

Concerning the lawfulness of Greek legislation regulating the registration of non-governmental organisations (NGOs) on the Registry of NGOs working with refugees and migrants in Greece

Expert Opinion upon request from the ELENA Coordinator in Greece

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Introduction

1. The present Opinion concerns the lawfulness of recent Greek legislation regarding the registration of NGOs in the national Registry of NGOs working in the field of asylum and migration in Greece. The Opinion will not provide a detailed description of the specific provisions and the legal issues of the legislation but a brief reference to reports that analyse the framework in detail and identify points of concern will be made. The Opinion will focus on the relevant guarantees of EU law, the Council of Europe's standards, as well as international law. The standards will be analysed vis-à-vis concerns regarding the rule of law, the freedom to provide services and the freedom of association, the compliance with legal obligations of assistance to applicants for asylum and individuals involved in return, removal or deportation procedures, as well as the right to an effective remedy.

Overview of the legal framework

2. Greece's domestic arrangements and practice regarding the operation of NGOs working with refugees and migrants has been criticised since 2016.¹ In 2018, a Joint Ministerial Decision ("the first JMD")² establishing an NGO registry was issued; the provisions of which did not create particularly onerous requirements at the time.
3. In April 2020, a second Joint Ministerial Decision³ was issued on the basis of the newly introduced Law 4662/2020 ("the second JMD").⁴ The second JMD introduced a highly restrictive framework for registration that introduces the registration of NGOs as a precondition for their operation in the field of asylum and migration and imposes numerous burdensome requirements for registration and certification.⁵ Specific provisions reserve the right for the authorities involved to verify submitted information and provide a seemingly unlimited margin of appreciation to reject the registration of an

¹ Fundamental Rights Agency, Challenges facing civil society organisations working on human rights in the EU, 2017, See sections 2.1.1., 2.1.4., 3.1.2., available at: <https://bit.ly/3xZ4NaN>

² Joint Ministerial Decision, 7586/18, Government Gazette B'4794/26.10.2018, available at: <https://bit.ly/31mYCRi> (in Greek)

³ Joint Ministerial Decision 3063/2020, Government Gazette B' 1382/14.04.2020, available at: <https://rb.gy/2qhoto> (in Greek)

⁴ Law 4662/2020, Government Gazette A'27/07.02.2020, available at: <https://bit.ly/3xJG5ei> (in Greek)

⁵ Articles 2,3 and 5 of the second JMD. See also, Amnesty international, Greece: Regulation of NGOs working on migration and asylum threatens civ space, 31 July 2020, pp. 3-4, available at: <https://bit.ly/3rsGjVW>

NGO based on an assessment of its activities, or the registration of an individual applicant following an assessment of their activities and personality.⁶ NGOs and natural persons can be removed from the registry on the basis of general and abstract criteria, such as “illegal acts”, or where the implementation of their activities is characterised as “poor.”⁷ The provision of remedy is only provided against the decision to remove an NGO from the registry and not against the decision to remove an individual from the Registry;⁸ in addition, the remedy consists of a prior hearing before an administrative body composed, *inter alia*, of staff from the same authority that oversees the coordination of the NGO registry and assesses application for registrations.⁹ A hearing is not foreseen where the removal from the registry was the result of a criminal conviction.

4. A third Joint Ministerial Decision¹⁰ was issued in September 2020 and replaced the second JMD; the third JMD is essentially identical to the previous one with several additions and modifications. Among these, an obligation is introduced for the submission of detailed audit reports by state-licensed accountants when applying for registration;¹¹ deadlines for NGOs to comply with requests made by authorities to complement missing documents are shortened (from 15 to 10 days) while deadlines for authorities to decide on the application for registration are prolonged (from 30 to 60 days).¹² In addition, whereas the previous decision introduced the act of registration as a condition for NGOs to operate in the specific facilities that national migration legislation foresees (reception facilities and regional asylum offices), the new decision makes registration a condition for NGOs to operate anywhere on Greek territory.¹³ Lastly, although designated as an optional procedure for certain activities in the second JMD, certification is now a requirement for all actors aiming to operate in the field of asylum and migration and is given at the moment of registration if additional substantive criteria are fulfilled.¹⁴ Operational capacity and efficiency are among the criteria that NGOs must comply with in order to register and function. However, the competent authority reserves the right to exceptionally authorise access to reception facilities for any organisation; the decision lies with the discretion of the competent authority.¹⁵

Criticism and impact of the JMD

5. The current legal framework, as established and amended by the last two JMDs, has been heavily criticised by civil society organisations,¹⁶ the Council of Europe¹⁷ and in the context of the UN Special

⁶ Articles 3 (4) and 12 (3) of the second JMD. See also, RSA, Risk of Repression: New Rules on Civil Society Supporting Refugees and Migrants in Greece p.3, available at: <https://bit.ly/31dyTLH>

⁷ Articles 8 and 14 of the second JMD. See also, RSA, Risk of Repression: New Rules on Civil Society Supporting Refugees and Migrants in Greece p.3, available at: <https://bit.ly/31dyTLH>

⁸ Articles 8 (3) and 14 of the second JMD.

⁹ Article 8 (3) of the second JMD. The competent authority is the Special Secretariat for the Coordination of Involved Actors, as established in Article 4 of the JMD.

¹⁰ Joint Ministerial Decision 10616/2020, Government Gazette B' 3820/09.09.2020, available at: <https://rb.gy/sjioncz> (in Greek)

¹¹ Article 2 (ι), of the third JMD.

¹² Article 3 of the third JMD.

¹³ Article 6 (2) of the third JMD,

¹⁴ Articles 5 and 6 of the third JMD.

¹⁵ Article 16 of the third JMD.

