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**OPINION OF THE COMMISSIONER FOR HUMAN RIGHTS**

**LEGISLATION AND PRACTICE IN THE RUSSIAN  
FEDERATION ON NON-COMMERCIAL ORGANISATIONS IN  
LIGHT OF COUNCIL OF EUROPE STANDARDS: AN UPDATE**

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## I. Background information

### 1.1 Introduction

1. Since 15 July 2013, when the Commissioner issued his first Opinion on the legislation of the Russian Federation on non-commercial organisations in light of Council of Europe standards ([Opinion CommDH\(2013\)15](#)), there have been a number of significant legislative developments in Russia governing non-commercial organisations (hereinafter referred to as NCOs<sup>1</sup>). In addition, the period which has elapsed since the entry into force on 21 November 2012 of Federal law no. 121-FZ on “Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of the Activities of the Non-Commercial Organisations Performing Functions of a Foreign Agent” (hereinafter referred to as the Law on Foreign Agents) is ample enough to permit a meaningful analysis of its application. Therefore, the present Opinion focuses on the analysis of the legislative amendments relating to NCOs which have been introduced since July 2013 and on legal issues which have arisen from the implementation of the Law on Foreign Agents, as well as the practical consequences of its application vis-à-vis Russian NCOs.
2. The present Opinion builds on the Commissioner’s previous discussions with the Russian authorities, including in Moscow on 9 September 2014. Most notably, the implementation of the Law on Foreign Agents and its impact on the work of non-commercial organisations in the Russian Federation were discussed during his meetings with Mr Alexander Konovalov, Minister of Justice of the Russian Federation, and Ms Ella Pamfilova, the Federal Ombudsman of the Russian Federation. It was also the subject of his discussions with the representatives of various NCOs, both in Moscow and in Strasbourg. In addition, it takes into account specific illustrative examples, as reflected in official documents,<sup>2</sup> where representatives of the Ministry of Justice, the prosecutorial and the judicial authorities have interpreted and applied the Law on Foreign Agents, as well as other information provided by Russian NCOs and lawyers who have represented them in courts.
3. It is important to note that the working environment of civil society in Russia has also been affected by a number of recent legislative developments concerning freedom of expression. A series of legislative amendments has widened the potential scope of state interference in the enjoyment of freedom of expression. For example, new restrictions in access to information on the Internet and in the space for the exchange of views by bloggers have been enabled by the so-called “Lugovoi Law”<sup>3</sup> and the so-called “Bloggers Law”.<sup>4</sup> Recent

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<sup>1</sup> Russian legislation, as a general rule, operates with the definition of a “non-commercial organisation” instead of the internationally used definition of “non-governmental organisation” except for in the newly adopted law on so-called “Undesirable International or Foreign Non-governmental Organisations”. For further details – see Section 2.1 below.

<sup>2</sup> The official documents collected by the Commissioner’s Office include, among others, warnings on the unacceptability of a violation of the law (*Предостережение о недопустимости нарушения закона*), notices of a violation of the legislation (*Представление об устранении нарушений законодательства*) – both delivered by prosecutorial authorities - records on administrative offences (*Протокол об административных правонарушениях*), judicial decisions in administrative and civil proceedings and other procedural documents such as records of court hearings, civil lawsuits, appeal petitions, additional submissions and third-party comments.

<sup>3</sup> The Federal Law no. 398-FZ of 28 December 2013 on “Introducing Amendments to the Federal Law on Information, Information Technologies and Data Protection” (entered into force on 1 February 2014).

legislation has also been enacted to introduce criminal responsibility for public calls made on the Internet to carry out rather broadly defined “extremist activity”<sup>5</sup> and for questioning the territorial integrity of the Russian Federation.<sup>6</sup> An analysis of these legislative developments and their practical implementation, however, falls beyond the scope of the present Opinion.

4. The protection of human rights defenders and the development of an enabling environment for their activities are at the core of the mandate of the Commissioner for Human Rights, and the Committee of Ministers has explicitly encouraged the Commissioner to “intervene [...] in the manner the Commissioner deems appropriate, with the competent authorities, in order to assist them in looking for solutions, in accordance with their obligations, to the problems which human rights defenders may face [...]”.<sup>7</sup> As was the case of the Opinion CommDH(2013)15, the present Opinion is part of the Commissioner’s general efforts to ensure the best possible conditions for the work of human rights defenders in the Council of Europe area, and its analysis of the issues concerned applies in any context where similar provisions, restrictions and practices exist or are under consideration.

## 1.2 Statistical data on the application of the Law on Foreign Agents

5. As of 29 June 2015 the Register of NCOs performing the functions of a Foreign Agent (hereinafter referred to as the Register of Foreign Agents) included at least 76 NCOs.<sup>8</sup> This figure includes six NCOs which have been labelled as withdrawn from the Register: four for reasons of liquidation, and two others which have ceased to perform the functions of a “foreign agent”. The majority of NCOs have been added to the Register during the last six months. With the exception of five NCOs which applied for registration voluntarily,<sup>9</sup> all were registered as “foreign agents” through decisions taken by the Ministry of Justice.
6. In addition, as of 29 June 2015 there have been at least 189 cases brought before domestic courts both in the first instance and at appellate levels in respect of the application of the Law on Foreign Agents. Of those, at least 28 judicial decisions were delivered in favour of the NCOs concerned, while at least 121 judicial decisions found that the law had been correctly applied against the NCOs. In at least 55 of the cases, the judicial decisions have already entered into force. As a result of the application of the Law

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<sup>4</sup> The Federal Law no. 97-FZ of 5 May 2014 on “Introducing Amendments to the Federal Law on Information, Information Technologies and Data Protection and Separate Legislative Acts of the Russian Federation” (entered into force on 1 August 2014).

<sup>5</sup> The Federal Law no. 179-FZ of 28 June 2014 on “Introducing Amendments to Separate Legislative Acts of the Russian Federation” which introduced amendments to Article 280 of the Criminal Code (entered into force on 11 July 2014).

<sup>6</sup> The Federal Law no. 433-FZ of 28 December 2013 on “Introducing Amendments to the Criminal Code of the Russian Federation” introducing new Article 280.1 (entered into force on 9 May 2014).

<sup>7</sup> See the Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, 6 February 2008, paragraph 4.iii.

<sup>8</sup> The Register of Foreign Agents is publicly available on the web-site of the Ministry of Justice of the Russian Federation: <http://unro.minjust.ru/NKOForeignAgent.aspx>.

<sup>9</sup> The five NCOs who applied for registration as “foreign agents” voluntarily are the following: 1) Non-commercial partnership for “the Support and Development of Competition in the CIS Countries”, Moscow (registered on 27 June 2013); 2) Karachay–Cherkess Republican Youth Social Organisation “The Union of Young Political Scientists” (registered on 15 December 2014); 3) Public regional movement “Women’s Parliament of Novgorod” (registered on 6 March 2015); 4) Foundation for the Protection of Customers’ Rights of Novosibirsk (registered on 17 April 2015) and 5) Regional public organisation “Centre of Independent Research of the Republic of Altai” (registered on 10 June 2015).

on Foreign Agents, at least 20 NCOs in the country have ceased their activity either in full (including by “self-liquidating” or suspending their activity) or in part (including by closing specific projects) (see paragraphs 66-67 below). According to information available to the Commissioner, many NCOs which have been registered as “foreign agents” intend to stop their activities if they lose judicial proceedings and remain on the Register. There is no specific data on the extent to which NCOs have engaged in self-censorship to avoid triggering the application of the Law on Foreign Agents against them and the concomitant risk of administrative fines or other sanctions.

7. At least 79 judicial proceedings (both at the first instance and appellate levels) were still pending before the domestic courts all across the country as of 29 June 2015. The domestic judicial proceedings may be categorised as follows: 1) appeals by NCOs against actions taken against them by prosecutorial authorities, including inspections, warnings and notices of a violation of the Law on Foreign Agents; 2) civil lawsuits initiated by prosecutorial authorities aimed at enjoining NCOs to register as “foreign agents”; 3) proceedings related to the application of sanctions under the Code of Administrative Offences (hereinafter referred to as the CAO) by both prosecutors and the Ministry of Justice against NCOs and their leaders who did not apply for registration as “foreign agents” voluntarily; and 4) judicial appeals filed by NCOs against their forced registration in the Register of Foreign Agents. There is also a group of cases where the Ministry of Justice has initiated legal proceedings with a view to applying administrative sanctions for the failure by an NCO to comply with the more stringent requirements specific to “foreign agents”, e.g. more frequent reporting pursuant to Article 19.7.5-2 of the CAO.<sup>10</sup> The latter group represents rather exceptional cases with few judicial decisions to date. In some of these cases the Ministry of Justice eventually withdrew its claims while in others the courts have asked for additional clarifications before initiating the procedure due to a lack of information in the case-files. Nevertheless, it is not excluded that more administrative proceedings of this type may be coming to the courts in the future.
8. According to information provided by a number of civil society organisations, as of 29 June 2015 at least eight different applications (including a collective application on behalf of thirteen Russian NCOs) were pending before the European Court of Human Rights (hereinafter referred to as the European Court) in relation to the Law on Foreign Agents. These applications were submitted on behalf of at least nineteen NCOs and one individual.

