFC/INF/OP/I(2003)004.
[36] See doc. CDL-AD (2003)8, doc. CDL (2002)104, ACFC/INF/OP/I(2003)002 and ACFC/INF/OP/I(2003)005; see also above, under 1.
[37] ACFC/INF/OP/I(2002)008; ACFC/INF/OP/I(2004)002; ACFC/INF/OP/I(2002)001.

national and ethnic minorities living in Hungary have their own representatives in Parliament, as provided for by the Constitution and Article 20 § 1 of the 1993 Act on the National and Ethnic Minorities. In recent years, various proposals have been put forward for the implementation of minority parliamentary representation, including: the nomination of minorities' delegates, the creation of a National Minority Council composed of members delegated by the local minority municipalities, lowering the electoral threshold or adoption of legislation introducing minority lists. With respect to the latter proposed solution, the Hungarian authorities note that a comprehensive reform of the relevant legal material is at present on the agenda of the National Assembly. If adopted, the regulation introducing minority lists could create an adequate legal foundation for minority parliamentary representation. In *Lithuania*, the representatives of the national minorities report that there has been a gradual tendency towards fewer opportunities available to them to participate in political life. This is due, in particular, to the fact that since the 1996 elections the political organisations of the national minorities, just like other political organisations and parties, have been subject to the threshold of 5% of votes, which, according to their representatives, reduces the national minorities' chances of being represented in the legislative organ.[38] In this respect, the Lithuanian authorities note, for their part, that political parties in *Lithuania* are formed on the basis of political interests of their members rather than on an ethnic basis. Persons belonging to the same national minority may be members of different political parties, whereas representatives of national minorities may be elected in single-member constituencies without being party members or supported by a party. Therefore, the requirement to obtain 5% of votes in the multi-member constituencies, which applies to all political parties, should not be regarded as decreasing possibilities of national minorities representatives to participate in political life.

42. As regards representation of Roma and/or Travellers, in most of the member states in which such minorities live, there are no political parties at national/federal level specifically representing Roma or Travellers. However, there are some countries where political representation of Roma is not only possible but has materialised with the emergence of one or more political parties which have an ethnic basis or defend the interests of Roma communities (*Bosnia and Herzegovina, Croatia, Hungary, Slovakia, "the former Yugoslav Republic of Macedonia"*).[39] In *Romania,* a party promoting the interests of Roma is already represented in parliament. There is, however, scope for further improvement in a number of municipalities as the low representation of Roma in elected bodies remains a serious problem.[40]

43. The CoE Commissioner for Human Rights, in his recent report on the human rights situation of Roma, Sinti and Travellers in Europe, refers to several studies, according to which the level of participation of Roma in the conduct of public affairs is strikingly low, even when it comes to measures affecting exclusively the Roma (CommDH(2005)4, § 19).

4. Financing

44. Transparency in the financing of political parties, as well as establishment of a balance between private and state funding reflect the idea of effective citizens' representation and association in the political life, either at the state or local level.[41] Legislation of member states may regulate (i) the financing of electoral campaigns only (electoral law), (ii) the regular financing of political parties only or (iii) both of them. Preference is to be given to one single and special law on party financing.[42]

45. In the terms of the CM Recommendation (2003)4 on "*Common rules against corruption in the funding of political parties and electoral campaigns*" (hereinafter referred to as "*the Rules*"), political parties and election campaigns funding should be *"subject to standards in order to prevent and fight against the phenomenon of corruption"*. There are two types of financing of political parties: (a) of *public* source with the aim to place all political parties on an equal footing or (b) of *private* source, either *internal* (mainly composed of membership fees and fund-raising activities, etc.) or *external*, such as donations.

[38] ACFC/INF/OP/I(2003)008.
[39] GT-ROMS(2003)9, 27.11.2003.
[40] ACFC/INF/OP/I(2002)001.
[41] See in this context CLRAE, Recommendation 86 (2000) and Resolution 105 (2000) on *the financial transparency of political parties and their democratic functioning at regional level*, and the CM Reply, 796th meeting, 22.05.2002.
[42] *Financing political parties and election campaigns – guidelines*, Ingrid van Biezen (hereinafter referred to as "*Financing political parties and election campaigns*"), Integrated Project "Making democratic institutions work", 2003, p. 14.

a. Public financing

46. According to the "*Rules*", the state should provide support to political parties, in the form of reasonable contributions and in application of objective, fair and reasonable criteria and without interference with their independence (Article 1). In addition, the Venice Commission Guidelines on the Financing of Political Parties (hereinafter referred to as "the *Guidelines on financing"*) acknowledge that "*public financing must be aimed at each party represented in Parliament*".

47. The legislation of member states generally awards state financing for purposes such as electoral campaigns subsidies or regular functioning of political parties.

48. Three general models of public financing can be distinguished: (i) systems where more than 50 per cent of income comes from the state (for example in *Spain, France* or *Italy)*; (ii) mixed systems of financing, based on proportionality (*Austria, Belgium, Germany, Greece, Ireland* or *Turkey*), and (iii) very little state financing (for example, in the *United Kingdom*, except in the Northern Ireland).[43]

49. In a number of cases, public financing can be awarded on the basis of votes received or representatives elected. For example, in *Austria*, if the party comprises at least five representatives, it receives the basic amount of EUR 218,019.[44] In *France*, the first fraction (half of the grant) of the state financing is proportional to the number of votes received in the first election round of the last legislative elections and the second fraction is conditioned on the distribution of the first fraction and proportional to the number of elected members of parliament. In *Sweden*, public financing represents 50% of the overall financing of large established political parties. It comprises a general subsidy, a subsidy to groups represented in Parliament and a subsidy to parliamentary secretariats. In this respect, the Swedish authorities note that not all political parties receive party funding, as it depends on whether a party only receives financial support from the local or regional authorities or if the party also receives from the national authorities. In addition, some parties have rather significant income (e.g. from organising lotteries). In *Hungary*, the rule according to which state financing can be awarded only to parties which obtained more than 1% of the votes cast in the previous elections was considered to be constitutional (doc. CDL-INF(2001)8).[45] In *Ukraine*, a political party has the right to receive state financing if it has received at least 4% of the votes cast in the previous parliamentary elections.

50. In practice, the member states' legislation imposes a series of conditions to political parties in order to qualify for public financing, for example to organise according to the law as an association and commit themselves to the principles enshrined in the Constitution (*Liechtenstein*) or to function democratically on the basis of political pluralism (*Spain*; see doc. CDL-INF(2001)8).

51. In its General Policy Recommendation No. 7, ECRI recommends that national legislation "*provide for an obligation to suppress public financing of organisations which promote racism*" and that, for instance, public financing for electoral campaigns should be refused to such political parties. This recommendation was reiterated recently in the Declaration on the use of racist, anti-Semitic and xenophobic elements in political discourse, adopted by the CM on 17.03.2005. Similar recommendations were addressed by ECRI to *Austria* (doc. CRI(2005)1). In *Belgium*, legislation amending the Law on Financing of Political Parties and allowing for the partial or total suppression of public financing for political parties which promote hostility towards the rights and freedoms enshrined in the ECHR and its additional protocols entered into force in March 1999. ECRI welcomed these amendments (doc. CRI(2004)1, § 91-92). A law which should allow their implementation was adopted in early 2005.[46] Another example is the Law on Subsidisation of Political Parties of 01.07.1999 in *the Netherlands* which authorises the withdrawal of subsidies to political parties convicted of racial offences (ECRI, CRI(2001)40).

b. Private financing

52. Private financing or donations[47] of a private nature are to be regulated by the state so as to avoid conflict of interests, ensure transparency and avoid secret donations, ensure the independence of political parties and avoid prejudice to their activities (*Rules*, Article 3 a.). Regulation by the state can include several

[43] Transparency International (TI), A. Miguet, Political Corruption and Party Funding in Western Europe- An Overview, August 2004 (hereinafter referred to as "TI, Western Europe").
[44] Information provided by the Austrian Human Rights Institute, 10.03.2005.
[45] For more details see *inter alia* PACE, doc. 9077, 04.05.2001.
[46] See E.U. Network of Independent Experts on Fundamental Rights, Report on the situation in Belgium in 2004, p. 94.
[47] Donations cover "*any deliberate act to bestow advantage, economic or otherwise*"; see *Rules*, Article 2.

requirements, such as: (i) publicity of donations (in particular the ones exceeding a fixed ceiling); (ii) limitation of the value of donations and (iii) prevention of fixed ceilings from being circumvented. However, there are countries whose legislation does not regulate private-sector funding (doc. CDL-INF(2001)8). As regards publicity, a recent example is the Law on Financing of Political Parties of *"the former Yugoslav Republic of Macedonia"*, adopted in October 2004, which requires that political parties make public the registry of donations.

53. According to the *Rules,* foreign donations are subject to specific limitation, prohibition or other regulation by the state. As regards donations from legal entities, legislation should provide for their registration in the books and accounts, strictly regulate donations from legal entities which provide goods or services for any public administration, and prohibit legal entities under the control of the state or of other public authorities from making donations to political parties. The *Guidelines on financing* enclose a prohibition of the donations from foreign states or enterprises, but do not prevent donations from nationals living abroad (Article 6).

54. In practice, two basic approaches have been retained in CoE member states: (i) restrictions on the amount of donations (for example in *France*, *Ireland*, *Portugal* and *Spain*), and (ii) conditions on the qualification of donors or donations. For example, in *Germany*, the Law on Political Parties draws a list of donors who should not be permitted. Other types of restrictions include the prohibition of donations from abroad (*France, Ireland, Ukraine*), by other states or other public foreign organs (*Spain, Ukraine*) or anonymous donations within certain levels. *Armenia*, *Bulgaria* and *Ukraine* prohibit all financial support from foreign states or foreign organisations and also from anonymous sources. In the *Russian Federation*, the list of restricted sources of donations is even longer and includes international organisations, stateless persons and Russian legal entities in which more than 30% of the capital is foreign owned (doc. CDL-INF(2001)8). The prohibition of anonymous individual donations was introduced in *Portugal* with the entry into force of a new Law on 01.01.2005.[48] There are a number of member states which prohibit corporate or business related donations, for example *Belgium*, *France, Poland or Portugal*. Trade unions are allowed to donate money to political parties, for instance, in the *United Kingdom* or *Denmark*. Restrictions related to foreign donors generally apply only to foreign states or institutions and not to private individuals (for example in *Portugal*).[49] However, in *Slovakia*, only citizens are allowed to donate money to political parties.[50] Finally, in several member states, the legislation does not apparently impose any limitations on the amount or origin of financing: *Austria, Czech Republic, Denmark, the Netherlands* and *Switzerland* (PACE, doc. 9077, 04.05.2001).

55. As regards NGOs which support candidates or political parties in elections, the Fundamental Principles require that their support should be subject to the general legislation on the funding of political parties (§ 12).

56. From a purely fiscal point of view, donations to political parties, with the exception of those made to entities connected to political parties, can benefit from limited tax deductibility provided for in the fiscal legislations (*Rules*, Article 4, 6). Questions related to tax privileges have been raised in *Germany* in connection with the equality of chances of political parties. In several member states, donations do not imply any tax deductibility advantages for the donors (for example in *Belgium* and *Czech Republic;* see *inter alia* PACE, doc. 9077, 04.05.2001).

c. Financing of electoral campaigns

57. The rules regarding general financing of political parties stated above apply *mutatis mutandis* to the funding of electoral campaigns and to political activities of elected representatives (*Rules*, Article 8). Some member states provide for limits on expenditure with a view to preventing excessive funding needs of political parties: for example *Belgium, France,* the *Russian Federation, Slovakia*.[51] Legislation in other states does not impose any such limits, for example in *Denmark, Germany or Norway*.[52] States should require that records be kept of all direct or indirect expenditure for each political party. In addition, the expenditure ceiling has to be appropriate to the situation in the country and fixed in proportion to the number of voters concerned (*Rules*, Articles 9, 10).

[48] Transparency international (TI), L. de Sousa, Country Reports on Political Corruption and Party Financing-Portugal, August 2004.
[49] See *Financing political parties and election campaigns*, *op. cit.*, pp. 24-28.
[50] Transparency international (TI), E. Sicakova, Country Reports on Political Corruption and Party Financing- Slovakia, August 2004, (hereinafter referred to as "TI, Slovakia").
[51] See PACE, doc. 9077, 04.05.2001 and TI, Slovakia.
[52] TI, Western Europe.

