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## **Explanatory Memorandum to Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the Legal Status of Non-Governmental Organisations in Europe**

### **Introduction**

1. For several years now the Council of Europe has been working to reinforce the legal framework for civil society in Europe. The work has led to the adoption of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (hereinafter Convention No. 124), which is the only binding international legal instrument to date on these organisations (hereinafter NGOs).
2. In 1996 specific discussions began on the status of non-governmental organisations in the Council of Europe, leading to the adoption in 1998 of “Guidelines for the Development and Reinforcement of NGOs in Europe”, followed in 2002 by the “Fundamental Principles on the Status of Non-governmental organisations in Europe”, which constitute a logical and vital complement to Convention No. 124 where national action by NGOs is concerned. Even though these Fundamental Principles have no legal force under the rules and regulations of the Council of Europe, the Committee of Ministers took note of them with satisfaction in 2003 and recommended circulating them as widely as possible in the member states.
3. Also in 2003, the Council of Europe carried out a survey of its member states concerning the legal framework for the setting up and functioning of NGOs. This survey was geared to analysing national legislation on NGOs from the angle of its compatibility with the aforementioned Fundamental Principles. The results were utilised in the Secretary General’s thematic monitoring report on “freedom of association”, which the Ministers’ Deputies considered in October 2005.
4. In December 2005, in the light of this monitoring report, the Committee of Ministers decided to set up a Group of Specialists on the Legal Status of Non-Governmental Organisations (CJ-S-ONG), mandating it, under the authority of the European Committee on Legal Co-operation (CDCJ), to continue examining the proposal for a new non-binding legal instrument in the form of a draft recommendation on the legal status of NGOs in Europe, taking account of the “Fundamental Principles on the Status of Non-governmental Organisations in Europe” and the Secretary General’s thematic report on “freedom of association”.
5. The CJ-S-ONG met twice in 2006 to prepare the draft recommendation on the legal status of non-governmental organisations in Europe. It was chaired by Mr Eberhard Desch (Germany), member of the CDCJ. Its scientific expert, Mr Jeremy McBride (United Kingdom), provided an invaluable contribution to its work.
6. Approved on 1 March 2007 by the CDCJ, the text of Recommendation CM/Rec (2007) 14 was adopted by the Committee of Ministers on 10 October 2007, at the 1006<sup>th</sup> meeting of the Ministers’ Deputies.
7. This instrument targets the legislator, the national authorities and the NGOs themselves. It aims to recommend standards to shape legislation and practice vis-à-vis NGOs, as well as the conduct and activities of the NGOs themselves in a democratic society based on the rule of law.
8. None of the provisions of this Recommendation can be interpreted as implying a limitation of a right or safeguard already recognised by a member state vis-à-vis the NGOs, or as preventing a member state from recognising wider rights and safeguards.

## Preamble

9. The success of efforts to bring about societies committed to democracy and human rights in all the member states of the Council of Europe owes much to the activities of NGOs, whether as formal entities or less formal ones. Their contribution is of historical importance and they continue to have a significant part to play in ensuring that this commitment is not weakened and that indeed democracy and human rights are more effectively secured. The importance of their role has been recognised recently at the universal level in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, United Nations General Assembly Resolution A/RES/53/144 (hereinafter UN Declaration on Human Rights Defenders) and at the regional level in the Action Plan of the Third Summit. Without the extensive campaigning and educational work of NGOs, many would be unaware of, and uninvolved in, the decision making that will affect them and the societies in which they live. Although this contribution to matters of public choice is vital, their part in developing and maintaining a rich cultural life and promoting and securing the social well-being of all in society is equally indispensable.
10. Moreover NGOs, in view of their continuing contribution in the fields of culture, democracy, human rights and social justice, are inevitably central to fulfilment of the goals for which the United Nations and the Council of Europe were established. They do so through their work in individual countries, whether as partners of the two organisations or in reliance on the standards that they have elaborated, and through their participation in international and regional fora.
11. At its Third Summit, Heads of State and Government envisaged the Council of Europe “as the primary forum for the protection and promotion of human rights in Europe” playing “a dynamic role in protecting the right of individuals and promoting the invaluable engagement of non-governmental organisations, to actively defend human rights.”
12. It is important to recognise the diverse ways in which NGOs can operate, not least because this needs to be borne in mind when establishing the legal framework applicable to them and determining the support (both direct and indirect) that public authorities can provide towards ensuring the success of their undertakings. The list here is illustrative of this diversity and should not be regarded as exhaustive.
13. Although NGOs play an essential part in securing human rights, the ability to establish and operate those that are membership-based organisations is itself a human right, guaranteed at the regional level for everyone by Article 11 of the European Convention on Human Rights (hereinafter the European Convention) and for particular groups or forms of organisation by Article 5 of the European Social Charter (revised), Articles 3, 7 and 8 of the Framework Convention for the Protection of National Minorities and Article 3 of the Convention on the Participation of Foreigners in Public Life at Local Level. Furthermore the ability of NGOs to contribute to public life and to express a wide range of views is itself a key element of the pluralism that is the hallmark of a true democracy.
14. This Recommendation is particularly concerned with the legal and fiscal framework required to ensure that NGOs can continue to make their various contributions to public and social life. It also draws attention to the limitations on objectives and activities that NGOs must observe, particularly those that are anti-democratic or are concerned with the making and distribution of profits. In addition, it highlights responsibilities that can arise from receiving public support for their activities as well as underlining their responsibility to be transparent and to observe the generally applicable law.
15. This Recommendation reflects and builds upon the elaboration given to broadly framed guarantees of freedom of association and other human rights and fundamental freedoms that has been provided in rulings of the European Court of Human Rights (hereafter the European Court) and the views of the UN human rights treaty bodies. It has also drawn upon the formulation of standards specifically concerned with NGOs. This is important because they also deal with matters which do not have a foundation in the right to freedom of association.

16. Although most NGOs are established within, and restrict their operations to, the territory of an individual member state, there are many NGOs which have objectives of relevance to two or more member states and which also have a membership which is international in character. Convention No. 124 was adopted in order to facilitate the operation of the latter NGOs. While implementation of this Recommendation could also contribute to this objective, the absence from it of any requirement to recognise the legal personality of NGOs established in other member states means that the further enlargement of the number of contracting parties to Convention No. 124 remains highly desirable.
17. Implementation of this Recommendation will require member states to take full account of the standards that it sets out in all their legislation, policies and practices that have any bearing on the formation, operation and termination of NGOs. Moreover, as an elaboration of more general commitments, these standards should provide a useful basis for assessing how satisfactory have been the steps taken to fulfil those commitments. Furthermore implementation of this Recommendation will only be fully successful through the widest possible dissemination of the standards set out in it. This would need them to be made available not only to all who have some role in regulating NGOs and NGOs themselves but also to the public which a) has a legitimate interest in the work of NGOs in particular as beneficiaries of their activities and b) is the source of members for those that are membership-based. In addition realisation of the standards will require them to be used in the training of all officials concerned with the activities of NGOs.