¹⁶ Amnesty international, Greece: Regulation of NGOs working on migration and asylum threatens civ space, 31 July 2020, available at: <https://bit.ly/3rsGjVW>; RSA, Risk of Repression: New Rules on Civil Society Supporting Refugees and Migrants in Greece p.3, available at: <https://bit.ly/31dyTLH>; RSA, Repression Continued: Greece Further Restricts Civil Society Supporting Refugees and Migrants, September 2020, available at: <https://cutt.ly/pYgAXAj>; HIAS Greece, Some thoughts on the new Joint Ministerial Decision, regulating the registration of migration-related NGOs in Greece, 8 May 2020, available at: <https://rb.gy/yu9wrr>

¹⁷ Letter of Commissioner for Human Rights, 3 May 2021, available at: <https://rb.gy/n6hhus>; Council of Europe, Expert Council on NGO Law of the Conference of INGOs, Opinion on the compatibility with European standards of recent and planned amendments to the Greek legislation on NGO registration, 6 July 2020, available at: <https://rb.gy/y0hp2a> and Addendum to that opinion, 23 November 2020, available at: <https://rb.gy/crxd6h>

Procedures.¹⁸ It has also been the subject of a question at the European Parliament.¹⁹ The criticism focuses on the lack of meaningful public consultation before the adoption of the framework, the excessive requirements for registration/certification, the designation of the latter as a precondition for NGO activities, the introduction of seemingly unlimited discretion to deny registration or remove NGOs from the registry on the basis of vague criteria, and the absence of effective remedies. According to the reports, such a framework can interfere with the freedom of association by establishing a situation of legal uncertainty and restricted guarantees that could create significant obstacles in the free development of NGO activities in Greece.

6. As of October 2021, at least three refugee-assisting organisations have been denied registration. The refusal for two of these was based on formalities, i.e., the absence of required documentation without them being first requested, and/or lack of operational efficiency.²⁰ A third organisation was refused as a result of lack of updated documentation, non-compliance with the criterion of effectiveness, and due to the fact that the organisation's statute referred to provision of 'support to individuals under deportation', which was deemed to be an unlawful activity.²¹ The Greek Ombudsman has since called for the reexamination of the rejection decision as it found that it resulted in violation of national, EU and international law.²² It is important to note that these acts of refusal over the past year and the potential for significant harm of the JMD regime must be analysed in the context of the recent emergence of a general climate of harassment against NGOs working on asylum and migration in Greece²³ and in Europe.²⁴
7. Information is still scarce, and the success of future applications by different NGOs remains to be seen, but the developments so far indicate that the aforementioned concerns did materialise in ways that can unpredictably restrict the activities of otherwise lawfully operating stakeholders. Although some of the reasons for refusal refer to procedural/technical matters, they still form part of the undesired effects of an excessively bureaucratic regulation system that makes the free development of NGO activities difficult. In addition, the vague reasoning and assessment of the lawfulness of certain activities, or the obscure reasoning behind the assessment of what constitutes operational efficiency, does little to address the previous concerns over the lack of legal certainty in the JMDs provisions and the arbitrary situations that can emerge. The practical impact of such refusals on the actual operation of NGOs is not evident yet but the potential implications for the freedom of association cannot be disregarded. The refusals also highlight the need for an effective remedy, in the form of an opportunity for NGOs to defend their activities and the rights of the individuals they support before an impartial and independent administrative body and/or tribunal.

¹⁸ OHCHR, Letter to Greece by the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the human rights of migrants, 31 March 2021, available at: <https://rb.gy/crx66h>

¹⁹ European Parliament, Priority question for written answer P-005656/2020 to the Commission, Rule 138, Tineke Strik (Verts/ALE), 16 October 2020, available at: <https://rb.gy/7kt7jr>

²⁰ Information obtained from the ELENA network.

²¹ For more information, see, RSA, Rejection of registration on the NGO Registry of the Ministry of Migration and Asylum despite the existence of all foreseen requirements, 26 November 2021, available at: <https://tinyurl.com/ycku79uz>; Joint statement by 19 organisations active on refugee issues in Greece on the rejection of RSA from the NGO Registry, available at: <https://bit.ly/3lx37K9>

²² RSA, Ombudsman calls for re-examination of rejection of RSA's registration on the NGO Registry, 13 December 2021, available at: <https://bit.ly/3ET6Waj>

²³ Human Rights Watch, Greek Authorities Target NGOs Reporting Abuses against Migrants, 22 July 2021, available at: <https://tinyurl.com/mwspa458>; ECRE, Greece: Criminalisation of Rescuers, Death for People on the Move, Impunity for Vigilantes, States Persist with Dublin Take-Back Requests Despite Risks and Deficiencies, 29 October 2021, available at: <https://tinyurl.com/2m22hywa>

²⁴ Council of Europe, Expert Council on NGO Law, Using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe Member States, December 2019, available at: <https://tinyurl.com/vw4fuuw3>; Resoma, Crackdown on NGOs and volunteers helping refugees and other migrants, June 2019, available at: <https://tinyurl.com/2p8heb4k>

8. As a last point, it should be emphasised that according to Article 1 (3) of the third JMD the objective of the regulatory framework is to ensure optimisation of services through transparency; as an ultimate objective, the provision includes the protection of the human rights of asylum applicants and migrants. However, the restrictive framework and the impact described above shows that the measures not only go beyond what is necessary to achieve the stated objective but also seriously risk defeating it.

Analysis

9. In light of the above, the opinion will analyse the lawfulness of the legislation from five different legal angles: rule of law and legal certainty, freedom of provision of services under EU law, freedom of association, the restriction of rights of asylum applicants and individuals under deportation, and effective remedy guarantees.

