Prof. Patricia Wiater, Friedrich-Alexander University of Erlangen-Nuremberg[1]

Political Participation of Civil Society

A human rights framework for the treatment of non-profit organisations

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[1] Comment: Prof. Patricia Wiater holds the Chair for Public Law, Public International Law and Human Rights at the Friedrich-Alexander University of Erlangen-Nuremberg, and is a Member of CHREN (Centre for Human Rights Erlangen-Nuremberg). Special thanks go to Ms Charlotte Jawurek (Dipl. iur., Maître en droit (Rennes)) for her preparatory case-law research.

I. Executive Summary

The European Court of Human Rights (ECtHR) assigns civil society organisations or non-governmental organisations (in the following only: NGOs) the role of a 'public watchdog' in the democratic discourse. NGOs are understood as equal to political parties and the press in terms of their relevance to a pluralist democracy. This role is reflected in the right to pursue political goals that is granted to NGOs by the freedom of expression and freedom of association guaranteed under Articles 10 and 11 of the European Convention on Human Rights (ECHR). An organisation may campaign for legal changes, even of constitutional nature, provided that it uses lawful and democratic means and that the proposed change is compatible with the fundamental principles of democracy. Under these conditions, NGOs are granted a number of rights, including the right to official recognition and the freedom to refrain from organising themselves in the form of a political party. State measures, such as the withdrawal of an NGO's non-profit status, can deteriorate the NGO's financial situation and reduce its sources of income. This may constitute an interference with political rights that must be justified. When assessing the proportionality of such interference, the ECtHR takes into account the practical impact of the State action, especially with regard to the remaining possibilities to participate in the public discourse. According to the ECtHR the term 'pluralism' means that persons and groups with varied identities and views are interacting harmoniously and that these exchanges are essential for achieving social cohesion. Minority organisations and smaller campaign groups that contribute to the public discourse are therefore granted special protection. The 'yardstick' for justifying an interference hampering their participation in the democratic discourse is correspondingly higher. The general standard against which a State's interference is judged is whether and to what extent an organisation would still be able to exercise its role as a watchdog effectively. Also, stigmatising and chilling effects may qualify as such State interference and therefore must meet these standards to be justified. This includes any measure that affects the public perception of an organisation to the extent that its political participation is jeopardised, for example by discrediting it in public.

II. Subject of the legal opinion

This legal opinion aims to identify the requirements for German non-profit law (§ 51 et seq. of the Tax Code (*Abgabenordnung*, AO)) – especially for the restrictions imposed on the political activities of civil society organisations – arising from the Charter of Fundamental Rights of the European Union (CFR). In particular, it refers to the requirements derived from the freedom of association granted under Article 12 CFR and the case-law of the ECtHR.

To date, the European Court of Justice (ECJ) and the ECtHR have not adjudicated on any cases involving the removal of a national non-profit status from a civil society association as a result of its political activities. Nevertheless, several landmark decisions relating to the treatment of politically active NGOs make it possible to identify human rights standards that States have to comply with. The legal opinion is structured as follows: Firstly, it introduces into the substantive interplay between the CFR, the ECHR and German constitutional law (III.) and the general human rights standards concerning political liberties that result from the CFR and the ECHR (IV.). Secondly, it presents the central findings that outline the protection of politically active civil society organisations (V.). Finally, the case-law analysis is summarized in the form of hypotheses (VI.).

III. Relationship between fundamental rights under EU law, the ECHR and fundamental rights under the German Basic Law

Sources of fundamental rights under EU law include the list of fundamental rights codified in the Charter of Fundamental Rights of the European Union, which holds binding legal force (Article 6(1) TEU) and the general principles of the EU law as developed by the ECJ (Article 6(3) TEU). According to the applicable provisions, i.e. in particular the duty of the EU to accede to the ECHR provided for in Article 6(2) TEU, the ECHR is merely a *subsidiary* source of law. Therefore, the ECJ takes the ECHR into account when identifying the autonomous meaning of fundamental rights of the European Union.[2] Article 6(3) TEU states that the guarantees provided by the ECHR and the fundamental rights resulting from the constitutional traditions common to the member states shall constitute part of the EU law as general principles. Notwithstanding the still pending EU accession, the ECJ regards the ECHR as a binding minimum standard for the Union and its institutions,[3] and takes into account the ECtHR's case-law.[4]

The Charter of Fundamental Rights of the European Union 'reiterates' the rights guaranteed by the

[2] *Streinz* in Streinz, *EUV* (TEU), third edition, 2018, Article 6(25).
[3] Ibid.
[4] See for example ECJ, C-94/00, Roquette Frères, ECLI:EU:C:2002:603, paragraph 29.

ECHR.[5] Article 52 (3) first sentence of the Charter codifies the 'correspondence rule'[6] as developed in the ECJ's case-law: In so far as the Charter contains rights which correspond to rights guaranteed by ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. For that reason, this report examines the ECtHR's case-law in detail in order to identify the relevant fundamental rights provisions under EU law.