## ***I. Basic principles***

### Paragraph 1

18. There is no universal definition of NGO, a term which can be used to cover a wide range of bodies operating within both states and intergovernmental organisations. The definition adopted for the purpose of this Recommendation emphasises certain qualities regarded as constituting the essential character of these bodies, namely, that their establishment and continued operation is a voluntary act (i.e., a matter of choice for those founding and belonging to them and, in the case of non-membership bodies, those entrusted with their direction), that they are self-governing rather than under the direction of public authorities and that their principal objective is not to generate profits from the activities that they undertake.
19. NGOs can go under various names such as associations, charities, foundations, non-profit corporations, societies and trusts but it is their actual nature rather than their formal designation that will bring them within the scope of this Recommendation. Thus the designation of a particular entity as “public” or “para-administrative” should not prevent it from being treated as an NGO if that is an accurate reflection of its essential characteristics; see *Chassagnou v. France*, nos. 25088/94, 28331/95 and 28443/95, 29 April 1999.
20. Political parties are excluded from the definition as in many countries they are the subject of separate provisions from those applicable to NGOs generally. However, this exclusion does not preclude states from choosing to treat such parties as NGOs.
21. Moreover those professional bodies established by law to which members of a profession are required to belong for regulatory purposes are also likely to fall outside the definition on account of the failure to comply with the requirement of voluntariness and freedom from direction by public authorities – this has led the European Court to consider such bodies as falling outside the protection for freedom of association under Article 11 of the European Convention; see *Le Compte, Van Leuven and De Meyere v. Belgium*, nos. 6878/75 and 7238/75, 23 June 1981 - but again this exclusion does not prevent states from treating them as NGOs. Nonetheless the voluntary aspects of their activities could be sufficient to bring sub-entities that they establish within the definition; e.g., the human rights committee of a bar association.

### Paragraph 2

22. The diversity of NGOs is reflected in the fact that they can be both membership and non-membership-based bodies, echoing the distinction in the explanatory report on Convention No. 124 between “associations” (“a number of persons uniting together for some specific purpose”) and “foundations” (“an identified property devoted to a given purpose”). Furthermore the persons establishing NGOs can be

natural or legal, including a combination of these, and NGOs themselves (uniting several such bodies to pursue aspects of their objectives collectively).

### Paragraph 3

23. In many instances, as the European Court recognised in *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998 and *Gorzelik and Others v. Poland* [GC], no. 44158/98, 17 February 2004, the right to act collectively would have no practical meaning without the possibility of creating a legal entity in order to pursue the objectives of an organisation. The absence of this possibility will thus result in a violation of Article 11 of the European Convention. Nonetheless those establishing NGOs may find that their objectives, particularly if they are relatively limited in scope or duration, can be achieved through a less formal structure and that there is, therefore, no need for them to have legal personality.
24. It should, therefore, be generally open to those forming NGOs (or their members if the decision is taken after they have been established) to choose whether they should become an entity which has legal personality or they will be (or remain) one that has no formal legal status. However, this does not preclude the law of a member state from conferring legal personality as an automatic consequence of the establishment of an NGO, i.e., without the need for any formal approval before this status can be obtained.

### Paragraph 4

25. Although many NGOs may have a focus that is local or regional in character, the objectives of some NGOs may be best pursued at the national or international level and in the case of others there may be a need to work at several or even all of these levels. The choice of level(s) at which to operate should always be a matter for those founding and belonging to the organisations concerned. It may well be that those belonging to an NGO will wish to change the level(s) at which it operates and they should be free to make such a change.

### Paragraph 5

26. Freedom of expression is especially important for NGOs in the pursuit of their objectives. However, although some human rights and freedoms are only enjoyed by those who found and belong to NGOs (see Appl. No. 7805/77, *X and Church of Scientology v. United Kingdom*, 16 DR 68 (1979) and *Wilson, National Union of Journalists and Others v. United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, 2 July 2002), there are many others which contribute to their ability to operate effectively, notably, the prohibition on discrimination, the right to a fair hearing, the prohibition on retrospective penalties, the right to respect for private life and correspondence, the right to freedom of assembly, the right to peaceful enjoyment of possessions and the right to an effective remedy.
27. Furthermore a failure to respect the human rights and freedoms of those who belong to membership-based NGOs – especially the right to life, the right to liberty and security of the person, the right to freedom of thought, conscience and religion, the right to freedom of association, the right to political participation and freedom of movement – will often undermine the pursuit by those organisations of their objectives.

### Paragraph 6

28. Although subject to the law like everyone else, the freedom from direction by public authorities is essential to maintain the “non-governmental” nature of NGOs. This freedom should extend not only to the decision to establish an NGO and the choice of its objectives but also to the way it is managed and the focus of its activities. In particular there should be no attempts by public authorities to make NGOs effectively agencies working under their control (see the finding of a violation of Article 11 of the European Convention in *Sigurdur A Sigurjónsson v. Iceland*, no. 16130/90, 30 June 1993 as a result of an attempt to use a taxi association to administer the provision of taxi services) or to interfere with the choice by an NGO of its leaders or representatives (see the finding of violations of freedom of religion under Article 9 of the European Convention, which imposes a similar obligation to Article 11 in this regard, in *Serif v. Greece*, no. 38178/97, 14 December 1999, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, 26 October 2000 and *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, 13 December 2001 following such interferences).

29. This does not mean that public authorities cannot choose to provide particular assistance to NGOs pursuing objectives that they consider to be of particular importance but the latter should be free to decide whether to accept or continue to receive such assistance. Furthermore neither legislation nor other forms of pressure should be used to make NGOs undertake particular activities considered to be of public importance.

Paragraph 7

30. The conferment of legal personality on NGOs need not involve the grant of any greater legal powers than those enjoyed by other legal persons; the most essential ones for their operation are likely to be those inherent in such personality, namely, the ability to enter into contracts related to the pursuit of their objectives, to make payments for the goods and services thereby obtained, particularly through the operation of bank accounts, and the ability to own property. However, it ought always to be possible to confer greater capacities on certain types of NGOs and indeed this may be essential for the pursuit of their objectives. Thus additional rights that have been recognised as necessary for NGOs include: the observation of trials and other proceedings<sup>1</sup>; participation in public affairs and criticism of governmental actions<sup>2</sup>; promotion of human rights ideas<sup>3</sup>; provision of advice<sup>4</sup>; provision of information to international organisations<sup>5</sup>; and seeking information<sup>6</sup>. At the same time, the enjoyment of legal capacities carries with it the responsibility to act within the law and NGOs should not expect any exemption from the application of the administrative, civil and criminal law obligations and sanctions that are generally applicable to legal persons. The application of the general law to NGOs does not, as the following paragraph makes clear, preclude the extension to NGOs of financial and other benefits not available to other legal persons.