Rule of law and the principle of legal certainty

10. The principle of legal certainty is one of the constitutive elements of the rule of law concept,²⁵ the latter being one of the foundations of the European Union.²⁶ Legal certainty holds a unique position in the EU legal order and has been identified by the Court of Justice of the EU (CJEU) as a general principle of law.²⁷ According to the Court's jurisprudence, the principle requires the clarity and precision of laws and foreseeability in their application – particularly when the consequences of this application may be negative.²⁸ Legislation must enable the concerned parties to know precisely the extent of obligations and rights and “to take steps accordingly.”²⁹
11. Although Member States are free to legislate the registration of associations operating in their territory, they are under a general obligation to refrain from measures that could jeopardise the attainment of the Union's objectives.³⁰ The CJEU has clarified that, when exercising their competence, Member States must comply with their obligations deriving from EU law.³¹ More specifically, Member States cannot amend their legislation “in such a way as to bring about a reduction in the protection of the value of the rule of law.”³² Consequently, Member States are precluded from enacting domestic legislation which fails to respect the most basic guarantees of the European legal order, including the rule of law and the principle of legal certainty.
12. Similarly, the Council of Europe has also identified legal certainty as a principle that requires the formulation of laws with precision and clarity in order to enable the regulation of one's conduct in accordance with such laws and ensures foreseeability.³³ The rule of law is one of the key principles in the Preamble of European Convention on Human Rights³⁴ and the European Court of Human Rights

²⁵ Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps, COM/2019/163 final, available at: <https://cutt.ly/eYpNdXt>

²⁶ Article 2, Treaty on European Union (TEU), available at: <https://rb.gy/pzptoa>

²⁷ Judgment of 15 February 1996, Duff and Others, C-63/93, EU:C:1996:51, paragraph 31, available at: <https://rb.gy/q1g7ym>

²⁸ Judgment of 29 April 2021, Banco de Portugal and Others, C-504/19, EU:C:2021:335, paragraph 51, available at: <https://cutt.ly/7YpW5aJ>

²⁹ Judgment of 11 July 2019, Agrenergy and Fusignano Due, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraphs 30, available at: <https://bit.ly/3spUXhp>

³⁰ Article 4 (3) TEU.

³¹ Judgment of 15 July 2021, European Commission v. Poland, C-791/19, EU:C:2021:596, paragraph 95, available at: <https://cutt.ly/QYpCnK9>

³² Judgment of 20 April 2021, Repubblica, C-896-19, EU:C:2021:311, paragraph 63, available at: <https://cutt.ly/QYpXtsU>

³³ Venice Commission of the Council of Europe, The Rule of Law Checklist, May 2016, p. 25, available at: <https://cutt.ly/lYp6b9q>

³⁴ Council of Europe, European Convention on Human Rights, available at: <https://cutt.ly/NYawktK>

(ECtHR) considers it to be “*inherent in the system of protection established by the Convention and its Protocols.*”³⁵

13. When assessing interference with Convention rights, the ECtHR has clarified that restrictions on rights do not only require the existence of a legal basis (“prescribed by law”) but that legal basis must also satisfy the criterion of quality.³⁶ The latter is intrinsically linked with the foreseeability test and the compatibility of legislation with the rule of law; as such, it requires adequate safeguards in domestic legislation to prevent arbitrary interference by authorities.³⁷ The quality of law in matters affecting fundamental rights should also be scrutinised in respect of the margin of discretion of authorities. In *Hasan and Chaush v. Bulgaria*, the Court underlined the rule-of-law implications of a “*legal discretion granted to the executive [...] in terms of an unfettered power*” and emphasised that “[...] the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.”³⁸
14. The UN Human Rights Council has emphasised the role of predictability and legal certainty in the application of the law in order to prevent arbitrariness.³⁹ The Human Rights Committee (CCPR) has noted, in the context of its assessment of a complaint against national anti-terrorism legislation enacted by the Republic of Maldives, that the legal provisions in question were formulated “*in a broad and vague fashion that is susceptible to wide interpretation [...] and does not comply with the principle of legal certainty and predictability.*”⁴⁰ In the context of complaints under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), the CCPR has provided a broad interpretation of the concept of “arbitrariness” that does not only cover situations that are clearly against the law but also “*considerations relating to inappropriateness, injustice, unpredictability and due process guarantees as well as those relating to reasonableness, necessity and proportionality.*”⁴¹

Freedom of provision of services under EU law

15. As noted in the criticism above, the stringent requirements make registration and operation of NGOs unreasonably difficult, in particular due to the excessive formalism of the registration procedure and the mandatory fulfillment of vague and not necessarily relevant criteria, as well as due to the resources needed to gather documentation and follow up on the procedure. Specific registration conditions, such as operation and efficiency-based criteria and submission of reports drafted by nationally recognised chartered accountants, could incur significant costs and affect resource allocation to the detriment of the development of an organisation’s core activities. For smaller NGOs or branches of international/pan-European NGOs that are (or seek to be) established in Greece, the cumulative effect of such conditions can amount to a negation of their freedom to establish operation and provide asylum and migration-related services in Greece, both due to the practical inability to fulfil certain mandatory criteria and to the dissuasive effect of the measures.⁴²

³⁵ ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18m 1 December 2020, para. 211, available at: <https://cutt.ly/TYawGKZ>

³⁶ ECtHR, *Delfi AS v. Estonia* [GC], no. 64569/09, 16 June 2015, para. 120, available at: <https://cutt.ly/7YaisEY>

³⁷ ECtHR, *Magyar Kétfarkú Kutya Párt v. Hungary*, no. 201/17, 20 January 2020, para. 93, available at: <https://cutt.ly/AYao0YF>

³⁸ ECtHR, *Hasan and Chaush v. Bulgaria*, no. 30985/96, 26 October 2000, para. 84, available at: <https://cutt.ly/YYIEDSs>