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<sup>10</sup> As of 29 June 2015, the Ministry of Justice has initiated administrative proceedings for failure to comply with the reporting requirements in several cases, for instance against the Foundation of Freedom of Information, Citizen Watch and Soldiers’ Mothers in St. Petersburg, and the Association *Golos* and Lawyers for Constitutional Rights “*Jurix*” in Moscow. According to Ministry of Justice statistics, there were 6 cases where NCOs registered as “foreign agents” failed to comply with the reporting requirements in 2014. For further details - see the Annual report of the Ministry of Justice on supervision of NCOs in 2014, p. 15, available on-line: <http://minjust.ru/ru/press/news/doklad-ob-osushchestvlenii-ministerstvom-yusticii-rossiyskoy-federacii-gosudarstvennogo-6>.

## II. Legal Framework

9. The applicable international standards protecting the activity of human rights defenders are set out in the Opinion CommDH(2013)15.<sup>11</sup> Furthermore, the international standards relating to the functioning of NGOs stress that NGOs make an essential contribution to the development, realisation and continued survival of democratic societies, in particular through the promotion of public awareness and the participatory involvement of citizens in the *res publica*<sup>12</sup> and that NGOs should be encouraged to participate in governmental and quasi-governmental mechanisms for dialogue, consultations and exchanges, with the objective of searching for solutions to society's needs.<sup>13</sup> NGOs' contributions are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities, through to the advocacy of changes in law and public policy.<sup>14</sup> NGOs should be free to solicit and receive funding not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies.<sup>15</sup> The European Court has characterised the important role played by NGOs as "watchdogs" in a democratic society<sup>16</sup> which involves imparting information and ideas on all matters of public interest.<sup>17</sup> It has also found that the holding of meetings, demonstrations, assemblies and other forms of public campaigning should not as such be qualified as political activities.<sup>18</sup>
10. The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention on Human Rights or the European Convention) limits the possible restrictions to the right to freedom of expression (Article 10) and the right to freedom of assembly and association (Article 11) only to those which are "prescribed by law", pursue a legitimate aim, and are "necessary in a democratic society". Any exceptions to freedom of association are to be construed strictly, and only convincing or compelling reasons can justify restrictions to that freedom. In addition, the notion of the rule of law itself is built on the following principles: 1) legality, including a transparent, accountable and democratic process for enacting law; 2) legal certainty; 3) Prohibition of arbitrariness; 4) access to justice before independent and impartial courts, including judicial review of administrative acts; 5) respect for human rights; and 6) non-discrimination and equality before the law. The principle of legal certainty requires a state to respect and apply, in a foreseeable and consistent manner, the laws it has enacted. Laws must be formulated with sufficient precision to enable the individual to regulate his or her conduct and Parliament should not be allowed to override fundamental rights with ambiguous laws. Retroactivity goes against the principle of legal certainty.<sup>19</sup>

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<sup>11</sup> See paragraphs 1-3 of CommDH(2013)15.

<sup>12</sup> See the preamble of the Fundamental Principles on the Status of Non-governmental Organisations in Europe of 13 November 2002, Council of Europe.

<sup>13</sup> *ibid*, para. 74.

<sup>14</sup> See the preamble of Recommendation of the Committee of Ministers of Council of Europe on the Legal Status of Non-governmental Organisations in Europe of 10 December 2007 CM/Rec(2007)14.

<sup>15</sup> *ibid*, para. 50.

<sup>16</sup> See *Vides Aizsardzibas Klubs v. Latvia*, no. 57829/00, judgment of 27 May 2004, § 42.

<sup>17</sup> See *Jersild v. Denmark*, no. 15890/89, Grand Chamber judgment of 23 September 1994, § 31.

<sup>18</sup> See *Zhechev v. Bulgaria*, no. 57045/00, judgment of 21 June 2007, § 55.

<sup>19</sup> See paragraphs 28 to 41 of CommDH(2013)15.

## 2.1 Amendments to the Federal Legislation on Non-Commercial Organisations

11. Since the adoption of the Law on Foreign Agents and the publication of the Commissioner's Opinion of July 2013, which provided detailed analysis of the Law on Foreign Agents,<sup>20</sup> there have been several amendments to the Russian legislation regulating the NCO sector, most notably related to the carrying out of inspections of NCOs and the Law on Foreign Agents. The newly adopted Law on so-called "undesirable" organisations as well as other pending legal initiatives are also summarised in the following paragraphs.

### *Inspections of Non-Commercial Organisations*

12. On 21 February 2014, through Federal Law No. 18-FZ, Article 32 of the Federal Law "On Non-Commercial Organisations" (hereinafter referred to as the Law on NCOs) was amended through the introduction of a new paragraph 4.2. which widened the legal grounds for the carrying out of unplanned or extraordinary inspections (*внеплановые проверки*) of NCOs in the following situations: 1) an NCO fails to rectify previously-identified infringements of law in a timely manner; 2) the Ministry of Justice receives information from state bodies that an NCO violated the NCO legislation or that there were indications of extremism in its activity; 3) the Ministry of Justice receives a notice from the electoral commission requesting an unplanned inspection of an NCO (with a view to verifying information about donations to political parties); or 4) the Ministry of Justice receives an instruction to carry out an unplanned inspection from the President of the Russian Federation or the Government, or a request to do so by a prosecutor.<sup>21</sup>

### *Law on Foreign Agents*

13. On 4 June 2014, through Federal Law No. 147-FZ, another set of amendments to Article 32 of the Law on NCOs was adopted: 1) unplanned inspections of NCOs may be initiated if the Ministry of Justice receives information from state bodies, self-managing entities, individuals or legal entities that an NCO performed the functions of a "foreign agent" but did not register as such<sup>22</sup> and 2) the Ministry of Justice may include an NCO in the Register of Foreign Agents if it finds that the NCO performed functions of a "foreign agent" and did not register voluntarily.<sup>23</sup> The 147-FZ Law also repealed paragraph 5.6 of Article 32 of the Law on NCOs which empowered the Ministry of Justice to suspend activities of an NCO if it did not apply for registration as a "foreign agent" while performing such functions. However, administrative sanctions for the said failure as provided by Article 19.34 of the CAO remain in force.
14. A further series of amendments was introduced on 24 November 2014 with the adoption of Federal Law No. 355-FZ, which imposes the following restrictions on NCOs registered as "foreign agents": 1) political parties are prohibited from concluding contracts with such

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<sup>20</sup> See paragraphs 17 to 22 of the Opinion CommDH(2013)15.

<sup>21</sup> See new paragraph 4.2 of Article 32 of the Law on NCOs.

<sup>22</sup> See the amended paragraph 4.2-5 of Article 32 of the Law on NCOs.

<sup>23</sup> See the amended 3rd part of paragraph 7 of Article 32 of the Law on NCOs.

NCOs<sup>24</sup> and 2) NCOs registered as “foreign agents” are prohibited, *inter alia*, from “participating in other ways in the electoral and referendum campaigns”.<sup>25</sup>

15. Moreover, on 8 March 2015 legislation was introduced granting NCOs the right to be removed from the Register of Foreign Agents (Federal Law No. 43-FZ amending Articles 27 and 38 of the Federal Law on Public Associations and Article 32 of the Law on NCOs). In order to claim this right, an NCO must first submit a request to the Ministry of Justice to be excluded from the Register.<sup>26</sup> Following such a request, the Ministry of Justice carries out an unplanned inspection of that NCO with a view to determining whether: a) the NCO ceased all its activities, was liquidated or is no longer included in the Unified State Register of Legal Entities;<sup>27</sup> b) the NCO did not receive foreign funding or other property from foreign sources and/or ceased political activity in the territory of the Russian Federation during the year preceding its request to be excluded from the Register; or c) the NCO had refused to receive and had returned voluntarily any foreign funding or other property to the foreign sources within three months from its inclusion in the Register of Foreign Agents.<sup>28</sup> The Ministry of Justice decides on whether or not to grant the request within three months of its submission. If an NCO which had previously been excluded from the Register is once again registered as a “foreign agent”, the time which must elapse from the last receipt of foreign funding until the right to leave the Register is extended to three years.<sup>29</sup>

#### *Law on Undesirable International or Foreign Non-Governmental Organisations*

16. On 23 May 2015, Federal Law No. 129-FZ on “Introducing Amendments to Certain Legislative Acts of the Russian Federation” (hereinafter referred to as the Law on Undesirable INGOs) was signed by the President of the Russian Federation. It entered into force on 3 June 2015. The law empowers the Prosecutor General and his deputies, in co-ordination with the Ministry of Foreign Affairs, to declare “undesirable” any international or foreign NGO (hereinafter referred to as INGO) whose activities are deemed to constitute a threat to constitutional order, national security and defence.<sup>30</sup>
17. Declaring an INGO as “undesirable” entails the following consequences: banning its activities on the whole territory of the Russian Federation; closing down any branches of the organisation and/or preventing it from opening them; and the prohibition of producing, storing and disseminating information materials produced by the INGO, including through

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<sup>24</sup> See the amended paragraph 4.1 of Article 31 of the Federal Law no. 95-FZ on “Political Parties” of 11 July 2001.