Paragraph 8

31. In view of the contribution that NGOs can make to the achievement of a wide range of societal objectives, it is appropriate to have a legal and fiscal framework applicable which facilitates their establishment and continued operation. The former entails in particular a flexible regime governing the acquisition of legal personality and an approach towards the regulation of their activities that is not overly strict or heavy-handed. The latter can be best achieved through non-taxable grants, direct relief from certain taxes on income and expenditure and the provision of incentives to taxpayers to support the activities of NGOs (see further Paragraph 57 of the Recommendation).

Paragraph 9

32. The freedom to establish NGOs is essentially civil and political in character rather than an economic right. So NGOs should not be established with the principal objective of making profits from their activities. Any profits accruing from those activities should be ploughed back into the pursuit of their objectives rather than be distributed to their members or founders. Nevertheless this does not mean that membership-based NGOs cannot exist to advance the interests of their members, securing economic as much as moral, physical, social or spiritual benefits for them.

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<sup>1</sup> UN Declaration on Human Rights Defenders, Art. 9(3)(b) and Document of the OSCE Moscow Meeting, 1991, para. 43

<sup>2</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("Aarhus Convention"), Arts. 6-8, European Charter on the Statute for Judges, Art. 1.8, UN Declaration on Human Rights Defenders, Art. 8 and Document of the OSCE Moscow Meeting, 1991, para. 43

<sup>3</sup> UN Declaration on Human Rights Defenders, Art. 7

<sup>4</sup> UN Declaration on Human Rights Defenders, Art. 9(3)(c)

<sup>5</sup> UN Declaration on Human Rights Defenders, Art. 9(4)

<sup>6</sup> Aarhus Convention, Art. 4

Paragraph 10

33. The Recommendation recognises the need for some regulatory controls over the establishment and continued operation of NGOs. However, it is essential that such controls are not applied in either a mistaken or improper manner. Fundamental safeguards against such a possibility occurring will be provided by the administration being prepared itself to review decisions that it has taken and by the supervisory control of the courts. Indeed in a state governed by the rule of law it is essential that NGOs and their members should be able to challenge acts or omissions affecting them in an independent court which has the capacity to review all aspects of their legality. Without this latter possibility there is likely to be a violation of the right to an effective remedy under Article 13 of the European Convention.

**II. Objectives**

Paragraph 11

34. NGOs should be able to pursue any objective that can be pursued by an individual since a grouping of individuals cannot make that objective inherently objectionable. Although the pursuit of unlawful objectives can generally be prohibited, this should not preclude the pursuit of a change in the law (including the constitution) by lawful means as it is of the essence of democracy to allow diverse political programmes to be proposed and debated; see Appl. No. 7525/76, *X v. United Kingdom*, 11 DR 117 (1978) (advocacy of criminal law reform) and *The Socialist Party and Others v. Turkey* [GC], no. 21237/93, 25 May 1998) (advocacy of a federal constitution).
35. Moreover it is essential that activities prohibited by the law do not cover any activities that are protected under universally and regionally guaranteed rights and freedoms; see the reliance in *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998 on the fact that Conference on Security and Cooperation in Europe documents allowing the formation of associations to protect cultural and spiritual heritage had been signed by the respondent state in supporting the conclusion that the objective of preserving and developing the traditions and folk culture of a region was perfectly legitimate.
36. However, it is not permissible either to use anti-democratic means to pursue a change in the law or the constitution or to seek a change that is inherently anti-democratic; see *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

Paragraph 12

37. The ability of NGOs to undertake research, education and advocacy on issues of public debate will often be crucial in the pursuit of their objectives. It would be pointless of them to undertake such research, education and advocacy if they were not also able to disagree with governmental policy or propose changes in the law.

Paragraph 13

38. Although NGOs are not political parties, support by the former for the latter in elections and referenda can be an important means of realising a particular objective, whether in whole or in part, as the outcome of an election or referendum may lead to a change in law or policy favourable to that objective. NGOs should, therefore, be free to provide that support but this may be conditioned on them being transparent in declaring their motivation, particularly to ensure that their members and funders are aware of such support being given and that the law on the funding of elections and political parties is observed. That law may, for example, set limits on the level of funding that can be provided or prohibit funding from sources outside the state concerned.

39. Furthermore, while NGOs should be able to support political parties on particular issues, such support may be incompatible with the objectives of some funders, whether because they are prohibited from supporting any form of advocacy or because their public status requires them to be non-partisan, and they should, therefore, be able to refuse or withdraw financial and other benefits where this support is given.

#### Paragraph 14

40. The fact that NGOs are non-profit-making is one of their essential characteristics, distinguishing them in particular from commercial enterprises. However, NGOs will be unable to pursue their objectives without some source of income and this can be provided not only by fees, grants and donations but also through undertaking economic, business or commercial activities.
41. There should, therefore, be no obstacle to them undertaking such activities subject to the prohibition on the income thereby derived being distributed to their members and founders (see Paragraph 9 of the Recommendation) and to the licensing and regulatory requirements generally applicable to those activities.
42. The ability to undertake economic, business or commercial activities should also not preclude a requirement that certain modalities be followed, such as the formation of a subsidiary company for this purpose.

#### Paragraph 15

43. Associations, federations and confederations of NGOs (which are themselves NGOs) play an important role in that they foster complementarity amongst such bodies and allow them to reach a wider audience, as well as enabling them to share services and set common standards. NGOs, in pursuit of their objectives, should thus be free to join or not join such associations, federations and confederations.

### **III. Formation and membership**

#### **A. Establishment**

#### Paragraph 16

44. As it is a fundamental principle that any person or group of persons should be free to establish an NGO, restrictions on the formation of NGOs either by persons who do not have the nationality of the state in which this takes place or by legal persons should not be imposed. In the case of non-nationals, this freedom is also specifically recognised in Article 3 of the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144).
45. Moreover, subject to their evolving capacities, the freedom of association explicitly guaranteed to children by Article 15 of the Convention on the Rights of the Child would enable them to found NGOs.
46. In the case of a non-membership-based NGO, establishment should be possible through the making of a gift where the founder is alive or of a bequest following his or her death. However, this provision should not be interpreted as being applicable to all legal forms. In some countries, for instance, the possibility of establishment by will does not exist for all non-profit-making legal forms.

