

BETWEEN:

THE NEW TIMES LLC AND OTHERS

Applicants

v

RUSSIA

Respondent

WRITTEN COMMENTS OF THE THIRD-PARTY INTERVENERS

22 November 2021

Introduction

1. ARTICLE 19: Global Campaign on Free Expression and Media Defence (“the Interveners”) submit these written comments pursuant to leave granted by the President of the Third Section under Rule 44 of the Rules of the Court.¹
2. This case concerns the prosecution of media organisations in Russia under its ‘foreign agent’ laws. According to these laws any violation of the requirements of foreign agent legislation by a foreign mass media organisation included in the register of foreign agents, by a Russian company it established or by any other entity included in the register, may be punishable with a fine. The applicants in this case were designated as ‘foreign agents’ on the basis they engaged in ‘political activity’ and received foreign funding.²
3. The application of these laws to media organisations in Russia is bound to intensify the pressure on media freedom and media pluralism. This Court has stressed that there is “no democracy without pluralism”³ and that the state has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.⁴ These laws will have a significant chilling effect on the media and combined with other repressive measures it is not an exaggeration to suggest that this legal framework might lead to the eventual extinguishment of independent media and reporting. The outcome of this case is therefore crucial for media organisations, journalists, and the press in Russia. Moreover, the decision will also provide useful guidance on the compatibility of ‘foreign agent’ type laws with the European Convention within the Council of Europe.
4. These written comments will focus on the following issues, with reference to relevant international and comparative law and commentary:
 - (i) The present cases should be considered in the context of the overall situation in Russia and the harassment and restrictions on the media and journalists covering public interest matters;
 - (ii) Whether ‘foreign agent’ type laws can meet the requirements of international human rights law;
 - (iii) The nature and content of the strict scrutiny that must be applied to ‘foreign agent’ type laws to ensure (if possible) that they do not create a chilling effect on the right to freedom of expression; and
 - (iv) Factors to be considered in assessing whether ‘foreign agent’ type laws are used for improper purposes to restrict Convention rights.

Overall freedom of expression situation in Russia and the harassment and restrictions of the media and journalists covering public interest matters

5. Freedom of expression and press freedom in the Russian Federation has been steadily worsening over the last twenty years: independent media have faced political pressure and legal persecution, journalists have been attacked and even killed with impunity, and the overall space for free expression has shrunk to a critical point.⁵ According to Freedom House, the government “controls, directly or through state-

¹ As provided in the letter dated 22 October 2021

² Federal Law on Non-Commercial Organisations (Federal Law No. 7-FZ). Amendments in 2017 and 2019 extended designation to mass media outlets - Federal Law No. 327-FZ of 25 November 2017, amending Articles 10.4 and 15.3 of the Federal Law on Information, Information Technology and Information Protection and Article 6 of the Russian Federation Law on Mass Media; Federal Law No. 75-FZ of 5 April 2021 amending Federal Law On Non-Commercial Organisations; Federal Law No. 91-FZ of 20 April 202, lameding certain laws of the Russian Federation, Federal Law No. 481-FZ of 30 December 2020, amending certain laws of the Russian Federation in part of introduction of additional measures countering threats to the national security, Federal Law No. 14-FZ of 24 February 2021 ‘On amendments to the Code of Administrative Offences of the Russian Federation’.

³ ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v Italy* [GC], no. 38433/09, §129, ECHR 2012

⁴ European Council of Ministers, *Recommendation CM/Rec (2007)2 on Media Pluralism* (31 January 2007), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6be3

⁵ As of 2021, Russia ranked 150 out of 180 countries in the Press Freedom Index. See: RSF, *2021 World Press Freedom Index: Journalism, the vaccine against disinformation, blocked in more than 130 countries* (2021), available at: <https://rsf.org/en/2021-world-press-freedom-index-journalism-vaccine-against-disinformation-blocked-more-130-countries>

owned companies and friendly business magnates, all of the national television networks and many radio and print outlets, as well as most of the media advertising market”.⁶ Human Rights House Foundation classifies the current environment for human rights and civil society organizations in Russia as increasingly dire. In their recent report they found that as a result of political and legal persecution, Russian civil society’s engagement with the UN human rights bodies and mechanisms has significantly declined over the decade, their voices have weakened and their relationship with the local communities has been undermined.⁷ Similar conclusions have been reached by ARTICLE 19 in subsequent global freedom of expression reports.⁸

6. An increasingly repressive legal framework is playing an instrumental role in clamping down on freedom of speech and freedom of the media; including through ‘foreign agent’ legislation that is the subject of this case, as well as a range of other legislation.⁹
7. According to available research, the crackdown on media and civil society through foreign agent law has intensified in the lead up to the 2021 parliamentary elections. The crackdown on media and civil society intensified and ‘foreign agent’ legislation has been used to suppress dissenting voices. Since April 2021, at least 30 journalists and media outlets have been labelled ‘foreign agents’ by the Russian Ministry of Justice, including Latvia-based online newspaper *Meduza*, a business magazine *VTimes*, the country’s largest independent online broadcaster *Dozhd (TV Rain)*, and two investigative platforms, *Vazhnyie Istorii (IStories)* and *The Insider*. Recently, police officers searched the apartment of Roman Dobrokhov, the editor-in-chief of *The Insider*.¹⁰ In July 2021, several reporters of *Radio Free Europe / Radio Liberty*, as well as *Open Media* and *MBKh* were also included on the list of ‘foreign agents’, after which Roskomnadzor blocked their websites.¹¹ Another prominent investigative outlet, *Project Media*, was banned after being labelled an ‘undesirable organisation’ by the Prosecutor General’s office in July 2021. Eight journalists and *Project Media*’s editor-in-chief were listed as “foreign agents”. Earlier, in June 2021, police raided their homes forcing some to flee Russia to avoid potential criminal prosecution.¹² Since June 2021, eighteen civil society organisations with foreign registration have been placed on the list of ‘undesirable organisations’ by the Russian Ministry of