<sup>25</sup> See paragraph 6 of Article 3 of the Federal Law no. 67-FZ on “Basic Guarantees of the Electoral Rights of the Russian Citizens and the Right to Participate in Referendum” of 12 June 2002.

<sup>26</sup> See the fifth part of Article 27 of the Law on Public Associations and paragraph 4.2-6 of Article 32 of the Law on NCOs.

<sup>27</sup> In Russian *Единый Государственный Реестр Юридических Лиц (ЕГРЮЛ)*. It is a unified database which contains information about all Legal Entities registered by the Ministry of Justice. According to Article 51 (paragraph 2) of the Civil Code of the Russian Federation, the database is publicly available.

<sup>28</sup> See parts 5-9 of Article 38 of the Law on “Public Associations” and paragraph 7.1 of Article 32 of the Law on NCOs.

<sup>29</sup> See paragraph 3 of the sixth part of Article 38 of the Law on “Public Associations” and paragraph 7.1-3 of Article 32 of the Law on NCOs.

<sup>30</sup> See Article 5 of the Law on Undesirable INGOs introducing new Article 3<sup>1</sup> to Federal Law No. 272-FZ “On measures for affecting persons implicated in violation of basic human rights and freedoms, rights and freedoms of the citizen of the Russian Federation” of 28 December 2012 – the so-called “Dima Yakovlev Law”.



mass media and the Internet.<sup>31</sup> Financial institutions are also under an obligation to refuse any financial operations involving the participation of an “undesirable” INGO.<sup>32</sup>

18. Under the law, the following sanctions will apply to individuals and entities who are found to be participating in the activity of the “undesirable” INGO: fines of up to 15 000 roubles for private persons; up to 50 000 roubles if the persons involved are officials (*должностное лицо*); and up to 100 000 roubles for legal entities (approximately 270, 900 and 1800 euros respectively).<sup>33</sup> The law envisages up to six years of deprivation of liberty for the repetitive (more than twice a year) participation in the activity of an “undesirable” INGO for any individual, as well as the same criminal responsibility for those holding management positions in the organisation concerned.<sup>34</sup> Finally, the law bans any foreign nationals participating in the activities of an “undesirable” INGO from entry into the territory of the Russian Federation.<sup>35</sup>
19. The Commissioner’s concerns with regard to this legislation are related to a lack of legal certainty, the prohibition of arbitrariness and the proportionality of sanctions which are illustrated by the wide discretionary powers granted to the Prosecutor’s Office and the executive authorities combined with the absence of prior judicial review.<sup>36</sup> The Ombudsman of the Russian Federation has expressed concerns about the broad and vague character of the definitions used in the law, for instance “undesirable” and “participation in activity”, which can easily result in the arbitrary interpretation of the law.<sup>37</sup> Most notably, the absence of criteria for determining what would constitute “participation in the activity of an undesirable INGO” could qualify virtually any action as falling under the scope of this law.
20. The law does not provide for a mechanism allowing an affected INGO to challenge a decision in the courts before it is declared “undesirable”.<sup>38</sup> The Commissioner would like to recall in this regard that in its case-law, the European Court has generally refused to consider public prosecutors as independent and impartial tribunals within the meaning of Article 6§1 of the Convention. According to the Court, “the mere fact that the prosecutors acted as guardians of the public interest cannot be regarded as conferring on them a judicial status of independent and impartial actors”.<sup>39</sup> It follows from the case-law of the Court that in principle, prosecutors should not have decision-making powers when taking measures concerning “civil rights and obligations”, unless their measures are subject to full

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<sup>31</sup> Ibid.

<sup>32</sup> See Article 5 of the Law on Undesirable INGOs introducing new Article 3<sup>2</sup> to the Federal Law No. 272-FZ “On measures for affecting persons implicated in violation of basic human rights and freedoms, rights and freedoms of the citizen of the Russian Federation” of 28 December 2012 – the so-called “Dima Yakovlev Law”.

<sup>33</sup> See Article 4 of the Law on Undesirable INGOs introducing new Article 20.33 of the Code of Administrative Offences of the Russian Federation.

<sup>34</sup> See Article 1 of the Law on Undesirable INGOs introducing new Article 284<sup>1</sup> to Criminal Code of the Russian Federation.

<sup>35</sup> See Article 2 of the Law on Undesirable INGOs introducing new paragraph 9 to Article 26 of the Federal Law 114-FZ on “The regulations of the entry to and leaving from the Russian Federation” of 15 August 1996.

<sup>36</sup> See, para. 34 of the Opinion CommDH(2013)15.

<sup>37</sup> See the legal analysis of the Law on Undesirable INGOs by the Ombudsman of the Russian Federation, available on-line:

[http://ombudsmanrf.org/news/novosti\\_upolnomochennogo/view/zakljuchenie\\_upolnomochennogo\\_na\\_federalnyj\\_zakon\\_ot\\_23052015\\_acirc](http://ombudsmanrf.org/news/novosti_upolnomochennogo/view/zakljuchenie_upolnomochennogo_na_federalnyj_zakon_ot_23052015_acirc).

<sup>38</sup> It is expected that the general provisions of the Civil Code of the Russian Federation would still allow an “undesirable” INGO to challenge the decision taken by the prosecutorial authorities in the court.

<sup>39</sup> See *Zlinsat, SPOL. S.R.O. v. Bulgaria*, no. 57785/00, judgment of 15 June 2006, §78.

judicial review. Furthermore, in the Commissioner's opinion, the granting of such broad powers to the Prosecutor General and his deputies would further undermine the equality of arms and exacerbate the "pronounced prosecutorial bias" in the judicial system.<sup>40</sup> As a practical consequence, it would be nearly impossible for the affected INGOs to challenge the respective prosecutorial decisions in the courts.

21. Recommendation CM/Rec(2007)14 of the Committee of Ministers on the Legal Status of Non-governmental Organisations in Europe emphasises that foreign NGOs' approval to operate can only be withdrawn in the event of bankruptcy, prolonged inactivity or serious misconduct.<sup>41</sup> However, the Law on Undesirable INGOs does not give specific criteria for determining the misconduct of an INGO which would trigger the corresponding administrative and criminal sanctions.
22. The principle of proportionality requires the presence of convincing and compelling reasons corresponding to a "pressing social need" which can justify interference with and/or restrictions to rights. Any restriction imposed on fundamental rights must also be proportionate to the legitimate aim pursued. The notion "necessary in a democratic society" used in Articles 10 and 11 of the European Convention is not as broad as "useful" or "desirable".<sup>42</sup> In this light, it is difficult to see how such a severe penalty as prohibiting entirely the operations of an INGO or introducing heavy administrative and criminal sanctions for those who participate in its activities could be qualified as corresponding to a pressing social need, and be "necessary in democratic society" while remaining proportionate to the offence committed. Furthermore, the case-law of the European Court provides that a difference in treatment will be regarded as discriminatory if it has no objective and reasonable justification, it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>43</sup>

#### *Pending legislative initiatives*

23. There are several legislative initiatives which, if adopted, would further restrict the legal regime regulating the work of the NCOs registered as "foreign agents". On 3 March 2015 a group of members of the State Duma proposed to ban members of the lower and upper chambers of the Russian Parliament, as well as state and municipal public servants from being included in the managing, patronage or supervisory boards of NCOs performing functions of a "foreign agent", as well as from membership in such NCOs.<sup>44</sup> The explanatory note to the draft law stipulates that the measure is necessary in view of "the danger of penetration of persons directly connected with the activity of NCOs performing

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<sup>40</sup> A similar assessment on the "pronounced prosecutorial bias" was made by President Vladimir Putin during his Presidential Address to the Federal Assembly of the Russian Federation on 12 December 2012, available on-line: <http://www.kremlin.ru/news/17118>.

<sup>41</sup> See para. 45 of the Recommendation CM/Rec(2007)14.

<sup>42</sup> See *Young, James and Webster v. the United Kingdom*, no. 7601/76 and 7806/77, judgment of 13 August 1981, § 63, and *Chassagnou and Others v. France*, nos. 25088/94, 28331/95 and 28443/95, Grand Chamber judgment of 29 April 1999, § 112.

<sup>43</sup> See, among others, *Inze v. Austria*, no. 8695/79, judgment of 28 October 1987, § 41.