#### Paragraph 17

47. No minimum number is prescribed in guarantees of freedom of association for the number of persons required to establish a membership-based NGO. The guarantee of this freedom to everyone should, in principle, mean that only two persons are required to establish such a body. However, it is accepted that the acquisition of legal personality might afford a justification for setting a higher threshold for the establishment of a membership-based NGO. Nonetheless there could be no justification for setting a minimum that clearly discouraged or inhibited the establishment of membership-based NGOs.

## **B. Statutes**

### Paragraph 18

48. NGOs, especially those with legal personality, must heed the needs of various parties – members, founders, users, beneficiaries, donors, staff and public authorities – as regards their organisation and decision-making processes. This is most easily achieved by NGOs with legal personality having clear statutes, howsoever described under the law of the member state in which they have been established, setting out the conditions under which they are to operate. Nonetheless it is recognised that in some legal systems it is possible to achieve this goal without formally adopted statutes (e.g., informal associations in the Netherlands).

### Paragraph 19

49. The requirements set out in this paragraph concern the matters that are most likely to be crucial to establishing the conditions under which NGOs are to operate. Those establishing or belonging to NGOs (as well as those responsible for their direction in the case of non-membership-based bodies) are free to specify additional matters in their statutes but they should not normally be under any obligation to do so. The term “powers” refers to the authority given by the statutes (expressly or impliedly) to do particular things in pursuit of an NGO’s objectives.

### Paragraph 20

50. The requirement that the membership should form the highest governing body of a membership-based NGO is a manifestation of the exercise of freedom of association by their members. This does not mean that the members cannot delegate the authority to take action to other bodies but they should always be able to revoke that delegation and determine the matter themselves.
51. Such a consideration does not apply in the case of non-membership-based NGOs and so the highest governing body should be determined by the statutes, whether as originally drawn up by their founders or as subsequently amended in the prescribed manner.

## **C. Membership**

### Paragraph 21

52. Freedom of association has a very important negative dimension, namely, that persons should not be unduly coerced into joining or remaining members of an NGO to which they do not wish to belong on account of ethical, philosophical, political or religious grounds. In particular individuals should not be required to forego their objections to membership of a particular NGO in order to retain a job or to continue to pursue their livelihood; see in the context of trade unions, *Young, James and Webster v. United Kingdom*, no. 7601/76 and 7806/77, 13 August 1981.
53. Outside of the context of work, it would also be unacceptable for someone to be compelled to belong to an NGO where they had a deep-seated objection to one or more of its objectives; see *Chassagnou v. France*, nos. 25088/94, 28331/95 and 28443/95, 29 April 1999 with regard to enforced membership of a hunting association. It does not matter whether the constraints imposed on someone to belong to an NGO are directly imposed by the law or are merely facilitated by it.
54. However, a requirement that someone join a professional association as part of the regulatory control of that profession would not be objectionable so long as there is no restriction on the members setting up their own organisation in addition to the one which they were obliged to join; see *Le Compte, Van Leuven and De Meyere v. Belgium*, nos. 6878/75 and 7238/75, 23 June 1981.



### Paragraph 22

55. The guarantee of freedom of association in Article 11 of the European Convention and in other human rights instruments is applicable to “everyone” within a State’s jurisdiction and the scope for imposing limitations will thus be quite narrow. Certainly children should not be excluded – particularly since this freedom is also specifically guaranteed to them by Article 15 of the Convention on the Rights of the Child – but that does not preclude the adoption of protective measures to ensure that they are not exploited or exposed to moral and related dangers. Any limitations on their ability to join membership-based NGOs will need to take account of their evolving capacities and, as well as being proportionate and respecting legal certainty, should never be such as totally to exclude them from becoming members.
56. Similarly the freedom should normally be exercisable by persons who are non-nationals and any limitation on this would need to be compatible with the limited authorisation to restrict the political activity of non-nationals allowed under Article 16 of the European Convention; see *Piermont v. France*, nos. 15773/89 and 15774/89, 27 April 1995. It would thus be hard to justify a bar on political activity in the non-party context and impossible to do so for one where no politics was involved at all (e.g., in the field of sport and culture).
57. It is possible that a prohibition on involvement in NGOs might be a legitimate consequence of having committed certain offences but its scope and duration must always respect the principle of proportionality (see *Applic. No. 6573/74, X v. The Netherlands*, 1 DR 87 (1974)) and a ban on membership as an automatic consequence of imprisonment would never be justified.
58. The essence of freedom of association is that individuals should be free to choose with whom they associate and so the law should not normally enable someone to join an NGO against the wishes of its members. However, there would be a good justification for constraining the freedom of members of an association to determine whom to admit as new members where this was done in order to fulfil obligations to prevent discrimination on any inadmissible ground and thereby protect the rights of others, as permitted by Article 11(2) of the European Convention.

### Paragraph 23

59. As with admission, the expulsion of someone from a membership-based NGO is generally a matter for the organisation itself. However, the rules governing membership in its statute must always be observed and national law should thus ensure that someone facing expulsion or who has been expelled has available an effective means on insisting on such observance; see *Applic. No. 10550/83, Cheall v. United Kingdom*, 42 DR 178 (1985). Moreover the rules governing expulsion should not be wholly unreasonable or arbitrary; in particular there should be a fair hearing before any decision is taken.

### Paragraph 24

60. Improper sanctions should not be imposed on persons merely because of their membership of an NGO. Thus there ought to be a remedy for anyone dismissed because he or she belongs to a trade union (see *Appl. No. 12719/87, Frederiksen v. Denmark*, 56 DR 237 (1988)) or because of the objectives of any other organisation to which they belong (see *Vogt v. Germany* [GC], no. 17851/91, 26 September 1995).
61. Similarly there ought to be protection for any other forms of sanction or pressures not to belong to an NGO, such as the loss of eligibility for certain benefits or posts; see *Grande Oriente D’Italia di Palazzo Giustiniani v. Italy*, no. 35972/97, 2 August 2001 and *Wilson, National Union of Journalists and Others v. United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, 2 July 2002.
62. There is also a need to provide protection against even more aggressive forms of action taken against persons on account of their membership of an NGO, namely, harassment, intimidation and the use of violence. However, some sanctions will be admissible where membership of an NGO is clearly incompatible with the performance of either a person’s responsibilities as an employee or office-holder (see *Appl. No. 11002/84, Van der Heijden v. The Netherlands*, 41 DR 264 (1985)) or of other obligations that have been undertaken (such as where there is a conflict of interest between the interests of two organisations to which a person belongs).