In German constitutional law, the ECHR holds the status of a formal federal act pursuant to Article 59 (2) first sentence of the German Basic Law (*Grundgesetz*, GG). Hence, because of the hierarchy of norms in the German legal system, the ECHR does not constitute a direct standard of review under constitutional law.[7] However, due to the 'commitment to international law' of the Basic Law, the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) assumes that the guarantees granted by the ECHR can influence the interpretation of fundamental rights and rule-of-law principles under the Basic Law. According to the Federal Constitutional Court, the text of the ECHR and the ECtHR's case-law serve as tools for interpretation at the level of constitutional law for the purpose of determining the substance and scope of fundamental rights and rule-of-law principles under the Basic Law. This applies provided that the interpretation does not result in restricting or reducing the protection of fundamental rights under the Basic Law.[8] In contrast, and in accordance with the principle of the precedence of EU law, the Federal Constitutional Court typically only considers the fundamental rights of the EU to be relevant, and not the fundamental rights under the Basic Law, when applying provisions that are fully harmonised under EU law.[9]

[5] 1. Declaration concerning the Charter of Fundamental Rights of the European Union, OJ C 326/339, 2012.
[6] *Streinz* in Streinz, *EUV* (TEU), third edition, 2018, Article 6(25).
[7] The following explanations concerning the status of the ECHR in relation to the Basic Law and in constitutional practice in Germany result from Federal Constitutional Court Decisions (BVerfGE) 111, 307, 317 et seq.
[8] Paraphrase of Federal Constitutional Court Decisions 111, 307, 317, see also Federal Constitutional Court Decisions 74, 358, 370.
[9] Paraphrase of Federal Constitutional Court Decisions 152, 216 (second headnote).

IV. General considerations regarding the protection of political activities in the CFR and the ECHR

1. Substantive provisions of the Charter and the ECHR

The freedom of expression and information protected under Article 11 CFR[10] and the freedom of assembly and association under Article 12 CFR[11] are core elements of political liberty. The historical origins of both articles can be traced back to the parallel provisions in the ECHR.[12] In spite of linguistic variations, the provisions of the Charter are intended to have the same the substantive scope as Articles 10[13] and 11 ECHR.[14] The ECJ has recently confirmed that Article 12 CFR corresponds to Article 11(1) ECHR, and that therefore Article 12 CFR has the same meaning and scope as Article 11(1) ECHR pursuant to Article 52(3) CFR.[15]

Articles 11 and 12 CFR, as so-called fundamental rights of communication, are expressions of the collectively exercised freedom of expression. They form the core of the common European constitutionality, which is essentially characterized by its democratic constitutionality. These rights are complemented by Article 10 CFR, which guarantees freedom of thought, conscience and religion, as well as the freedom of the arts and sciences guaranteed by Article 13 CFR.

The case-law of the ECJ and ECtHR places particular emphasis on the democratic relevance of freedom of expression and freedom of association. According to the ECJ, freedom of expression constitutes 'one of the essential foundations of a pluralist, democratic society'.[16] The right to freedom of association serves as the basis for a democratic and pluralist society and is important to the proper functioning of public life.[17] The ability for citizens to form a 'legal entity' in order to act collectively in a field of

[10] Article 11 CFR reads as follows: '(1) Everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (2) The freedom and pluralism of the media shall be respected.'.
[11] Article 12 CFR reads as follows: '(1) Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. (2) Political parties at Union level contribute to expressing the political will of the citizens of the Union.'.
[12] Explanations relating to the Charter of Fundamental Rights, 14 December 2007, C 303/17, Explanations on Article 11 and Article 12.
[13] The official languages of the ECHR and the ECtHR's decisions are English and French.
In the official English version, Article 10(1) ECHR reads as follows: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'.
[14] In the official English version, Article 11(1) ECHR reads as follows: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.'.
[15] ECJ, C-78/18, Commission v Hungary (Transparency of associations), ECLI:EU:C:2020:476, paragraph 111.
[16] ECJ, C-203/15, Tele2 Sverige, ECLI:EU:C:2016:970, paragraph 93 = NJW 2017, 717 (721); ECJ, C-112/00, Schmidberger, ECLI:EU:C:2003:333, paragraph 79; ECJ, C-163/10 Patriciello, ECLI:EU:C:2011:543, paragraph 31, in each case with reference to the relevant ECtHR case-law. See also *Jarass*, *GrCh* (Charter of Fundamental Rights), fourth edition. 2021, Article 11(4).
[17] ECtHR, judgment of 17 February 2004, 44158/98, Gorzelik and Others v. Poland [GC], paragraphs 88, 90,

mutual interest is a central right without which the freedom of association would be deprived of any practical meaning.[18] There is a close connection between the realisation of the freedom of expression and freedom of association. The ECtHR takes the position that the principle of pluralism can only be realised if an association is able to freely express its ideas and opinions. As a result, the ECtHR has recognised that the protection of opinions and freedom of expression within the meaning of Article 10 ECHR may be one of the objectives of the freedom of association within the meaning of Article 11 ECHR.[19] It is particularly important to take this into account if State authorities take action against an organisation on the basis of certain aspects of the organisation's position.[20]