<sup>44</sup> The draft of the Federal Law No. 735229-6 is available on-line: [http://asozd2.duma.gov.ru/main.nsf/\(Spravka\)?OpenAgent&RN=735229-6](http://asozd2.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=735229-6).

functions of foreign agents, to the key positions in state and municipal services, as well as to the legislative body of the Russian Federation”.<sup>45</sup>

24. Another legislative initiative - draft Federal Law No. 735304-6 - was registered in the State Duma on 5 March 2015. It envisages an extension of the statute of limitations on application of the administrative sanctions for non-compliance with the Law on Foreign Agents pursuant to Article 19.34 of the CAO from three months to one year.<sup>46</sup> Furthermore, according to information published in the Russian media on 22 May 2015, another draft amendment is currently under preparation which, if approved, would remove the NCOs registered as “foreign agents” from representation in the public consultative commissions attached to the state law enforcement and military bodies, as well as preventing them in principle from carrying out any activities in these domains.<sup>47</sup>
25. The national human rights structures – the Federal Ombudsman of the Russian Federation, Ms Ella Pamfilova, and the Council on the Development of Civil Society and Human Rights under the President of the Russian Federation (hereinafter referred to as the “Human Rights Council”), chaired by Mikhail Fedotov – have stressed the need to revise the legislation regulating NCOs in the Russian Federation. In particular, the Human Rights Council has suggested the harmonisation of the Law on NCOs with the provisions of the Civil Code, the Law on Political Parties and other legislative documents currently in force.<sup>48</sup> As a result, the Law on Foreign Agents could disappear as an “unnecessary layer” as NCOs defending human rights would be taken out of its scope, while those organisations which pursue political goals would be covered by the legislation regulating political parties.<sup>49</sup> The Federal Ombudsman has also suggested amending the legislation, *inter alia*, by clarifying the current definition of “political activity” as it has resulted in a “high degree of arbitrariness and a selective approach in designating foreign agents”. She has furthermore observed that the principles, criteria and basis for including NCOs in the Register of Foreign Agents are so vague and arbitrary that they have provoked justified criticism from the NCO community and damaged the reputation of civil society.<sup>50</sup>
26. On 4 June 2015 a member of the State Duma Gudkov introduced a Federal Law draft no. 808729-6 “Amending certain legislative acts of the Russian Federation in part of regulating the activities of non-commercial organisations”. The draft law is aimed at abolishing the concept of an NCO performing functions of a “foreign agent” as the current legislation on NCOs “requires a substantive analysis and a complex revision in order to prevent its excessively broad interpretation”. The proposed law is also motivated by the observation that “the law-enforcement practice of including organisations in the [...] Register has demonstrated that the said provisions are excessive and in some situations extremely

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<sup>45</sup> The explanatory note to the draft of law No. 735229-6 is available on-line: [http://asozd2.duma.gov.ru/main.nsf/\(Spravka\)?OpenAgent&RN=735229-6](http://asozd2.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=735229-6).

<sup>46</sup> The draft of the Federal Law No. 735304-6 is available on-line: [http://asozd2.duma.gov.ru/main.nsf/\(Spravka\)?OpenAgent&RN=735304-6](http://asozd2.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=735304-6).

<sup>47</sup> See the news article from *Izvestia* newspaper of 21 May 2015, available on-line: <http://izvestia.ru/news/586774>.

<sup>48</sup> See the news article of Human Rights Council on the ongoing initiatives of the Council of 27 January 2015, available on-line: <http://president-sovet.ru/presscenter/news/read/2183/>.

<sup>49</sup> See also the news article on the ongoing reform of the NCO legislation of 19 February 2015, available on-line: <http://president-sovet.ru/presscenter/publications/read/2532/>.

<sup>50</sup> See the 2014 annual report of the Ombudsman of the Russian Federation, pp. 48-50, available on-line: <http://ombudsmanrf.org/www/upload/files/docs/appeals/doklad2014.pdf>.

ineffective [where] they are expected to ensure the substantive supervision over the activity of NCOs [receiving foreign funding]”.<sup>51</sup>

## 2.2. Relevant judgments of the Constitutional Court

27. On 8 April 2014 the Constitutional Court of the Russian Federation delivered a judgment whereby it confirmed the overall compatibility of the Law on Foreign Agents with the Russian Constitution.<sup>52</sup> The Court interpreted the term “political activity” as an “activity which in its substance and aims is not limited to the needs of an organisation itself, but obviously concerns both public interests in general and the rights and freedoms of everyone.” The Constitutional Court also provided a non-exhaustive list of forms of political actions, such as: public gatherings, demonstrations, marches, picketing, political agitation in the context of electoral processes and referenda, public speeches to state bodies, and the dissemination of opinions regarding decisions taken by the authorities.<sup>53</sup> The Constitutional Court established that the crucial factors which should be taken into account in qualifying an action as political were: 1) whether an action is aimed at influencing decision-making by state bodies or influencing state policy directly or by shaping public opinion; and 2) the public character of an action, i.e. whether it elicits a significant public response (*резонанс*) or attracts the attention of state bodies or civil society to the issue in question.<sup>54</sup> This would appear to be in contradiction with the case law of the European Court (cf. paragraph 9 above).
28. The Constitutional Court also found that the attribution of a “foreign agent” status to Russian NCOs was aimed at ensuring the transparency of NCO work and did not entail any interference in the substance of their activities. The Law on Foreign Agents established a voluntary regime for registration as a “foreign agent” and in no way prevented NCOs from seeking or receiving foreign funding, including for the carrying out of political activities. Moreover, NCOs had the right to judicial review in those matters and the burden of proof that an NCO had engaged in political activity or received foreign funding remained on the authorities.<sup>55</sup> According to the Constitutional Court, the “foreign agent” status did not signify a negative attitude of the authorities towards NCOs engaged in political activity and funded by foreign sources.<sup>56</sup>
29. As to a provision of the Code of Administrative Offences (Article 19.34, paragraph 1), pursuant to which an NCO performing the functions of a “foreign agent” without being registered is to be sanctioned with administrative fines, the Constitutional Court found that it was compatible with the Constitution. However, the minimum administrative sanctions under the CAO provision in question (100 000 roubles for individuals and 300 000 roubles

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<sup>51</sup> See the explanatory note together with the draft law available on-line:

[http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/013351F42EF57B7043257E5A004B0075/\\$FILE/808729-6\\_04062015\\_808729-6.PDF?OpenElement](http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/013351F42EF57B7043257E5A004B0075/$FILE/808729-6_04062015_808729-6.PDF?OpenElement).

<sup>52</sup> Judgment of the Constitutional Court of the Russian Federation No. 10-P of 8 April 2014.

<sup>53</sup> In his dissenting opinion Judge Yaroslavtsev provided a detailed analysis of why this interpretation of the notion of “political” activity may not be in compliance with the standards enshrined in the European Convention on Human Rights.

<sup>54</sup> See the judgment of the Constitutional Court of the Russian Federation No. 10-P of 8 April 2014, section 3.3.

<sup>55</sup> *ibid*, section 3.4.

<sup>56</sup> *ibid*, section 3.1.

for NCOs (approximately 1800 and 5500 euros respectively) were found to be excessively high and therefore unconstitutional.

30. In a judgment of 17 February 2015, the Constitutional Court also concluded that the Federal Law No. 2202-1 “On the Prosecutor’s Office of the Russian Federation” of 17 January 1992 was compatible with the Constitution.<sup>57</sup> At the same time, it specified certain rules in order to avoid arbitrary use of powers in the context of inspections of NCOs by prosecutors. In particular, the Constitutional Court established that prosecutors: must give reasons to and notify an NCO about the carrying out of an inspection and, subsequently, of its results; should not request documents which are publicly available or already in the possession of other state bodies; cannot initiate repetitive inspections of an NCO on identical grounds. In addition, the Constitutional Court emphasised that prosecutors’ decisions may be appealed in courts, and that the Law on the Prosecutor’s Office should be amended to include a clear provision as to the time-limits of inspections. The Ministry of Justice and the Human Rights Council are currently in the process of drafting guidelines for carrying out inspections of NCOs in light of the Constitutional Court’s judgment.

### **III. Implementation of the Law on Foreign Agents**

#### **3.1. Legal issues arising from the application of the Law on Foreign Agents**

31. Since its entry into force on 21 November 2012 the application of the Law on Foreign Agents reveals a number of shortcomings as regards the principles of legal certainty and the prohibition of arbitrariness, which, together with the principles of proportionality and of the right to a fair trial, are core values of a democratic society. Some of the recently adopted amendments also raise issues in terms of the prohibition of discrimination.

##### *The Principle of Legal Certainty*

32. Articles 10 and 11 of the European Convention on Human Rights each contain - in their second paragraphs, which cover possible interferences into those rights - the standard “prescribed by law”. The European Court of Human Rights has established that the “prescribed by law” standard means that the interference in freedom of expression and of association should not only have some basis in domestic law, but that the law in question must be of a certain *quality*.<sup>58</sup> The European Court further established that the law should be formulated with sufficient precision to enable the persons concerned to foresee the consequences which a given action may entail.<sup>59</sup> Furthermore, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention.<sup>60</sup>

##### **3.1.1. Retrospective application of the law and related issues**

33. Retroactivity goes against the principle of legal certainty: in criminal law, since legal subjects have to know the consequences of their behaviour, but also in civil and administrative law to the extent that it negatively affects fundamental rights and legal

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<sup>57</sup> Judgment of the Constitutional Court of the Russian Federation No. 2-P of 17 February 2015.

<sup>58</sup> See *Maestri v. Italy*, no. 39748/98, Grand Chamber judgment of 17 February 2004, § 30.

<sup>59</sup> See *Sunday Times v. the United Kingdom* (no. 1), no. 6538/74, judgment of 26 April 1979, § 49.