63. The risk of incompatibility where the member is a public employee is expressly recognised in the stipulation in Article 11(2) of the European Convention that the guarantee of freedom of association does not “prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”. However, as with any other conflict of interest, the existence of such an incompatibility must be demonstrated by direct evidence and should not thus be a matter of supposition. Moreover the restrictions must always have a basis in law and respect the principle of proportionality; see the *Vogt* case, *Ahmed and Others v. United Kingdom* [GC], no. 22954/93, 2 September 1998 and *Rekvényi v. Hungary* [GC], no. 25390/94, 20 May 1999. Furthermore those regarded as belonging to the administration of the State should be seen as covering only higher-ranking officials and not all employees paid out of public funds; see the *Vogt* and *Grande Oriente* cases.

Paragraph 25

64. This paragraph confirms that membership of an NGO need not be a precondition to becoming involved in any activities that it might undertake. Whether or not membership is required for this purpose – whether as regards some or all of its activities - should be a matter for the NGO itself to determine. However, membership is essential for participation in meetings of the highest governing body of a membership-based NGO since membership must be a precondition to take part in such meetings (see Paragraph 20 of the Recommendation).

**IV. Legal personality**

**A. General**

Paragraph 26

65. The existence of legal personality has been recognised by the European Court as essential for the functioning of many NGOs (see *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998 and *Gorzelik and Others v. Poland* [GC], no. 44158/98, 17 February 2004) and such personality would be meaningless if it were not distinct from that of those who have established the organisation or who belong to it. However, as Paragraph 75 of the Recommendation makes clear, the distinct personality of an organisation from that of its founders and members should not be an obstacle to either of the latter being held liable to third parties or the NGO itself for any professional misconduct or neglect of duties arising from their involvement in the activities of the NGO.

Paragraph 27

66. It follows from the fact that an NGO has a distinct personality from that of its founders and members that it should be the new organisation created in the event of a merger of two or more existing ones that succeeds to their rights and liabilities.

**B. Acquisition of legal personality**

Paragraph 28

67. Where the acquisition of legal personality is not an automatic consequence of forming an NGO, there will inevitably have to be a process of assessing whether the legal requirements have been met. In order to minimise the risk of the resulting discretion being inappropriately exercised, the grounds for taking a decision on the grant or refusal of legal personality should always be stated with an appropriate degree of precision and be such as to permit objective assessment of the observance of these legal requirements. The formulation in Paragraph 34 of the Recommendation should serve as a guide in this respect.

Paragraph 29

68. The formation of NGOs will be facilitated if those interested in so doing have ready access to the applicable rules and the process to be followed is easy to understand and to satisfy. The latter requirement could be met by producing a guide to the requirements for establishing an NGO.

Paragraph 30

69. Although the ability to form an NGO ought, in principle, to be open to anyone, some disqualification on being able to do so might be an appropriate consequence of the past activities of the person concerned. This might be particularly the case where the person concerned has been found guilty of an offence which entailed the pursuit of objectives that are not ones for which an NGO might be formed. Similarly a bankruptcy determination might mean that someone ought not to be allowed to establish an NGO, or at least not ones that can be expected to be in receipt of significant funding. In all cases the scope of such restrictions would need to be clearly connected with the activities concerned and their duration should also not be disproportionate.

Paragraph 31

70. In order to ensure that those seeking to establish NGOs are not unduly burdened and that any decision-making process is appropriately focused, the only information that should need to be filed with an application for legal personality will be the statute, the address of the NGO and the details needed to identify the persons concerned.
71. In the case of non-membership-based NGOs, which are likely to require some form of funding or property before they can pursue their objectives, there could be an additional requirement of demonstrating that such funding or property is available so that entities that will never operate cannot be created. However, it is not essential that there be such a requirement, particularly as the circumstances in a particular country may be such that the acquisition of the necessary funding or property is dependent upon the intended recipient first obtaining legal personality.

Paragraph 32

72. The requirement that the members of a membership-based NGO should first adopt a resolution in favour of acquiring legal personality is a reflection of the fact they are its highest governing body. In order for the members to have an opportunity to take part in such an important decision, the invitation of the meeting at which such a resolution is to be adopted must be one that gives them a reasonable prospect of attending - two weeks' notice might be appropriate for this purpose – but it cannot be expected that every member actually attends and the use of proxies ought to be permitted.
73. Proof that the necessary meeting had been held could be provided by a copy of the invitation, evidence of how the invitation to attend was communicated, a record of the proceedings and the signatures of those attending, as well as any authorisations for proxies.

Paragraph 33

74. Although there will be costs involved in the processing of applications to acquire legal personality, the level at which any fees are set should reflect both the desirability of encouraging the formation of NGOs and the fact that their character is essentially non-profit-making.

Paragraph 34

75. The grounds stipulated for refusal of legal personality reflect the only considerations relevant for such a decision. As to names belonging to another or which are confusing, see *Apeh Uldozotteinek Szovetsege, Ivanyi, Roth and Szerdahelyi v. Hungary* (dec.), no. 32367/96, 31 August 1999 and as to inadmissible objectives, see *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, 13 December 2001. This underlines the structured nature of the discretion that must be established by national law.

Paragraph 35

76. The case law of the European Court demonstrates the real risk of authorities being too ready to assume the worst about the objectives of an NGO; see, e.g., *United Communist Party of Turkey and Others v. Turkey*, no. 19392/92, 30 January 1998 and *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998. As the European Court has made clear it is particularly difficult to draw adverse conclusions about broadly framed objectives where an NGO has yet to undertake activities which demonstrate a commitment to the pursuit of inadmissible objectives.
77. It is not appropriate to rely on suspicions or to draw conclusions simply from the use of certain terms in a statement of objectives. While an NGO's stated aims might conceal certain inadmissible objectives and intentions, this is likely to be demonstrated only by concrete action and not in an application for legal personality. Although past behaviour might give some indication as the way in which someone will behave in the future, there will be a need for significant corroboration that a risk exists before such personality could be legitimately refused.
78. Furthermore the importance of political pluralism in a democracy means that the establishment of NGOs with objectives that challenge the established order must be permitted unless there is compelling evidence that they will be pursued in a manner that is anti-democratic and this cannot be assumed simply because change is being proposed; see *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

Paragraph 36

79. Although in some countries the responsibility for decisions relating to grant of legal personality to NGOs is vested in courts, this is not an essential means of ensuring that the process is not affected by political considerations. It is sufficient that the body with this responsibility is genuinely independent not only of an executive elected or chosen as part of the political process but also of any other entity whose interests might be affected by the coming into being of a new NGO; see *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, 13 December 2001.
80. The body concerned may thus be an administrative one but, whatever its formal status, it is essential that it have an appropriate level of staff to ensure that the requirement of expeditious decision making is fulfilled and that those staff be persons who are suitably qualified and trained for the task expected of them.