The ECtHR derives from Article 10 ECHR and Article 11 ECHR both positive obligations and the duty not to interfere with those rights. With regards to the positive obligations incumbent upon the member states to protect freedom of association, the primary focus of the case-law to date has been interference by third parties.[21] Persons who are vulnerable to victimisation because they belong to minorities or hold 'unpopular views' must receive special protection by the State.[22] To date, the ECtHR has only assumed the existence of duties of protection relating directly to the relationship between the member state and the association in respect of the recognition of religious associations.[23] Also in the context of Article 10 ECHR, the ECtHR has held that the State, as the ultimate guarantor of pluralism,[24] is not only under a duty not to interfere, but may be required to take positive measures of protection.[25] For public audiovisual broadcasting, for example, this implies an obligation to provide the public with access to impartial and accurate information reflecting the diversity of political outlook.[26] However, the State is granted a broad margin of appreciation in this area.[27]

92; judgment of 8 October 2009, 37083/03, Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan, paragraphs 52 et seq.; ECJ, C-78/18, Commission v Hungary (Transparency of associations), ECLI:EU:C:2020:476, paragraph 112 with further references from ECtHR case-law.

[18] ECtHR case law, judgment of 10 July 1998, 26695/95, Sidiropoulos and Others v. Greece, paragraph 40; judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraph 34.

[19] ECtHR, judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraphs 33, 36; judgment of 17 February 2004, 44158/98, Gorzelik and Others v. Poland [GC], paragraph 91.

[20] ECtHR, judgment of 20 October 2005, 59489/00, United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria, paragraph 59; judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraph 36.

[21] ECtHR, judgment of 20 October 2005, 74989/01, Ouranio Toxo and Others v. Greece, paragraph 37: "It follows from that finding that a genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general."; ECtHR, judgment of 16 July 2019, 12200/08, Zhdanov and Others v. Russia, paragraph 162.

[22] ECtHR, judgment of 3 May 2007, 1543/06, Bączkowski and Others v. Poland, paragraph 64.

[23] ECtHR, judgment of 8 April 2014, 70945/11, Magyar Keresztény Mennonita Egyház and Others v. Hungary, paragraph 91: Hungary was obliged to establish a legal framework aimed at simplifying the legal recognition of religious communities, since otherwise the effective enjoyment of the right to freedom of religion under Article 9 ECHR would not be guaranteed.

[24] ECtHR, judgment of 22 April 2013, 48876/08, Animal Defenders International v. United Kingdom, paragraph 101.

[25] ECtHR, judgment of 17 September 2009, 13936/02, Manole and Others v. Moldova, paragraph 99; judgment of 24 November 1993, 13914/88 et al., Informationsverein Lentia and Others v. Austria, paragraph 38.

[26] ECtHR, judgment of 17 September 2009, 13936/02, Manole and Others v. Moldova, paragraph 100.

[27] ECtHR, judgment of 22 April 2013, 48876/08, Animal Defenders International v. United Kingdom,

2. Standard of review and the 'margin of appreciation' in the context of freedom of expression and association

The ECJ and ECtHR review the existence of a violation of the Charter or the ECHR by adopting a doctrinal approach comparable to that under German constitutional law: if an activity falls under the scope of protection granted by a right under the Charter or ECHR, the ECJ or the ECtHR assess whether State measures that qualify as interference are justified.[28] This may only be the case if the State measure is based on a law (Article 52(1) CFR: 'provided for by law'; Article 10(2), Article 11(2) ECHR: 'prescribed by law') and if the interference is considered to be proportionate. Whereas Article 52(1) CFR explicitly refers to the essence and proportionality as 'limits on limits' ('Schranken-Schranken'), in the ECHR, the principle of proportionality is expressed in Article 10(2) and Article 11 in the phrase 'necessary in a democratic society'. Article 52(1), second sentence of the Charter also implies that restrictions on the exercise of rights under the Charter may be imposed only if they are 'necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

A special feature of the ECtHR's case-law is the legal concept of the margin of appreciation in the framework of the proportionality test. When examining matters relating to freedom of expression and freedom of association, the ECtHR accords to State authorities a certain margin of discretion and appreciation when assessing whether State interference is to be deemed 'necessary' and proportionate within the meaning of the ECHR.

However, if there is a democratic relevance of the expression of opinion or association, the 'margin of appreciation' is reduced by a stricter judicial control.[29] For example, in view of the differences between a political party and a non-political association in terms of their importance in a democracy, the ECtHR subjects only restrictions against political parties to a 'most rigorous scrutiny'.[30] This results from the special constitutional role and legal privileges attributed to political parties in many member states of the Council of Europe. However, the ECtHR also applies this concept of a stricter judicial control to associations (i.e. entities that do not have the organisational form of a party) in so far as these latter have a comparable level of political influence.[31]

Derogations under Article 11(2) ECHR are thus to be interpreted restrictively, must be based on

paragraph 123.

[28] For further details of the parallel nature of the legal test structure, see also *Jarass*, *GrCh* (Charter of Fundamental Rights), fourth edition 2021, Article 52(1), (2).

[29] As an overview, see *ECtHR*, Guide on Article 11 of the European Convention on Human Rights 2021, paragraph 154 with further references; *ECtHR*, Guide on Article 10 of the European Convention on Human Rights 2020, paragraphs 81 et seq. with further references.

[30] ECtHR, judgment of 9 July 2013, 35943/10, Vona v. Hungary, paragraph 58.