³⁹ Human Rights Council, *Human Rights, democracy and the rule of law*, A/HRC/RES/19/36, available at: <https://cutt.ly/GYgTz2N>

⁴⁰ CCPR, *Mohamed Nasheed and others v. Republic of Maldives*, Communication nos. 2270/2013 and 2851/2016, 4 April 2018, para. 8.3, available at: <https://cutt.ly/SYgYiOa>

⁴¹ CCPR, *Lydia Cacho Ribeiro v. Mexico*, Communication no. 2767/2016, 17 July 2018, para. 10.10, available at: <https://cutt.ly/5YgY8fR>

⁴² See for example, the CJEU’s reasoning in *Commission v. Hungary*, C-78/18, paragraphs 117-118, on the possibility of restrictive registration, publicity and declaration measures for NGOs that receive finance from foreign actors and the potential deterrent effects in the financing of such associations, including through the creation of a general climate of distrust and stigmatisation.

16. The Treaty on the Functioning of the European Union (TFEU)⁴³ requires Member States to take action for the removal of restrictions that can interfere with the right of individuals and companies to freely provide services in the Union.⁴⁴ The Treaty provisions on freedom of services are applicable where a cross-border element exists but it does not only concern measures that explicitly discriminate against non-national providers of services, i.e. providers of services that are not established in the Member State that imposed the restrictive measures. The Court has found that even if the measures apply indistinctively to national and non-national providers of services, freedom of movement is limited where restrictions are in any case liable “[..] to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.”⁴⁵
17. The CJEU has examined the effect of prior administrative authorisation systems in a variety of cases and has emphasised that such systems “cannot legitimise discretionary decisions taken by the national authorities which are liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom [...]”⁴⁶ Such measures are examined by the CJEU as derogations from the freedom to provide services. In *Smits and Peerbooms*, where authorisation from insurance funds was a legally required condition for claiming sickness benefits, the Court considered that such a derogation from fundamental freedoms must be based on “objective, non-discriminatory criteria” and that these criteria are made known in advance in a way that ensures the exercise of national authorities’ discretion is not arbitrary; in addition, a procedural system that is “easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time” must be in place.⁴⁷
18. National restrictions that derogate from the fundamental freedoms of the TFEU may be justified under specific grounds of public policy, public security or public health,⁴⁸ and such restrictions must satisfy, *inter alia*, the criterion of proportionality. In *Analir*, the provision of shipping services in specific maritime routes was made subject to prior administrative authorisation, the validity of which was conditional on the fulfilment of public service obligations imposed by the Spanish authorities. The Court emphasised that, in addition to the need for objective and non-discriminatory criteria, the authorisation scheme in question must also be necessary and proportionate to the aim pursued.⁴⁹ Regarding the justification of the measure in question, which concerned overarching public interest considerations in shipping routes of essential interest, the Court noted that a prior authorisation scheme may be appropriate in order to enable “a prior check to be made on [the provider’s] ability to fulfil such obligations” but the authorities must still ensure that the scheme is not established in a way that creates conditions that allow national discretionary conduct on behalf of Spanish authorities that effectively nullifies the fundamental freedom.⁵⁰
19. Where less restrictive measures are available, the CJEU has emphasised that these will be more appropriate in justifying the derogation. In *Sanz de Lera*, the Court assessed the requirement of prior

⁴³ Consolidated version of the Treaty on the Functioning of the European Union, available at: <https://cutt.ly/fYhaNRL>

⁴⁴ Articles 56-62 TFEU (free movement of services). The CJEU has ruled that these provisions also cover non-profit making activities, see, CJEU, Judgment of 17 June 1997, *Sodemare*, C-70/95, EU:C:1997:301, available at: <https://cutt.ly/JYlusf7>

⁴⁵ CJEU, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33, available at: <https://cutt.ly/1Yhalbr>

⁴⁶ CJEU, Judgment of 16 May 2006, *Watts*, Case C-372/04, EU:C:2006:325, paragraph 114, available at: <https://cutt.ly/SYhd8Dx>

⁴⁷ CJEU, Judgment of 12 July 2001, *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraph 90, available at: <https://cutt.ly/HYhjxew>; See also similar reasoning in: CJEU, Judgment of 13 May 2003, *V.G. Müller-Fauré*, Case C-385/99, EU:C:2003:270, available at: <https://cutt.ly/kYhkKiM>

⁴⁸ See TFEU, Articles 52 and 62 (for the provision of services) and Article 65 (for the free movement of capital).

⁴⁹ CJEU, Judgment of 20 February 2001, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir)*, C-205/99, EU:C:2001:107, paragraph 35, available at: <https://cutt.ly/JYhxgOP>

⁵⁰ *Idem*, paragraphs 36-37.

authorisation by national authorities for the export of banknotes, coins and cheques (free movement of capital). The Court noted that the system established by Spanish law essentially suspended currency exports by making them conditional on the consent of national authorities through means of a special application.⁵¹ It concluded that the effect of such a requirement rendered the freedom illusory and suggested that a less restrictive scheme could have achieved the legitimate public policy aims without infringing on Treaty freedoms.⁵² In *Commission v. France*, the Court noted that, although an overriding reason for justification existed, the national measure and its potential effects revealed a scale of restrictions that were disproportionate in relation to the objective pursued.⁵³ Although the Court does not preclude the imposition of national supervisory schemes in domestic arrangements regulating the provision of services in certain situations, there is a clear requirement for flexible, proportionate schemes that do not circumvent the Member States' Treaty-derived obligations.