⁶ Freedom House, *Russia* (2021), available at: <https://freedomhouse.org/country/russia/freedom-world/2021>; See also: The Moscow Times, *Russian Newspaper’s Office Attacked, Editor Receives Death Threat* (1 April 2019), available at: <https://www.themoscowtimes.com/2019/04/01/russian-newspapers-office-attacked-editor-receives-death-threat-a65036>; The New York Times, *Russian Court Convicts Journalists for “Justifying Terrorism”* (6 July 2020), available at: <https://www.nytimes.com/2020/07/06/world/europe/russia-journalist-convicted.html>; *Meduza*, *The Insider editor-in-chief Roman Dobrokhov was searched by the police in a libel case* (28 July 2021), available at: https://meduza.io/news/2021/07/28/k-glavnomu-redaktoru-the-insider-prishla-politsiya?utm_source=facebook&utm_medium=main&fbclid=IwAR04QGNFVtEKZcLYBCvfwgPsSR8sXUFA6bg-vd4_xVoesabcl0v1n1tvE4M

⁷ Human Rights House Foundation, *Crisis Point in Russia. Russian Authorities’ Assault on Human Rights Defenders and Organisations and How the International Community Should Respond*, (October 2021), available at: <https://humanrightshouse.org/reports/crisis-point-in-russia/>

⁸ See e.g. ARTICLE 19, *The Global Expression Report 2021, The state of freedom of expression around the world* (July 2021), available at: <https://www.article19.org/wp-content/uploads/2021/07/A19-GxR-2021-FINAL.pdf>

⁹ Amendments to the Federal Law ‘On Information, Information Technologies and Protection of Information’ of 18 March 2019, available at: <http://publication.pravo.gov.ru/Document/View/0001201903180022?index=0&rangeSize=1>; Federal Law No. 327-FZ of 25 November 2017, amending Articles 10.4 and 15.3 of the Federal Law on Information, Information Technology and Information Protection and Article 6 of the Russian Federation Law on Mass Media, available at: <https://rg.ru/2017/11/25/fz327-site-dok.html>; Federal Law No. 481-FZ of 30 December 2020, available at: <http://publication.pravo.gov.ru/Document/View/0001202012300001?index=0&rangeSize=1>

¹⁰ *Meduza*, *The Insider editor-in-chief Roman Dobrokhov was searched by the police in a libel case* (28 July 2021), available at: https://meduza.io/news/2021/07/28/k-glavnomu-redaktoru-the-insider-prishla-politsiya?utm_source=facebook&utm_medium=main&fbclid=IwAR04QGNFVtEKZcLYBCvfwgPsSR8sXUFA6bg-vd4_xVoesabcl0v1n1tvE4M

¹¹ MBK-News, *Roskomnadzor has blocked the site “MBH Media”* (4 August 2021), available at: <https://mbk-news.appspot.com/category/news/>

¹² ARTICLE 19, *Russia: Government must end its crackdown on independent voices ahead of parliamentary election* (16 September 2021), available at: <https://www.article19.org/resources/russia-must-end-is-crackdown-on-independent-voices-ahead-of-election/>

Justice.¹³ Most recently, in November 2021, the Prosecutor's General Office launched a process to shut down *International Memorial*, one of Russia's oldest and most reputable human rights organisations based on the foreign agent law.¹⁴ All in all, there is a clear pattern of designating as foreign agents and subsequently persecuting those organisations and individuals who are critical of the government. Some of the journalists and bloggers labelled 'foreign agents' already expressed concerns about possible discrimination and adversarial treatment as a consequence of such labelling.¹⁵

Whether 'foreign agent' type laws can meet the requirements of international human rights law

8. Under Article 10 of the Convention, states also have a positive obligation, identified by this Court, to create a favourable or enabling environment for freedom of expression.¹⁶ Connected to this, the Council of Europe has called on member states to "put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear".¹⁷
9. The Interveners are aware that, along with Russia, other Council of Europe member states have introduced 'foreign agent' type laws. These laws have proliferated in recent years as states across the region have introduced strikingly similar restrictions.¹⁸ The rationale provided by states for these restrictions is remarkably consistent: prevention of foreign interference in domestic affairs; national security; and ensuring accountability. Examples of this can be found outside the Council of Europe region. The Inter American Commission on Human Rights (IACHR), which has also urged states to create a more favourable environment for the press,¹⁹ commented on the Nicaraguan Foreign Agents Law as follows; "...with the excuse of branding as a "foreign agent" any individual or organization who is a beneficiary of international cooperation or has ties with institutions who promote international cooperation, the new law seeks to silence individuals and organizations who are deemed to oppose the Nicaraguan government and to prevent the exercise of civil liberties, including freedom of expression and association."²⁰ In April 2021, the Inter American Association of Press referred to a proliferation of legislation or rhetoric in the Americas aiming to stifle the work of journalists and civil society organisations defending freedom of expression and human rights in general under the guise of putting an end to foreign interference in countries like Nicaragua, Mexico, Venezuela, Cuba, Ecuador and Bolivia.²¹

¹³ The list 'undesirable' organisations can be accessed here: <https://minjust.gov.ru/ru/documents/7756/>