[31] Ibid. For a detailed investigation into the political activities of NGOs, see V.2.

convincing and compelling reasons, and meet a 'pressing social need'[32]. The margin of appreciation to be accorded to the member states pursuant to Article 10(2) ECHR when placing restrictions on the activities of NGOs is also a narrow one.[33]

V. Human rights protection and the importance of the political activities of civil society organisations

1. Key role of civil society organisations in safeguarding pluralism and democracy ('public watchdog' function)

The ECtHR holds that civil society makes an important contribution to the discussion and critical debate of public affairs.[34] Alongside political parties, it is not only the press, but also civil society organisations that play an important role in helping to safeguard pluralism and democracy, which are two central fundamental values of the ECHR.[35] The ECtHR's understanding of pluralism is based on recognition of and respect for diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious faith and artistic, literary and socioeconomic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. According to the ECtHR, in a properly functioning civil society the participation of citizens in the democratic process is achieved to a significant degree through belonging to associations in which they may integrate with each other and pursue common objectives collectively. The ECtHR considers it of central importance that in a democratic society even 'small and informal campaign groups' must be able to carry out their activities effectively, including those that operate only locally and are not structured as an association.[36] It has found that there is a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas, for example on matters of general public interest such as health and the environment.[37]

The key role assigned by the ECtHR to civil society organisations in the democratic process culminates

[32] ECtHR, judgment of 17 February 2004, 44158/98, Gorzelik and Others v. Poland [GC], paragraphs 94 et seq.
[33] ECtHR, judgment of 22 April 2013, 48876/08, Animal Defenders International v. United Kingdom, paragraph 104.
[34] ECtHR, judgment of 8 November 2016, 18030/11, Magyar Helsinki Bizottság v. Hungary, paragraph 166; judgment of 15 February 2005, 68416/01, Steel and Morris v. United Kingdom, paragraph 89; judgment of 14 April 2009, 37374/05, Társaság v. Hungary, paragraph 38.
[35] The statements in the following paragraph are paraphrases of the ECtHR, judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraph 34 with reference to the judgment of 17 February 2004, 44158/98, Gorzelik and Others v. Poland [GC], paragraph 92 and judgment of 5 October 2006, 72881/01, Moscow Branch of The Salvation Army v. Russia, paragraph 61.
[36] See the example of a local environmental group in ECtHR, judgment of 15 February 2005, 68416/01, Steel and Morris v. United Kingdom, paragraph 9.
[37] Paraphrase of ECtHR, judgment of 15 February 2005, 68416/01, Steel and Morris v. United Kingdom, paragraph 89.

in the concept of a 'public watchdog' ('chien de garde public'). This concept was originally developed in the context of Article 10 ECHR with regards to the press, in order to serve as a relevant factor limiting the State's 'margin of appreciation'. The ECtHR takes the view that the function of a 'public watchdog' can also be performed by NGOs and is of similar significance for the latter. In the case *Animal Defenders International v. United Kingdom*, the ECtHR directly confirms this functional equivalence of the press and NGOs, stating that the latter act in the public interest by contributing information to the debate on politically relevant facts.

"As to the breadth of the margin of appreciation to be afforded, it is recalled that it depends on a number of factors. It is defined by the type of the expression at issue and, in this respect, it is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest (...). ***The margin is also narrowed by the strong interest of a democratic society in the press exercising its vital role as a public watchdog*** *(Editions Plon v. France, no. 58148/00, § 43, ECHR 2004-IV): freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.*

(...) In the present context, it must be noted that, ***when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press."***[38]

The ECtHR justifies this by pointing to the potential scope and impact of an NGO when reporting on irregularities of public officials, stating that it disposes of greater means of verifying and corroborating the veracity of relevant information than would be the case of an individual reporting on what he or she has observed personally.[39] The 'Fundamental Principles on the Status of Non-governmental Organisations in Europe' adopted by the Council of Europe provide guidance to the ECtHR.[40] They emphasise that NGOs make an essential contribution to the development, realisation and continued survival of democratic societies.[41] As a consequence and while referring to the 'Code of Ethics and Conduct for NGOs', the ECtHR applies the same considerations to NGOs[42] as to journalists in respect

[38] ECtHR, judgment of 22 April 2013, 48876/08, Animal Defenders International v. United Kingdom [GC], paragraphs 102 and 103 (emphasis added by the author) with a reference to the judgment of 27 May 2004, 57829/00, Vides Aizsardzības Klubs v. Latvia, paragraph 42, since then settled case-law.
[39] ECtHR, judgment of 27 June 2017, 17224/11, Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina, paragraph 87.
[40] *Council of Europe*, Fundamental Principles on the Status of Non-governmental Organisations in Europe and Explanatory Memorandum, Strasbourg, 13 November 2002. ECtHR, judgment of 27 June 2017, 17224/11 Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina, paragraphs 45, 86.
[41] See the third recital of the aforesaid Fundamental Principles: 'Considering that non-governmental organisations (hereinafter NGOs) make an essential contribution to the development, realisation and continued survival of democratic societies, in particular through the promotion of public awareness and the participatory involvement of citizens in the res publica, and that they make an equally important contribution to the cultural life and social well-being of such societies;'.
[42] Judgment of 8 November 2016, 18030/11, Magyar Helsinki Bizottság v. Hungary, paragraphs 159, 166; judgment of 14 April 2009, 37374/05, Társaság v. Hungary, paragraph 27; judgment of 25 June 2013, 48135/06, Youth Initiative for Human Rights v. Serbia, paragraph 20.