20. The public interest objective of the registration/authorisation framework for the operation of NGOs in Greece lies in the need to ensure transparency in the operation of NGOs in order to attain an optimisation of services and, ultimately, the effective protection of asylum applicants and migrants.⁵⁴ Although such an aim may be legitimate, there is no sufficient explanation regarding the reasons for increased transparency in the operation of NGOs working specifically in the field of asylum and migration and not in other fields of public policy. In addition, it is unclear how the purpose of optimisation of services will be achieved if operation is made conditional on an exacting system of prior authorization with strict and resource-demanding requirements. Similarly, it is unclear how the protection of the human rights of asylum applicants and migrants can be secured through measures that significantly restrict the operation of NGOs in that field. In *Commission v. Hungary*, the latter asserted a similar justification for its restrictions on the free movement of capital regarding the financing of NGOs only where these are financed by foreign entities; the CJEU found that the transparency of the financing of associations is a legitimate objective but the measures singled out foreign financing without sufficient explanation and concluded that such justifications cannot be based “on a presumption made on principle.”⁵⁵

The right to freedom of association

21. State measures that introduce limitations to fundamental freedoms protected under the TFEU must be regarded as implementing Union law, in the context of Article 51 (1) of the Charter of Fundamental Rights of the EU (CFREU), and must therefore comply with the rights contained in the Charter.⁵⁶ The CFREU recognises the right to freedom of association at all levels,⁵⁷ while the CJEU considers it to be one of “*the essential bases of a democratic and pluralist society*.”⁵⁸ In *Commission v. Hungary*, the Court examined obligations of declaration, registration and publicity regarding the financing of associations, as requirements that made the operation of associations difficult, and concluded that they constituted a limitation on the right to freedom of association under Article 12 of the Charter.⁵⁹ As noted in the previous paragraph in respect of interference with fundamental freedoms, Hungary's

⁵¹ Judgment of 14 December 1995, *Sanz de Lera and Others*, C-163/94, C-165/94 and C-250/94, EU:C:1995:451, paragraph 24.

⁵² *Idem*, paragraph 25.

⁵³ Judgment of 26 February 1991, *Commission v. France*, C-154/81, EU:C:1991:76, paragraphs 17-21, available at: <https://cutt.ly/vYld8lx>

⁵⁴ Article 1 (3) of the third JMD.

⁵⁵ Judgment of 18 June 2020, *Commission v. Hungary*, C-78/18, EU:C:2020:476, paragraph 86, available at: <https://cutt.ly/PYEPTGK>

⁵⁶ Judgment of 18 June 2020, *Commission v. Hungary*, C-78/18, EU:C:2020:476, paragraphs 101-104, available at: <https://cutt.ly/PYEPTGK>

⁵⁷ Charter of Fundamental Rights of the EU, Article 12, available at: <https://cutt.ly/nYglWza>

⁵⁸ Judgment of 18 June 2020, *Commission v. Hungary*, C-78/18, EU:C:2020:476, paragraph 112, available at: <https://cutt.ly/PYEPTGK>

⁵⁹ *Idem*, paragraphs 115-119.

objective of, *inter alia*, transparency had not been sufficiently substantiated and could not support any justification of interference with the Charter right.⁶⁰

22. The European Court of Human Rights considers that national legislation regarding the formation of legal entities falls under the right to form an association under Article 11 ECHR and its practical application by domestic authorities “*reveal[s] the state of democracy in the country concerned.*”⁶¹ The right is not limited to the formation of an association but also covers their right to carry on their activities once formed.⁶² Difficulties emanating from registration obligations that affect the operation of an association constitute an interference with Article 11 rights.⁶³ In *Ramazanova and others v. Azerbaijan*, the Court assessed Article 11 guarantees in respect of the quality of legislation regarding the registration of associations and found a violation of that Article on account of, *inter alia*, national legislation that did not include sufficiently precise guarantees against arbitrary state action in registration procedures.⁶⁴ Exceptions under Article 11 are permitted but they can only be construed strictly and must be based on convincing and compelling reasons.⁶⁵ In *Gorzelik and others v. Poland*, which concerned the refusal to register an association, the Court noted that such exceptions must be based on reasons that correspond to a “*pressing social need*” and cannot merely be “*useful or desirable.*”⁶⁶
23. Under international law, Article 22 ICCPR protects the right to freedom of association. The CCPR considers the denial of registration for human rights NGOs as “*the most extreme measure*” by Governments that directly curtails the right to freedom of association.⁶⁷ The Special Rapporteur on the situation of human rights defenders has identified several situations that interfere with the operation of human rights NGOs, including burdensome registration procedures and ensuing costs, excessive government discretion and legal frameworks that constantly change, overly vague legislation.⁶⁸
24. In *Kungurov v. Uzbekistan*, the CCPR confirmed that Article 22 covers the right of an association to freely carry out its activities and that the denial of registration should conform with Article 22 (2).⁶⁹ The Committee found a violation of Article 22 on account of, *inter alia*, lack of precision and predictability regarding the requirements⁷⁰ and lack of proportionality regarding the denial of registration.⁷¹ In *Mikhailovskaya and Volchek v. Belarus*,⁷² the domestic authorities denied the registration of a new NGO and dissolved another because they were providing legal assistance to citizens without a license and had violated rules on NGO registration. The Committee noted that objective justifications are not sufficient in order to limit the right to freedom of association; the prohibition of an association should respond to a real threat to national security and democratic

⁶⁰ *Idem*, paragraphs 139-142. For the Court’s reasoning on transparency as an objective that justifies limitations from Treaty obligations, see also paragraph 86.

⁶¹ ECtHR, *Ramazanova and others v. Azerbaijan*, no. 44363/02, 1 February 2007, para. 54, available at: <https://cutt.ly/NYlcPoe>

⁶² ECtHR, *United Communist Party of Turkey and others v. Turkey*, no. 19392/92, 30 January 1998, para. 33, available at: <https://cutt.ly/LYITgca>

⁶³ ECtHR, *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, 5 October 2006, paragraphs 71-75, available at: <https://cutt.ly/xYlvnA3>

⁶⁴ ECtHR, *Ramazanova and others v. Azerbaijan*, no. 44363/02, 1 February 2007, para. 66, available at: <https://cutt.ly/NYlcPoe>

⁶⁵ *Idem*, para. 76.