¹⁴ Council of Europe, *Secretary General concerned by plans to liquidate International Memorial in the Russian Federation* (12 November 2021), available at: <https://www.coe.int/en/web/portal/-/secretary-general-concerned-by-plans-to-liquidate-international-memorial-in-the-russian-federation>

¹⁵ MMDC, "I don't know at what stage they will not want to rent my housing." *Petersburg journalists on how the status of a media-foreign agent affects their public and private life* (29 October 2021), available at: <https://mmdc.ru/news-div/digest/ne-znayu-na-kakom-etape-mne-ne-zahotyat-sdavay-v-arendu-zhile-peterburgskie-zhurnalisty-o-tom-kak-status-smi-inoagenty-lyayet-na-ih-publichnuyu-i-chastnuyu-zhizn/>

¹⁶ ECtHR, *Dink v Turkey*, no. 2668/07, 6102/08, 30079/08, 14 September 2010; ECtHR, *Rizvanov v Azerbaijan*, no. 31805/06, 17 April 2012; ECtHR, *Najafli v Azerbaijan*, no. 2594/07, 2 October 2012

¹⁷ Council of Europe, *Recommendation CM/Rec(2016)4* (adopted by the Committee of Ministers on 13 April 2016), available at: <https://rm.coe.int/recommendation-cm-rec-2016-4-of-the-committee-of-ministers-to-member-s/1680983254>

¹⁸ *For example*, at the time of the introduction of the Transparency of Organisations Receiving Foreign Funds Law in Hungary in 2017 the Parliamentary Assembly of the Council of Europe the Hungarian law described it as having been "inspired by the corresponding Russian law" See Council of Europe, *Resolution 2162 (2017) Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University* (27 April 2017), available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23715&lang=en>

¹⁹ IACHR, *Silenced Zones: Highly Dangerous Areas for the Exercise of Freedom of Expression*, OEA/Ser.L/V/II CIDH/RELE/INF 16/17 (15 March 2017) §152, available at:

http://www.oas.org/en/iachr/expression/docs/publications/zonas_silenciadas_eng.pdf

²⁰ The IACHR also noted that "This act is being implemented alongside others that have recently been passed and that are also a source of concern for the IACHR. The Commission believes that these pieces of legislation ([the Special Cybercrime Act](#), [the Act to Defend the Rights of the People](#), and [the Reform of the Code of Criminal Procedure](#)) all seek to scare Nicaraguans, with a view to restricting freedom of expression, in violation of inter-American human rights standards" See OAS, *IACHR Rejects Nicaragua's Foreign Agents Act and Calls on the State to Repeal It* (26 February 2021), available at: http://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/043.asp

²¹ Inter American Press Association, *Non-interference and freedom of association - Resolution of the IAPA Midyear Meeting* (20-23 April 2021), available at: <https://en.sipiapa.org/notas/1214528-non-interference-and-freedom-of-association>

10. The Interveners recognise that there might be legitimate concerns about foreign influence in a globalised world and attempts to influence democratic decision-making. However, we submit that the restrictions on freedom of expression, imposed by these laws, can only be legitimate where they comply with the three-part test of legality, legitimacy, and necessity and proportionality. Further, any limitation of rights provided for by such laws should not be contrary to Article 18.
11. **Legality:** The Russian law and many other laws in the region and beyond, are often drafted in a way that is unduly vague and over broad, with limited guidance as to what would be prohibited under the law. Hungary's now defunct 'foreign agent' law, when introduced, contained overbroad and unclear provisions on the regulation of foreign financing of NGOs.²² At the time of its enactment, it was widely criticised, and it was recently repealed.²³ Azerbaijan has, over a number of years, introduced a series of vaguely worded legislative measures impacting on the ability of NGOs to operate.²⁴
12. **Legitimacy:** In many instances, the purpose and effect of these laws is to prevent NGOs, human rights defenders, and others from challenging state authority. The enforcement practice also suggests that they were adopted with an ulterior purpose and do not genuinely serve the interests of national security or any other legitimate aim. In Turkey, a recently enacted foreign agent type law enables the authorities to target the activities of NGOs and the right to association of their members.²⁵ Outside of the Council of Europe, in Belarus, a 2011 law regulating the activities of NGOs imposes restrictions that are similar to those found under the Russian law.²⁶ Since 2012 the Russian authorities have expanded the scope of their 'foreign agent' legislative regime, initially aimed at NGOs, to capture journalists, lawyers and, most recently, those who report on problems in the military and security services.²⁷ The OSCE Representative on Freedom of the Media, Teresa Ribeiro, expressed her concerns at this ongoing expansion noting that the practice of Russian authorities designating media outlets and journalists as foreign agents "imposes excessive burdens upon media organisations and individuals, and, by stigmatising them, exerts a dangerous chilling effect on their work".²⁸
13. **Necessity and proportionality:** The disproportionality of the interference with the Convention rights of those designated as 'foreign agents' is evident in a number of ways. First, such laws contribute to the

²² Council of Europe, European Commission for Democracy through Law (Venice Commission), *Opinion on the Draft Law on the Transparency of the Organisations Receiving Support from Abroad*, Opinion 889/ 2017, (adopted by the Venice Commission at its 111th Plenary Session Venice, 16-17 June 2017), §§43 and 45, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e)

²³ Human Rights Watch, *Hungary's Scrapping of NGO Law Insufficient to Protect Civil Society* (23 April 2021), available at: <https://www.hrw.org/news/2021/04/23/hungarys-scrapping-ngo-law-insufficient-protect-civil-society>