of the rights and obligations afforded to them on the basis of their right to freedom of expression.[43] In substantive terms, the role of a 'public watchdog' implies a right to gain access to information held by State bodies on the basis of Article 10(1) ECHR.[44] Four conditions must be met in order for a person or an organisation to be granted accesses to any State held information:[45] First, the gathering of the information is a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate; second, the nature of the information sought must meet a public interest; third, the role of the applicant must be that of a 'public watchdog', and fourth, the information must be 'ready and available' and not necessitate the collection of any additional data by the government authority. The ECtHR has developed an extensive and differentiated case-law on access to information for NGOs.[46]

[43] *World Association of Non-Governmental Organisations (WANGO)*, Code of Ethics and Conduct for NGOs, 2004, see ECtHR, judgment of 27 June 2017, 17224/11 Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina, paragraphs 46, 87.
[44] ECtHR, judgment of 14 April 2009, 37374/05, Társaság v. Hungary, paragraph 35; ECtHR, judgment of 8 November 2016, 18030/11, Magyar Helsinki Bizottság v. Hungary, paragraphs 149 et seq.
[45] ECtHR, judgment of 8 November 2016, 18030/11, Magyar Helsinki Bizottság v. Hungary, paragraphs 158-169.
[46] ECtHR, judgment of 14 April 2009, 37374/05, Társaság v. Hungary: a Hungarian human rights organisation requests access to details of a complaint pending before the Hungarian Constitutional Court (conclusion: violation of Article 10 ECHR); ECtHR, judgment of 8 November 2016, 18030/11, Magyar Helsinki Bizottság v. Hungary: a Hungarian human rights organisation carries out a survey on court-appointed defence counsel and to this end requests information from various police departments, some of which refuse the request (conclusion: violation of Article 10 ECHR); ECtHR, judgment of 25 June 2013, 48135/06, Youth Initiative for Human Rights v. Serbia: refusal of access to intelligence agency information in spite of a binding court ruling (conclusion: violation of Article 10 ECHR); ECtHR, judgment of 28 November 2013, 39534/07, Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria: refusal to transmit copies of official decision of relevance to the NGO's objectives (conclusion: violation of Article 10 ECHR).

2. Protection of the political activities of civil society organisations

According to the ECtHR, the protection of civil society organisations that contribute to public life and democracy includes their right to engage in political activities. With regard to political objectives that may be permissibly pursued in a democratic society, the ECtHR has developed the following standard, initially applied to political parties: a political party can campaign for a change in the law or of the constitutional structures of a State provided that two conditions are met. Firstly, the *means* must be legal and democratic, and secondly, the *change* proposed must itself be compatible with *fundamental democratic principles*.[47]

The ECtHR also applies these premises to the political activities of civil society organisations. In the context of the right to freedom of association under Article 11 ECHR, the ECtHR furthermore attributes to NGOs a key function in safeguarding pluralism and democracy. In the case *Zhechev v. Bulgaria*, the equality of associations not organized in party form and political parties is stressed.[48] This conclusion is based on the fact that a civil society that "functions in a healthy manner" also participates in the democratic process by joining together in associations in order to collectively pursue common goals:[49]

"While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, ***associations formed for other purposes are also important to the proper functioning of democracy****. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts.*

The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the ***participation of citizens in the democratic process*** *is to a large extent achieved through* ***belonging to associations*** *in which they may integrate with each other and pursue common objectives collectively (...)."*

Like political parties, civil society organisations are also free to campaign, based on their own political agenda, for a change of the legal or constitutional structures, provided that the aforementioned conditions are met, namely the legal and democratic nature of the means deployed and of the change

[47] ECtHR, judgment of 9 April 2002, 22723/93 et al., Yazar and Others v. Turkey, paragraph 49: "(…) (T)he Court considers that a political party may campaign for a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles."; ECtHR, judgment of 13 February 2003, 41340/98, Refah Partisi v. Turkey [GC], paragraph 98; judgment of 20 October 2005, 59489/00, United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria, paragraph 61.
[48] ECtHR, judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraph 35.
[49] Ibid with reference to the judgment of 17 February 2004, 44158/98, Gorzelik and Others v. Poland [GC], paragraph 92 and judgment of 5 October 2006, 72881/01, Moscow Branch of The Salvation Army v. Russia, paragraph 61 (emphasis added by the author).

proposed:[50]

*"An **organisation may campaign for a change in the legal and constitutional structures of the State** if the means used to that end are in every respect legal and democratic and if the change proposed is itself compatible with fundamental democratic principles (...)."*

The State's obligation to tolerate proposals for alternative political models is therefore far-reaching. Thus, according to the ECtHR, the fact that a political programme is considered incompatible with the current principles and structures of a State does not automatically render it incompatible with the rules and principles of democracy. Instead, it is part of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.[51] States may verify that the objectives and functioning of an association comply with applicable law, but must do so in a manner compatible with their obligations under the ECHR.[52]