58. As regards supervision, the electoral campaign accounts are to be submitted to the organ in charge of supervision in election procedures (in general the Electoral Commission) within a reasonable time limit after the elections (*Guidelines on financing*, Article 11). The campaign accounts should also be made public (*Guidelines on financing*, Article 12). Sanctions based on an irregularity should be proportional to the severity of the offence. The *Guidelines on financing* (Articles 13-15) envisage the following sanctions: (i) the loss or the total or partial reimbursement of the public contribution; (ii) the payment of a fine or another financial sanction, or (iii) the annulment of the election. Imposition of the sanctions has to be enforced by the election judge (be it constitutional or other; see also below, under d).

d. Transparency, supervision and sanctioning

59. The obligation of transparency comprises the obligation to keep proper books and accounts of political parties and entities connected to them, specifying all the donations received, including their nature and value, as well as the identity of donors for donations over a certain value.

60. There is an obligation to disclose the identity of donors in countries such as *France, Germany, Greece, Italy*, *Slovakia or the United Kingdom*.[53] Transparency implies an obligation to regularly present the accounts - at least annually - to an independent supervisory authority and make public the whole or only a summary of them (*Rules*, Articles 11-13; *Guidelines on financing*, Articles 5 and 7). For example, in *Slovakia*, the annual financial report has to be published in the media before 30 June of each year.[54] Enforcement of the legislation on free access to information is also relevant in the transparency process.

61. According to the *Rules* (Article 14), supervision or monitoring should be independent and should include supervision over the accounts of political parties and the expenses involved in election campaigns as well as their presentation and publication. As concerns public financing, the accounts of political parties should be submitted to control by specific public organs (see also *Guidelines on financing*, Article 5).

62. In practice, supervision can be done through different means including: (i) by the competent supervisory body, which differs among member states; (ii) by Constitutional Courts, or (iii) by state financial bodies. In *Austria*, distribution of financial contributions must be recorded and is checked yearly by two accredited auditors,[55] whereas in *Bulgaria*, the body which supervises the financial activities of the political parties is the National Audit Office. In *Portugal*, a single monitoring entity operating under the authority of the Constitutional Court has been created as of 01.01.2005.[56] In *Ukraine* public control is ensured by the Main Supervisory-Revision Office of Ukraine. This Office can apply to the courts concerning the suspension of public financing. In this case, notification to the Ministry of Justice, which is the ministry in charge of the distribution of state financing, is also required.

63. Some member states do not provide for mechanisms of control, for example*, Iceland*, *Luxembourg or Switzerland*.[57] In other CoE states, additional general supervisory bodies have been created, such as Commissions for the prevention of corruption *(*for example *Latvia*, *"the former Yugoslav Republic of Macedonia"* or *Serbia and Montenegro).*

64. The sanctions to be imposed by states in case of violation of the transparency rules should be effective, proportionate and dissuasive (*Rules*, Article 14, 16). One example of sanction is the loss of all or part of public financing for the following year. In the event of evasion of restrictions on donations, or violation of reporting requirements or campaign financing, different sanctions are provided for under national legislations, such as the forfeiture of donations, fines or prison sentences, withdrawal of a certain status or deprivation of public funding (PACE, doc. 9077, 04.05.2001). For example, in *Germany*, criminal sanctions include fines and prison sentences of up to three years.[58]

[53] TI, Western Europe.
[54] TI, Slovakia.
[55] Information provided by the Austrian Human Rights Institute, 10.03.2005.
[56] Transparency International (TI), L. de Sousa, Country Reports on Political Corruption and Party Financing-Portugal, August 2004.
[57] See *inter alia* TI, Western Europe; see also PACE, doc. 9077, 04.05.2001; doc. Greco Eval I Rep (2001) 10E Final; doc. Greco Eval I Rep (2001)2E final.
[58] Transparency international (TI), D. Schröder, C. Schumbach, M. Koss, Country Reports on Political Corruption and Party Financing-Germany, August 2004.

B. Trade unions

65. Trade unions play a crucial role in a democratic society to the extent that they enable the collective expression of the workers' interests through peaceful dialogue with employers and governments.

66. Article 5 of the European Social Charter (ESC) defines a trade union as '*an organisation whose primary role is to protect the economic and social interests of its members – workers*'.[59] However, the European Committee of Social Rights (ECSR) has never adopted a formal definition of a trade union.

1. Establishment and membership

a. Freedom to form trade unions

67. The establishment of trade unions and employers' organisations must be free (ESC, Article 5) and therefore subject to no prior authorisation.[60] This principle is respected in most member states.[61] In some member states, however, the development of bodies of collective expression of workers' rights and interests faces significant difficulties. In *Azerbaijan*, for instance, the development of trade unions, notably within the foreign and multinational companies, is reportedly discouraged by the employers.[62]

68. The ECSR has held that the compulsory registration of trade unions is in principle not contrary with Article 5 ESC, as long as the persons concerned have adequate administrative and legal protection against abuse of power to register a trade union.[63] A legal remedy against a decision refusing registration and acquisition of legal personality should in particular be available.[64]

69. A minimum membership requirement for the establishment of a trade union is in conformity with the provisions of the Charter if fixed at a reasonable number, such as 5 in *Estonia,*[65] 10 in *Poland*[66] or 15 in *Romania*.[67] However, the ECSR has held that a minimum membership requirement amounting to 30 persons is excessive and thus not in conformity with the Charter (for example in *Lithuania*).[68]

b. Freedom to join or not to join trade unions

70. According to the ECSR, Article 5 ESC provides for the positive right to join, but also for the negative right not to join a trade union. Thus, in the case-law of the ECSR it has been stated that this principle makes clear that a compulsory unionism is not in conformity with the Charter.[69] In the case of *Sigurjonsson v. Iceland,* the Court, referring *inter alia* to the ECSR's conclusions, stated that a legislative obligation to be member of a specific private-law association (in this specific case the trade union of taxi-drivers) was neither in compliance with Article 11 ECHR nor with Article 5 ESC. Subsequently, in 1995, *Iceland* abrogated the relevant provision and the Constitution was amended in order to introduce the right not to organise.[70] In the *United Kingdom,* following the *Young, James and others* judgment of 1981, concerning the applicants' dismissal for their refusal to join a trade union, the provisions at the origin of the violation were amended in 1982.[71] A further legislative reform in the *United Kingdom* in 1990 made unlawful any discrimination in hiring

[59] See also above Part I, I, B.
[60] ECSR Conclusions 2002, *Romania, p.125.*
[61] See, for instance, for *Bulgaria* in ECSR Conclusions 2004, p. 32; for *Estonia* in ECSR Conclusions 2004, p. 141; for *Serbia and Montenegro* in CCPR/C/SEMO/2003/1, 24.07.2003, p.109; for *Ukraine* see Addendum to the Fifth Periodic Reports of States Parties due in 1999, UN Human Rights Committee under the CCPR, doc. CCPR/C/UKR/99/5, 16.11.2000, p. 78.
[62] Human Rights in Azerbaijan (Eng), Digest No. 133, Press release of the Oil Workers' Rights Protection Committee, 28.12.2004.
[63] ECSR Conclusions II, *Cyprus*, p. 184.
[64] ECSR Conclusions 2004, *Slovenia*, p. 510.
[65] ECSR Conclusions 2004, *Estonia*, p. 141.
[66] Addendum to ECSR Conclusions XV-1, *Poland*, p.145.
[67] ECSR Conclusions 2002, *Romania*, p. 125.
[68] ECSR Conclusions 2004, *Lithuania*, p. 340-342. In this respect, the Lithuanian authorities note that the law requires at least 30 founding members to establish a trade union within a company, institution or organisation with 150 or more employees; in companies, institutions or organisations with less than 150 employees, 1/5 of the total number of employees suffices to establish a trade union, provided that are at least three members.
[69] See also Part I, I, B, 1, b.
[70] *Sigurdur A. Sigurjonsson v. Iceland*, No. 16130/90, ECHR A-264; CM Resolution ResDH(1995)36.
[71] *Young, James and Webster v. United-Kingdom*, No. 7601/76 and 7806/77, ECHR A-44; CM Resolution ResDH(1983)3.

based on membership or non-membership of a trade union.[72] Similarly, these grounds cannot justify dismissal or discrimination in work treatment in *Finland*.[73] In *Ukraine*, no one may be forced to join or not to join a trade union. As concerns the *'closed shop'* agreements (i.e. agreements or arrangements between one or more trade unions and one or more employers or employers' associations providing that membership of a specified union is a condition of employment) existing in *Sweden, Denmark* and *Ireland*, the ECSR has considered that these agreements are not in conformity with the provisions of the Charter.[74] When the Governmental Committee presented a recommendation referring to the *Danish* system of '*closed shop*' agreements to the Committee of Ministers' deputies, however, only 11 out of 28 member states supported the recommendation. Hence, the ECSR's interpretation of Article 5 was not supported by the Committee of Ministers' deputies in this respect, and the Danish authorities therefore consider that to this day there is no common political understanding concerning *'closed shop'* agreements. In *Norway*, where the Supreme Court decided that the '*closed shops'* agreements were unlawful, the situation was found to be in conformity with the ESC.[75]

2. Organisational autonomy

71. Trade unions must be free to organise and administer their own affairs without undue interference from governments.[76] In *Ukraine*, for instance, the authorities note that trade unions are independent from the state and local government authorities, employers, other public organisations and political parties: they are not accountable to them and are not under their control. Interference by any of the above-mentioned bodies with the statutory activity of trade unions, their organisations or associations is prohibited by law (Article 12 of the Law of Ukraine on Trade Unions). Restrictions on the use of its property by a trade union or restrictions applied as disciplinary sanctions towards its members was considered by the ECSR as an excessive intervention and thus not in conformity with Article 5 of the Charter.[77]

72. The issue of interference with the independence of the trade unions was dealt with by the ECtHR in its judgment *Wilson and others v. the United Kingdom.* The Court found that the State had failed in its positive obligation to secure the enjoyment of rights under Article 11 by permitting employers "*to use financial incentives to induce employees to surrender important union rights*".[78] In order to prevent similar violations, in 2003, a new bill was introduced in Parliament. However, doubts remain as to the extent to which the relevant aspects of the bill will solve the problems identified in the ECtHR's judgment. Clarifications are accordingly expected as regards the execution of the Court's judgment on specific issues as well as information on the progress of the bill in Parliament and any follow-up given to outstanding issues. This case will be re-examined by the Ministers' Deputies in June 2005.[79]

73. In *Turkey*, the Public Prosecutor of Ankara initiated judicial proceedings against the Education Workers' Union, '*Egitim Sen'*, one of the largest trade unions, for violation of the Turkish Constitution on the ground that one of its statutory aims was to support the right to education in the mother tongue. According to the Turkish Constitution, education should be provided in the official language. Despite two rulings of the Ankara Second Labour Court in favour of the teachers' union, the Supreme Court of Turkey, seized of the case for a second time, pronounced the closure of the union on 25.05.2005.[80] Judicial proceedings concerning the Education Workers' Union ('*Egitim-Sen'*) are currently pending. The Union still operates since there exists no final judicial decision to cease its operation. Furthermore, on 29 July 2005, the Union declared that, in accordance with the decision of its general assembly, taken on 3 July 2005 during its 2nd extraordinary meeting, the provision that was subjected to the judicial proceedings in question was removed from the Union's statute. As regards the existence of independent and autonomous trade union organisations for journalists, it has been reported that it could be put at risk by the government's intention to encourage the creation of a single trade union which would cover the entire sector.[81]

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[72] ECSR Conclusions X-1, *United Kingdom*, p. 79 and XII-1, *United Kingdom,* p. 114.
[73] See the Fifth Periodic Report, *Finland,* UN Human Rights Committee under the CCPR, doc. CCPR/C/FIN/200 5, 17.06.2003, p. 64. [74] Complaint No. 12/2002, *Confederation of Swedish Enterprise v. Sweden*, decision on the merits, 15.05.2003, § 30 ; ECSR Conclusions 2004, vol. 2, *Sweden*, p.564; ECSR Conclusions 2004, vol. 1, *Ireland*, p.263; ECSR Conclusions XVII-1, *Denmark*, p. 127.
[75] ECSR Conclusions 2004, vol. 2, *Norway*, p. 402.
[76] See also Part I, I, B, 2.
[77] ECSR Conclusions XVII-1, *United Kingdom*, p. 510.
[78] Application Nos. 30668/96, 30671/96 and 30678/96, ECHR 2002-V.
[79] CM/Del/Dec(2005)922 final, 26.04.05.
[80] Education International, Press Release of 25.05.2005.
[81] International Federation of Journalists (IFJ), Press Release of 12.01.2005.