²⁴ See Law of the Republic of Azerbaijan- On Non-Governmental Organisations (Public Associations and Funds) ("the NGO Law") adopted 13 June 2000 (amendments on it were adopted on 15 February 2013, 17 December 2013 and 17 October 2014); The Law of the Republic of Azerbaijan- On State Registration and State Register of Legal Entities ("the Registration Law") adopted 12 December 2003; The Law of the Republic of Azerbaijan - On Grants ("the Law on Grants") adopted 17 April 1998 and amended 17 October 2014

²⁵ Law on Preventing Financing of Proliferation of Weapons of Mass Destruction; See criticism of the law, Parliamentary Assembly Council of Europe, *Rapporteurs urge Turkish parliament not to adopt new restrictions on NGOs*, (21 December 2020), available at: <https://pace.coe.int/en/news/8147/rapporteurs-urge-turkish-parliament-not-to-adopt-new-restrictions-on-ngos->

²⁶ Law of the Republic of Belarus on Public Associations, No.3252-XII (4 October 1994) [as amended at 4 November 2013]; See also, Olga Oleinikova, *Foreign Funded NGOs in Russia, Belarus and Ukraine: Recent Restrictions and Implications* (2017) Vol. 9 No. 3, *Cosmopolitan Civil Societies: an Interdisciplinary Journal* available at: <https://epress.lib.uts.edu.au/journals/index.php/mcs/article/view/5637/6188>

²⁷ Order of the Federal Security Service of the Russian Federation of 28 September 2021 No. 379 "On approval of the List of information in the field of military, military-technical activities of the Russian Federation, which, when received by a foreign state, its state bodies, an international or foreign organisation, foreign citizens or stateless persons can be used against the security of the Russian Federation, available at: <http://publication.pravo.gov.ru/Document/View/0001202109300048?index=2&rangeSize=1>

²⁸ Organisation for Security and Co-operation in Europe, *OSCE Media Freedom Representative expresses grave concern about dangerous effects of 'foreign agent' legislation on media freedom in Russia* (24 August 2021), available at: <https://www.osce.org/representative-on-freedom-of-media/496291>

chilling effect on organisations affected by imposing an additional administrative burden and constraining them in applying to foreign donors for funding. Second, the nature and scope of criminal and administrative liability for violation of these laws often does not allow the possibility to assess the severity and danger of the offence in each case and is often not adapted to the individual circumstances of each case. Third, the 'political activity' of any member of a civil society or media organisation, even where the member acted in his or her personal capacity, is often considered as the activity of the entire organisation, resulting in the organisation being subjected to administrative or criminal sanction. Fourth, where these laws introduce a criminal sanction for activity previously considered legal, this may offend the rule on the prohibition on retroactivity of criminal offences. Fifth, where these laws require 'self-incrimination' - where an organisation is required to 'admit' to wrongdoing - they may increase the chilling effect of these laws.²⁹

14. Considering these factors in the context of media freedom, the designation of journalists as foreign agents pursuant to vague and overbroad legislation is incompatible with the well-established international law standards on freedom of expression. Specifically, it is contrary to the case law of this Court, which confers upon journalists "certain increased protections under Article 10 of the Convention."³⁰ The Interveners submit that, given the vital role performed by the media in collecting and disseminating information about events of public concern, measures capable of discouraging participation by the press in public debate must be subject to the strictest scrutiny under Article 10.

The nature and content of the strict scrutiny that must be applied to 'foreign agent' type laws

15. In relation to restrictions on press freedom, where the legal framework is inadequate to comply with the "prescribed by law" requirement under Article 10(2), it will be unlawful. The legal provisions which permit interference must be sufficiently protective to provide an ascertainable check against arbitrary use of intrusive state power. Such legal provisions must enable persons to foresee the general circumstances in which their activities may be subject to sanction under the law.³¹
16. Taking the Russian foreign agent laws as an example, its provisions are vague and overbroad.³² The Venice Commission in its most recent Opinion, having analysed the amendments introduced to the laws in question and the related enforcement practices, expressed its concern about the risk of arbitrary implementation and the potential chilling effect "due to the lack of legal certainty concerning the scope of the 'foreign agent' designation"³³. It further noted that no administrative guidelines existed to render

²⁹ See more generally: Council of Europe, European Commission for Democracy Through Law (Venice Commission), *Opinion On The Compatibility With International Human Rights Standards Of A Series of Bills Introduced By The Russian State Duma Between 10 and 23 November 2020 To Amend Laws Affecting "Foreign Agents"*, Opinion No. 1014/2020 (adopted by the Venice Commission at its 127th Plenary Session – Venice and online, 2-3 July 2021), available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)027-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)027-e); See also, Council of Europe, *Third party intervention by the Council of Europe Commissioner for Human Rights in ECODEFENCE and others v Russia and 48 other applications no. 9988/13* (5 July 2017), available at: <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680731087>

³⁰ Committee of Ministers of the Council of Europe, *Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors* (adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers' Deputies) §6, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680645b44>

³¹ ECtHR, *The Sunday Times v United Kingdom (no.1)*, 26 April 1979, §49, Series A no. 30

³² Council of Europe, European Commission for Democracy through Law (Venice Commission), *Opinion on Federal Law No. 121-FZ 'On Non-commercial Organisations ("law on foreign agents")*, *Federal Laws No. 18-FZ and n. 147-FZ and Federal Law n. 190-FZ on making amendments to the Criminal Code ("law on treason") of the Russian Federation*, Opinions no. 716-717/2013, (Adopted by the Venice Commission at its 99th Plenary Session - Venice and online, 13-14 June 2014), § 82, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2014\)025-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2014)025-e)