⁶⁶ ECtHR, *Gorzelik and others v. Poland*, no. 44158/98, 17 February 2004, paras. 94-96, available at: <https://cutt.ly/CYlmvVB>

⁶⁷ Report of the Special Rapporteur on the situation of human rights defenders, 4 August 2009, A.64/226, para. 67, available at: <https://undocs.org/A/64/226>

⁶⁸ *Idem*, para. 70-74.

⁶⁹ CCPR, *Kungurov v. Uzbekistan*, Communication No. 1478/2006, 20 July 2011, para. 8.2, available at: <https://cutt.ly/rYIFtOs>

⁷⁰ *Idem*, para. 8.5.

⁷¹ *Idem*, para. 8.6.

⁷² CCPR, *Raisa Mikhailovskaya and Oleg Volchek v. Belarus*, Communication No. 1993/2010, 24 July 2014, available at: <https://cutt.ly/eYISNo8>

order and less intrusive measures should be deemed insufficient.⁷³ The CCPR observed that, even if the allegations were true, the denial of registration and the dissolution constituted disproportionate responses by the State party, particularly given the assurances provided by the associations that they had rectified registration deficiencies and the Constitutional Court's confirmation of the lawfulness of legal assistance provision by non-lawyers.⁷⁴

Scope of NGO operation: NGO role in the protection of the rights of asylum applicants and migrants and lawfulness of activities

25. The activity of NGOs working on asylum and migration is covered by EU law in the following areas: support throughout asylum procedures under the Asylum Procedures Directive (APD),⁷⁵ provision of services in the context of reception systems under the Reception Conditions Directive (RCD),⁷⁶ and provision of services for third-country nationals with no right of residence or stay under the Return Directive (RD).⁷⁷ National legislation that restricts the activities of refugee-assisting NGOs must also be examined on the basis of its potential effect on the enjoyment of the rights of asylum applicants and persons in removal/expulsion proceedings, including deportation, as guaranteed under the aforementioned Directives.
26. For asylum applicants, the APD enshrines a right to information and legal assistance throughout the procedure, including through the possibility to communicate with organisations providing such services,⁷⁸ while the RCD requires Member States to ensure that legal advisers and persons representing relevant NGOs have access to detainees under Article 10 (4). For persons in return proceedings,⁷⁹ the RD includes guarantees on the provision of legal assistance to all individuals in order to secure their right to challenge a return decision under Article 13 (3) and (4) and enshrines a right of access for NGOs to facilities where individuals might be detained with the purpose of removal in Article 16 (4) and (4).
27. A national administrative decision that considers unlawful, and subsequently restricts, the operation of NGOs that provide services in the context of securing the rights contained in the aforementioned EU Directives is in clear violation of the latter. In a recent judgment, the CJEU examined national legislation establishing a criminal offence for certain NGO activities in the field of asylum under specific conditions and noted how such restrictive legislation “[...] *may lead persons wishing to assist third-country nationals or stateless persons wishing to obtain refugee status in Hungary to refrain from participating in the assistance activities which are the subject of the provisions of EU law [...]*”.⁸⁰ Noting that the APD provisions give concrete expression to the right of asylum under Article 18 CFREU, the Court concluded that the legislation enacted by Hungary restricted those rights.⁸¹ Regarding the possibility for justification of this restriction, which according to Hungary was necessary for the fight against fraudulent and abusive practices in asylum procedures, the Court

⁷³ *Idem*, para. 7.3.

⁷⁴ *Idem*, para. 7.4.

⁷⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, available at: <https://bit.ly/3ECPwyM>

⁷⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), available at: <https://bit.ly/309maJm>

⁷⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, available at: <https://bit.ly/3DHrzVS>

⁷⁸ Articles 12 (1) a and c, 19, 20 and 22 APD.

⁷⁹ The term includes also deportation procedures; under Article 3 (3) RD, the Directive establishes a broad term for the concept of “return” which includes any process of a third-country national going back, either voluntary or enforced.

⁸⁰ CJEU, Judgment of 16 November 2021, *Commission v. Hungary*, C-821/19, EU:C:2021:930, paragraph 98, available at: <https://bit.ly/3duhZe8>

⁸¹ *Idem*, paragraphs 98-99.

noted that the application of such restrictive legislation even in cases where assistance is provided “*in strict compliance with the rules [...] and without any intention to mislead [...]*” goes beyond actions that can be regarded as fraudulent or abusive.⁸² In the same line, other national provisions that prevented persons suspected of committing the aforementioned offence from accessing asylum applicants at the Hungarian border were found incompatible with the right of communications enshrined in Article 12 (1) c APD.⁸³