74. In some countries, there were incidents of hindrance to the trade unions activities, notably within foreign and multinational companies (see, for instance, for *Czech Republic* doc. CommDH(2003)10, and for *Poland* doc. CommDH(2003)4). The CoE Commissioner for Human Rights urged the governments of both countries to effectively monitor respect for trade unions rights.

75. The trade unions' delegates must be entitled to have access to the working places and the trade union meetings must be allowed to take place there. This rule is valid for both the public and the private sectors. In *Greece* the legislation provides for such a possibility,[82] whereas in *France* these rights are only partially guaranteed for the private sector.[83] However, these rights are subject to regulations, such as the obligation to hold meetings outside the working hours, and limitations can be imposed taking into account the interests of the enterprise, such as security measures.[84]

3. Restrictions

a. Civil servants and members of the judiciary

76. Restrictions on the right to join trade unions imposed on civil servants are permissible to the extent that they are in accordance with Article G of the Revised Charter (Article 31 of the 1961 Charter), i.e. are "*prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals*".

77. Thus, the denial of the right to associate to Senior officials in the Supreme Chamber of Control (court of auditors), justified by the confidential and sensitive nature of the information it acquires in the performance of its duties and by the need for complete political impartiality, is in conformity with Article 5.[85] On the contrary, *Polish* legislation which prevents civil servants from performing trade union activities constitutes a restriction to their right to organise. An amendment to this legislation is expected.[86]

78. According to Article 1 of Organisation Act No. 11/1985 of *Spain*, the exercise of the right to trade union freedom does not apply, *inter alia*, to judges, magistrates and prosecutors, who cannot belong to trade unions as long as they are in active service.[87]

b. Police

79. Article 5 ESC allows for restrictions, but not for the complete denial of the right of police staff to form or join trade unions. "*It follows, firstly, that police personnel must be able to form or join genuine organisations for the protection of their material and moral interests and secondly, that such organisations must be able to benefit from most trade union prerogatives. […] The right to constitute trade unions can be effectively implemented only if the creation itself, the accession to an existing association, its hypothetical affiliation to other organisations and its internal organisation and internal operation are protected by appropriate guarantees. […] Basic trade union prerogatives means the right to express demands with regard to working conditions and pay, the right of access to the working place and the right of assembly and speech*".[88]

80. For example, there is no restriction on the right of police staff to form trade unions in *Greece*.[89] In *Spain,* the establishment of national police trade unions is authorised, provided that their membership is limited to the national police staff exclusively. They may federate with other trade unions constituted solely by members of the national police or similar international trade unions. This restriction is in conformity with Article 5 ESC.[90] In *Moldova*, according to the Law on the police of 18.12.2002, police staff is allowed to associate within trade unions.

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[82] See Initial Report by *Greece* to the UN Human Rights Committee under the CCPR, doc. CCPR/C/GRC/2004/1, § 824, 05.04.2004.
[83] See Section 4 of the Decree of 28.05.1982.
[84] ECSR Conclusions XV-1, *Belgium*, p. 74-79 and ECSR Conclusions XVI-1, *Belgium*, p. 67-68.
[85] ECSR Conclusions XV-1, *Poland*, p. 535.
[86] ESCR, Conclusions XVII-1, *Poland*, p. 376.
[87] See 4th Periodic Report by *Spain* to the UN Economic, Social and Cultural Rights Committee, doc. E/C.12/4/Add.11, 14.01.2003.
[88] See Complaints No. 11/2000, *European Council of Police Trade Unions v. Portugal*, Decision on the merits of 21.05.2002, § 26, 28 and 40; ECSR Conclusions 2004, *Romania*, p. 456; see also ECSR Conclusions X-2, *Cyprus*, p. 67.
[89] See Act No. 2265/1994, Article 1, and doc. CCPR/C/GRC/2004/1, § 824, 05.04.2004.
[90] ECSR Conclusions XIII-3, *Spain*, p. 105-106.

c. Members of the armed forces

81. Article 5 ESC allows not only for restrictions on the trade union rights for the members of armed forces, but also for the complete denial of this right.[91]

82. Many CoE member states deny the right to association for members of the military (for instance, *Albania*, *Bosnia and Herzegovina, Croatia, Cyprus, Estonia, France, Greece, Italy, Latvia, Lithuania, Romania, Serbia and Montenegro, Spain, Turkey* and *the United Kingdom*). It would appear that the situation is similar in *Armenia, Azerbaijan, Georgia* and *Moldova*.[92]

83. In *Poland*, the Commissioner for Civil Rights Protection applied to the Constitutional Court with respect to the provisions forbidding members of the professional military service to organise and join trade unions. The Constitutional Court concluded that the provisions in question could not be understood as a basis for depriving the professional military staff of the right to form trade unions. The Commissioner, nevertheless, remains of the opinion that the legislation should make a clear distinction between the terms 'restrictions on the right' and 'prohibition, deprivation of the right'.[93]

84. Other CoE member states, such as *Austria, Belgium, Denmark, Finland, the Netherlands, Norway, Sweden* and *Switzerland,* do not place any restrictions on the freedom of association of members of the armed forces (PACE Doc. 9518 of 15.07.2002). Trade unions of military staff are also authorised in *Germany* and *Portugal*.[94] Only in few CoE member states, however, such as *Belgium, Denmark, Finland, "the former Yugoslav Republic of Macedonia", the Netherlands, Norway* and *Sweden,* the military staff enjoy also the right to collective bargaining.[95]

d. Foreigners

85. As mentioned above (Part I, I, B, 3), only foreigners who are nationals of other States Parties to the ESC, lawfully residing or working regularly within the territory of the Contracting Party concerned, can enjoy the rights guaranteed by the ESC. Article 19 § 4*b* ESC compels States Parties to afford nationals of other States Parties treatment not less favourable than that of their own nationals as regards membership of trade unions and enjoyment of the benefits of collective bargaining. Similarly, according to Article 28 of the European Convention on the Legal Status of Migrant Workers,[96] each Contracting Party shall allow migrants *"the right to organise for the protection of their economic and social interests on the conditions provided by national legislation for its own nationals*". However, this right, as all rights enshrined in this Convention, is guaranteed only to migrants who are nationals of a Contracting Party and have been authorised by another Contracting Party to reside in its territory in order to take up paid employment.

86. Article 3 of the Convention on the Participation of Foreigners in Public Life at Local Level[97] affords a larger protection to the extent it compels Contracting Parties to guarantee to foreign residents, on the same conditions as to their own nationals, the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests, irrespective of whether or not they are nationals of another Contracting Party (see also Part I, II, C, 2).

87. It appears that the right to join trade unions is guaranteed to migrants in all CoE member states. In this respect, PACE in 2000 welcomed the fact that *"trade unions rights now exist in almost all CoE member states, although they were granted to immigrants later than civil rights and at different times in the different countries"*.[98]

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[91] See above Part I, I, A, 2, b and B, 3, including references to PACE Recommendation 1572 (2002) *on the right to association of the members of the professional staff of the armed forces and* CM Reply, doc. CM/AS(2003)1572 final, as well as to work being currently carried out by PACE and by the CoE Human Rights Commissioner.
[92] Information provided by the European Organisation of Military Associations (EUROMIL), 10.03.2005; see also PACE Doc. 9518 of 15.07.2002 *on the right to association for members of the professional staff of the armed forces*, § 19, 20 and 21.
[93] Information provided by the Commissioner for Civil Rights Protection of *Poland*, 07.02.2005.
[94] For *Germany* see information provided by the EUROMIL, 10.03.2005; for *Portugal*, see State Party Report by *Portugal* to the UN Human Rights Committee under the CCPR, doc. CCPR/C/PRT/2002/3, p. 114, 06.06.2002.
[95] Information provided by the EUROMIL, 10.03.2005.
[96] Signed by 14 member states and ratified by 8 member states.
[97] Signed by 11 member states and ratified by 7 member states.
[98] See Doc. 8916 of 22.12.2000 *on the participation of migrants and foreign residents in political life in the CoE member states;* see also PACE Recommendation 1187(1992) *on relations between migrants and trade unions.*

88. In *Italy* and in *Slovenia*, foreigners benefit from the same trade union rights as nationals.[99] Until recently, in *Lithuania*, only citizens and permanent residents enjoyed the right to join trade unions.[100] The amendment introduced on 11.03.2003 to the Law on Trade Unions now guarantees the right of the aliens lawfully working in the country to join trade unions and participate in their activities. In *Ukraine*, foreigners and stateless persons may not create trade unions, but may join trade unions if it is so provided in the unions' statutes.

89. In a number of member states, some of trade unionists' rights are still secured to nationals only. For instance, in *France* foreign nationals are ineligible for election to employment tribunals even if they are trade-union representatives. This restriction was found in conformity with the Article 5 of the Charter since, according to ECSR, "*justice, which is a sovereign function of the state and a prerogative of national sovereignty, can only be exercised by nationals*".[101] In *Austria,* non-EEA[102] nationals do not possess active and passive voting rights in the most influential trade unions bodies (*Arbeiterkammer*). In this respect, the European Parliament (EP) urged *Austria*, as well as *Luxembourg,* to amend their legislation prohibiting non-nationals from standing for election to work councils as such legislation was contrary to trade union freedoms.[103]

90. In *Romania*, the ECSR found restrictions on the non-citizens' participation to trade unions' governing bodies contrary to Article 5 ESC. Namely, the ECSR considered that the nationality requirement for the representatives of the social partners to the Economic and Social Council constituted a hindrance to the right for trade unions to choose freely their representatives.[104] Following the ESCR conclusions, new trade union legislation abolished the nationality requirement. Also, the principle of equal treatment of citizens and aliens in trade unions matters was included in the Law on Trade Unions.[105] However, despite these legislative reforms, the trade unions' and employers' representatives have agreed to retain the nationality criterion for membership of the Economic and Social Council. Thus, since the violations had not been remedied, the ECSR found that the situation in *Romania* in this regard was still not in conformity with Article 5 ESC.[106]

4. The specific question of "representativity"

91. In order to render efficient their participation in various procedures of consultation and collective bargaining, States Parties to the ESC may require from trade unions to meet certain criteria of representativity. Such criteria - in particular for the purpose of collective bargaining - must be prescribed by law, objective, reasonable and subject to judicial review.[107]

92. In *France*, the legislation establishes a "*presumption of representativity*" for trade unions which either have at least one seat in each of the higher public service councils or received at least 10% of all the votes cast in the elections for staff representatives to the joint administrative councils and at least 2% of the votes cast in the same elections in each of the individual public services. At the same time, if trade unions do not satisfy these criteria, their representativity might be established in accordance with the following criteria: numbers of members, independence, membership fees, level and length of experience, criteria which have been considered by the ECSR as objective and reasonable.[108]

93. In *Slovenia*, the criteria for determining trade unions' representativity are as follows: democratic character of the organisation, at least six months' existence, independence from state bodies and employers, own funding and sufficient membership to satisfy the quantitative thresholds laid down in the legislation. At national level, organisations must have a membership equal to at least 10 % of the workforce in the sectors concerned. In *Italy*, trade unions must represent at least 5 % of the workforce in the department or area concerned. These criteria have been considered to be in conformity with Article 5 ESC.[109]

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[99] ECSR Conclusions 2002, *Italy*, p. 80; ECSR Conclusions 2002, *Slovenia*, p. 181-184.
[100] See State Party Report by *Lithuania* to the UN Human Rights Committee under the CCPR, doc.CCPR/C/LTU/2003/2, p. 39.
[101] Conclusions XV-1, *France*, p. 240-250; see also PACE Doc. 8916 of 22.12.2000.
[102] European Economic Area.
[103] EP's Report on the situation as regards fundamental rights in the European Union (2002) A5-0281/2003 REV1, 21.08.2003; see also *The Legal Status of Migrants Admitted for Employment, Ryszard Cholewinski*, CoE Publishing, 07.2004, p. 85.
[104] Conclusions 2002, *Romania*, p. 125-131.
[105] Commission of the European Communities, 2004 Regular Report on Romania's progress towards accession, COM(2004) 657 final, 06.10.2004; 2003 Regular Report on Romania's progress towards accession, 05.11.2003.
[106] ECSR Conclusions 2004, *Romania*, p. 454.
[107] ECSR, *Syndicat occitan de l'éducation v. France*, decision on the merits of 07.09.2004, complaint No. 23/2003, § 26; see also Part I, I, B, 4.
[108] ECSR, *idem* §§ 28 and 29.
[109] ECSR Conclusions 2002, *Italy*, p. 80, and *Slovenia*, pp. 181-184, and ECSR Conclusions 2004, *Slovenia*, p. 510.