³³ Council of Europe, European Commission for Democracy Through Law (Venice Commission), *Opinion On The Compatibility With International Human Rights Standards Of A Series of Bills Introduced By The Russian State Duma Between 10 and 23 November 2020 To Amend Laws Affecting "Foreign Agents"*, Opinion No. 1014/2020 (adopted by the Venice Commission at its 127th Plenary Session – Venice and online, 2-3 July 2021), §55, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)027-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)027-e)

the legislation more foreseeable in practice and that the practical experience with the legislation suggested that vague terms were likely to be interpreted broadly in order to expand the reach of the law³⁴. Relevant to press freedom, it emphasised that the over broad terminology and definitions of activity considered illegal under the domestic legislation might enable the governments to introduce even further restrictions on media.

17. This Court has found that “a rule is also ‘foreseeable’ when it affords a measure of protection against arbitrary interferences by the public authorities and against the extensive application of a restriction to any party’s detriment”.³⁵ Where the provisions of the law are set out in broad terms, there should, at a minimum, exist a more detailed domestic legal framework for interpretation of such provisions. The level of precision for the laws prescribing specific sanctions for specific activity is much higher than, for example, the constitutional provisions, which are of a more general nature³⁶.
18. The Interveners submit that legal definitions in the ‘foreign agent’ type laws must be sufficiently narrowly worded to serve as a basis for restrictive measures that could be deemed “necessary in a democratic society”. Furthermore, the Court should have regard to whether the measures adopted are ‘relevant’ to the achievement of a legitimate aim under Article 10(2). This provides an important safeguard against measures, such as suspension, fines, or criminal sanction, being imposed arbitrarily.³⁷
19. In the case of the Hungarian Transparency Law, the Court of Justice of the European Union found that Hungary had not demonstrated why the objective on which it relied warranted the measures specifically implemented by the law.³⁸ In parallel, since Russia’s ‘foreign agent’ laws were first introduced, no clear and legitimate aim had been defined either by the legislature,³⁹ or by the judiciary in the subsequent application of the law.⁴⁰ As to the alleged aim of transparency, initially referred to upon adoption of these laws, the Venice Commission has stated that this did not appear to be a legitimate aim *per se*, but rather an accompanying element to one of the well-established legitimate aims.⁴¹
20. This Court has consistently recognised that the most careful scrutiny is called for when criminal measures or sanctions are applied in a way that is capable of discouraging the participation of the press in debates over matters of legitimate public concern.⁴² Notably, the Court has repeatedly held that “imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article 10 ...only in exceptional circumstances, notably where other

³⁴ *Id.*, §55.

³⁵ ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v Italy* [GC], no. 38433/09 §143, ECHR 2012

³⁶ ECtHR, *Rekvenyi v Hungary* [GC], no. 25390/94, §34, ECHR 1999-III

³⁷ ECtHR, *Társaság a Szabadságjogokért v Hungary*, no. 37374/05, §27, 14 April 2009; See also the UN Human Rights Committee which has stated that when a state has invoked a legitimate aim, it is for the state to demonstrate in a “specific and individualised fashion the precise nature of the threat”, and to establish “a direct and immediate connection between the expression and the threat”, UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34 (12 September 2011), §35, available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

³⁸ Court of Justice of the European Union, *Commission v Hungary (Transparency of associations)*, Case C-78/18 (18 June 2020), available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=227569&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=479483>

³⁹ Explanatory Memorandum to the Draft Law No. 1052523-7 ‘On Making Amendments to the Federal Law on Non-Commercial Organisations’ (9 November 2020), available at: <https://sozd.duma.gov.ru/bill/1052523-7>

⁴⁰ Council of Europe, *Third party intervention by the Council of Europe Commissioner for Human Rights in ECODEFENCE and others v Russia and 48 other applications no. 9988/13* (5 July 2017), §20, available at: <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680731087>

⁴¹ Council of Europe, European Commission for Democracy Through Law (Venice Commission), *Report on Funding of Associations*, Study No. 895 / 2017, (adopted by the Venice Commission at its 118th Plenary Session – Venice and online, 15-16 March 2019), §80, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)002-e)

⁴² ECtHR, *Bladet Tromsø and Stensaas v Norway* [GC], no. 21980/93, §64, ECHR 1999-III

fundamental rights have been seriously impaired” [emphasis added].⁴³ It has clarified that such “exceptional circumstances” include “cases of hate speech or incitement to violence.”⁴⁴

21. In addition, in assessing the proportionality of any interference, the Court should also have regard to the severity of the sanction.⁴⁵ This Court has stated that the law should determine an adequate sanction,⁴⁶ including fines for administrative offences, for violation of its provisions, and that the sanction or fine should be proportionate to the gravity of the offence it is designed to punish.⁴⁷ For example, the Russian Constitutional Court has previously found the provisions of the foreign agents law prescribing severe penalties unconstitutional.⁴⁸
22. Further, there must be a guarantee in place that the law will not be applied without regard to circumstances of the individual cases or lead to the automation of such process with complete omission of the proportionality assessment.⁴⁹ As this Court has noted, “the law must provide adequate and effective safeguards against abuse, which may include procedures for effective scrutiny by the courts”.⁵⁰ Absence of independent authorisation or effective oversight is contrary to the requirements that interferences with Article 10 must be “prescribed by law” and must be proportionate.⁵¹ The domestic courts’ reasoning is necessary to guarantee an important procedural safeguard for the applicants, and to provide this Court with an opportunity to examine whether the proper balance between the interests in question has been struck.⁵² The Constitutional Court of Russia itself had noted that the inconsistencies in the implementation of the law in question had to be further resolved by the judiciary;⁵³ however, in practice it cannot be said that such mechanism actually exists.⁵⁴
23. The Court has previously noted that “a mere failure to respect certain legal requirements or internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution”.⁵⁵ Such a disproportionate measure was prescribed under the repealed Hungarian Transparency Law.⁵⁶ Accordingly, it can be argued that a fine, imposed as a punishment for