These premises give rise to a canon of rights for civil society organisations. According to the ECtHR, freedom of association includes the right to adopt a recognised legal status, although there is no entitlement to a *specific (public-)law* status.[53] At the same time, no legal status may be prescribed for the association that effectively proves an insurmountable obstacle to exercising the right to freedom of association.[54] In particular, the ECtHR takes the view that a politically active organisation should not be forced to assume the form of a political party, which means as a consequence that a field of activity must remain for political NGOs that do not wish to organize themselves in party form. In the aforementioned case *Zhechev v. Bulgaria*, the Bulgarian law required the association to organize itself and register as a political party in order to pursue political goals. The ECtHR considered this to be a restriction of political freedom, which is part of the freedom of association, contrary to the ECHR, because it would render political freedom either non-existent or so reduced as to be of no practical value:[55]

[50] ECtHR, judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraph 47 with further references (emphasis added by the author).
[51] Paraphrase of ECtHR, judgment of 20 October 2005, 59489/00, United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria, paragraph 61.
[52] ECtHR, judgment of 10 July 1998, 26695/95 - Sidiropoulos and Others v. Greece, paragraph 40; judgment of 20 October 2005, 59489/00, United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria, paragraph 57; judgment of 5 October 2006, 72881/01, Moscow Branch of The Salvation Army v. Russia, paragraph 59; judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraph 34.
[53] For further information regarding the right to freedom of religion, see ECtHR, judgment of 8 April 2014, 70945/11, Magyar Keresztény Mennonita Egyház and Others v. Hungary, paragraph 91: "The Court further considers that there is no right under Article 11 in conjunction with Article 9 for religious organisations to have a specific legal status. Articles 9 and 11 of the ECHR only require the State to ensure that religious communities have the possibility of acquiring legal capacity as entities under the civil law; they do not require that a specific public-law status be accorded to them.".
[54] ECtHR, judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraph 56.
[55] ECtHR, judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraph 56 (emphasis added by the

"(...) (U)nder Bulgarian law, as it stood at the material time and as it stands at present, associations may not participate in national, local or European elections (see paragraph 21 above). There is therefore ***no "pressing social need" to require every association deemed by the courts to pursue "political" goals to register as a political party****, especially in view of the fact that, as noted above, the exact meaning of that term under Bulgarian law appears to be quite vague. That would mean forcing the association to take a legal shape which its founders did not seek. It would also mean subjecting it to a number of additional requirements and restrictions, such as for instance the rule that a political party cannot be formed by less than fifty enfranchised citizens (see paragraph 19 above), which may in some cases prove an insurmountable obstacle for its founders. Moreover, such an approach runs counter to freedom of association, because, in case it is adopted,* ***the liberty of action which will remain available to the founders of an association may become either non-existent or so reduced as to be of no practical value*** *(...)."*

On the recognition of a formal status following the registration of an association or the refusal thereof, an instructive case-law has been developed by the ECtHR .[56] Most importantly for the matter of concern, the ECtHR has held that a refusal to register an association constitutes an interference with the right to freedom of association which has to be justified[57] by a 'pressing social need' ('besoin social impérieux'),[58] which must go beyond a useful or merely desirable objective.[59] The interference must not be comprehensive and unconditional; it must preserve the essence of freedom of association and must not prevent the very existence of the organisation.[60] In particular, the dissolution of a party or organisation must be an *ultima ratio* and may only be considered after all less stringent measures have been exhausted.[61]

author).

[56] ECtHR, judgment of 17 February 2004, 44158/98, Gorzelik and Others v. Poland [GC]: the Polish authorities refused to register the 'Union of People of Silesian Nationality' on the grounds that the Silesians were not a recognised minority, and recognising their self-assigned status as a minority would automatically confer privileges on them under electoral law (conclusion: no violation of Article 11 ECHR). ECtHR, judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria: the Bulgarian authorities refused to register an organisation campaigning for the restoration of the monarchy and the reinstatement of borders on the grounds that it pursued political goals and needed to be registered as a political party, which entailed a number of additional requirements (conclusion: violation of Article 11 ECHR); ECtHR, judgment of 5 October 2006, 72881/01, Moscow Branch of The Salvation Army v. Russia: the registration of the organisation was refused by the Russian authorities and its dissolution initiated on the grounds that the applicant organisation was of foreign origin (conclusion: violation of Article 11 ECHR, because the authorities had neglected their duty of neutrality and impartiality).

[57] ECtHR, judgment of 10 July 1998, 26695/95 - Sidiropoulos and Others v. Greece, paragraph 31; judgment of 17 February 2004, 44158/98, Gorzelik and Others v. Poland [GC], paragraph 52; ECtHR, judgment of 3 February 2005, 46626/99, Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania, paragraph 27; ECtHR, judgment of 20 October 2005, 59489/00, United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria, paragraph 53; ECtHR, judgment of 5 October 2006, 72881/01, Moscow Branch of The Salvation Army v. Russia, paragraph 71; ECtHR, judgment of 1 February 2007, 44363/02, Ramazanova and Others v. Azerbaijan, paragraph 60.