II. STRENGTHENING OF CIVIL SOCIETY

A. NGOs and foundations

94. There is no general definition of an NGO in international law. The *Fundamental Principles on the Status of NGOs in Europe* (hereinafter referred to as "*Fundamental Principles*") define NGOs as essentially voluntary bodies independent of the public authorities and having specific, non-profit-making, aims. The many different forms of NGOs are reflected in national law by a variety of terms such as "*associations", "charities", "foundations", "funds", and "non-profit corporations, societies and trusts*". This list is not exhaustive and does not include trade unions or religious groups, since these often come under specific regulations. Professional bodies to which members of a profession are required to belong for regulatory purposes are not covered by the *Fundamental Principles*' definition of NGOs either. Political parties for their part are expressly excluded.

95. The distinction most frequently drawn in the case of NGOs is that between *associations* and *foundations*. As the explanatory report accompanying the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS No. 124) explains, an association consists in *"a number of persons uniting together for some specific purpose"*, while a foundation is *"an identified property devoted to a given purpose"*.

96. The content of the term "*foundation*" varies considerably in the laws of member states. Some countries require a public-interest objective (*Belgium, Czech Republic, Hungary, Spain, United Kingdom*), while others provide a simplified and very general definition as *"assets established as an institution"* (*Germany, Greece, Italy, Netherlands, Poland, Switzerland*). Some countries even accept the principle of a profit-making foundation (*Belgium, Italy, Luxembourg, Switzerland*) and make foundations subject to commercial law. In *Sweden*, there are different taxation regulations regarding foundations that serve a public cause and those which do not. In most member states, the rules for establishing foundations are usually similar to those for registered associations.[110]

1. Establishment and membership

97. In addition to ECtHR case-law in this field,[111] the main attempt to frame procedures for establishing, registering, granting legal personality to and dissolving associations is to be found in the *Fundamental Principles*.

98. The establishment of an NGO arises out of an act of free will. Any person, whether legal or natural, national or foreign, or any group of such persons, may establish an NGO (Principle No. 15).

99. The *Fundamental Principles* specify that a minimum number of two founding members should suffice to establish an informal association, whereas a greater minimum number may be required before legal personality can be granted (Principle No. 16). However, this figure should not be so large as to discourage actual establishment. In *France*, legislation foresees a minimum number of two members.[112] In most member states, law requires a minimum number of three founders (*Azerbaijan, Belgium, Bulgaria, Croatia, Czech Republic, Lithuania, Poland, Romania, Slovenia*), while in other countries this figure rises to 10 (*Hungary, Slovenia, Latvia*) or even higher (*Cyprus, Greece*). In some member states, there is no requirement at all (*Norway* and *Sweden).*[113]

100. Membership of an NGO must be voluntary and no person should therefore be required to join any NGO other than in the case of bodies established by law to regulate a profession in states which treat them as NGOs (Principle No. 20). Principle No. 23 provides that persons belonging to an NGO should not be subject to any sanction because of their membership. However, membership of an NGO may be incompatible with a person's position or employment.

101. National law should not unjustifiably restrict the ability of any person, natural or legal, national or foreign, to join NGOs (Principle No. 21). In a number of countries, legal residence is a general condition for non-citizens wishing to join associations (*Lithuania, Portugal, Slovenia, "the former Yugoslav Republic of*

[110] Le guide.
[111] See above, Part I, I, A.
[112] Law on Associations, 01.07.1901.
[113] ODIHR, Legislation Online, Non-governmental organisations and doc. ONG (2005) 1.

Macedonia"). The citizenship requirement imposed by the law on public organisations in *Lithuania* in 1995 was abolished in 2004. In *Slovenia*, a provision in the statutes of an NGO is needed to allow non-citizens to become members of the organisation (ONG (2005) 1). In *"the former Yugoslav Republic of Macedonia"* the legislation on associations makes express reference to citizenship, specifying that foreign nationals may join an association on condition that the latter's statutes make provision for this and the foreign national is a legal resident.

102. The *Fundamental Principles* declare that the existence of informal NGOs not wishing to become legal persons must be allowed. However, NGOs may seek to obtain legal personality in order to increase their legal capacity. In most national legislations, NGOs need it in order to have access to some rights, such as the right to hold their own assets, take part in court proceedings, receive donations, purchase goods, hire staff and sign contracts. In many countries, there are no legal barriers to forming and operating an NGO without legal personality (*Belgium, Bulgaria, Croatia, France, Germany, Hungary, Lithuania, Norway, Portugal, Romania, Serbia,*[114] *Slovenia, Sweden* and *Switzerland*).[115]

103. A number of countries favour registration as a procedure for acquiring legal personality rather than a precondition for the existence of an NGO. However, in certain countries registration is in fact necessary given that it is impossible for an NGO to carry out basic activities, such as opening a bank account or renting premises, without it (for example in *Azerbaijan).*[116]

104. In some countries, NGOs automatically have legal personality as soon as they are formed (*Cyprus, Denmark, Finland, Netherlands, Spain, Switzerland, United Kingdom*). They must, however, register with the authorities to receive public grants or carry on certain types of activity. In *Sweden*, according to a longstanding practice, an NGO has automatically legal personality as soon as it has statutes enacted by its members and a board elected according to the statutes. In *Georgia,* there are special arrangements that nevertheless allow associations which do not register and thus do not acquire legal personality to have limited legal capacity: they may collect membership fees and be represented in legal proceedings.[117] In *Ukraine*, "*notification*" is required from an informal NGO, and if it is not provided, the persons involved risk a fine (see doc. ONG (2005) 1). In some countries, the procedure for acquiring legal personality has been simplified and is confined to nothing more than publication in the Official Gazette (*Austria, Belgium, France*).

105. In a number of countries, acquisition of legal personality automatically entails a registration procedure (*Azerbaijan, Bulgaria, Croatia, Russian Federation, Turkey)*.[118] The *Fundamental Principles* state that registration rules and procedures must have an objective basis, not result in arbitrary treatment of NGOs or the exercise of discretion, and be as simple and undemanding as possible. Payment of registration fees may be required, but their amount should not be dissuasive. There must be a prescribed time-limit for taking a decision and any refusal must include written reasons (Principles Nos. 28, 30 and 35). The registration procedure must not allow a state to discriminate between NGOs in so far as their objectives and the means employed are lawful. In addition, NGOs should not be compelled to renew their legal personality on a periodic basis. A re-registration procedure to obtain legal personality is acceptable only if there are substantial reasons for it and must provide for sufficient time.

106. The unwieldiness of the procedure varies from one country to another. The procedure specified for associations to obtain legal personality in *Central European* and *Baltic countries* is on the whole more onerous than in the rest of Europe. In *France*, for example, unregistered associations play a very minor role, more particularly because the formalities for gaining legal personality are very simple. In *Italy,* the procedure is more dissuasive, and most associations therefore remain unregistered and without their own legal personality. They are recognised by ministerial decree.[119]

107. In *Azerbaijan*, despite the adoption in 2004 of the Legal Entities Registration Act, which specifies a time-limit for taking a decision, NGOs continue to encounter difficulties in registering. In connection with the policy on protection of national minorities, the CM, in its Resolution CMN(2004)8, asked the Azerbaijani authorities to address certain general human rights issues as a matter of priority and made express reference

[114] As part of the *State Union of Serbia and Montenegro.*
[115] For France, see Law on Associations, 01.07.1901, and for other states, see doc. ONG (2005) 1.
[116] See ODIHR, Legislation Online, Non-governmental organisations.
[117] ODIHR, Legislation Online, Non-governmental organisations.
[118] See USAID, NGO Sustainability Index 2003; Le guide; ODIHR, Legislation Online, Non-governmental organisations; PACE Doc. 9396.
[119] Le guide.

to the NGO registration process. In *Bosnia and Herzegovina*, rejected registrations were often unaccompanied by any notification in writing explaining the grounds for refusal.[120]

108. In 2002, the PACE was particularly concerned about the registration procedure and compulsory re-registration to which NGOs in the *Russian Federation* were subject under the 1995 Public Associations Act. A large number of public associations (nearly half at federal level) failed to re-register in time. NGOs claim to have encountered problems during re-registration, mostly due to the attitude of the Ministry of Justice, which was responsible for registration both at federal and local levels. A number of other NGOs were forced to change their name or statute to obtain re-registration. NGOs allege that 8,500 local associations and about 57% of federal associations were denied the right to register.[121]

109. According to the *Fundamental Principles*, the body responsible for granting legal personality need not be a court, but it should preferably be independent of control by the executive branch of government (Principle No. 33). National law often requires registration with a court. Sometimes this entails actual court proceedings comprising an investigation and an *inter partes* examination involving the court and the applicants (*Bulgaria, Estonia, Hungary, Poland, Romania*).[122]

110. As regards *international non-governmental organisations (INGOs)* in particular, the *Fundamental Principles* state that, without prejudice to the applicability of Convention No. 124 for those states that have ratified it, the host country may require an INGO to obtain approval to operate in that country. However, the INGO in question should not have to establish a new and separate entity (Principle No. 37).

111. Some countries require an INGO to be registered if its legal personality is to be recognised (*Hungary, Lithuania, Romania, Slovenia, Ukraine*). In *Bulgaria*, *Germany*, *Sweden* and *Switzerland* recognition depends on the personality granted in the organisation's country of origin. *Croatia*, *Norway* and *Serbia*[123] lay down no special conditions. The law in *Belgium* requires INGOs to declare their existence and submit their activities to public-policy restrictions. In many countries no distinction is made between the basis on which foreign and national NGOs may pursue their objectives (*Bulgaria, Croatia, Hungary, Lithuania, Norway, Romania, Serbia,*[124] *Slovenia, Switzerland* and *Ukraine;* see ONG (2005) 1).

112. Many countries have no restrictions concerning individuals wishing to join foreign NGOs (*Belgium, Bulgaria, Croatia, Hungary, Lithuania, Norway, Romania, Slovenia, Sweden, Switzerland, Ukraine*), although *Serbia,*[125] *Slovenia* and *Ukraine* impose restrictions on membership of legal persons. In *Ukraine,* public organisations which set up or become members of INGOs or extend their operations to the territory of a foreign state are required, within a period of one month, to present the necessary registration documents to the Ministry of Justice in order to assert their right to international status, unless Ukrainian law provides otherwise (ONG (2005) 1). In *Turkey*, an INGO must obtain authorisation from the Ministry of the Interior after the Ministry of Foreign Affairs has been consulted, in order to be able to operate on its territory. Nevertheless, the new legislation on associations has removed the former restriction whereby prior authorisation was required in order to enter into co-operation with international organisations.[126]

2. Organisational autonomy

113. According to the first of the *Fundamental Principles*, *"NGOs are essentially voluntary self-governing bodies and are not therefore subject to direction by public authorities."* In addition, NGOs are sovereign in determining the arrangements for pursuing their objectives (Principle No. 45).

114. Every NGO with legal personality must have statutes setting out its objectives and the conditions under which it operates. A decision to amend the statutes lies with the NGO's highest governing body, consisting of its entire membership. The *Fundamental Principles* (No. 42) state that a change in the statutes of an NGO with legal personality should require approval by a public authority only where its name or its objectives are affected. A number of states verify the compatibility of statute changes with registration

[120] HRP, 2004 report (*Bosnia and Herzegovina*).
[121] See PACE Doc. 9396 and Doc. 8799; see also ACFC/INF/OP/I(2003)005.
[122] Le guide.
[123] As part of the *State Union of Serbia and Montenegro.*
[124] As part of the *State Union of Serbia and Montenegro.*
[125] As part of the *State Union of Serbia and Montenegro.*
[126] PACE, Doc. 10111, 17.3.2004; CommDH (2003)15.

requirements (*inter alia Croatia, Germany, Hungary, Lithuania, Luxembourg*). In *Norway* and *Sweden* a change in the statutes of an NGO with legal personality requires neither approval nor registration. *Bulgaria* and *Serbia*[127] only make provision for the formality of notifying changes in the statutes (see ONG (2005) 1, § 98).

3. Restrictions, refusal of registration and grounds for dissolution

a. Refusal of registration

115. To limit the scope for exercise of discretion in granting legal personality, the *Fundamental Principles* list the grounds on which an NGO's application may be refused. Thus legal personality should only be refused where there has been a failure to submit all the clearly prescribed documents required, if 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 country concerned, or if there is an objective in the statutes which is clearly incompatible with the law (Principle No. 31). This list is not exhaustive, however, and member states' law may provide for additional grounds for refusal based on clear and objective reasons. Any evaluation of the acceptability of an NGO's objectives must be substantiated and respectful of the concept of political pluralism without being driven by prejudice.