⁴³ ECtHR, *Gavrillovici v Moldova*, no. 25464/05, §60, 15 December 2009; ECtHR, *Cumpănăand Mazăre v Romania* [GC], no. 33348/96, §115, ECHR 2004-XI; ECtHR, *Mahmudov and Agazade v Azerbaijan*, no. 35877/04, §50, 18 December 2008

⁴⁴ ECtHR, *Cumpănăand Mazăre v Romania* [GC], no. 33348/96, §50, ECHR 2004-XI; see also, ECtHR, *Mahmudov and Agazade v Azerbaijan*, no. 35877/04, §50, 18 December 2008

⁴⁵ ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v Azerbaijan*, no. 37083/03, §82, ECHR 2009

⁴⁶ ECtHR, *Tolstoy Miloslavsky v United Kingdom*, 13 July 1995, §§ 50-52, Series A no. 316-B

⁴⁷ ECtHR, *Grifhorst v France*, no. 28336/02, §§ 87-106, 26 February 2009; ECtHR, *Sadocha v Ukraine*, no. 77508/11, §31, 11 July 2019

⁴⁸ Constitutional Court of the Russian Federation, *Resolution of the Constitutional Court of the Russian Federation of April 8 2014 N 10-P* (8 April 2014), pp. 45-46, available at: <https://base.garant.ru/70634146/>

⁴⁹ ECtHR, *Kasabova v Bulgaria*, no. 22385/03, §43, 19 April 2011; and ECtHR, *Tolmachev v Russia*, no. 42182/11, §§ 53-55, 2 June 2020.

⁵⁰ ECtHR, *Glas Nadezhda EOOD and Anatoliy Elenkov v Bulgaria*, no. 14134/02, §46, 11 October 2007

⁵¹ As the Court has confirmed in the *Telegraaf Media Nederland Landelijke Media B.V. and Others v the Netherlands*, no. 39315/06, 22 November 2012, at §98, “[i]n a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge”. In an appropriate context, and where other safeguards are sufficient, the Court has been prepared to accept that “independent supervision” is adequate.

⁵² *mutatis mutandis* ECtHR, *Cumhuriyet Vakfi and Others v Turkey*, no. 28255/07, §69, 8 October 2013.

⁵³ Constitutional Court of the Russian Federation, *Resolution of the Constitutional Court of the Russian Federation of April 8 2014 N 10-P* (8 April 2014), pp. 38 and 41, available at: <https://base.garant.ru/70634146/>

⁵⁴ Council of Europe, *Commissioner for Human Rights Opinion on Legislation and Practice in the Russian Federation on Non-Commercial Organisations in light of Council of Europe Standards: An Update*, CommDH(2015)17, §68, 9 July 2015, available at: <https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-on-the-legislation-and-pr/16806da772>; *Third party intervention by the Council of Europe Commissioner for Human Rights in ECODEFENCE and others v Russia and 48 other applications no. 9988/13* (5 July 2017), §20, available at: <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680731087>

⁵⁵ ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v Azerbaijan*, no. 37083/03, ECHR 2009.

⁵⁶ Court of Justice of the European Union, *Commission v Hungary (Transparency of associations)*, Case C-78/18 (18 June 2020), available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=227569&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=479483>: “By imposing obligations of registration, declaration and publication on certain categories of civil

a failure to comply with reporting provisions of the “foreign agents” laws, and so large as to inevitably lead to termination of functioning of the media organisation, cannot be considered a proportional measure.

24. This Court has found that a large fine, particularly resulting in the closure of the media outlet or putting its functioning under substantial risk, will have a chilling effect on freedom of expression⁵⁷ and that its imposition is capable “of discouraging open discussion of matters of public concern” by silencing a dissenting voice altogether.⁵⁸ It is therefore submitted that placing an excessive and disproportionate burden on the media, among other affected by the impugned law parties, and straining their resources by way of arbitrary imposition of extreme financial sanctions, would inevitably have a chilling effect on the freedom of expression of the party subjected to such a penalty, but also on the freedom of the press in general – by putting other media organisations in fear of the same treatment.

Factors to be considered in assessing whether ‘foreign agent’ type laws are used for improper purposes to restrict Convention rights

25. Article 18 requires states to act in good faith.⁵⁹ While there is a presumption that they will do so, that presumption can be rebutted where it is shown that “the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context)”.⁶⁰ Furthermore, this Court has noted that in the absence of a legitimate purpose the Court itself can examine and identify an ulterior one.⁶¹ It is submitted that the legitimate aims cannot be used as a pretext to control or to restrict lawful activities. Where an examination of all the circumstances of the case “indicates that the actual purpose of the impugned measures was to silence and punish the applicant(s) for (their) activities”, then it can be concluded that Article 18 has been violated.⁶²

26. The Court has stated that Article 18’s terms appear capable of allowing a more objective assessment of the presence or absence of an ulterior motive and thus of a ‘misuse of power’ (“*détournement de pouvoir*”, as stated in the Convention’s Travaux Préparatoires), which is prohibited under the object and purpose of Article 18.⁶³ The misuse of power is also a well-established concept in EU law.⁶⁴ This Court has previously established that in the context of ‘misuse of power’ targeting specific groups, as in the group of cases against Azerbaijan, there are several specific factors which allow for a finding of

society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and providing for the possibility of applying penalties to organisations that do not comply with those obligations, Hungary had introduced discriminatory and unjustified restrictions with regard to both the organisations at issue and the persons granting them such support”.