<sup>60</sup> See *Hasan and Chaush v. Bulgaria*, no. 30985/96, Grand Chamber judgment of 26 October 2000, § 84.

interests.<sup>61</sup> The implementation of the Law on Foreign Agents presents a number of examples where the law was applied retrospectively. For instance, in many cases the presence of “political” activity was established on the basis of activities conducted before the entry into force of the law (21 November 2012). As an illustration, the Public Verdict Foundation was found to perform political activities because of, *inter alia*, legal assistance provided to participants in public protests at Bolotnaya square in Moscow in May 2012.<sup>62</sup> Furthermore, the mere publication on-line of reports and other information materials related to the events organised in the past was qualified as “political” in dozens of cases. For example, the on-line publication of the 2012 annual activity report which was previously submitted to the Ministry of Justice by the Union Women of Don was found to be “political”, even if the activities described in it took place before the entry into force of the Law on Foreign Agents (i.e. the round tables were held on 6-8 September 2012).<sup>63</sup>

34. The information which may serve as a basis for the Ministry of Justice to register an NCO as a “foreign agent” may no longer be of relevance by the time of its inclusion in the Register. For example, the Human Rights Centre Memorial (hereinafter referred to as HRC Memorial) was included in the Register of Foreign Agents in June 2014 on the basis of a prosecutor’s Notice delivered on 29 April 2013. The prosecutor’s Notice, in turn, refers to events which occurred *inter alia*, in May 2012,<sup>64</sup> i.e. even before the Law on Foreign Agents entered in force. In the case of the Volgograd Youth Centre for Consulting and Training, the organisation reportedly did not receive foreign funding for more than a year prior to the inspection conducted by the Ministry of Justice. Nevertheless, it was still included in the Register of Foreign Agents. The Centre, together with several other NCOs, has requested withdrawal from the Register on the basis of an absence of foreign funding for more than a year.
35. In a case involving Regional *Golos*, both the Moscow Prosecutor’s Office and judicial authorities have stated that the obligation to comply with the Law on Foreign Agents was triggered not only when an NCO had actually engaged in “political activity” but also when the group decided to organise the events which constituted “political activity”. The fact that Regional *Golos* subsequently cancelled the planned events was not taken into account by the authorities.<sup>65</sup> In other words, it appears that the Law on Foreign Agents was applied against the group for the mere intention to conduct certain activities, irrespectively of whether it actually fulfilled its intention.

### 3.1.2 Inclusion and withdrawal from the Register of Foreign Agents

36. As mentioned above, in June 2014 amendments to the Law on NCOs empowered the Ministry of Justice to include an NCO in the Register of Foreign Agents without its consent provided that the Ministry “uncovers signs that the NCO is performing functions of a foreign agent” (see paragraph 13 above). The amendments to the law, however, do not establish a procedure of how the Ministry would identify such NCOs, and do not specify whether the

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<sup>61</sup> See, the Venice Commission Report on the Rule of Law of 4 April 2011, CDL-AD(2011)003, para. 46.

<sup>62</sup> See the Notice delivered to Public Verdict by the Moscow prosecutor’s office on 8 May 2013, p. 3.

<sup>63</sup> See the civil lawsuit of the Novochoerkassk town prosecutor’s office against Union Women of Don of 3 September 2013, p. 4.

<sup>64</sup> See the Notice delivered to HRC Memorial by the Moscow prosecutor’s office on 29 April 2013, p. 3.

<sup>65</sup> See the decision of Zamoskvoretzkiy district court of Moscow of 10 July 2013, p. 4 in a case of Regional *Golos*.

Ministry is the only state body entitled to assess whether “political activity” has taken place. Moreover, the amendments do not specify whether an inspection is necessary for this purpose or whether there are other possibilities, apart from inspections, to assess the activity of an NCO. Furthermore, the law is silent as to whether the Ministry must notify an NCO that it will be registered as a “foreign agent” and whether such an NCO could challenge this decision and thus prevent its inclusion in the Register of Foreign Agents.

37. In practice, different modalities were employed in relation to inclusion in the Register of Foreign Agents. Below are some examples:

- In February 2014 HRC Memorial was inspected by the Ministry of Justice which did not find any “political” activity in its operations. However, several months later the Ministry nonetheless registered HRC Memorial as a “foreign agent” on the basis of a Notice issued by the prosecutor’s office in April 2013.<sup>66</sup> No binding judicial decision preceded HRC Memorial’s inclusion in the Register;
- The Kaliningrad environmental NCO “*Ecozashita*” was inspected by the Ministry of Justice in May 2014.<sup>67</sup> As a result, the Ministry initiated administrative proceedings against it and registered it as a “foreign agent” on 27 July 2014,<sup>68</sup> i.e. without awaiting the outcome of the appeal by the NCO which was pending in the courts;
- The Krasnodar Regional Social Organisation of University Alumni was included in the Register of Foreign Agents without any previous inspection, but “in the context of state supervision (*государственный надзор*) of its activity by the Krasnodar Regional Department of the Ministry of Justice”<sup>69</sup> which reportedly implied, *inter alia*, the monitoring of the organisation’s web-site by the Ministry on its own initiative.

38. The practice of implementing the Law on Foreign Agents is rich in examples where the Ministry of Justice includes an NCO in the Register of Foreign Agents before the NCO has exhausted the judicial review of the lawfulness of the decision related to the application of the said Law. As an illustration, HRC Memorial was in the appeal process related to the lawfulness of the prosecutorial Notice on the infringement of the Law on Foreign Agents when the Ministry of Justice registered it as a “foreign agent”. A similar situation involved the Institute for the Development of Freedom of Information. Union Women of Don was appealing the decision of Novocherkassk town court obliging the Union to register as a “foreign agent” when the Ministry of Justice included it in the Register. The Kaliningrad environmental NCO “*Ecozashita*” was registered as a “foreign agent” before it had the possibility to contest the application of the Law in court in the administrative proceedings under Article 19.34 of the CAO initiated by the Ministry of Justice. The same happened to the “Public Commission for the Preservation of Academic Sakharov’s Heritage” (hereinafter referred to as the Sakharov Centre), the All-Russia Movement “For Human Rights”, the Samara Interregional Public Fund For Civil Society Development “*Golos-Povolzhye*” and others.

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<sup>66</sup> See the press release of the Ministry of Justice of 27 July 2014, available on-line: <http://minjust.ru/ru/press/news/minyustom-rossii-vneseny-dopolneniya-v-reestr-nekommercheskih-organizatsiy>.

<sup>67</sup> See the Protocol of inspection of “*Ecozashita*” delivered by the Ministry of Justice on 9 June 2014.

<sup>68</sup> See the Register of Foreign Agents of the Ministry of Justice of the Russian Federation, available on-line: <http://unro.minjust.ru/NKOForeignAgent.aspx>.

<sup>69</sup> See the press release of the Ministry of Justice of 25 December 2014, available on-line: <http://minjust.ru/ru/print/116234>.

39. Due to the fact that the 2014 amendments empowered the Ministry of Justice to identify and include NCOs in the Register, such decisions, if adopted, are subject to a separate judicial review. The application of the recently-acquired powers by the Ministry of Justice to register NCOs as “foreign agents” renders meaningless any ongoing judicial proceedings in which an NCO contests the application of the Law on Foreign Agents (for instance, any prosecutorial decision taken in this regard), since even if an NCO wins the case in the court, this will not result in the cancellation of its registration as a “foreign agent”, because the decision taken by the Ministry must be challenged separately. The Commissioner notes that in order to be in compliance with the principles of the rule of law and fair trial, the introduction of new legal provisions and their implementation must not interfere with the ongoing judicial proceedings if it places a party in a disadvantageous position towards the state. This is of particular importance when the enforcement of new legislation determines the outcome of the judicial proceedings.
40. The law foresees a one-year waiting period after an NCO has ceased its involvement in activity deemed to be political and/or stopped receiving foreign funding and before it is entitled to request a removal from the Register of Foreign Agents. If an organisation is then re-registered as a “foreign agent”, this period is extended to three years. At present, it remains unclear if the information about an NCO which was previously included in the Register would be conserved or cleared after the removal of the NCO from the Register. Recently liquidated NCOs and NCOs whose “foreign agent” status has been withdrawn are still mentioned in the Register of Foreign Agents to date.<sup>70</sup>
41. The adoption of the amendments to the Law on Foreign Agents which specified a procedure for removal of the organisations from the Register is regarded as a positive step. However, the amendments did not address a number of broader issues related to the application of the Law on Foreign Agents.

### **3.1.3 Coexistence of mutually exclusive requirements**

42. Article 19.34 of the CAO which determines applicable sanctions for a failure to register as a “foreign agent” (together with the criminal provisions under Article 330.1 of the Criminal Code as analysed below) had not been repealed at the moment when the amendments empowering the Ministry of Justice to register NCOs as “foreign agents” were introduced. Accordingly, the current legislation envisages mutually exclusive obligations: on the one hand, NCOs are under an obligation to register as “foreign agents” if they perform such a function; on the other hand, the Ministry of Justice has the power to identify and register such NCOs. This inconsistency has resulted in a simultaneous application of the Law on Foreign Agents, with an NCO being included in the Register of Foreign Agents in a compulsory way and at the same time sanctioned for the alleged failure to apply for such registration pursuant to Article 19.34 of the CAO (see paragraphs 37-38 above). The imposition of administrative sanctions in this context appears to be difficult to justify. These conflicting requirements further hinder the foreseeability of the application of the law and create yet more uncertainty as to the legal consequences of NCOs’ actions.