116. In a number of countries, national law specifies the grounds on which registration may be refused (for instance in *Belgium, Germany, Hungary, Lithuania, Switzerland, "the former Yugoslav Republic of Macedonia"*). In addition to the failure to comply with formalities, registration can be refused in many CoE member states if the objectives pursued are anti-constitutional or anti-democratic. This covers mainly objectives advocating violence, representing specific threats to democracy or attempting to interfere with the rights and freedom of others, with public order, health or morals, with the rule of law, etc. (for example in *Croatia, Germany, Norway, Serbia*[128] and *Ukraine*). Some countries prohibit objectives entailing incitement to racial or religious hatred (*Serbia,*[129] *Ukraine*) or promoting neo-fascist propaganda (*Ukraine*). Certain types of associations are very often expressly banned: paramilitary organisations and organisations pursuing unlawful objectives, for example (Ukraine). Activities are deemed to be unlawful if they represent a threat to national security, are likely to promote war, or threaten a country's independence, unity or territorial integrity through violence (*Croatia, Romania, Ukraine;* see ONG (2005) 1). In *Moldova*, the legislation, in compliance with CoE standards, prohibits those organisations which pursue as objective or choose as method of action the change of the constitutional regime through violence, the breach of territorial integrity of the Republic or the propaganda of war, violence and cruelty, the incitement to social, racial or religious hatred or other illegal acts. The legislation also prohibits the associations which infringe the rights and legitimate interests of citizens, public health and morals.[130] In *Albania* and *Bulgaria*, the Constitution prohibits the formation of organisations that are totalitarian, incite racial, ethnic or religious hatred or use violence to take power. In *Lithuania*, the government continues to prohibit organisations associated with the former Soviet regime. In *Latvia* and *Romania*, Nazi and Communist organisations cannot register or acquire legal personality.[131]

117. Although it seems perfectly legitimate to prohibit these objectives, it is the way in which each prohibition is construed and enforced that could lead to violations of Article 11 ECHR (ONG (2005) 1). The *Fundamental Principles* stipulate that evaluation of the acceptability of the objectives of an NGO when it seeks legal personality must respect the concept of political pluralism and not be driven by prejudices (Principle No. 32).

118. In the case of *Sidiropoulos and Others v. Greece,* the refusal by the national courts of the application to register an association called "*Home of Macedonian Civilisation*" was successfully challenged before the ECtHR.[132] The Greek courts had refused to register the association on the conviction that the applicants had intended to dispute the Greek identity of Macedonia and its inhabitants and undermine Greece's territorial integrity. The ECtHR observed that the aims of the association, as set out in its memorandum, had been exclusively to preserve and develop the traditions and folk culture of the Florina region in Greece and were thus perfectly clear and legitimate. The Court did not rule out that, once founded, the association might, under cover of these aims, have engaged in activities incompatible with them. Such a possibility which the national

[127] As part of the *State Union of Serbia and Montenegro.*
[128] As part of the *State Union of Serbia and Montenegro.*
[129] As part of the *State Union of Serbia and Montenegro.*
[130] HRP, 2004 report (*Moldova*).
[131] HRP, 2004 reports (*Albania, Bulgaria, Hungary, Latvia, Lithuania and Romania*).
[132] *Sidiropoulos and Others v. Greece*, No. 57/1997/841/1047, ECtHR 1998-IV.

courts had seen as a certainty, could have hardly been belied by any practical action as the association had never existed and thus taken no action. If this possibility had become a reality, the national courts could have ordered the dissolution of the association under domestic law. Hence, the Court concluded that the refusal to register the applicants' association constituted a violation of Article 11 ECHR. To date, the association in question is still not registered but an appeal is pending before the domestic courts.[133] ECRI notes that similar cases are currently before the Greek courts concerning registration of associations whose title includes the adjective "Turkish".[134]

119. In *Turkey* the reform of legislation on associations (through the laws of 9 April 2002, 11 January 2003 and 4 November 2004), achieved as part of discussions relating to opening of negotiations for Turkey's entry into the European Union, reflects notable progress. It recognises the right of any legal entity or individual – apart from members of the national army, security forces and, in certain circumstances, civil service – to form an association. Amongst other things, the new arrangements abolish prior authorisation for setting up an association – which was designed to check that there was no political aim.[135] Another positive development to be welcomed regards legislation on associations for national minorities. Until recently, it was theoretically impossible to set up an association in order to protect a culture or language other than Turkish. These restrictions have been partially lifted by the recent reforms. Henceforth this ban will apply only to those associations whose aim is to *"create differences of race, religion, sect, region and minorities, and harm the unitary structure of the state"*.[136] The law has also reduced the restrictions hitherto imposed on student associations, whose objectives were limited by the previous legislation to a few narrowly defined areas.[137] However, Turkish civil-rights activists claim that many associations and trade unions are still subject to repression, especially when sensitive questions such as protection of the rights of Turkish citizens of Kurdish ethnic origin are involved.[138]

121. The *Fundamental Principles* make specific reference to the fact that an NGO is entitled to pursue the objective of a change in the law and to participate in political debate. There are many countries in which NGOs may seek a change in the law (*Belgium, Bulgaria, Croatia, Germany, Hungary, Luxembourg, Norway, Portugal, Romania, Serbia,*[139] *Slovenia, Sweden, "the former Yugoslav Republic of Macedonia", Ukraine*). For NGOs in *Azerbaijan, Bulgaria, Croatia* and *"the former Yugoslav Republic of Macedonia"* there is a general restriction on support for political parties. It seems unlikely that such a restriction is consistent with the Fundamental Principle No. 12.[140]

122. Most countries make provision for appeals against refused registration, sometimes judicial (*Bulgaria, Croatia, Germany, Hungary, Romania, "the former Yugoslav Republic of Macedonia", Ukraine*) and sometimes administrative (for example *Switzerland*).[141]

123. As a rule, the legal framework for foundations is different from that for NGOs. The *United Kingdom* has the peculiarity of allowing foundations without legal personality, which they can acquire by becoming a recognised "*charity*". But in most member states, registration for foundations is mandatory. In some, moreover, the registration procedure includes verification of the source of funds or proof of financial

[133] See CRI (2004) 24, 8 June 2004; for the general measures taken by the Greek authorities in execution of the Court's judgment see CM Resolution DH(2000)99.
[134] See CRI (2004) 24.
[135] FIDH/OMCT, 2004 annual report – Human Rights Defenders on the Front Line – 14 April 2005; see also Le guide.
[136] Law of 11 January 2003; see PACE, Doc. 10111, 17.03.2004.
[137] HRP 2004 (*Turkey*); see also CommDH (2003)15, 19.12.2003.
[138] Memorandum to CoE bodies from INGOs in the Council of Europe Human Rights Grouping, 10.03.2005.
[139] As part of the *State Union of Serbia and Montenegro.*
[140] See ONG (2005) 1, § 42; ODIHR, Legislation Online, Non-governmental organisations; USAID NGO Sustainability Index 2003.
[141] See ONG (2005) 1, § 94.

resources (*France, Germany, Slovenia*). In some countries the foundation's establishment must be approved by the upper levels of the executive, as in *Greece* by a presidential decree or in *Belgium* by a royal decree. The procedure is simplified in *Spain* and *Denmark*, where merely being entered in the registers is enough to obtain legal personality. In *Bulgaria*, the relevant checks and formalities are less rigid for foundations than for associations.[142]

b. Restrictions concerning foreigners

124. Countries do not, in general, have any restrictions on the right of foreigners to set up NGOs. Some countries stipulate that a minimum number of citizens should sit on the board (*Romania* and *Switzerland*).[143] For other restrictions, see above, para. 101.

c. Loss of legal personality/dissolution

125. As pointed out in the explanatory memorandum to the *Fundamental Principles*, the best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation in this sector at national and international levels.

126. It is perfectly legitimate for a state to make NGOs subject to the existing civil, criminal and administrative law in order to secure the rights of others, including members and other NGOs. However, in supervising an NGO's operation, the administrative authorities must assume that any activity is lawful in the absence of contrary evidence. The powers of the administrative authorities and the police, notably as regards search and seizure, and the penalties that may be imposed, must be consistent with the principle of proportionality and subject to effective judicial supervision.

127. As the explanatory memorandum to the *Fundamental Principles* explains, an NGO's legal personality ends with its dissolution – voluntary or involuntary – in case of bankruptcy, prolonged inactivity – which might arise from insufficient membership – or as an exceptional sanction (ONG (2005) 1, § 140). The *Fundamental Principles* declare that dissolution of an NGO should only be an ultimate penalty used as a last resort when warranted by compelling evidence (Principle No. 71). To be valid, such a measure must also be open to judicial review.

128. However, the national law is often quite obscure concerning the grounds for loss of legal personality. For example, inability to achieve the association's objectives is a ground for revoking an NGO's legal personality in *Croatia*, *Switzerland* (ONG (2005) 1) and *Georgia* (amendment dated 26 November 2004 of Article 35 of the Civil Code); in *Serbia*[144] "*insufficient work*" is mentioned.

129. In *Germany* and *Serbia*[145] an NGO can lose its legal personality if it does not have enough members. In the case of foundations, lack of funding may be cited (*Croatia* and *Romania*; see ONG (2005)1, § 140).

130. In the *Russian Federation*, the 2002 Law on combating extremism allows dissolution of registered associations and prohibition of informal organisations judged to be "extremist" by a decision of the Court upon application by the State Prosecutor. The latter, by his/her own decision, may suspend operation of the organisation in question until the Court has considered the application. The UN Human Rights Committee has expressed its fear that the definition of "extremist activity" is too vague to protect individuals and associations against arbitrariness in its application.[146] In *Romania* the law provides for suspension of an association's activities even before the case has been brought to court.[147] Some countries provide for precautionary intervention by the administration in the shape of "w*arnings*", thus allowing associations to take action within the prescribed period in order to avoid dissolution (*Latvia* and *Russian Federation*). With regard to certain countries, there are persistent allegations that applications for dissolution may be politically motivated.[148]

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[142] Le guide.
[143] See ONG (2005) 1, § 46 and § 64.
[144] As part of the *State Union of Serbia and Montenegro.*
[145] As part of the *State Union of Serbia and Montenegro.*
[146] See Concluding observations of the UN Human Rights Committee under the CCPR, *Russian Federation,* doc. CCPR/CO/79/RUS, 6.11.2003.
[147] Le guide.
[148] See IHF, 15 March 2005; FIDH/OMCT, 2004 annual report – Human Rights Defenders on the Front Line – 14 April 2005.

4. Funding

131. The possibility for NGOs to raise funds – in cash or in kind – is part of the Fundamental Principles.[149] As NGOs are by their very nature non-profit making, such contributions are a vital source of funding for their activities. However, it is perfectly legitimate for a state to regulate the way in which such funds are collected in order to protect the public being specifically targeted.

132. Donors may be natural or legal persons (such as companies or institutions) and may be national or foreign. The rules applying to foreign and national funding should, in principle, be the same, particularly with regard to the use to be made of the funds and reporting requirements.

133. In addition to obtaining funding from financial contributions, NGOs with legal personality must also be able to carry out economic activities, with the profits being used to finance their objectives, without being obliged to obtain special authorisation and subject to the regulatory conditions applicable to the activities in question (Fundamental Principle No. 13).

134. Eligibility for public assistance, including tax concessions, must be set out on the basis of clear and objective criteria, such as the NGO's public interest function, and must be transparent. It is entirely appropriate for an NGO to use its funds for paying its staff and reimbursing staff and volunteers for the costs incurred while acting on its behalf, even where the funds used were obtained by means of public assistance.