⁵⁷ ECtHR, *Cumpănă and Mazăre v Romania* [GC], no. 33348/96, §114, ECHR 2004-XI.

⁵⁸ ECtHR, *Timpul Info-Magazin and Anghel v Moldova*, no. 42864/05, §39, 27 November 2007.

⁵⁹ In *Navalnyy and Ofitserov v Russia* this Court considered the origins of Article 18 in light of the Travaux Préparatoires to the Convention: ‘...it was drafted as a defence against abusive limitations of Convention rights and freedoms and thus to prevent the resurgence of undemocratic regimes in Europe. Article 18 of the Convention was intended to provide Europe with the new approach needed in the “battle against totalitarianism”, premised on the understanding that States could always and would always find excuses or reasons to limit, restrict, and ultimately hollow out individual rights and freedoms: the public interest in “morality, order, public security and above all democratic rights” can all be abused for this purpose; See ECtHR, *Navalnyy and Ofitserov v Russia*, nos. 46632/13 and 28671/14, 23 February 2016, joint partly dissenting opinion of Judges Nicolaou, Keller and Dedov.

⁶⁰ ECtHR, *Khodorkovskiy and Lebedev v Russia*, nos. 11082/06 and 13772/05, §899, 25 July 2013; ECtHR, *Lutsenko v Ukraine*, no. 6492/11, §106, 3 July 2012.

⁶¹ ECtHR, *Navalnyy v Russia* [GC], nos. 29580/12 and 4 others, §166, 15 November 2018 and ECtHR, *Sabuncu and Others v Turkey*, no. 23199/17, §252, 10 November 2020

⁶² ECtHR, *Rasul Jafarov v Azerbaijan*, no. 69981/14, §162, 17 March 2016.

⁶³ ECtHR, *Merabishvili v Georgia* [GC], no. 72508/13, §§283 and 303, 28 November 2017.

⁶⁴ According to the settled case-law of the Court of Justice of the European Union, an act is vitiated by misuse of power if it appears, on the basis of objective, relevant and consistent evidence, to have been undertaken solely or mainly for an end other than for which the power in question was conferred (see, among many other authorities, judgment of the Court of Justice of the European Communities of 13 November 1990 in *FEDESA and Others*, C-331/88, EU:C:1990:391, §24; judgment of the Court of Justice of the European Union of 16 April 2013 in *Spain and Italy v Council*, C-274/11 and C-295/11, EU:C:2013:240, §33; and judgment of the Court of Justice of the European Union of 4 December 2013 in *Commission v Council*, C-111/10, EU:C:2013:785, §80).

a violation of article 18. In the so-called *Mammadov/Mammadli* group of cases the Court established a pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of the criminal law.⁶⁵

27. The Interveners consider that a parallel can be drawn between some of the Court's findings in the above cases and the use of 'foreign agent' type laws. In those cases, the Court had regard to three factors in determining whether there had been a violation of Article 18. First, the Court examined the general context of the increasingly harsh and restrictive legislative regulation concerning the right allegedly violated in that country. Secondly, it examined the statements of high-ranking state officials together with the articles published in the progovernment media relevant to the matter in issue. Thirdly, it examined whether a pattern has emerged where individuals in the same position as the applicant have been targeted in the same or similar terms to the applicant:

(i) *The increasingly harsh and restrictive legislative regulation*

28. Vague and overbroad legislative provisions and their further enforcement, lacking any additional clarification in the legal framework or judicial practice, constitute an important element to be taken into account. This Court has found that the vagueness of the terminology used, and the potentially unlimited scope of its application creates an opportunity for abuse in individual cases.⁶⁶ This Court has also considered the application of such laws against journalists in a number of cases relating to Turkey.⁶⁷ Most recently the Turkish Government has been heavily criticized by international human rights organisations for introducing further restrictions to its 'foreign agent' law and misusing the antiterrorism legislation to target and silence outspoken activists, journalists, scholars, artists, and lawyers.⁶⁸

29. For example, with the adoption of the latest legislative amendments in Russia, individuals can now be designated as foreign agents. In addition to individual journalists, a number of human rights defenders and lawyers have now been labelled as "media performing the functions of foreign agents".⁶⁹ The Interveners respectfully submit that the designation of individuals, especially where they are engaged in work that is directly in opposition to the government, raises a very serious doubt as to whether there is a connection between the stated aim of the impugned law and its application.