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<sup>70</sup> See the Register of Foreign Agents of the Ministry of Justice of the Russian Federation, available on-line: <http://unro.minjust.ru/NKOForeignAgent.aspx>.



### *Prohibition of arbitrariness*

43. Although the Law on Foreign Agents explicitly refers to the Ministry of Justice as the body responsible for its application, since its entry into force the prosecutorial authorities have played a prominent role in its application, with reference to the general duty of prosecutors to supervise respect for the law by NCOs.<sup>71</sup> In 2013 the Commissioner already pointed out that the legislative provisions did not clearly delimit the roles and duties between the two institutions with regard to oversight of NCO activities, but apparently allowed them to overlap, and that this has certainly contributed to the overall confusion with regard to the implementation of the Law on Foreign Agents.<sup>72</sup>
44. Not only do the Ministry of Justice and the Prosecutor's offices apply the Law on Foreign Agents in parallel, at times there is also a clear lack of co-operation and coordination between them, which further contributes to the overall confusion around the implementation of the Law and hinders its foreseeability (see examples in paragraphs 37-38 above). In a few cases the respective authorities disagreed as to what constituted "political activity", as was the case in civil proceedings initiated by the Murmansk Prosecutor's office against the Humanistic Youth Movement, where the Ministry of Justice was of the opinion that the activities of this NCO should not be qualified as "political," contrary to the position expressed by the Prosecutor's Office. The court, however, supported the position of the prosecution.
45. Another alarming trend is the use of the newly granted powers to carry out unplanned inspections of NCOs on the basis of information provided to the Ministry of Justice by various actors, including individuals (see paragraph 13 above). Thus, in many cases the Ministry of Justice initiated an unplanned inspection of an NCO - with a view to verifying if it was performing the functions of a "foreign agent" - on the basis of unspecified individual complaints. In several cases, neither the substance of such complaints nor the identity of the individual who filed the complaint was communicated to the NCO concerned. The Nizhny Novgorod-based Committee Against Torture and Environmental Centre "*Dron*", the Voronezh Regional Fund "Centre for Defence of Mass Media Rights", the Moscow Foundation for Support of Investigative Journalism "Foundation 19/29" and the Sakharov Centre are recent examples of such practice. The law does not establish any limits on how often a given NCO can be inspected by the Ministry of Justice on the above-mentioned grounds, which can result in the abusive application of such powers.
46. The information received by the Commissioner thus far suggests that the implementation of the Law on Foreign Agents remains at the discretion of the respective authorities to a significant extent. The absence of clear and transparent rules governing the sequence in application of the law and the lack of a clear division of responsibilities and/or coordination between respective state bodies has resulted in unpredictable and difficult to foresee application of the law. Russian NCOs have not been provided with any clear guidance as to what activities among those which they are carrying out could potentially be qualified as "political" and/or what sanctions will apply for any given alleged infringement of the law. This runs contrary to the requirement of legal certainty (see paragraph 32 above).

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<sup>71</sup> For the Commissioner's position on the supervisory review powers of the prosecutors, see paragraphs 74-76 of the Commissioner's Report on his visit to the Russian Federation, [CommDH\(2013\)21](#).

<sup>72</sup> See paragraph 65 of the Commissioner's Opinion of 15 July 2013, [CommDH\(2013\)15](#).

### *The Principle of Proportionality*

47. The European Court has reiterated on many occasions that exceptions to the rights of freedom of association and expression must be construed strictly and that only convincing and compelling reasons can justify restrictions. Any interference must correspond to a “pressing social need”.<sup>73</sup> In determining whether a necessity within the meaning of Article 11 § 2 (or 10(2)) exists, states have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision encompassing both the law and the decisions applying it. From the Commissioner’s perspective, it is difficult to discern how the application of the Law on Foreign Agents has corresponded to a “pressing social need”. The provisions of the law already raise concerns about their proportionality while the measures used to apply the law have resulted in severe consequences for the NCOs affected.

#### **3.1.4 Criminal prosecution**

48. The current legislation relating to “NCOs performing the functions of a foreign agent” is open to the possibility of misuse as a repressive tool against human rights defenders. Criminal provisions remain in force (Article 330.1 of the Criminal Code) allowing for the deprivation of liberty of NCO managers for up to two years for “malevolent” non-compliance with the Law. So far the criminal sanctions have not been invoked, however their presence in the law certainly has a “chilling effect” on the work of civil society institutions and plays an important role in triggering self-censorship (see paragraphs 65-67 below).

#### **3.1.5 Administrative sanctions**

49. The fines for not applying voluntarily for registration as a “foreign agent” and/or not designating information materials and publications - as prescribed by the law – gives rise to concerns from the point of view of proportionality. The fines, which range from 100 000 to 300 000 roubles for NCO managers and from 300 000 to 500 000 roubles for NCOs (approximately from 1800 to 5400 Euros and from 5400 to 9000 euros respectively), represent major additional costs for any NCO which, by its very nature, is not engaged in any profit-making activity. Such amounts represent a significant portion of the annual budget of a significant number of small NCOs.
50. As mentioned earlier (see paragraph 29 above), the Constitutional Court found in its judgment of 8 April 2014 that the minimum fine amounts were at odds with the principle of proportionality and were in breach of the constitutional provisions as they did not allow for the assessment of individual circumstances specific to a particular case. It concluded that the amount of administrative fines must correspond to the character and seriousness of offence and have a reasonable deterrent effect.<sup>74</sup>
51. However, even after the Constitutional Court delivered the above-mentioned judgment, domestic courts have continued to impose heavy fines for NCOs, with a few exceptions

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<sup>73</sup> See *Gorzelik and Others v. Poland*, no. 44158/98, Grand Chamber judgment of 17 February 2004, § 95; see also paragraph 22 above.

<sup>74</sup> See the judgment of the Constitutional Court of the Russian Federation no. 10-P of 8 April 2014, paragraph 2 of section 4.2.

where the amount was reduced.<sup>75</sup> In many cases, NCOs have had no other choice but to initiate a liquidation procedure after receiving heavy fines (see paragraph 66 below). Others have stated that this will be the only option for them if they lose the judicial proceedings in the final instance, since they cannot afford payment of the fines and/or do not agree to operate under the “foreign agent” label. This practice is contrary to the requirement of proportionality under Articles 10 and 11 of the European Convention.

52. Furthermore, the Law envisages the possibility of applying a less intrusive tool to ensure compliance with its provisions, such as a warning. The Ministry of Justice can issue warnings in cases of minor infringements of the Law, while at the same time granting a one-month period for the rectification of the revealed shortcomings.<sup>76</sup> In the case of the Voronezh Regional Fund "Centre for Defence of Mass Media Rights", the justice of the peace stated that the said “norm is of a discretionary character and grants the supervisory body the right to deliver the relevant warning. At the same time while there are alternative sanctions for the same offence the choice of a concrete sanction belongs to the supervisory body which chooses the means of reaction according to the circumstances of the committed offence”.<sup>77</sup> It remains unclear what criteria are used by the Ministry of Justice when assessing the necessity of the application of administrative sanctions under Article 19.34 of the CAO as opposed to the other, less intrusive measures, in particular from the point of view of the existence of the “pressing social need” as required by the case-law of the European Court (see paragraphs 22 and 47 above).

#### *Respect for Procedural Rights in Courts*

53. In his Opinion of 15 July 2013, the Commissioner emphasised in particular the important role to be played by the domestic courts in the process of the application of the Law on Foreign Agents by providing relevant and sufficient reasons for their decisions. Most notably, he warned against the tendency to overwhelmingly rely on the findings provided by officials (either the Ministry of Justice or the prosecutorial authorities) and accept them at face value, but highlighted the need to verify whether any such allegations are well-grounded and justified.<sup>78</sup> The subsequent judicial practice of the application of the Law on Foreign Agents during 2013-2015 in cases which were brought to the attention of the Commissioner may be characterised by the overall reluctance of Russian courts to thoroughly assess the factual circumstances of cases, to deal with the arguments brought by NCOs before domestic courts and to deliver properly reasoned decisions.

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<sup>75</sup> The amount of fines pursuant to Article 19.34 of the CAO was apparently lowered in the cases of Citizen Watch (fined in March 2015), Ekaterinburg Educational Centre Memorial, Bellona-Murmansk, Samara Educational Centre for Environment and Security (all three NCOs were fined in April 2015), Interregional charity organisation “Siberian Environmental Centre” of Novosibirsk (fined in May 2015), St. Petersburg Centre for Development of NCOs and Kaliningrad public organisation “Women’s League” (both fined in June 2015).

<sup>76</sup> See, in particular, para. 5-5 of Article 32 of the Law on NCOs.