135. NGOs having received public assistance or granted tax concessions may be asked to give account for the use made thereof. However, this need for transparency must be counterbalanced by obligations relating to the respect of privacy and confidentiality. Any exception to these obligations must uphold the principles of necessity and proportionality.[150]

136. In practice, the following sources of funding are generally authorised in member states: (a) public funding, mainly grants from central or local government; (b) private funding, mainly subscription fees and resources from commercial activities, and (c) donations.

a. Public funding

137. In a number of countries there is a trend towards increased public assistance to NGOs, particularly through contracts for the provision of community services (*Croatia, Czech Republic, Estonia, Hungary* and *Montenegro*[151]). In the *Czech Republic*, 85% of NGOs are financed from domestic sources, with government funding playing a predominant role. In *Croatia*, the government has decided to allocate 50% of lottery-derived funds (approximately USD 20 million) to developing the NGO sector, by setting up a National Foundation for the Development of Civil Society, tasked with monitoring these funds. In *Moldova*, the Ministry of the Environment, Construction and Regional Planning has forged good working relations with NGOs by awarding them projects in the field of environmental protection. In *Bulgaria*, public financial support for NGOs is still the exception to the rule.[152]

138. As a general rule, member states do offer *tax exemptions as a means of financial assistance to NGOs.* In many countries, associations recognised as working in the public or community interest can be entitled to significant tax advantages, particularly as regards tax other than VAT or on profits (*Austria, the Czech Republic, Denmark, Finland, Hungary, Italy, Latvia, Portugal, Spain, Switzerland, United Kingdom*).[153] *Hungary* has a tax system which is advantageous to public service associations, exempting them from local taxes, property tax and VAT.

139. Legislation in the *Russian Federation* makes provision for exoneration of income tax for certain types of NGOs and donors.[154] The law amending the Tax Code, adopted by Duma on 12.05.2005, increases the number of fields in which the grants, national and foreign, can be exempted from income tax, notably, adding the human rights protection field. At the same time, the law provides that the government will establish a list

[149] See Explanatory Memorandum to the Fundamental Principles.
[150] See Explanatory Memorandum to the Fundamental Principles.
[151] As part of the *State Union of Serbia and Montenegro.*
[152] USAID, NGO Sustainability Index 2003.
[153] Le guide.
[154] See *The tax treatment of NGOs: legal, ethical and fiscal frameworks for promoting NGOs and their activities*, ed. by Paul Balter, Frits Hondius and Penina Kessler Lieber, p. 85.

of organisations whose grants can benefit from such exemptions without stipulating the criteria of eligibility.[155] In *Moldova*, NGOs are exempted from income tax. In *Azerbaijan*, although NGOs are given certain tax exemptions (in particular VAT), under the 2003 law on donations, they have to pay heavy social contributions: NGOs which receive donations must pay 27% of their staff salaries to the Social Insurance Fund.[156] In *Estonia, Bulgaria* and *Hungary* foundations are exempt from tax, including public interest foundations.[157]

140. Certain countries increasingly opt for systems to fund associations from taxes. *Hungary*, *Lithuania*, *Poland* and *Slovakia* have introduced systems whereby tax-payers can assign a percentage of their annual tax (1-2%) to NGOs. However, the impact of this system on the financial viability of NGOs is variable.[158]

b. Private funding

141. Membership fees, which underpin the concept of associations, are authorised in all countries. The subscription amount, laid down in their statutes, is generally modest and has a symbolic value. The scope of this source of funding is rather limited and in itself is not sufficient to enable the NGO to operate. However, in some countries, the role of membership fees in the funding of NGOs is increasing (for example in *Romania*).[159]

142. In the majority of member states, non-profit-making organisations are authorised to carry out an economic activity, which often entails significant tax repercussions, providing that this is not its main activity. The NGOs' economic activity may be totally or partially exempt from tax (*Lithuania, Malta, Romania*) or be liable to tax in the same way as companies *(Norway, Serbia,*[160] *"the former Yugoslav Republic of Macedonia"*).[161] In the EU countries, the VAT adjustment directive[162] provides for exemptions on the non-profit-making part of the activities of associations. This directive, which enables firms with a given turnover to be exempt from VAT, is interpreted in a variety of ways with regard to associations in the different countries. Exemptions apply to public service activities (*Portugal*), those of a social nature (*Belgium, Denmark, Germany*), and a cultural or sports-related nature (*Denmark, Spain*).

143. Some countries (*Denmark, France, Germany, Ireland, the Netherlands, Spain and the United Kingdom*) opt to consider associations as commercial companies liable for corporate tax if they are engaged in competitive economic activities, even if their aim is not to make a profit. However, frequently these same countries also provide for tax exonerations if the associations fulfil a public service, community service or charitable objective, and particularly if they do not undertake any industrial or commercial activity. In *France*, an association engaged in commercial activities can be exempted from taxes on legal persons if its activity has a certain social utility.[163] In some countries (*Croatia, Luxembourg, Ukraine*) there are restrictions on commercial or business activities by NGOs.[164] In *Lithuania*, a new Law on Associations, adopted in 2004, no longer prohibits associations to engage in commercial activities.[165]

c. Donations

144. Donations and bequests from individuals or companies, both national and foreign, are generally authorised. In many countries, there are no restrictions placed on this source of funding (*Bulgaria, Croatia, Hungary, Norway, Romania, Serbia,*[166] *Sweden, Switzerland*). Some of them do stipulate that the source must not be illegal (*Serbia,*[167] *Switzerland;* see ONG (2005)1, § 111).

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[155] See the site of the State Duma: http://www.duma.gov.ru/.
[156] USAID, NGO Sustainability Index 2003.
[157] Le guide.
[158] USAID, NGO Sustainability Index 2003; PACE Doc. 10368, 24.01.2005.
[159] USAID NGO Sustainability Index 2003.
[160] As part of the *State Union of Serbia and Montenegro.*
[161] USAID NGO Sustainability Index 2003, see also ONG (2005) 1.
[162] *Sixth Council Directive 77/388/EEC* of 17.05.1977.
[163] Le guide.
[164] ONG (2005)1, § 113, USAID NGO Sustainability Index 2003.
[165] See E.U. Network of Independent Experts on Fundamental Rights, Report on the situation in Lithuania in 2004, p. 29.
[166] As part of the *State Union of Serbia and Montenegro.*
[167] As part of the *State Union of Serbia and Montenegro.*

145. Foreign donations continue to play a major role in the financial support given to NGOs in many countries in Central and Eastern Europe (*Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Moldova, Russian Federation, Serbia and Montenegro, "the former Yugoslav Republic of Macedonia", Ukraine).* Legislations vary considerably. In *Bosnia and Herzegovina, Croatia, the Czech Republic* and *Hungary* both foreign and national donations are tax-free. In *Azerbaijan* the amendments to the law on donations which came into force in 2003 require prior registration of foreign donations which are then exempt from taxation, but there are heavy social contributions.[168] Also, the Azerbaijani legislation prohibits election observation to those national NGOs whose budget consists of 30% of foreign financing.[169] *Lithuania* places limits on the ability of NGOs to
receive donations from a government or foreign governmental organisation, except in respect of support for education, culture, health protection and sport. However, donations are tax-free.[170]

146. In *Turkey***,** the new law on associations (Law No. 5253), passed in November 2004, allows national associations, under certain conditions, to receive financial assistance from abroad. Nonetheless, the question remains a sensitive one and the provisions of the law in question have been referred to constitutional review.[171] In the *Russian Federation* there are reportedly smear campaigns against independent NGOs relating to their sources of funding.[172] The CoE Commissioner for Human Rights, noticing the worries expressed by the Russian NGOs as to the state of relationship with the public authorities in recent times, underlined that no democracy can do without the critical opinion of the NGOs and pressure on them is inadmissible.[173]

147. Fluctuations in foreign funding weaken the financial viability of the non-profit-making sector. Questions concerning the possibility and ability to diversify sources are not a matter of choice but one of survival for NGOs. For example, in *Belgium, Bulgaria, Norway, Romania* and *Slovenia* donations to NGOs are encouraged by a system of tax relief (varying in extent) for donors.[174] In countries where foreign funding has fallen considerably in recent times (*Czech Republic, Hungary, Latvia, Romania,* and *Slovakia*), the viability of the NGO sector is contingent on the national funding system currently being set up. In *Bulgaria*, for example, companies and tax-payers can apply for tax deductions on donations to NGOs of up to 10% of their profits or income. A similar system, encouraging national generosity is also to be found in *Estonia, Lithuania* and *Slovakia*. In *Poland***,** the passing in 2003 of the Law on Public Benefit Organisations and Volunteer Work, which now provides for a fixed deductible amount to replace the previous tax deduction of 15% of income on donations, would appear to be a backward step. In *Hungary* and the *Czech Republic*, donors are also entitled to a deduction on taxable income/profits for the previous year, but the low percentage of deduction is not sufficient encouragement to ensure an increase in national donations. In other countries *(Albania, Azerbaijan, Bosnia and Herzegovina, Montenegro,*[175] *"the former Yugoslav Republic of Macedonia"* and *Russian Federation*), national private and corporate donations are limited, due amongst other things to the almost total absence of financial incentives.[176]

5. Legal means of action

148. The right to obtain judicial protection for NGOs is mentioned both in the Fundamental Principles on the Legal Status of NGOs in Europe and the European Convention on the Recognition of the Legal Personality of INGOs (ETS No. 124). According to Article 9 of the first document "*any act or omission by a governmental organ affecting an NGO should be subject to administrative review and be open to challenge in an independent and impartial court with full jurisdiction*".

a. Conditions

149. To the extent that NGOs have legal personality, they are entitled to initiate legal proceedings as any other legal person. This is why in most member states legislation on associations or public organisations

[168] USAID NGO Sustainability Index 2003; see also above.
[169] See Statement of PACE Monitoring Committee, 25.04.2005.
[170] ONG (2005)1, § 111.
[171] See the site of the Turkish government: http://www.tbmm.gov.tr.
[172] FIDH/OMCT, Annual Report 2004 – Human Rights Defenders on the Front Line- 14 April 2005.
[173] Report of the CoE Commissioner for Human Rights on his visit to the *Russian Federation*, 15-30 July 2004 and 19-29 September 2004, doc. CommDH(2005)2.
[174] ONG (2005)1, § 127; USAID NGO Sustainability Index 2003.
[175] As part of the *State Union of Serbia and Montenegro.*
[176] USAID NGO Sustainability Index 2003.

does not contain any specific provisions on the possible legal means of action of NGOs. Only a very limited number of states, such as *France* or *Serbia,*[177] regulate this issue in separate legal acts.

150. Some member states grant the right to initiate legal proceedings also to associations with no legal personality, such as *Spain* and *Germany*.[178]

151. NGOs with no legal personality are often subject to specific provisions related to the "*representation procedure*", which means that the right to represent an NGO in judicial or administrative proceedings is conferred to the person elected by its members (for instance in *Belgium, Germany, Italy, Luxembourg*).

152. In certain countries, such as *Germany*, NGOs wishing to have access to a legal action are obliged to give the proof of possessing enough human and material resources.[179]

b. Administrative proceedings

153. In certain countries such as *France* and *Italy*, it is possible for NGOs to challenge the validity of administrative decisions before the administrative courts in cases of abuse of power.

154. Certain NGOs with particular statutory aims can be subject to specific provisions granting them special means of action. For example, legislation in *Italy* regulating NGOs active in the field of environmental protection grants them the possibility to participate in proceedings dealing with health and environmental issues. In the case *Italia Nostra* of 1973, an NGO protecting natural, cultural and historical treasures was given the opportunity to challenge before the Council of State an administrative decision which authorised the construction of a road through a park.[180]

155. In the *United Kingdom*, as in the other common law countries, only the Attorney General has the possibility to bring proceedings on behalf of an NGO for the protection of public interests or the prevention of any prejudice to public in general. However, when the decision affects a group of persons, an NGO may claim damages directly suffered by this group.

156. The *Swiss* Federal law on the Protection of Nature entitles NGOs protecting the environment to file a complaint with the Federal Court against any administrative decisions.[181] Similar means of action are also provided for in the legislation of cantons (as well as in local legislation in the departments of Alsace-Moselle in *France*).

157. In other member states, notably *Germany*, for the admissibility of the case an applicant must prove the existence of injury suffered directly by him/her. That is why the German courts are rather restrictive in their attitude towards the right of NGOs to initiate proceedings for instance for the protection of the environment.[182]

c. Civil proceedings

158. In general there are three types of action which NGOs can undertake before the civil courts: defend their own interests; act on behalf of their members; defend a general interest.

159. In most countries any NGO can initiate civil proceedings for defending its own interests or property rights. For example, in *France* an association engaged in fishing activities brought a civil action against the companies, which were polluting the water even if this was the result of activities included in the statutes of the defendants.[183]

160. When acting on behalf of its members an NGO must usually comply with two main conditions: the prejudice should directly concern its members and such an action must be in conformity with its main object. Sometimes "*joined representation*" is possible when the interests of persons belonging to different NGOs are at stake.