(ii) *An established pattern of mistreatment of the media*

30. It is further submitted that the 'general context' doctrine that the Court has developed in a number of cases against Azerbaijan⁷⁰ is particularly relevant in cases concerning the application of foreign agent laws. Taking into account the situation in Russia, political pressure and attacks on the media and civil society have been reported by numerous local and international observers, organisations, and media. In its consideration of whether there has been a violation of Article 18 in such cases, this Court should pay particular attention to this context, noting that the Venice Commission, in its assessment of Russia's

⁶⁵ ECtHR, *Ilgar Mammadov v Azerbaijan*, no. 15172/13, 22 May 2014; ECtHR, *Yunusova and Yunusov v Azerbaijan* (no. 2), no. 68817/14, §§ 191-193, 16 October 2020; ECtHR, *Khadija Ismayilova v Azerbaijan* (no. 2), no. 30778/15, §118, 27 February 2020; ECtHR, *Natig Jafarov v Azerbaijan*, no. 64581/16, §67, 7 November 2019; ECtHR, *Aliyev v Azerbaijan*, no. 68762/14 and 71200/14, §§208-215, 20 September 2018; ECtHR, *Rasul Jafarov v Azerbaijan*, no. 69981/14, §§156-162, 17 March 2016; and ECtHR, *Mammadli v Azerbaijan*, no. 47145/14, §§98-104, 19 April 2018

⁶⁶ ECtHR, *Bayev and Others v Russia*, nos. 67667/09, §83, 20 June 2017

⁶⁷ ECtHR, *Demirel and Ates v Turkey* (no. 2), no. 31080/02, 29 November 2007; ECtHR, *Üstün v Turkey*, no. 37685/02, 10 May 2007; ECtHR, *Dink v Turkey*, no. 2668/07, 14 September 2010; ECtHR, *Sik v Turkey*, no. 53413/11, 8 July 2014

⁶⁸ Freedom House, *Turkey: Passage of NGO Law Strips Away Fundamental Rights and Freedoms* (4 January 2020), available at: <https://freedomhouse.org/article/turkey-passage-ngo-law-strips-away-fundamental-rights-and-freedoms>

⁶⁹ Deutsche Welle, *Lawyer Pavlov and LGBT Network have been announced 'foreign agents' in Russia* (8 November 2021), available at: <https://www.dw.com/ru/v-rf-objavili-inoagentami-advokata-pavlova-i-lgbt-set/a-59760148>

⁷⁰ ECtHR, *Rasul Jafarov v Azerbaijan*, no. 69981/14, §§156-163, 17 March 2016; ECtHR, *Mammadli v Azerbaijan*, no. 47145/14, §§99-104, 19 April 2018; ECtHR; *Ilgar Mammadov v Azerbaijan*, no. 15172/13, §§133-144, 22 May 2014

laws, has found that the ‘foreign agent’ laws have mostly targeted organisations and individuals who are active in the field of human rights, democracy and the rule of law.⁷¹

31. Importantly, where the law is being implemented in a way that is manifestly discriminatory against organisations and individuals critical of the government, in addition to any Article 14 analysis, this should be a consideration in the Court’s assessment of whether there has been a violation of Article 18.⁷² Where the case concerns journalists and press freedom, any ulterior motive should attain ‘significant gravity’.⁷³

(iii) *The statements and publicly expressed opinions of government officials and other state authorities*

32. Another relevant factor in the Article 18 analysis can be found in the statements of the government officials and other state representatives which may serve, even indirectly, as evidence of ulterior motive. For example, criticism of journalists by state officials such as labelling their activities as traitorous, or as condoning or supporting terrorism and extremism, or being a ‘voice of the West’, would be relevant in this assessment.⁷⁴ The Interveners would also submit that even in circumstances where such evidence is not as readily available, for example where a state is careful not to issue statements that might call into question its motives, this should not prevent it from finding a violation of Article 18 based on the combination of other factors. This Court has established that it is not bound by formulae and adopts conclusions supported by the free evaluation of all the evidence.⁷⁵ Other factors the Court might wish to consider are the timing and manner in which proceedings are being conducted,⁷⁶ lack of reasoning in the domestic judicial decisions,⁷⁷ and events surrounding the specific interference.

33. It is therefore submitted that the combination of the case-specific factors set out above may enable the Court to establish to a sufficient degree the proof of the ulterior motive of the interference, for example, that such interference, under the pretext of the respective law, has been carried out as part of a wider campaign to silence and eliminate the media in its role as a public watchdog and discourage political pluralism or criticism of the government.

ARTICLE 19

Media Defence

⁷¹ Council of Europe, European Commission for Democracy Through Law (Venice Commission), *Opinion On The Compatibility With International Human Rights Standards Of A Series of Bills Introduced By The Russian State Duma Between 10 and 23 November 2020 To Amend Laws Affecting “Foreign Agents”*, Opinion No. 1014/2020 (adopted by the Venice Commission at its 127th Plenary Session – Venice and online, 2-3 July 2021), §56, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)027-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)027-e)

⁷² Compare with ECtHR, *Khodorkovskiy and Lebedev v Russia* (no. 2), no. 51111/07 and 42757/07, §§624-625, 14 January 2020.

⁷³ ECtHR, *Kavala v Turkey*, no. 28749/18, §§157 and 231, 10 December 2019

⁷⁴ VOA, *Russia increases legal pressure on foreign outlets* (4 February 2021), available at:

<https://www.golosameriki.com/a/russia-increases-legal-pressure-on-foreign-outlets/5764838.html>; DW, *Prosecutors accused Memorial of justifying extremism and terrorism* (12 November 2021), available at: <https://www.dw.com/ru/прокуратура-обвинила-мемориал-в-оправдании-экстремизма-и-терроризма/a-59804343>

⁷⁵ ECtHR, *Nachova and Others v Bulgaria* [GC], nos. 43577/98 and 43579/98, §147, ECHR 2005-VII: “According to established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact”.

⁷⁶ *mutatis mutandis*, ECtHR, *Merabishvili v Georgia* [GC], no. 72508/13, §§320-332, 28 November 2017; ECtHR, *Natig Jafarov v Azerbaijan*, no. 64581/16, §68, 7 November 2019

⁷⁷ ECtHR, *Nastase v Romania*(*dec.*), no. 80563/12, §108, 18 November 2014