[58] ECtHR, judgment of 17 February 2004, 44158/98, Gorzelik and Others v. Poland [GC], paragraph 94; ECtHR, judgment of 21 June 2007, 57045/00, Zhechev v. Bulgaria, paragraph 54.

[59] ECtHR, judgment of 5 October 2006, 72881/01, Moscow Branch of The Salvation Army v. Russia, paragraph 62.

[60] Opposite conclusion in ECtHR, judgment of 17 February 2004, 44158/98, Gorzelik and Others v. Poland [GC], paragraph 105.

[61] ECtHR, judgment of 7 June 2007, 71251/01, Parti Nationaliste Basque v. France, paragraph 49.

3. Importance of a comprehensive overall assessment of state measures: prohibition of stigmatisation and intimidation

In addition to cases relating to a refusal of a formal legal recognition of parties and civil society organisations, the ECtHR has also found State action to constitute an interference requiring justification in the event that such measure *de facto* lead to the party or organisation not being able to continue its existence or act effectively. When reviewing compliance with the ECHR, the ECtHR assesses the factual circumstances resulting from a State measure and how they affect the freedoms of NGOs to carry on political activities.[62] A landmark decision in this regard is the case *Parti Nationaliste Basque v. France,*[63] in which the ECtHR examined the French ban on foreign sources of funding for political parties. The ECtHR found that limiting the sources of funding had significant impact on the ability to fully participate in political activities, and thus constituted an interference with Article 11 ECHR that required justification.[64] When assessing the proportionality of the interference, the ECtHR held that while the State measure did not affect the party's legality, it greatly restricted its financial means. In doing so, the Court took into account the practical impact on the party's ability to engage in political activities:[65]

"It remains to be determined in practical terms whether the measure complained of is proportionate to the aim pursued; this entails assessing its impact on the applicant party's ability to engage in political activities. The Court reiterates in this connection that when assessing the "necessity" of an interference with the right to freedom of association, the extent of the interference is decisive."

As a consequence, the ECtHR examined in depth the alternative sources of funding that were available to the applicant. In this case it concluded that the situation of the party – irrespective of the anticipated

[62] ECtHR, judgment of 30 January 1998, 19392/92, United Communist Party of Turkey and Others v. Turkey [GC], paragraph 33: "The Court reiterates that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective. The right guaranteed by Article 11 would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention.".
[63] ECtHR, judgment of 7 June 2007, 71251/01, Parti Nationaliste Basque v. France. The French branch of the Spanish Basque Nationalist Party founded an organisation in France with a view to deriving financial support from Spain (or more specifically from the Spanish Basque Nationalist Party). The French authorities refused to register the organisation, citing the ban under French law on foreign sources of funding for political parties.
[64] ECtHR, judgment of 7 June 2007, 71251/01, Parti Nationaliste Basque v. France, paragraph 37 et seq.
[65] ECtHR, judgment of 7 June 2007, 71251/01, Parti Nationaliste Basque v. France, paragraph 49.

shortage of funds[66] – was no different from that of any other small political party.[67]

Also, in the context of the 'public watchdog' function of the press and civil society organisations within the meaning of Article 10 of the ECHR, the ECtHR has stressed that it must be possible to effectively fulfil this function in practice. For example, the ECtHR has held that it is in the interest of a democratic society that the press is put in the actual position of exercising its important role as a 'public watchdog'; the same applies to NGOs that monitor the State.[68] In short, the benchmark to be applied is the effective exercise of the watchdog role.[69] The ECtHR also found that there had been a restriction on an NGO's activity that was incompatible with the ECHR in a context of civil proceedings in which the NGO had to carry a significant burden of proof but had not been granted any legal aid.[70]

Based on the previous explanations, it can be stated that the loss of a civil society organisation's non-profit status as a result of its political activities constitutes an interference with its political rights that requires justification. Both the ECJ and the ECtHR take into account not only situations where these rights can actually no longer be exercised as a result of State interference, but also the overall effects of State measures such as potential stigmatisation and chilling effects. The ECtHR has developed this premise with reference to the right to freedom of association under Article 11 ECHR and the right to freedom of expression and of the press under Article 10 ECHR. When examining the proportionality of a State measure that curtails Article 10 ECHR, the ECtHR takes into account the potential chilling effects on other NGOs that might hamper the public discourse.[71] In the context of the right to freedom of association, the ECtHR has found that an obligation to disclose membership of an association prior to taking up a public office constitutes an interference requiring justification precisely because it entails

[66] ECtHR, judgment of 7 June 2007, 71251/01, Parti Nationaliste Basque v. France, paragraph 50: "It is true, as the applicant party pointed out, that these sources of funding appear somewhat hypothetical in its particular case. In view of its political aims, it is unlikely that it would attract the support of another French party; and in view of its geographical sphere of activity, it is likely to take part in local rather than parliamentary elections, so that it scarcely appears to be in a position to take advantage of the system of public funding (which is based on results in parliamentary elections). Its election candidates would nevertheless enjoy all the same benefits as those from other parties in terms of the funding of their election campaign (…).".
[67] ECtHR, judgment of 7 June 2007, 71251/01, Parti Nationaliste Basque v. France, paragraph 51.
[68] ECtHR, judgment of 8 November 2016, 18030/11, Magyar Helsinki Bizottság v. Hungary, paragraph 167; for further details of the 'adverse effects' on other organisations in these areas, see also ECtHR, judgment of 14 April 2009, 37374/05, Társaság v. Hungary, paragraph 38: "The Court considers that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs' and their ability to provide accurate and reliable information may be adversely affected (…)".
[69] ECtHR, judgment of 8 November 2016, 18030/11, Magyar Helsinki Bizottság v. Hungary, paragraph 167.
[70] ECtHR, judgment of 15 February 2005, 68416/01, Steel and Morris v. United Kingdom, paragraph 95.
[71] See for example ECtHR, judgment of 15 February 2005, 68416/01, Steel and Morris v. United Kingdom, paragraph 95: "The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible 'chilling' effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion".