<sup>77</sup> See the decision of justice of the peace of the circuit no. 1 of the Central judicial district of the Voronezh region delivered against the Voronezh Centre for the Defence of Mass Media Rights on 15 April 2015, p. 18.

<sup>78</sup> See para. 70 of the Commissioner’s Opinion of 15 July 2013, CommDH(2013)15.

### 3.1.6 Requirement to deliver a reasoned judgment

54. The procedural guarantees enshrined in Article 6 of the European Convention in its civil limb are fully applicable to cases of the application of the Law on Foreign Agents.<sup>79</sup> Article 6§1 of the Convention requires domestic courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties,<sup>80</sup> as well as to give reasons for their decisions and an explicit response where an applicant clearly and precisely raises an argument which could have been decisive for the outcome of the proceedings.<sup>81</sup> In the case of *Kuznetsov and others v. Russia* – concerning interference with freedom of association – the European Court found a violation of Article 6 of the Convention as the judgments of the domestic courts did not address the applicants’ submission and remained silent on crucial points which permitted domestic courts to avoid the applicants’ main complaint.<sup>82</sup>
55. When it comes to the application of the Law on Foreign Agents by the courts, the main issue of concern is that the courts do not undertake a consistent and thorough analysis and provide detailed reasoning as to why one activity or another should be considered as “political”, thus providing no guidance to other NCOs performing similar activities. As an illustration of these issues, at the hearing in the first instance court of the case of the Nizhniy Novrogod Committee Against Torture, the line chosen by the defence, in order to avoid the activity being qualified as “political”, was to argue that the organisation is in no way involved in changing state policy. On the contrary, it was argued that the main goal of the organisation was to ensure that the official state policy aimed at preventing and combating torture and ill-treatment in the Russian Federation was effectively implemented in practice. By carrying out a range of different activities, the organisation was in no way trying to challenge the existing policy, but to assist state institutions in rooting out this worrisome practice. The court, however, did not properly address this argument in its decision, and simply stated that the organisation’s activities were of a “political” nature.
56. In some cases, the prosecutors, instead of referring to certain activities of an affected NCO and qualifying them as “political”, explicitly stated that the activity of such an NCO “in its entirety” was qualified as “political”. This line of argument was first invoked by the prosecutors in a civil lawsuit against Anti-Discrimination Centre Memorial in St. Petersburg and subsequently reiterated by the prosecution in cases against Union Women of Don in Novocherkassk (Rostov region), HRC Memorial, Public Verdict and several other cases. Such a wide-ranging interpretation of the law leaves almost no scope for an NCO to defend its position vis-à-vis the prosecutorial submission.
57. The Commissioner would like to highlight that since its entry into force the implementation of the Law on Foreign Agents has revealed a fundamental uncertainty surrounding the term

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<sup>79</sup> The European Court has pointed out that Article 6 applies in decisive cases where there is a genuine and serious dispute over a civil right, its scope and the manner of its exercise and when it is recognised under domestic law (see *Frydlender v. France*, no. 30979/96, Grand Chamber judgment of 27 June 2000, §27). The Court has also acknowledged the applicability of fair trial guarantees to civil society organisations seeking to protect their rights as legal entities (see *Collectif Stop Melox et Mox v. France*, no. 75218/01, judgment of 12 June 2007).

<sup>80</sup> See *Van Kuck v. Germany*, no. 35968/97, judgment of 12 June 2003, §47-48.

<sup>81</sup> See *Krasulya v. Russia*, no. 12365/03, judgment of 22 February 2007, §52.

<sup>82</sup> See *Kuznetsov and others v. Russia*, no. 184/02, judgment of 11 January 2007, § 84.

“political” as interpreted by the executive (Ministry of Justice), prosecutorial authorities and domestic courts. Because this term is inherently vague and could be subject to largely diverse interpretations,<sup>83</sup> the courts could label any activity which is in some way related to the normal functioning of a democratic society as “political” and accordingly not only classify NCOs as “foreign agents”, but also apply disproportionate administrative and even criminal sanctions to them. In her assessment of the application of the Law on Foreign Agents, the Federal Ombudsman of the Russian Federation concluded that “almost any activity of an NCO may be, and is indeed declared as ‘political’”.<sup>84</sup> The Commissioner points out that the classification based on this criterion is liable to produce incoherent results and engender considerable uncertainty among the NCOs concerned.

### 3.1.7 Practical impact of the Constitutional Court’s decision

58. In certain cases which were brought to the Commissioner’s attention, domestic courts appear not to be following the conclusions made by the Constitutional Court in its judgment of 8 April 2014. The Constitutional Court clearly stated that the activity of an individual who was a member of an NCO should not be confused with the activity of the organisation as a whole and would therefore not engage an NCO in a political activity.<sup>85</sup> In a great number of cases domestic courts have established the political activity of NCOs due to, *inter alia*, the involvement in certain activities of their leaders, employees and/or members, including those acting in their personal capacity or in another capacity unrelated to their links with the NCOs. For example, one of the aspects of “political” activity invoked in the case against Women of Don NCO was the visit of its chairperson to the correctional facilities in her capacity as a member of the public supervisory commission over the situation in correctional establishments.<sup>86</sup> In other cases the courts have also made a questionable link between the alleged “political” activity of a given NCO and certain activities performed by their leaders, which according to them, were carried out in their personal capacity. Most notably, this refers to the case of the Executive Director of the Voronezh Regional Fund “Centre for Defence of Mass Media Rights” and her publications, interviews and related activities; the Association Agora and its chairperson who is also a member of the Human Rights Council; and the Nizhniy Novgorod Committee Against Torture and its chairperson who is a representative in the Commission for the Reform of the Penitentiary System in Russia.

### 3.1.8 Lack of assessment of European Convention requirements

59. In their respective judgments in the cases involving the application of the Law on Foreign Agents, the domestic courts have clearly refrained from any assessment of the law as such and its compliance with the principles and standards enshrined in the European Convention, implying that this would exceed their jurisdiction. Several judicial decisions

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<sup>83</sup> See *Zhechev v. Bulgaria*, no. 57045/00, judgment of 21 June 2007, § 55, 21 June 2007.

<sup>84</sup> See, in particular, the 2014 annual report of the Ombudsman of the Russian Federation, p. 50, available on-line: <http://ombudsmanrf.org/www/upload/files/docs/appeals/doklad2014.pdf>.

<sup>85</sup> See the judgment of the Constitutional Court of the Russian Federation No. 10-P of 8 April 2014, section 3.1, p. 24.

<sup>86</sup> According to Article 15.1-1 of the Federal Law No. 76-FZ on “Public Supervision of Respect for Human Rights in Places of Detention and on Assistance to Persons Remained in Places of Detention” of 10 June 2008, available on-line: <http://www.rg.ru/2008/06/18/prava-cheloveka-dok.html>.

explicitly confirmed that their task was to apply the law which entered into force and not to question its compatibility with the Russian Constitution or the European Convention.<sup>87</sup>

60. Furthermore, the domestic courts have been reluctant to apply the European Convention's standards and assess the possible infringement by the authorities of the NCOs' rights to freedom of association and expression. At best, the domestic courts have included in the judgment a reference to paragraph 2 of Articles 11 and 10 (i.e. describing the grounds of possible restrictions).<sup>88</sup> The domestic courts have also refrained from addressing the issue of the proportionality of the sanctions to be imposed on NCOs, for example by not assessing the negative consequences that the application of the Law on Foreign Agents will entail in concrete cases. For example, the Novocheerkassk town court remained silent as to the arguments of the Chairperson of Union Women of Don that the NCO would not be able to continue to operate effectively and would be forced to cease its co-operation with the authorities if it were included in the Register. The justice of peace in the Basmanniy district court of Moscow did not pay attention to the arguments of Regional *Golos*' representatives that the NCO was unable to bear the heavy financial burden of fines (from 300 000 to 500 000 roubles, or from 5400 to 9000 euros) pursuant to Article 19.34 of the CAO. Furthermore, the courts usually make no proper analysis of whether a legitimate aim is being pursued by the authorities, what that aim might be and how it is being pursued in their application of the Law on Foreign Agents in a concrete case.
61. In a couple of cases domestic courts have simply denied the applicability of the European Convention as, allegedly, the Convention was not applicable to legal entities.<sup>89</sup>

### **3.2. Practical consequences for non-commercial organisations**

62. The implementation of the Law on Foreign Agents has not only revealed the legal deficiencies inherent in the said Law and serious shortcomings in its application, but has also resulted in a series of severe practical consequences undermining the effective functioning of NCOs in the Russian Federation. Most notably, the application of the Law resulted in the stigmatisation of the work of several affected NCOs by putting them in a clearly disadvantaged position vis-à-vis other organisations, and in many cases led either to self-censorship or triggered the decision leading to the organisation's liquidation.

#### **3.2.1. Stigmatisation of NCOs**

63. The effect that the application of the Law on Foreign Agents has had on respective NCOs is in particular evident in the case of those organisations which were involved in monitoring electoral processes. Since September 2014, the observers of various local and regional NCOs involved in election monitoring (usually referred to as the *Golos* group) were impeded from monitoring regional and local elections in various entities of the Russian

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<sup>87</sup> See, for example, the decision of justice of the peace no. 387 of the Basmanniy district court of Moscow delivered on 6 June 2013, p. 12 in a case of Regional *Golos*.