28. In respect of return procedures, the RD guarantees the continuous provision of different kinds of support to individuals as discussed above. However, the refusal of one of the organisations mentioned above was based on the characterisation of their activities in support of persons under deportation as unlawful. It is unclear how such an activity ensuring the realisation of the aforementioned guarantees under the RD can be considered to be unlawful. It is also unclear whether a distinction is drawn between the terms of return and deportation, one that is based on national regulation of return procedures following a decision to disapply the RD.
29. While the disapplication of the RD is permissible in certain cases under Article 2 (2) a RD, Article 4 (4) RD requires Member States to continue observing important guarantees: even when Member States choose not to apply the RD, they must in any case respect and continue to apply specific provisions, including those of Article 16 and the principle of *non-refoulement*. Consequently, even where the RD is not applied, contact with persons detained for the purpose of return under Article 16 RD not only is a lawful activity but Member States are also obliged to respect it. Similarly, regardless of the legal basis of the return procedure, be it the RD or a national legal framework, an EU law obligation to comply with the principle of *non-refoulement* presupposes the securement of the right to human dignity (Article 1 CFREU), prohibition of torture and ill-treatment (Article 4 CFREU), the right to asylum (Article 18 CFREU), and the right to effective judicial protection (Article 47 CFREU).⁸⁴
30. In light of the above, there is no sufficient legal basis for outlawing activities of support towards the realisation of the rights above, including where Member States make use of the possibility to disapply the RD. Conversely, Member States are required to ensure that such realisation remains possible at all times and refrain from taking any measures that could jeopardise the attainment of the Union’s objectives in accordance with Article 4 (3) TEU, including those pursued by directives.⁸⁵ In this line, the CJEU has had the opportunity to examine how national measures falling under the competence of Member States may affect the rights protected under the RD. In *Achughbabian*, the Court held that, while criminal legislation is a Member State competence, the latter cannot apply its legislation in a way that impedes the realisation of the aims of the RD and deprives the instrument of its effectiveness.⁸⁶ Relying on the effect of Article 4 (3) TEU, the Court confirmed that national legislation must not be capable of compromising the attainment of the RD’s common standards and procedures.⁸⁷
31. It should be noted that the ECtHR uses the term “expulsion” to examine “*any forcible removal of an alien from a State’s territory, irrespective of the lawfulness of the person’s stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border*”, including in the context of Articles 3 and 13 ECHR.⁸⁸ State parties cannot rely on a national classification of a removal

⁸² *Idem*, paragraphs 116-117.

⁸³ *Idem*, paragraphs 162-163.

⁸⁴ CJEU, Judgment of 19 June 2018, Gnandi, C-181/16, EU:C:2018:465, paragraphs 54-56, available at: <https://cutt.ly/1YTL0pE>

⁸⁵ CJEU, Judgment of 28 April 2011, El Dridi, C-61/11, EU:C:2011:268, paragraphs 55-56, available at: <https://cutt.ly/1YT01Wo>

⁸⁶ Judgment of 6 December 2011, Achughbabian, C-329/11, EU:C:2011:807, paragraph 33, available at: <https://bit.ly/3rLeurY>

⁸⁷ Judgment of 6 December 2011, Achughbabian, C-329/11, EU:C:2011:807, paragraph 43, available at: <https://bit.ly/3rLeurY>

⁸⁸ ECtHR, N.D. and N.T. v. Spain, nos. 8675/15 8697/15, 13 February 2020, para. 185, available at: <https://cutt.ly/dYEL1Pb>

measure in order to preclude the application of the Convention's non-refoulement guarantees under Articles 3 and 13 for every person under *any* form of enforced return. Similarly, such national classification cannot provide the basis for considering as unlawful activities aimed at securing the rights of asylum applicants and migrants whenever they are involved in expulsion procedures.

32. The role of NGOs in the protection of the right of asylum applicants and migrants is important in securing access to effective judicial protection, particularly in the context of limited provision of state-funded legal aid in Greece.⁸⁹ That right, as enshrined in Article 47 CFREU, includes not only the right to defence and access to a tribunal but also the right to be advised, defended and represented.⁹⁰ By limiting the provision of legal aid by NGOs in Greece, the measures have the effect of restricting access to that right preventing thus asylum applicants and migrants from complaining of violations of their rights under EU law. In the context of asylum and return procedures, such a deprivation risks exposing individuals to ill-treatment by not enabling them to put forward reasons against their expulsion. In the words of the CJEU, *“the protection inherent in the right to an effective remedy and in the principle of non-refoulement must be guaranteed by affording the applicant for international protection the right to an effective remedy which has automatic suspensory effect, before at least one judicial body, against a return decision or a possible removal decision.”*⁹¹ As noted above, in return procedures, a national authority must observe the principle of non-refoulement and must guarantee, under Article 47 CFREU, the possibility for a third-country national to challenge any adopted return decision.⁹²
33. As a last consideration regarding the refusal of NGO registration on account of unlawful activities, it should be recalled that the first principle of the Venice Commission and OSCE Guidelines on the freedom of association is that of the presumption of lawfulness.⁹³ The presumption covers both the establishment of associations, as well as their objectives and activities, regardless of any existing technical requirements for establishment.

The right to an effective remedy in respect of refusals to form, or operate as, an association

34. Article 19 TEU requires Member States to provide remedies that ensure effective legal protection in the fields covered by EU law; the CJEU has confirmed that the principle of effective judicial protection is a general principle of EU law which has been reaffirmed in Article 47 of the Charter.⁹⁴ In its case law on prior administrative authorisation schemes, the Court has explicitly stated that there is a need for a legal remedies for *all* persons affected by measures that restrict fundamental freedoms.⁹⁵ In addition, all bodies tasked with the assessment of EU law violations must be independent; in terms of their composition, the Court has clarified that it should be such *“as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.”*⁹⁶

⁸⁹ ECRE/AIDA, Country Report: Greece, pp. 73-74, available at: <https://cutt.ly/DYTPIA6>

⁹⁰ CJEU, Judgment of 26 July 2017, Moussa Sacko, C-348/16, EU:C:2017:591, paragraph 32, available at: <https://cutt.ly/sYTSya2>

⁹¹ CJEU, Judgment of 25 June 2020, VL, C-36/20 PPU, EU:C:2020:495, paragraph 97, available at: <https://cutt.ly/jYTDofE>

⁹² CJEU, Judgment of 14 May 2020, FMS and others, Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 118 and 129, available at: <https://cutt.ly/QYTJ74s>

⁹³ Principle 11, Joint guidelines for the freedom of association by the European Commission for Democracy through Law of the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights, available at: <https://bit.ly/3rMSfSs>