the risk for the NGO of losing members and prestige.[72]

The interfering quality of State measures because of indirect, restrictive effects was also recently confirmed by the ECJ in the infringement proceedings concerning the so-called "Hungarian Transparency Law".[73] This law imposed specific requirements (registration, reporting and disclosure) on civil society organisations receiving a certain amount of monetary donations directly or indirectly from abroad. The decisive factor for the ECJ was that these obligations and the sanctions attached to their non-compliance could have a deterrent effect, limiting the potential of the associations and foundations to obtain financial support from other member states or third.[74] This could hinder the associations from achieving their aims. The ECJ also found it relevant that the legal situation was of such a nature as to 'create a generalised climate of mistrust vis-à-vis the associations and foundations at issue and to stigmatise them.'[75] Hence, chilling effects of this kind also amount to an interference requiring justification in the event of withdrawal of the status of a non-profit organisation.

VI. Conclusions

Based on the relevant case-law of the ECtHR and the ECJ and in aiming to adopt an approach to political activity of civil society organisations in line with international and EU law, the following prerequisites apply to German non-profit law:

1. In the ECtHR's case-law, **NGOs are seen as functionally equivalent to political parties and the press** in terms of their importance for a pluralist democratic discourse. Their right to carry out political activities encompasses the right to use legal and democratic means to pursue political goals, for example to seek a change in the current legal situation.[76]

2. The key role of NGOs in a democracy culminates in the concept of a 'public watchdog' and results in various State obligations, such as the duty to allow access to documents relevant to the public discourse

[72] ECtHR, judgment of 2 August 2001, 35972/97, Grande Oriente d'Italia di Palazzo Giustiniani v. Italy, paragraph 15: "Additionally, and above all, the Court accepts that the measure in question may cause the applicant association – as it submits – damage in terms of loss of members and prestige." An Italian regional government had instituted a requirement for candidates for public office to declare that they were not Freemasons. A masonic lodge had submitted an application to the ECtHR.
[73] ECJ, C-78/18, Commission v Hungary (Transparency of associations), ECLI:EU:C:2020:476.
[74] Paraphrase of ECJ, C-78/18, Commission v Hungary (Transparency of associations), ECLI:EU:C:2020:476, paragraph 116 et seq.
[75] Paraphrase of ECJ, C-78/18, Commission v Hungary (Transparency of associations), ECLI:EU:C:2020:476, paragraph 118.
[76] For further details, see the comments in IV.1. and V.1.

and the obligation to refrain from imposing on an NGO the specific legal form of a political party.[77]

3. If the **removal of non-profit status** results in a deterioration of the financial situation of a civil society organisation that is actively engaged in the democratic discourse, such a removal may restrict **the organisation's right to political participation and may thus constitute an interference with the right to freedom of association that requires justification**.[78]

4. In determining whether an interference can be justified (and is, in particular, proportionate), the ECtHR assesses *in concreto* the practical impact of a State measure – for example the curtailment of financial sources – and its implications for the NGO in effectively exercising its watchdog function. The harder it becomes for an NGO to participate effectively in the public discourse, the more restricted is the State's margin of appreciation under Article 10 and Article 11 ECHR and the more difficult it is to justify the State's measure.[79] However, if the possibility to participate in the democratic discourse remains available albeit restricted, State measures may satisfy this standard of justification.[80]

5. The ECtHR emphasises the particular importance of small and informal campaign groups for a pluralist discourse, and stresses that they must be in a position to carry out their activities effectively.[81] It can therefore be assumed that this special protection also plays a role in the judicial review of remaining financial sources and options for participation, and raises the standard for justification of state intervention.

6. The ECtHR and ECJ furthermore held that State measures require justification if they have the effect of indirect intimidation and stigmatisation and, as a result of the reputational damage, worsen the opportunities for effective participation of the affected NGO in the public discourse.[82] Also from this point of view, the effects of withdrawing an NGO's non-profit status constitute an interference in political rights that has to be justified.

[77] For further details, see the comments in V.1. and V.2.
[78] For further details, see V.3. The relevant landmark decision relates to a political party. In other contexts, however, the ECtHR considers parties and politically active NGOs to be functionally equivalent (see the decision referred to in footnote 42, for example), which leads to the assumptions that this assessment can also be applied to NGOs.
[79] For further details, see IV.2.
[80] For further details, see the case-law citations in footnotes 66 and 67.
[81] For further details, see V.1.
[82] For further details, see V.3.