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[177] As part of the *State Union of Serbia and Montenegro.*
[178] *Droits des étrangers*, Recueil Lamy Associations, 2000.
[179] See Cappelletti, M., *Accès à la justice et Etat-Providence*, Editions Economica, Paris, 1984, pp.111-513, hereinafter referred to as "Accès à la justice*".*
[180] The Supreme Court of Appeal of *Italy* has refused an association of gondoliers the right to oppose to closing certain channels in Venice in the case *Foro Italiano*, Judgment of 13/11/1973, No.829; see Accès à la justice*; Droits des étrangers*, *op. cit.*
[181] Flücker, A., Morand, Ch.-A., Tanquel, T., *Quels sont les effets du droit de recours des organisations de protection de l'environnement*, Office de l'environnement et des forêts, Genève, 2000, p. 4.
[182] See *Accès à la justice*.
[183] Judgment of the Court of Cassation of 28.04.1993, No.156.

d. Criminal proceedings

161. In *France,* Articles 2-19 of the Code of Criminal Procedure allow certain associations to participate in criminal proceedings as a civil party in order to protect *public interest* which falls within their statutory aims. The same right to NGOs is provided for in the *German* Code of Criminal Procedure, though it is apparently not used in practice.[184]

e. Constitutional proceedings

162. In some member states NGOs are entitled to introduce proceedings before the Constitutional Court. For example, in *Spain* all types of associations have the possibility to protect their rights by filing a complaint "*d'amparo*" with the Constitutional Court.[185] This is also the case in *Germany*, where NGOs can obtain similar protection by virtue of the Fundamental Law.

f. Access to the European Court of Human Rights

163. See Part I, I, A, 3.

B. Participation of the civil society in the democratic process

1. Mechanisms for dialogue between NGOs and the authorities

164. If NGOs are to participate effectively in the decision-making process, they must co-operate closely with the authorities and play an active role as pressure groups.

a. Institutional co-operation

i. At the national level

165. The Budapest Declaration, approved on 1 March 2003 at the meeting between the CLRAE and INGOs enjoying consultative status with the CoE called on the Committee of Ministers *"to invite the Steering Committee on Local and Regional Democracy (CDLR) to consider institutional machinery for fostering partnership between local, regional and national authorities and NGOs"*.[186]

166. In a number of countries institutional mechanisms allowing for NGOs participation in the decision-making process already exist. In the *Russian Federation*, the consultative body under the President, composed of a number of prominent human rights defenders, is considered to be one of the essential components of the national system of human rights protection. In 2004, this body was transformed and renamed "*the Council under the President for development of civil society institutions and human rights protection*". The functions of the Council include, *inter alia,* regular briefings of the President on the human rights situation in the country, organisation of the appraisals of the federal legislation dealing with the questions related to human rights protection, suggestions on improvement of the national mechanisms of human rights protection and of dialogue with the human rights protection associations.[187]

167. In addition, a law adopted in April 2005 to enter into force on 1 July 2005, provides for the creation of a new mechanism of institutional dialogue between the authorities and the civil society in the *Russian Federation*. The task of the new federal organ, the "*Public Chamber*", composed of 126 members, will be to reconcile the positions of citizens and public authorities on the main issues of public interest. The "Public Chamber" will be habilitated to give expert opinions on legal acts prepared by state and local authorities and will have the right of nation-wide civil initiative.[188]

168. In *Croatia*, several NGOs are represented on parliamentary committees. In addition, a governmental office for co-operation with NGOs has been set up. In *Romania*, each ministry has set up an office to oversee relations with NGOs.[189]

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[184] See *Accès à la justice.*
[185] Article 53.2 of the Constitution of *Spain*, Article 41 of the Organic Law on the Constitutional Court.
[186] Appendix 2 to CG(10)23 Part II, 31 October 2003.
[187] Information provided by the Commissioner for Human Rights of the *Russian Federation*, 17.05.2005; see also doc. CommDH(2005)2, 20.04.2005.
[188] Information provided by the Commissioner for Human Rights of the *Russian Federation*, 17.05.2005.
[189] USAID, 2003 NGO Sustainability Index.

169. In *Bosnia and Herzegovina*, on 7 December 2004, the NGO Coalition "*To work and Succeed Together*" organised a conference of NGOs in the country which was also attended by a number of international organisations, including the CoE. The aim of the conference was to strengthen partnership between the *Bosnia and Herzegovina* authorities and some 300 NGOs. It is expected that an "*Agreement on Co-operation between the Council of Ministers and the Non-Governmental Sector in Bosnia and Herzegovina*" will be signed in the near future (SG/Inf(2005)2).

170. Some member states have developed a number of measures to support associations. They include: the provision of grants to support activities and projects, the offer of contracts to undertake service provision, access to specialist expertise and advice and support through provision of meeting places or other key resources.[190]

ii. At the local level

171. A policy of local democratic participation presupposes recognition and enhancement of the role played by associations and groups of citizens as key partners in developing and sustaining a culture of participation.[191]

172. The Congress, in its Resolution 165(2003) *on NGOs and local and regional democracy,* called on local and regional authorities to organise meetings with NGOs in their respective areas in order to exchange information. The CLRAE considered that *"freely-entered-into partnerships between local and regional authorities and NGOs help to strengthen local and regional democracy and citizen participation, by reducing the divide between those authorities and their citizens".* Accordingly, it recommended that member states *"adopt legislation that encourages partnership between local and regional authorities and NGOs"* and *"give practical support to machinery to improve co-operation between local and regional authorities and NGOs on subjects of common interest"*.[192] In this same recommendation, the CLRAE noted that the principle of partnership between local and regional authorities and NGOs was not systematically recognised and applied in all CoE member states.

173. In some member states, however, local authorities have developed co-operation with NGOs in a variety of ways. In *Hungary*, for example, the Budapest City Council maintains an ongoing relationship with the NGOs represented there. In *Italy*, in application of the 2000 law which reformed local authorities and enabled municipalities to provide financial support to NGOs, Rome set up an office tasked with allocating 0.8% of its budget to international solidarity initiatives undertaken by NGOs, and in 2002 the municipality set up a citizens' committee to hear the 130 NGOs active in the field of environmental protection, protection of children and the defence of human rights.[193]

b. Interest /pressure groups and citizens' initiatives

174. In most CoE member states, the possibility for associations to participate in and influence the decision-making process is envisaged in the general legal provisions regulating access of civil society to information and decision-making.

i. At the national level

175. Usually, interest groups are *de facto* recognised, which means that they run their activities without undergoing any specific registration procedure. For example, the Statute of *Seimas* in *Lithuania* provides for the possibility for the parliamentary committees to invite representatives of public organisations to join relevant working groups or committee meetings and thus participate in the preparation of draft legislation. In the *Danish Folketing* and the *Swedish Riksdag*, interest groups may also be received and heard by parliamentary committees according to an accepted practice. In some states, such as *Germany,* specific rules stipulate that groups ("*Verbände*") wishing to express or defend their interests before the *Bundestag* or before the Federal Government must be recorded in a register; a list of organisations registered, including information on them, is published annually.[194]

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[190] Explanatory report to CM Rec(2001)19 *on the participation of citizens in local public life.*
[191] CM Rec(2001)19 *on the participation of citizens in local public life.*
[192] CLRAE, Rec.139(2003) *on NGOs and local and regional democracy*, 26 November 2003.
[193] CG(10)23 Part II, 31.10.2003.
[194] Lobbying in the EU: current rules and practices, Constitutional Affairs Series AFCO 104 EN, European Communities, 04.2003.

176. NGO participation in advocacy and lobbying efforts is increasing in almost all member states. The activities of NGOs in these spheres are highly developed in some countries such as *France* for example.[195] In other countries, although the environment for political lobbying exists, there is often a lack of developed and proven skills to capitalise on it. At the same time, it is often difficult for NGOs to agree on common goals, as
sometimes they are unwilling to suppress their own specific interests. Another problem is that co-operation with the government is generally based on individual attitudes and personal connections rather than established norms and procedures (for instance, in *Bulgaria*, *Estonia*, *Russian Federation* and *Slovenia*).[196]

177. That said, the growing role of NGOs in shaping the public agenda and influencing legislation cannot be denied. Coalitions of various associations resulted in a number of successful NGO policy initiatives. For example, in *"the former Yugoslav Republic of Macedonia"***,** a campaign organised by the Regional Environmental Center resulted in the introduction of the Law on Air. A similar NGO role in environmental affairs needs to be mentioned with respect to the adoption of a Declaration on the protection of the Tara River in *Montenegro.*[197] Legislative initiatives in *Hungary*, such as the Laws on Equal Treatment and the Promotion of Equal Opportunities, on Anti-Discrimination and on Legal Aid, enhanced the ability of NGOs to participate in the decision-making process. In *Lithuania*, numerous NGOs participated in discussions on the Laws on youth, on associations and on gambling. A new concept with a view to enhancing dialogue and lobbying methods has been developed in *Estonia* in the form of a web-based legal forum which permits organisations and individuals to comment on and supplement draft laws.[198] In *Georgia,* NGOs contribute in an active manner to the legislative process on a broad range of issues such as local democracy reform, fight against corruption and electoral matters, mainly since the "Rose Revolution" of 2003.[199]

ii. At the local level

178. As local governments are considered to be closer to civil society, the efforts of NGOs to change the governmental policy are much more successful at the local level. The CLRAE has adopted a number of resolutions on related issues, such as the Res134 (2002) *on women's individual voting rights: a democratic requirement*, which envisages that NGOs in member states should *"develop their activities as pressure groups working for equality in the political process, with special emphasis on women's equal right to vote."*

179. Local government in *Bulgaria* closely co-operated with NGOs in 2003 in the context of the local elections. Many NGOs participated directly in the elections, nominating lists of candidates for municipal councils. In *Ukraine*, 'the Khmelnitsky Association of Women in Business' succeeded in persuading the city council to amend the public tender regulations to allow civic organisations to compete for social services contracts. In *Slovakia*, local lobbying campaigns have generally been more successful than national ones, especially regarding environmental issues.[200]

180. In *Hungary*, there has been an increased advocacy activity at the local level, with local governments and so-called "*smaller regions*"; this is also the case in other countries, *inter alia Ukraine* and the *Russian Federation*. NGOs are becoming more widely represented in municipal councils and boards in *Lithuania*.[201]

c. Practical constraints on the human rights defenders' activities

181. Whereas, on the one hand, efforts to strengthen participation of NGOs in the decision-making process and institutionalisation of their relations with the authorities have recently increased, on the other hand, reports on incidents of pressure and harassment against human rights defenders in 2004-2005 were frequent all over the world, including in some CoE member states. The civil activists were targeted while carrying out their activities on a wide range of issues such as protection of minority rights, religious freedom, or human rights protection in conflict and post-conflict situations. The Special Representative of the UN

[195] See http://lobbying.ifrance.com/lobbying/MEMOIRE/m%E9moire.html.
[196] USAID 2003 NGO Sustainability Index.
[197] As part of the *State Union of Serbia and Montenegro.*
[198] USAID 2003 NGO Sustainability Index.
[199] See doc. SG/Inf(2005)6.
[200] USAID 2003 NGO Sustainability Index.
[201] USAID 2003 NGO Sustainability Index.

Secretary General on human rights defenders voiced concern against the spread of such practices and called upon the governments to combat them.[202]

2. Participation in the decision-making process of:

a. Foreigners and members of national minorities

182. Immigrant associations constitute an important step in immigrants' integration in the political process. They provide the opportunity to inform immigrants of their civic and political rights, are a useful tool for presenting immigrants' demands and constitute the basis for dialogue between the different groups in society and the authorities. Detailed examples of consultative bodies and participation of the immigrants and foreign resident population in CoE member states and, in particular, *Estonia*, *France*, *Latvia*, *the Netherlands*, *Poland*, *Portugal* and *Sweden* are given in the PACE report *on the participation of immigrants and foreign residents in political life in the CoE member states*.[203]

183. In the words of the ECtHR, "*forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights*".[204]

184. The CoE Commissioner for Human Rights welcomed in several occasions the initiatives taken by national authorities regarding the participation of foreigners and invited them to further their participation in public life (see for example his report on *Luxembourg*, 2-3 February 2004, CommDH (2004)11 §§ 16-17 or on *Liechtenstein*, 8-10 December 2004, CommDH(2005)5, §§ 6-7).