Paragraph 37

81. The right to form NGOs with legal personality will only be truly meaningful where any process of approval that may be involved is completed in a reasonably speedy manner; delay in decision making should not be allowed to frustrate the pursuit of the objectives of the proposed organisation. A useful point of comparison in judging what is reasonable might be the time taken to register corporations or business since these also have objectives to be scrutinised and the fulfilment of requirements to be checked. However, in most countries this is something that can be completed in a matter of days rather than of weeks or months. Failure to decide within the prescribed time limit should then be automatically treated as either a refusal of legal personality or the granting of it.

Paragraph 38

82. The provision of a reasoned decision to the person affected by it is a fundamental principle of good administration that not only assists acceptance of a well-founded but adverse decision but also ensures that such a decision can be subjected to appropriate scrutiny. Although the review of a refusal of legal personality might in the first instance be a matter for internal review within the decision-making body, the ultimate guarantee that the rights of those seeking legal personality for an NGO have been respected can only be afforded by an appeal to an independent and impartial court.

Paragraph 39

83. The separation of decision making about the grant of legal personality from that about the grant of financial or other benefits is necessary in order to avoid the possibility of these two quite discrete matters becoming confused, with the result of inappropriate conclusions being reached in respect of the former. Such a risk might be most easily avoided by having two different decision-making bodies but this objective could also be achieved by giving these two functions to separately run units within the same body.

Paragraph 40

84. In order to protect the interests of all who may have dealings with NGOs with legal personality, the fact that this has been granted and the information submitted for this purpose should be recorded in a manner that allows members of the public to check any details that may be of concern to them. Ideally this should take the form of an electronic database that can be accessed without formality or fee over the internet.

Paragraph 41

85. The legal personality granted to an NGO should normally be for an indefinite duration, with this being determined only in accordance with the terms of its statute or pursuant to termination fulfilling the requirements of this Recommendation (see Paragraphs 44 and 74 of the Recommendation). The grant of legal personality should not, therefore, be for a limited duration or subject to a requirement of renewal unless this is the wish of those establishing the NGO concerned.

**C. *Branches; changes to statutes***Paragraph 42

86. The establishment or accreditation by an NGO of branches should be a matter for its own internal organisation and thus subject only to the requirements of its statute. The only circumstance in which any official authorisation for the establishment of a branch could be required would be where a discrete legal personality for the branch from that of the NGO establishing it was being sought for this purpose. In such a case the grant of approval could be made subject to the rules generally applicable to the grant of legal personality to NGOs.

Paragraph 43

87. Approval for a change in the statutes of an NGO should only be required where this concerns a matter that might be the basis for a refusal to grant legal personality (see Paragraph 34 of the Recommendation). However, the legitimate interest of members of the public in being able to verify the content of the statute of an NGO with which they have dealings would justify a requirement that other changes are notified prior to their coming into force. Therefore a member state may require that a change in the statutes must be entered in the register before it can be applied. This requirement may be necessary for members, those intending to join as members and creditors, bodies granting subsidies, authorities and other contact groups.
88. Although seeking approval for a change should be governed by the procedure already set out with respect to the initial grant of legal personality, the grant of approval should not involve the NGO concerned first having to establish itself as an entirely new entity. The term "approval" for the purpose of this paragraph does not cover any involvement of a lawyer or notary in preparing the change to the statutes.

**D. Termination of legal personality**Paragraph 44

89. The termination of the legal personality of an NGO against the will of its members or, in the case of a non-membership-based organisation, its founders is not something that should be easily done as this would undermine the principle that such bodies ought not to be subject to the direction of public authorities (see Paragraph 6 of the Recommendation). Involuntary termination ought, therefore, only to be possible where there is a compelling public interest in so doing. This will be where the NGO concerned has become bankrupt, has not been active for an extensive period – this is probably not something that can be claimed unless at least several years have elapsed between meetings of the highest governing body and there have been at least two failures to file annual reports on their accounts - or has engaged in serious misconduct in the sense of wilfully engaging in activities that are inconsistent with the objectives for which an NGO can be founded (including becoming an essentially profit-making body).

**E. Foreign NGOs**Paragraph 45

90. States that have not ratified Convention No. 124 may retain some discretion as to whether they recognise the legal personality of foreign NGOs and as to whether they allow them to operate within their territory but neither can be absolute on account of both the freedom of association guaranteed to those who are resident within them and the recognition by instruments such as the UN Declaration on Human Rights Defenders (Articles 5, 16 and 18) of the legitimacy of international human rights NGOs operating within individual countries. Certainly any process of prior approval to operate should be restricted and should not entail any requirement that NGOs first establish a new and separate entity under the law of the state in which they are seeking to operate. Furthermore the process of approval and its withdrawal should emulate, insofar as appropriate, the approach required for granting and terminating legal personality to NGOs set out in this Recommendation.

**V. Management**Paragraph 46

91. In a membership-based NGO the members should ultimately determine who carries out its management but, while in some cases they might decide this directly, they should be free to delegate the task to an intermediary body which may be especially desirable where the membership is particularly large. Nonetheless the status of the membership as the highest governing body must mean that any such delegation cannot be irrevocable.
92. In the case of a non-membership-based NGO the statutes do not have to protect the rights of members and are thus not subject to any particular limitations regarding the choice of management.

Paragraph 47

93. Although the decision-making process of an NGO must always comply with the requirements of its statutes, the limited requirements as to what these must contain and the principle of self-regulation (see Paragraphs 1 and 67 of the Recommendation) mean that there should be no other constraints on how they decide to pursue their objectives and manage the organisation.
94. Thus the NGO should be free to adopt organisational arrangements that it considers appropriate and to change them as and when it considers this to be necessary. Such internal matters should not require the approval of anyone outside the organisation concerned.
95. The freedom that NGOs ought to have with respect to decision making should not, however, lead their management to ignore the wide range of persons with a legitimate interest in the way in which the organisations concerned conduct themselves. The taking into account of these interests will require the use of a number of different techniques – notably consultation and reporting – and their precise form and scope will vary according to the character of the interest in question.

Paragraph 48

96. The freedom of NGOs to determine the arrangements for pursuing their objectives also extends to the choice of officers and the admission and exclusion of members.
97. It is possible that, as with the ability to form an NGO (see Paragraph 30 of the Recommendation), a prohibition on acting as an officer in an NGO might be a legitimate consequence of committing certain offences. In all cases the scope of such restrictions would need to be clearly connected with the activities constituting the offences and their duration should also not be disproportionate.
98. The freedom of NGOs to determine the admission or exclusion of members is subject to the prohibition on discrimination and the right to be protected against arbitrary exclusion.