⁹⁴ CJEU, Judgment of 18 May 2021, Asociația ‘Forumul Judecătorilor din România’, C-83/19, EU:C:2021:393, paragraph 190, available at: <https://cutt.ly/aYvryhs>

⁹⁵ CJEU, Judgment of 20 February 2001, Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir), C-205/99, EU:C:2001:107, paragraph 38, available at: <https://cutt.ly/JYhxgOP>;

⁹⁶ CJEU, Judgment of 15 July 2021, Commission v. Poland, C-791/19, EU:C:2021:596, paragraph 59, available at: <https://cutt.ly/kYvtPAe>

35. The right to an effective remedy is also protected under Article 13 ECHR, which states that effective remedies should be available for any individual to be able to complain before national authorities for violations of their rights under the Convention. It is not necessary for the authority to be a judicial body; nonetheless, its powers and the guarantees it affords are relevant in determining its effectiveness.⁹⁷ In *Khan v. the United Kingdom*, the ECtHR examined the guarantees of the police complaints authority as a remedy for examining allegations of misconduct and noted that the Secretary of State's involvement in the composition of the body was important and could therefore affect independence.⁹⁸ According to the joint guidelines of the European Commission for Democracy through Law of the Council of Europe (Venice Commission) and the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights, it is a key principle that associations should have access to a remedy against decisions affecting the exercise of their rights before authorities that can afford fair trials standards.⁹⁹
36. The existence of an effective remedy is also important in connection with the scope of the notion of foreseeability and the rule of law. While a provision may be capable of different interpretations within the limits imposed by the rule of law principles discussed above,¹⁰⁰ it is the role of adjudicatory bodies to “dissipate such interpretational doubts” and ensure that the law is not applied arbitrarily.¹⁰¹ In the absence of authorities that can offer proper Article 13 guarantees, including independence and impartiality, the very concept of the rule of law may be eventually undermined, in particular where legal instruments have not been drafted with clarity and precision.
37. Article 2 (3) ICCPR foresees an effective remedy before competent judicial, legislative or administrative authorities for violations of its provisions. The CCPR has clarified that administrative mechanisms are particularly required to ensure the provision of effective remedy through impartial and independent bodies.¹⁰²

Conclusions

38. The current legal framework establishing an NGO Registry in Greece for organisations operating in the area of asylum and the rejection of applications for registration on account of formalities, a presumably lacking operational capacity, and an allegedly unlawful scope of activities is in clear violation of EU law, the ECHR and international law. More specifically:
- a. **Rule of law guarantees:** The legal framework does not comply with the requirements that rule of law dictates and the European and international obligations that Greece has undertaken in that regard. The vague nature of the reasons for refusal of authorisation in the law, as well as the unfettered discretion of the competent authority to refuse registration, create a clear situation of legal uncertainty and arbitrariness. The practical consequences of such uncertainty are evidenced in the similarly broad and insufficient reasoning on which the refusal of at least one NGO has been based.

⁹⁷ ECtHR, *Silver and others v. The United Kingdom*, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 25 March 1983, para. 113 (b), available at: <https://bit.ly/3GqXdZc>

⁹⁸ ECtHR, *Khan v. The United Kingdom*, no. 35394/97, 12 May 2000, paras. 46-47, available at: <https://bit.ly/3GqHFF6>

⁹⁹ Principle 11, Joint guidelines for the freedom of association by the European Commission for Democracy through Law of the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights, available at: <https://bit.ly/3rMSfSs>

¹⁰⁰ See paragraphs 9-14 of the present opinion.

¹⁰¹ ECtHR, *Gorzelik and others v. Poland*, no. 44158/98, 17 February 2004, paras. 65, available at: <https://cutt.ly/CYImvVB>

¹⁰² CCPR, General Comment no. 31, CCPR/C/21/Rev.1/Add. 1326, May 2004, para. 15, available at: <https://bit.ly/309x4yQ>

- b. **Free movement of services under EU law:** The multiple changes in legislation and the eventual establishment of a complex, demanding and costly system of registration as a condition for operation in the country, in combination with a wider domestic climate of harassment against NGOs in the area of asylum and migration, can create a dissuasive effect which can ultimately prevent foreign NGOs, in particular those with limited resources, from pursuing activities in that domain in Greece. While prior authorisation schemes are permitted under EU law, lack of proportionality, inflexibility and unlimited discretion unlawfully restrict the fundamental freedoms that the Union foresees, in particular the freedom of movement provisions under the TFEU.
- c. **Freedom of association:** The excessive requirements and complex procedures for registration, the unfettered discretion in refusing registration, as well as administrative decisions which reject applications for registration by an NGO without stating adequate reasons, violate the right to freedom of association under Article 12 CFREU, Article 11 ECHR and Article 22 ICCPR.
- d. **Restriction of the rights of asylum applicants and persons in return proceedings, including under deportation:** National legislation regulating the activities of NGOs operating in the area of asylum and migration cannot be enacted and applied in a manner that restricts rights enshrined in EU law, in particular where access to communication with and legal, or other, assistance to asylum applicants and persons in return proceedings, including under deportation, is required for the realisation of those rights. By applying the framework in a manner that designates as unlawful NGO activities which are foreseen and protected under EU law; ultimately, the administrative conduct of the authorities has the effect of defeating the very objective that the measures purport to pursue, namely the protection of the rights of asylum applicants and migrants.
- e. **Effective remedy:** National remedies must provide an opportunity to address violations of rights under EU law, ECHR and the ICCPR before a body that has been composed and operates in a manner that ensures independence, impartiality and neutrality. The remedy provided by the third JMD, providing for a hearing before a body that is composed of, *inter alia*, members of the authority that regulates registration, does not comply with the guarantees of effective judicial protection.