<sup>88</sup> See, for example, the decision of the Zamoskvoretskiy district court of Moscow delivered on 23 May 2014, p. 6, in the case of Human Rights Centre Memorial or the decision of the Zamoskvoretskiy district court of Moscow delivered on 27 June 2014, in the case of the Public Verdict Foundation.

<sup>89</sup> See the judicial decision of the Sovietsky district court of Ryazan city delivered on 16 November 2013, p. 5 in the case of the Ryazan historical and human rights society Memorial and the decision of justice of the peace no. 422 of the Tagansky district court of Moscow delivered on 23 March 2015, p. 13 in the case of the Sakharov Centre.

Federation after the Central Electoral Commission issued a press release with severe criticism of the involvement of NCOs included in the Register of Foreign Agents in the observation of elections. According to the press release, such NCOs attempt to discredit the Russian electoral process and the legitimacy of the authorities.<sup>90</sup> The adoption of the November 2014 amendments (see paragraph 14 above) which contain an explicit prohibition to participate in electoral and referendum campaigns has cemented this tendency. Since then, members and activists of the *Gołos* group are systematically denied the opportunity to monitor electoral processes.<sup>91</sup>

64. The same amendments prohibited NCOs performing functions of a “foreign agent” from concluding contracts with political parties, which represents yet another restriction on NCO activities. These legal provisions potentially pose serious obstacles or even render it impossible for the relevant non-commercial organisations to co-operate with political parties, most notably through offering their expertise on a number of topics of public interest, including police reform and healthcare among others.

### 3.2.2. Self-censorship of NCOs

65. During his meetings with NCOs in Moscow and Strasbourg in 2013 and 2014, the Commissioner was informed of several cases of self-censorship among civil society institutions. Since the adoption of the Law, there is a clear tendency among NCOs to become more cautious in their work, most notably when taking decisions about organising or participating in public events, round table discussions and exhibitions; when giving interviews and expressing their views in publications and reports; and when posting information materials on their websites. This tendency is also visible in the long-term planning of NCOs’ activities. Many NCOs, especially those who have already been affected by the application of the Law, are not in a position to launch long-term projects, as they remain unsure about the organisation’s ability to operate in the future.
66. Another alarming consequence of the application of the law is that a significant number of NCOs have decided either to shut down some of their projects and/or to stop their operations entirely. Several NCOs ceased their activities even before the 2014 legislative amendments entered into force, for example: Organisation advocating the rights of LGBTI persons “Coming Out”; “Side-by-Side”; and Anti-Discrimination Centre Memorial. The list of those NCOs which have decided to cease their activities due to the application of the Law on Foreign Agents and are already definitely liquidated also include: the Saratov Centre for Social Policy and Gender Studies (liquidated on 1 December 2014); the St. Petersburg League of Women Voters (liquidated on 3 February 2015); the Jewish regional branch of the Russian public organisation “Municipal Academy” (liquidated on 22 May 2015) and the Lawyers for Constitutional Rights “*Jurix*” (liquidated on 26 May 2015). It is reported that a great number of NCOs have decided to initiate liquidation proceedings as a result of the negative impact of the said law to their activities. These NCOs include the Saratov Environmental group “Partnership for Development”, the Arkhangelsk NCO advocating rights of LGBTI people “*Rakurs*”, the St. Petersburg Institute for the Development of Freedom of Information, the St. Petersburg Human Rights Resource Centre, the

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<sup>90</sup> See the press release of the Central Electoral Commission of the Russian Federation, available on-line: <http://www.cikrf.ru/news/cec/2014/09/12/06.html>.

<sup>91</sup> See the decision of the 558 circuit electoral commission of the Chelabinsk region of 14 September 2014.

Novosibirsk Foundation for Consumers' Rights Defense, the Rostov public organisation “*Eco-Logika*”, the Kaliningrad Women’s League, the Volgograd Youth Centre for Consulting and Training, the Murmansk House of Youth “Mister Pink” and the Charitable Foundation “*Dinastiya*”. Many NCOs have publicly stated that they will not continue to operate under the “foreign agent” label and prefer to terminate their activities themselves rather than to remain in the Register of Foreign Agents. These NCOs include the Nizhniy Novgorod Committee Against Torture and the St. Petersburg-based Soldiers’ Mothers among others. The Council of Europe-funded School of Political Studies (renamed after the Law on Foreign Agents entered into force as “Moscow School of Civic Education”) announced the suspension of its activities after it was included in the Register of Foreign Agents.

67. A recent example involves the announcement made by the founder and chief sponsor of the Charitable Foundation “*Dinastiya*” - involved in various social, scientific and educational projects - Mr Dmitriy Zimin, that the Foundation might cease its activities following its inclusion in the Register of Foreign Agents.

#### **IV. Conclusions and recommendations**

##### **Conclusions**

68. The Commissioner notes with regret that the recommendations in his Opinion on the legislation of the Russian Federation on non-commercial organisations in light of Council of Europe standards of 15 July 2013 have not yet been implemented. The subsequent practice in the application of the Law on Foreign Agents has largely confirmed the Commissioner’s initial concerns and, in many respects, the problems have been compounded even further.
69. The interpretation of the notion of “political activity” – as provided in the Law – by the prosecutorial, executive and judicial authorities in the last few years has only confirmed the Commissioner’s initial concern that any advocacy activity and/or public scrutiny of the decisions, actions and policies of the state authorities would fall under the scope of the Law. Such an interpretation questions the very essence of the role played by civil society organisations in a democratic society – that of a public watchdog (see paragraph 9 above).
70. The imposition of the label of “foreign agent” on NCOs and the enforcement of disproportionate sanctions are increasingly perceived by the affected organisations as a defamation campaign against those who express disagreement or criticism of the policies pursued by the authorities. The Commissioner’s growing concern is that human rights defenders, including his Office’s long-standing partners in the country, appear to be particular targets of these measures.
71. The Commissioner observes that the environment in which human rights defenders and non-commercial organisations in the Russian Federation are operating is becoming increasingly restrictive and less conducive to performing their essential role. The chilling effect of this development undermines the very essence of the activity of human rights defenders and NCOs in Russia. The Commissioner can only regret such a tendency, since the Russian Federation has until now possessed a strong and vibrant civil society, which for years has been playing an important role in the development of state policies, with its contributions positively valued by state institutions.



72. The Commissioner is seriously concerned about the recently introduced laws which can further restrict the legitimate activity of human rights defenders and NCOs in Russia. These measures include the adoption of the Law on Undesirable INGOs and the series of legislative amendments which have widened the scope of potential state interference in the enjoyment of freedom of expression. Additional legislative initiatives which could restrict civil society activities even further have been tabled in the State Duma. In the Commissioner's view, attempts to impede NCOs and human rights defenders from working in key areas of public interest render their enjoyment of freedoms of association and expression virtually meaningless or illusory.
73. On a positive note, the Commissioner is heartened by the active and principled stance taken in this field by national human rights structures in the Russian Federation. The Federal Ombudsman and the Human Rights Council have consistently highlighted the shortcomings of the Law on Foreign Agents and its implementation while advocating the revision of the legislation on NCOs in line with European standards. A genuine dialogue between the government, human rights structures and civil society could certainly pave the way out of this impasse, for the benefit of all people in the Russian Federation.

### **Recommendations**

74. In light of his Opinion of 15 July 2013 and the observations and conclusions made in the present update to that Opinion, the Commissioner makes the following recommendations to the authorities of the Russian Federation.
75. The Commissioner calls on the Russian authorities to revise the legislation on non-commercial organisations in order to establish a clear, coherent and consistent framework in line with applicable European and international standards. While revising the current legal framework, specific attention must be paid to the revealed shortcomings and the respect for the principles of the rule of law, legal certainty, the prohibition of arbitrariness, proportionality, non-discrimination, access to justice before an independent and impartial tribunal and the availability of an effective domestic remedy. In particular, the legislative revision should entail:
- the use of clear definitions in the legislation allowing to foresee the legal consequences of its implementation;
  - avoiding the use of stigmatising language such as "foreign agent" towards NCOs;
  - non-discriminatory legal provisions, including in the field of reporting and sanctioning of NCOs, irrespective of the sources of their funding;
  - application of the "pressing social need" criteria for any state interference with the freedoms of association and expression, including the imposition of sanctions;
  - limiting state interference in NCO activities to setting up clear and non-biased standards of transparency and reporting;
  - application of sanctions only as measures of the last resort in full compliance with the principle of proportionality;
  - revocation of provisions establishing criminal prosecution of NCO staff in cases which normally fall under administrative procedures.

76. The process of amending the current legal framework should be conducted in close consultation and with the participation of national human rights structures and representatives of civil society. Awaiting the revision of the current legal framework, the Commissioner calls on the authorities to suspend any further application of the Law on Foreign Agents and to refrain from imposing any further restrictions on the work of civil society organisations in the Russian Federation.
77. The Commissioner stands ready to continue his dialogue with the authorities on these issues and would like to reiterate his willingness to provide further guidance when needed.