Paragraph 49

99. Foreign nationals employed by NGOs or involved in their management should be subject to the generally applicable laws of the country in which they are established or operate as regards entry, stay and departure but there should not be any special limitation on such nationals becoming employees or being involved in the management of such organisations.

**VI. Fundraising, property and public support****A. Fundraising**Paragraph 50

100. The ability of NGOs to solicit donations in cash or in kind will, notwithstanding the possibility of them also engaging in some economic activity, always be a crucial means for them to raise the funds required in order to pursue their objectives. It is important that the widest range of possible donors can be approached by NGOs.
101. The only limitation on donations coming from outside the country should be the generally applicable law on customs, foreign exchange and money laundering, as well as those on the funding of elections and political parties. Such donations should not be subject to any other form of taxation or to any special reporting obligation.

**B. Property**Paragraph 51

102. Access to banking facilities will be essential if NGOs with legal personality are to be able to receive donations and to manage and protect their assets. This does not mean that banks should be placed under an obligation to grant such facilities to every NGO seeking them. However, their freedom to select clients should be subject to the principle of non-discrimination and the ability to operate bank accounts should be a necessary incident of the grant of legal personality to NGOs.

Paragraph 52

103. The possibility of NGOs protecting their property rights, as well as any other legal interests, through being able to bring and defend legal proceedings is essential since any taking of, the loss of control over or damage to their property could frustrate the pursuit of their objectives; see the finding of a violation of the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the European Convention in *The Holy Monasteries v. Greece*, nos. 13092/87 and 13984/88, 9 December 1994 which concerned a religious entity that had lost the right to bring legal proceedings in respect of its property.

Paragraph 53

104. The fact that assets of some NGOs have come from public bodies and that their acquisition has been assisted by a favourable fiscal framework are reasons to ensure that these assets are carefully managed and that the best value is obtained when buying and selling them. It would, therefore, be appropriate to adopt a requirement in these cases that NGOs be guided by independent advice when engaging in some or all such transactions.

Paragraph 54

105. It is a corollary of the adoption of a special tax regime to facilitate the acquisition of property for certain purposes that that property should not be utilised for other purposes. In the event of an NGO not being in a position to use the property for such purposes, it could thus be required to return the property concerned to the donor, to transfer it to another NGO that can use it for those purposes or to retain it on payment of the applicable taxes.

Paragraph 55

106. Most NGOs are unlikely to be able to pursue their objectives without employing some staff and/or having volunteers carrying out some activities on their behalf. It should, therefore, be recognised that it is a legitimate use of NGOs' property to pay their employees and to reimburse the expenses of those who act on their behalf. While market conditions and/or legislation will influence the level of payments made to staff, the need to ensure that property is properly used for the pursuit of an NGO's objectives would justify imposing a criterion of reasonableness for the reimbursement of expenses.

Paragraph 56

107. National law should permit an NGO to designate, whether in its statutes or by resolution of its highest governing body, another NGO to receive its assets in the event of its termination. This should, however, only apply to assets left after all the liabilities of the NGO being terminated have been met and this would include the fulfilment of a condition in a donation that funds unspent on the purpose for which it was given should either be returned to the donor or transferred to an NGO specified by the donor.
108. The freedom otherwise left to the NGO to determine who should succeed to its assets will, however, be subject to the prohibition on distributing any profits that it may have made to its members (see Paragraph 9 of the Recommendation) and may also be constrained by an obligation to transfer assets obtained with the assistance of tax exemptions or other public benefits to other NGOs pursuing objectives for which such exemptions or benefits are granted. In addition an NGO whose objectives or activities have been found to be inadmissible for reasons set out in Paragraph 11 of the Recommendation should not have any right to determine the successor to its assets but these should instead be applied by the State for public purposes.

**C. Public support**Paragraph 57

109. It is appropriate to grant public support to NGOs since they are often able to answer the needs of society in ways that public bodies cannot. The forms that such support can take will be wide-ranging and will need to be settled according to the conditions prevailing in a country at a particular time. However, various forms of tax exemption, whether directly to the NGOs themselves or indirectly to those who might thereby be encouraged to make donations to them, are likely to be the most useful as they enable NGOs to determine the best use of the resulting income.



Paragraph 58

110. It is essential that clear and objective criteria should govern the grant or refusal of any form of public support to NGOs so that any such decision can be scrutinised by all who may be interested in it - not only the NGOs concerned but also other NGOs working in the same field and members of the public interested in the use made of public resources - and subject to challenge in a court where it is considered that they have not been properly applied.

Paragraph 59

111. In deciding whether to grant public support, or particular forms of it, to an NGO or a certain category of NGO, it will be appropriate to take into account the nature and beneficiaries of any activities undertaken by such an organisation or category of organisation and thereby establish whether they address those needs of society considered to be a particular priority. What is seen as a priority and thus what forms of activity are regarded as worthy of public support can change over the course of time.

Paragraph 60

112. The provision of public support (in the form of financial or other benefits) for the activities of NGOs is something that can be made contingent upon them qualifying for a special category or regime (e.g., a charity), or even a specific legal form (e.g., a trade union, church or religious association). A failure to obtain such a status or classification or to be allowed to take on such a legal form should not, however, lead to the loss of any legal personality already acquired.

Paragraph 61

113. Since the granting of public support can be conditional upon certain objectives being pursued or certain activities being undertaken, it should be expected that a material change in either those objectives or activities will lead to a review of the provision of this support and possibly its modification or termination.

**VII. Accountability****A. Transparency**Paragraph 62

114. Those NGOs receiving any form of public support should expect to account for the use made of it. It is not unreasonable for NGOs to be required to report each year on the activities that they have undertaken and the accounts for the income and expenditure concerned. However, such a reporting obligation should not be unduly burdensome and should not require the submission of excessive detail about either the activities or the accounts. This reporting obligation is without prejudice to any particular reporting requirement in respect of a grant or donation. This requirement is distinct from any generally applicable requirement regarding the keeping and inspection of financial records and the filing of accounts.

Paragraph 63

115. In order to allay any concern that NGOs might not be devoting as much of their resources as is practicable to the pursuit of their objectives, an obligation to require them to disclose the proportion in fundraising and administrative overheads can be imposed. This provision is not meant to set a particular limit for expenditure on fundraising and administrative overheads but to ensure transparency.

Paragraph 64

116. Obligations to report should be tempered by other obligations relating to the right to life and security of beneficiaries and to respect for private life and to confidentiality. In particular a donor's desire to remain anonymous should be respected. However, the need to respect private life and for confidentiality are not absolute and should not be an obstacle to the investigation of criminal offences (e.g., in connection with money-laundering). Nonetheless any interference with respect for private life and confidentiality should observe the principles of necessity and proportionality.