185. The Advisory Committee of the FNCM has recommended that member states, which do not have any appropriate structures, establish special representative bodies in the form, for instance, of *Councils of National Minorities*, in order to increase the level and quality of dialogue between national minorities and the competent authorities and ensure the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs. Such measures have already been taken in a number of CoE member states. Thus, special bodies which contribute to the effective participation of the minorities concerned have for instance been set up in *Germany* (Sorbian minority), *Norway* (Sami minority) and *Poland* (plenipotentiaries for Minorities).[205]

186. Other States are currently setting up different bodies in order to ensure the participation of minorities but not all of them are able to guarantee that such participation is effective.[206]

187. Over the past 15 years, a substantial number of Roma associations have been officially registered in Europe. Some CoE member states (*Hungary*, *Romania*, *Slovakia*, *Spain*, *"the former Yugoslav Republic of Macedonia"*) have more than 100 such associations. The creation of Roma associations' networks facilitates dialogue and communication between Roma groups and also between Roma and the authorities. Among other examples, 15 Roma organisations formed a network in *"the former Yugoslav Republic of Macedonia"* in 2000 and 20 Roma organisations made a similar step in *Moldova* in July 2003.[207]

188. In his recent report on the human rights situation of the Roma, Sinti and Travellers in Europe, the CoE Commissioner for Human Rights welcomed the measures taken in several CoE member states to enhance the participation of Roma in decision-making processes through, for instance, the establishment of advisory councils or special governmental structures responsible for minority affairs, or through making a

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[202] For more details see Report by Special Representative of the UN Secretary General on human rights defenders, December 2004, including references to incidents in *Azerbaijan*, *Russian Federation, Serbia and Montenegro,* "*the former Yugoslav Republic of Macedonia*" and *Turkey*; see also FIDH/OMCT, Rapport annuel 2004 – Les défenseurs des droits de l'homme en 1ère ligne, 14.04.05.
[203] See doc. 8916 of 22.12.2000; for the Convention on the Participation of Foreigners in Public Life at Local Level, ETS No. 144, see above, Part I, II, C, 2, and for the European Convention on the Legal Status of Migrant Workers , see above Part II, I, B, 3, d.
[204] *Gorzelik and others v. Poland*, N° 44158/98, 17.02.2004, § 93; see also Article 15 FCNM and above Part I, II, A, 2.
[205] ACFC/INF/OP/I(2002)008, ACFC/INF/OP/I(2003)003, ACFC/INF/OP/I(2003)003, ACFC/INF/OP/I(2004)005; see also in respect of *Poland* GT-ROMS(2003)9, 27.11.2003.
[206] See ACFC/INF/OP/I(2002)002 with respect to: *Czech Republic* and consultative bodies, such as the Inter-Ministerial Commission for Roma Affairs and the consultative committees on questions concerning national minorities attached to various ministers; ACFC/INF/OP/I(2003)006 with respect to *Sweden* and the on-going process to set up a Council of Roma; ACFC/INF/OP/I(2003)004 with respect to *Albania* and the creation of the Office for National Minorities.
[207] GT-ROMS(2003)9.

special provision for minority representation in elected bodies at national or local level. However, for the Commissioner, such positive developments are not sufficient by themselves: "*What is of critical importance is the long-term enhancement of the right of the Roma to participate, on terms of equality, in the general conduct of public affairs, be it in elected bodies or positions within the administration. Special attention must be devoted to promoting the participation of Roma women and Roma youth in decision-making processes*" (see CommDH(2005)4, 04.05.05, § 20-21).

b. Youth

189. Although different mechanisms and structures aiming at the consultation of young people on matters which concern them exist in many CoE member states*, national youth councils*, which today exist in 42 of them, constitute the most elaborate, sustainable and the widest-spread and tested practice. They run their activities following the example of an *Advisory Council of Youth NGOs* within the CoE, which has the mandate to express opinions and proposals on any issue concerning youth, with the possibility of addressing itself to the different bodies of the CoE. National youth councils work according to the same principle of *"co-management" (*or *"co-ordination")* which provides for the original mechanism of partnership between governments and non-governmental youth organisations. For example, in *Sweden* the National Board of Youth Affairs supports the development of youth organisations according to the assignments from the Government.

190. In some member states, the principle of co-management is implemented by the functioning of institutions or programmes which enables co-operation between the relevant ministries, public bodies, local/regional authorities and associations, such as, for example, in *France*, "*Le Fonds de Coopération de la Jeunesse et de l'Education Populaire"* (FONJEP) or in *Croatia*, the National Programme of Action for Youth and establishment of Youth Clubs. In *Portugal*, the youth associations being independent of the State, they co-operate with the government mostly on issues relevant to the determination of education policy.[208] This is also the case in other member states, where such associations participate in different policy spheres. Nevertheless only some CoE member states, such as *Croatia***,** *Germany*, *Lithuania* or *Malta* have implemented a global and coherent youth policy.[209]

191. The *European Youth Forum* is an example of the promotion of associative life and the development of mechanisms of partnership between youth NGOs and public authorities, both at national and European level. The Forum works to empower young people to actively participate in the shaping of Europe and society and is the youth platform representing youth organisations in international institutions.[210]

192. In many member states, initiatives have been taken during the last few years towards founding and funding youth committees in *sport*. For instance, the *Lithuanian* Parliament has created the Commission for Youth and Sport, while in *Austria*, *Hungary*, *Latvia* or *Sweden* the national umbrella sports organisations have set up their own youth committees. In *Germany*, the Sports Youth Federation has been established, providing greater autonomy to the associative life of young people. In *Estonia*, the degree of development of the non-governmental sport sector and the co-operation between governmental and non-governmental organisations is also impressive. A youth branch of the European Non-Governmental Sports Organisation (ENGSO Youth) has also been established.[211]

3. The role of the civil society with respect to:

a. Social cohesion

193. The Revised Strategy for social cohesion, adopted by the CM on 31.03.2004, underlines the role of civil society considering *social cohesion* as a responsibility shared by all. Paragraph 39 of the Strategy states that: *"Non-governmental organisations need to be recognised and provided with support in order to help them play a more active part in strengthening social cohesion".*

194. The 5th Conference of European Health Ministers of 07-08.11.1996 on "*Social Challenge to Health:*

[208] See doc. CCPR/C/PRT/2002/3, 06.06.2002, *Portugal*.
[209] Comparative Study of Youth Policies and Legislation in States Party to the European Cultural Convention of the Council of Europe, doc. CDEJ (96)11rev.2, 15.10.1998.
[210] For more details see http://www.youthforum.org/en/home/welcome.html.
[211] For more details see ENGSO Youth.

Equity and Patients Rights in the context of health reforms" stressed the need for action on citizens and patients' participation in the conception, building-up, reforming and functioning of a *health system*.[212]

195. Increasingly, public authorities harvest the experience of civic society through:

i consultation: see, for example, in the *United Kingdom* the recent consultation of health users and citizens as part of the preparation of a long term plan for the National Health Service;
ii establishment of citizens' representative bodies, such as health boards, national councils, quality and accreditation bodies, health education boards: see, for example, in *Slovenia* the Council of NGOs for Slovenian patients or in *Portugal* the representation in the National Rehabilitation Council;[213]
iii delegation of some functions: see, for example, in *Poland* the NGOs taking over some nursing and caring services or the *Dutch* "*Personal Budget Management*" initiatives for chronic disease patients.[214]

196. In a small number of CoE member states a constructive alliance between the health professionals' organisations and NGOs has been developed, leading to joint initiatives to influence national health programmes and priorities (for example in the *United Kingdom*, in *Denmark* and *the Netherlands*). With respect to other states, a systematic inclusion of citizens' participation issues in assistance programmes takes place.

197. Governments of the member states are also called upon to create a favourable environment for encouraging *people with disabilities* to participate in associative life. As the Malaga Ministerial Declaration *on People with disabilitie*s of May 2003 states, Ministers "*undertake to involve people with disabilities in decisions affecting them personally and organisations of people with disabilities in policy making*" (§46).

198. In many CoE member states there are examples of good practice as regards the associations of disabled people. NGOs primarily represent disabled people and their families and promote their rights in all matters concerning them, e.g. community life, leisure and sports, health care and rehabilitation. Most public authorities at national, regional and local level co-operate with them closely. *Scandinavian countries* offer a very advanced partnership system in particular through institutionalised mechanisms. *Newly accepted EU member states* have joined efforts at non-governmental level by progressively setting up national organisations for/of disabled people, which become members or associated members of European organisations.[215] NGOs providing services for the disabled are often more up-to-date, in comparison with the authorities, as they can better register the needs of the society (for example *Georgia***,** *Slovakia*, *Slovenia*).[216]

199. In other member states, health-related associations and associations of disabled people have not yet reached the required democratic maturity: they *inter alia* face the problem of a lack of democratic statutes and procedures, shaky independence in decision-making and in sources of financing or lack of transparency. Often neither legal nor institutional frameworks exist, which leads to counterproductive competition between similar NGOs (for example in *Albania*, *Bosnia and Herzegovina*, *Greece*, *Moldova* or *Ukraine*). Moreover, there is neither a register of existing NGOs, nor a forum for developing a national position of the civic society in health matters (for example in T*urkey* or *Ukraine*). With the exception of the situation in the *Nordic countries*, *the Netherlands* and the *United Kingdom*, NGOs dealing with health issues often face problems of lack of communication between them and professionals' organisations. NGOs of disabled people encounter the same difficulties *inter alia* in *Albania*, *Bosnia and Herzegovina*, *"the former Yugoslav Republic of Macedonia"*, *Ukraine* and *Moldova*.[217] In the latter, as the Moldovan authorities underline, there are at present 132 health and disabled persons' associations and their number continues to increase.

[212] See also above Part I, II, C, 5.
[213] See doc. CCPR/C/PRT/2002/3, 06.06.2002, *Portugal*.
[214] See the Explanatory memorandum of Rec(2000)5 *on the development of structures for citizen and patient participation in the decision-making process affecting Health Care*, May 2001.
[215] See the Explanatory memorandum of Rec(2000)5, May 2001.
[216] USAID 2003 NGO Sustainability Index.
[217] See Explanatory memorandum of Rec(2000)5, May 2001.

b. Culture and education

200. In the area of *cultural and natural heritage*, technical co-operation and field activities are based on the participation of the inhabitants in the decision-making and the project management processes. Dialogue mechanisms between national, regional and local institutions as well as those between associations contribute to the promotion of democracy and tolerance through a participative process.

201. The project entitled *"The HEREIN on-line information system*", set up in 1998, offers a comparative databank on cultural heritage policies in member states. This project, as the one concerning cultural policies ("*the Compendium*"), is implemented through a partnership comprising voluntary organisations in the field of culture and heritage.

202. On the occasion of the 5th European Conference of Ministers responsible for cultural heritage, which took place in Portorož (*Slovenia*) on 5-7 April 2001, a Declaration *on the role of voluntary organisations in the field of cultural heritage* was published by the CoE. A new instrument in the form of a CoE Framework Convention *on the Value of Cultural Heritage for Society* has been drafted and presented to the CM Rapporteur Group on Education, Culture, Sport, Youth and Environment (GR-C) on 14 June 2005. Its Article 12 recognises *"the role of voluntary organisations both as partners in activities and as constructive critics of cultural heritage policies*". Awareness-raising initiatives such as the European Heritage Days could not be developed without a strong involvement of voluntary organisations.

203. The sector of *conservation of biological diversity* is one of those in which NGO involvement is high. The participation of citizens in environmental NGOs is considered as a mark of compromise with the challenges of modern society and a way to exert their democratic rights. In particular, NGOs play an important role in the monitoring of the Bern Convention (19.09.1979), as they can initiate infringement procedures against states for the possible non-respect of the obligations by States Parties.

204. At a Conference held in Sofia in December 2004, the CoE proclaimed 2005 European Year of Citizenship through Education and the participants reaffirmed "*the fundamental role of Education for Democratic Citizenship and human rights education in developing a democratic culture, based on human rights, democracy and the rule of law*".[218] Moreover, national and international NGOs underlined at a conference on "*The role of NGOs in Education for Democratic Citizenship*", held on 21-24.04.2005 in Warsaw, "*the value of non-formal education and learning carried out by NGOs in the field of Education for Democratic Citizenship and consider[ed] it necessary to develop innovative practices in such learning*".[219]

205. In order to implement their obligations in this field, appropriate measures have been taken by the Governments of many CoE member states. Some of them introduced or enhanced the teaching of civic education in recent years (*inter alia Austria*, *Estonia*, *France*, *Russian Federation*). In the *Russian Federation* in particular, an important step to be welcomed is the creation of the "*Expert Council on Civic and Human Rights Education of the Parliamentary Committee on Education and Science*".

[218] Conference Report, doc. DGIV/EDU/CAHCIT (2004)19, 14.02.2005.
[219] NGO Declaration, 23.04.2005.