Paragraph 65

117. In order to guarantee objectivity there can be a requirement that NGOs have their accounts audited by a person or institution independent of its management. The scope of any such requirement should take account of the size of the NGO concerned. In smaller ones the requirement of independence might be satisfied where the audit is carried out by a member who has no connection with the management. For those with substantial income and expenditure the use of the services of a professional auditor is likely to be considered more appropriate. It is recognised that there may also be a general legal obligation for all entities with legal personality (including NGOs) of meeting certain objective criteria, such as net value of assets or average number of employees, to have their accounts audited, which would be applicable even where NGOs do not receive any public support.

Paragraph 66

118. Although there is no reason to differentiate between foreign and other NGOs as regards the applicability of reporting and inspection requirements, it is only appropriate to subject foreign NGOs to them in respect of the activities that they actually carry out in the host country.

**B. Supervision**Paragraph 67

119. The best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation in this sector at the national and international level. Certainly responsible NGOs are conscious of the fact that their success depends to a large extent on public opinion concerning their efficiency and ethics. Nonetheless states have a legitimate interest in regulating NGOs so as to guarantee respect for the rights of third parties (whether donors, employees, members or the public) and to ensure the proper use of public resources and respect for the law.
120. In most instances the interests of third parties can be adequately protected by enabling them to bring the relevant matter before the courts; there should generally be no need for a public body to take any other action on their behalf.
121. Whatever the form of regulatory control employed, it is essential that it be governed by objective criteria and be subject to the principle of proportionality so that its exercise can be amenable to control by the courts. It is also vital that public authorities, in supervising the activities of NGOs, apply the same assumption that holds good for individuals, namely, that their activities are lawful unless the contrary is proved.

Paragraph 68

122. It should be possible to scrutinise the financial records and activities of NGOs where there are sufficient grounds for inquiry. In most instances this is only likely to be justified where an NGO has failed to comply with reporting requirements, whether because no report has been made or because what has been produced gives rise to genuine concerns, but it is possible that circumstances will warrant an inquiry even before a report is due. Mere suspicion should not be the basis for any such inquiry; there must always be reasonable basis for believing that impropriety has occurred or is imminent.

Paragraph 69

123. This provision requires that NGOs should have the benefit of the guarantees applicable to the search of persons and premises under Article 8 of the European Convention; see, e.g., *Funke v France*, no. 10828/84, 25 February 1993.
124. Judicial authorisation should normally be obtained prior to any such search taking place but this can be dispensed with where the power is subject to both very strict limits and subsequent judicial control, providing a sufficient guarantee against arbitrary interference with the right to respect for private life; see *Camenzind v. Switzerland*, no. 21353/93, 16 December 1997.

Paragraph 70

125. Intervention by an external body in the actual running of an NGO should be extremely rare. It should be based on the need to bring an end to a serious breach of legal requirements where either the NGO has failed to take advantage of an opportunity to bring itself into line with those requirements or an imminent breach of them should be prevented because of the serious consequences that would follow.

Paragraph 71

126. The possibility of seeking suspension of administrative action is something expected of all administrative law systems – see Recommendation Rec(2003)16 of the Committee of Ministers on the execution of administrative and judicial decisions in the field of administrative law – but it is especially important that this is available in respect of directions to an NGO to desist from particular activities as these are often tied to particular moments in time and so could not usefully be undertaken at a later date after a challenge to the directions has been successfully pursued.
127. Although there may be good reasons in a particular case for refusing suspension of an order to desist from certain activities or of any other measure taken in respect of an NGO, the significance of so doing is such that there should then be the possibility of this being subjected to a prompt judicial challenge.

Paragraph 72

128. NGOs, like everyone else, are subject to the law and sanctions may thus be imposed on them for failing to observe its requirements. However, it is essential that the principle of proportionality be respected in both framing and applying sanctions for non-compliance with a particular requirement. Moreover there should always be a clear legal basis for any sanctions that are imposed in a given case.

Paragraph 73

129. Although there is no reason to differentiate between foreign and other NGOs as regards the applicability of inspection requirements, it is only appropriate to subject foreign NGOs to them in respect of the activities that they actually carry out in the host country.

Paragraph 74

130. The need to respect the principle of proportionality should mean that resort to the sanction of enforced termination of an NGO for the reasons set out in Paragraph 44 of the Recommendation should be very rare. An extremely well-founded basis for such drastic action as enforced termination is essential; see *United Communist Party of Turkey and Others v. Turkey*, no. 19392/92, 30 January 1998, *Socialist Party and Others v. Turkey* [GC], no. 21237/93, 25 May 1998 and *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.
131. Moreover in making any assessment about the need for enforced termination it will be important to be sure that the reprehensible activities of members and even office-holders of an NGO can justifiably be regarded as engaging the responsibility of the latter; see *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no. 25141/94, 10 December 2002.
132. Where enforced termination does appear to be justified, it is a measure that must be adopted by a court and should be subject to appeal. It should only be in the most exceptional case that the effect of a termination ruling would not be suspended until the outcome of an appeal; see the contribution of the absence of such a possibility to the measure being found to be disproportionate in the *United Communist and Socialist Party* cases.

### **C. *Liability***

#### Paragraph 75

133. The principles set out in this provision are a necessary consequence of the legal personality of an NGO. Such personality confers on it a separate existence from its members and founders and it should normally, therefore, be the only one liable for its debts, liabilities and obligations. However, legal personality cannot operate as a barrier to liability on the part of an NGO's members, founders and staff for any professional misconduct or neglect of duties with regard to its functioning that affects the rights or other legal interests of third parties.
134. In some countries it is possible to *choose* to establish an NGO with legal personality where the officers can be held personally liable for the NGO's debts, liabilities and obligations (for example, informal associations in the Netherlands).

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

#### Paragraph 76

135. Notwithstanding the different perspective of NGOs and public authorities, it is in their common interest and that of society as a whole for them to have available effective mechanisms for consultation and dialogue so that their expertise is fully exploited. Certainly competent and responsible input by NGOs to the process of public policy formulation can contribute greatly to efforts to find solutions to the many problems that need to be addressed.
136. Although direct consultation and dialogue with all interested NGOs may not be feasible in every instance, the adoption of techniques to facilitate their input through bodies playing a co-ordinating role should be encouraged.
137. No NGO should be excluded from participation on a discriminatory basis and the expression of a diversity of views should be ensured.
138. The quality of the input of NGOs should not be undermined by inappropriate restrictions on access to official information.

#### Paragraph 77

139. It is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the law which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of the important contribution that they are able to make to democratic societies but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed.