

Legal instruments



**Legal status of non-governmental
organisations in Europe**

Recommendation CM/Rec(2007)14
and explanatory memorandum



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Recommendation CM/Rec(2007)14
adopted by the Committee of Ministers
of the Council of Europe
on 10 October 2007
and explanatory memorandum

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*Statut juridique des organisations non gouvernementales en Europe
(Recommandation CM/Rec(2007)14 et exposé des motifs)*

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Introduction

1. This document contains the text of Recommendation CM/Rec(2007)14 which was adopted by the Committee of Ministers on 10 October 2007.
2. The text of the recommendation was prepared, under the authority of the European Committee on Legal Co-operation (CDCJ), by a Group of Specialists on the Legal Status of Non-Governmental Organisations (CJ-S-ONG).

Recommendation CM/Rec(2007)14

of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe

*(Adopted by the Committee of Ministers on 10 October 2007
at the 1006th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members and that this aim may be pursued through the adoption of common rules;

Aware of the essential contribution made by non-governmental organisations (NGOs) to the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies;

Taking into consideration the invaluable contribution also made by NGOs to the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe;

Having regard to the Declaration and Action Plan adopted at the 3rd Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005);

Noting that the contributions of NGOs are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of changes in law and public policy, the provision of assistance to those in need, the elaboration of technical and professional standards, the monitoring of compliance with existing obligations under national and international law, and on to the provision of a means of personal fulfilment and of pursuing, promoting and defending interests shared with others;

Bearing in mind that the existence of many NGOs is a manifestation of the right of their members to freedom of association under Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and of their host country's adherence to principles of democratic pluralism;

Having regard to Article 5 of the revised European Social Charter (ETS No. 163), Articles 3, 7 and 8 of the Framework Convention for the Protection of National Minorities (ETS No. 157) and Article 3 of the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144);

Recognising that the operation of NGOs entails responsibilities as well as rights;

Considering that the best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation;

Taking into consideration the case law of the European Court of Human Rights and the views of United Nations human rights treaty bodies;

Taking into account the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, United Nations General Assembly Resolution A/RES/53/144;

Drawing upon the Fundamental Principles on the Status of Non-governmental Organisations in Europe;

Having regard to the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS No. 124) (hereinafter Convention No. 124) and to the desirability of enlarging the number of its contracting parties,

Recommends that the governments of member states:

- be guided in their legislation, policies and practice by the minimum standards set out in this recommendation;
- take account of these standards in monitoring the commitments they have made;
- ensure that this recommendation and the accompanying explanatory memorandum are translated and disseminated as widely as possible to NGOs and the public in general, as well as to parliamentarians,

relevant public authorities and educational institutions, and used for the training of officials.

I. Basic principles

1. For the purpose of this recommendation, NGOs are voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members. They do not include political parties.
2. NGOs encompass bodies or organisations established both by individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based.
3. NGOs can be either informal bodies or organisations or ones which have legal personality.
4. NGOs can be national or international in their composition and sphere of operation.
5. NGOs should enjoy the right to freedom of expression and all other universally and regionally guaranteed rights and freedoms applicable to them.
6. NGOs should not be subject to direction by public authorities.
7. NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and should be subject to the administrative, civil and criminal law obligations and sanctions generally applicable to those legal persons.
8. The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation.
9. NGOs should not distribute any profits which might arise from their activities to their members or founders but can use them for the pursuit of their objectives.
10. Acts or omissions by public authorities affecting an NGO should be subject to administrative review and be open to challenge by the NGO in an independent and impartial court with full jurisdiction.

II. Objectives

11. NGOs should be free to pursue their objectives, provided that both the objectives and the means employed are consistent with the requirements of a democratic society.
12. NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law.
13. NGOs should be free to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation. Any such support should also be subject to legislation on the funding of elections and political parties.
14. NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorisation being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned.
15. NGOs should be free to pursue their objectives through membership of associations, federations and confederations of NGOs, whether national or international.

III. Formation and membership

A. Establishment

16. Any person, be it legal or natural, national or non-national, or group of such persons, should be free to establish an NGO and, in the case of non-membership-based NGOs, should be able to do so by way of gift or bequest.
17. Two or more persons should be able to establish a membership-based NGO but a higher number can be required where legal personality is to be acquired, so long as this number is not set at a level that discourages establishment.

B. Statutes

18. NGOs with legal personality should normally have statutes, comprising the constitutive instrument or instrument of incorporation and, where

applicable, any other document setting out the conditions under which they operate.

19. The statutes of an NGO with legal personality should generally specify:

- a. its name;
- b. its objectives;
- c. its powers;
- d. the highest governing body;
- e. the frequency of meetings of this body;
- f. the procedure by which such meetings are to be convened;
- g. the way in which this body is to approve financial and other reports;
- h. the procedure for changing the statutes and dissolving the organisation or merging it with another NGO.

20. The highest governing body of a membership-based NGO should be the membership and its agreement should be required for any change in the statutes. For other NGOs the highest governing body should be the one specified in the statutes.

C. Membership

21. No person should be required by law or otherwise compelled to join an NGO, other than a body or organisation established by law to regulate a profession in those states which treat such an entity as an NGO.

22. The ability of any person, be it natural or legal, national or non-national, to join membership-based NGOs should not be unduly restricted by law and, subject to the prohibition on unjustified discrimination, should be determined primarily by the statutes of the NGOs concerned.

23. Members of NGOs should be protected from expulsion contrary to their statutes.

24. Persons belonging to an NGO should not be subject to any sanction because of their membership. This should not preclude such membership being found incompatible with a particular position or employment.

25. Membership-based NGOs should be free to allow non-members to participate in their activities.

IV. Legal personality

A. General

26. The legal personality of NGOs should be clearly distinct from that of their members or founders.

27. An NGO created through the merger of two or more NGOs should succeed to their rights and liabilities.

B. Acquisition of legal personality

28. The rules governing the acquisition of legal personality should, where this is not an automatic consequence of the establishment of an NGO, be objectively framed and should not be subject to the exercise of a free discretion by the relevant authority.

29. The rules for acquiring legal personality should be widely published and the process involved should be easy to understand and satisfy.

30. Persons can be disqualified from forming NGOs with legal personality following a conviction for an offence that has demonstrated that they are unfit to form one. Such a disqualification should be proportionate in scope and duration.

31. Applications in respect of membership-based NGOs should only entail the filing of their statutes, their addresses and the names of their founders, directors, officers and legal representatives. In the case of non-membership-based NGOs there can also be a requirement of proof that the financial means to accomplish their objectives are available.

32. Legal personality for membership-based NGOs should only be sought after a resolution approving this step has been passed by a meeting to which all the members had been invited.

33. Fees can be charged for an application for legal personality but they should not be set at a level that discourages applications.

34. Legal personality should only be refused where there has been a failure to submit all the clearly prescribed documents required, a name has been

used that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person in the state concerned or there is an objective in the statutes which is clearly inconsistent with the requirements of a democratic society.

35. Any evaluation of the acceptability of the objectives of NGOs seeking legal personality should be well informed and respectful of the notion of political pluralism. It should not be driven by prejudices.

36. The body responsible for granting legal personality should act independently and impartially in its decision making. Such a body should have sufficient, appropriately qualified staff for the performance of its functions.

37. A reasonable time limit should be prescribed for taking a decision to grant or refuse legal personality.

38. All decisions should be communicated to the applicant and any refusal should include written reasons and be subject to appeal to an independent and impartial court.

39. Decisions on qualification for financial or other benefits to be accorded to an NGO should be taken independently from those concerned with its acquisition of legal personality and preferably by a different body.

40. A record of the grant of legal personality to NGOs, where this is not an automatic consequence of the establishment of an NGO, should be readily accessible to the public.

41. NGOs should not be required to renew their legal personality on a periodic basis.

C. Branches; changes to statutes

42. NGOs should not require any authorisation to establish branches, whether within the country or (subject to paragraph 45 below) abroad.

43. NGOs should not require approval by a public authority for a subsequent change in their statutes, unless this affects their name or objectives. The grant of such approval should be governed by the same process as that for the acquisition of legal personality but such a change should not entail the NGO concerned being required to establish itself as a new entity. There

can be a requirement to notify the relevant authority of other amendments to their statutes before these can come into effect.

D. Termination of legal personality

44. The legal personality of NGOs can only be terminated pursuant to the voluntary act of their members – or in the case of non-membership-based NGOs, its governing body – or in the event of bankruptcy, prolonged inactivity or serious misconduct.

E. Foreign NGOs

45. Without prejudice to applicability of the articles laid down in Convention No. 124 for those states that have ratified that convention, foreign NGOs can be required to obtain approval, in a manner consistent with the provisions of paragraphs 28 to 31 and 33 to 39 above, to operate in the host country. They should not have to establish a new and separate entity for this purpose. Approval to operate can only be withdrawn in the event of bankruptcy, prolonged inactivity or serious misconduct.

V. Management

46. The persons responsible for the management of membership-based NGOs should be elected or designated by the highest governing body or by an organ to which it has delegated this task. The management of non-membership-based NGOs should be appointed in accordance with their statutes.

47. NGOs should ensure that their management and decision-making bodies are in accordance with their statutes but they are otherwise free to determine the arrangements for pursuing their objectives. In particular, NGOs should not need any authorisation from a public authority in order to change their internal structure or rules.

48. The appointment, election or replacement of officers, and, subject to paragraphs 22 and 23 above, the admission or exclusion of members should be a matter for the NGOs concerned. Persons may, however, be disqualified from acting as an officer of an NGO following conviction for an offence that has demonstrated that they are unfit for such responsibilities. Such a disqualification should be proportionate in scope and duration.

49. NGOs should not be subject to any specific limitation on non-nationals being on their management or staff.

VI. Fundraising, property and public support

A. Fundraising

50. NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.

B. Property

51. NGOs with legal personality should have access to banking facilities.

52. NGOs with legal personality should be able to sue for the redress of any harm caused to their property.

53. NGOs with legal personality can be required to act on independent advice when selling or acquiring any land, premises or other major assets where they receive any form of public support.

54. NGOs with legal personality should not utilise property acquired on a tax-exempt basis for a non-tax-exempt purpose.

55. NGOs with legal personality can use their property to pay their staff and can also reimburse all staff and volunteers acting on their behalf for reasonable expenses thereby incurred.

56. NGOs with legal personality can designate a successor to receive their property in the event of their termination, but only after their liabilities have been cleared and any rights of donors to repayment have been honoured. However, in the event of no successor being designated or the NGO concerned having recently benefited from public funding or other form of support, it can be required that the property either be transferred to another NGO or legal person that most closely conforms to its objectives or be applied towards them by the state. Moreover the state can be the successor where either the objectives or the means used by the NGO to achieve those objectives have been found to be inadmissible.

C. Public support

57. NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits.

58. Any form of public support for NGOs should be governed by clear and objective criteria.

59. The nature and beneficiaries of the activities undertaken by an NGO can be relevant considerations in deciding whether or not to grant it any form of public support.

60. The grant of public support can also be contingent on an NGO falling into a particular category or regime defined by law or having a particular legal form.

61. A material change in the statutes or activities of an NGO can lead to the alteration or termination of any grant of public support.

VII. Accountability

A. Transparency

62. NGOs which have been granted any form of public support can be required each year to submit reports on their accounts and an overview of their activities to a designated supervising body.

63. NGOs which have been granted any form of public support can be required to make known the proportion of their funds used for fundraising and administration.

64. All reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality.

65. NGOs which have been granted any form of public support can be required to have their accounts audited by an institution or person independent of their management.

66. Foreign NGOs should be subject to the requirements in paragraphs 62 to 65 above only in respect of their activities in the host country.

B. Supervision

67. The activities of NGOs should be presumed to be lawful in the absence of contrary evidence.

68. NGOs can be required to submit their books, records and activities to inspection by a supervising agency where there has been a failure to comply with reporting requirements or where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent.

69. NGOs should not be subject to search and seizure without objective grounds for taking such measures and appropriate judicial authorisation.

70. No external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent.

71. NGOs should generally be able to request suspension of any administrative measure taken in respect of them. Refusal of a request for suspension should be subject to prompt judicial challenge.

72. In most instances, the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of legal personality) should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality.

73. Foreign NGOs should be subject to the provisions in paragraphs 68 to 72 above only in respect of their activities in the host country.

74. The termination of an NGO or, in the case of a foreign NGO, the withdrawal of its approval to operate should only be ordered by a court where there is compelling evidence that the grounds specified in paragraphs 44 and 45 above have been met. Such an order should be subject to prompt appeal.

C. Liability

75. The officers, directors and staff of an NGO with legal personality should not be personally liable for its debts, liabilities and obligations. However, they can be made liable to the NGO, third parties or all of them for professional misconduct or neglect of duties.

VIII. Participation in decision making

76. Governmental and quasi-governmental mechanisms at all levels should ensure the effective participation of NGOs without discrimination in dialogue and consultation on public policy objectives and decisions. Such participation should ensure the free expression of the diversity of people's opinions as to the functioning of society. This participation and co-operation should be facilitated by ensuring appropriate disclosure or access to official information.

77. NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation.

Explanatory memorandum

Introduction

1. For several years now the Council of Europe has been working to reinforce the legal framework for civil society in Europe. The work has led to the adoption of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (hereinafter Convention No. 124), which is the only binding international legal instrument to date on these organisations.

2. In 1996 specific discussions began on the status of non-governmental organisations (hereinafter NGOs) in the Council of Europe, leading to the adoption in 1998 of Guidelines for the Development and Reinforcement of Non-Governmental Organisations in Europe, followed in 2002 by the Fundamental Principles on the Status of Non-Governmental Organisations in Europe, which constitute a logical and vital complement to Convention No. 124 as far as national action by NGOs is concerned. Even though these fundamental principles have no legal force under the rules and regulations of the Council of Europe, the Committee of Ministers took note of them with satisfaction in 2003 and recommended circulating them as widely as possible in the member states.

3. Also in 2003, the Council of Europe carried out a survey of its member states concerning the legal framework for the setting up and functioning of NGOs. This survey was geared to analysing national legislation on NGOs from the angle of its compatibility with the aforementioned fundamental principles. The results were utilised in the Secretary General's thematic monitoring report on freedom of association, which the Ministers' Deputies considered in October 2005.

4. In December 2005, in the light of this monitoring report, the Committee of Ministers decided to set up the Group of Specialists on the Legal Status of Non-Governmental Organisations (CJ-S-ONG), mandating it, under the authority of the European Committee on Legal Co-operation (CDCJ), to continue examining the proposal for a new non-binding legal instrument in the form of a draft recommendation on the legal status of NGOs in Europe, taking account of the Fundamental Principles on the Status of

Non-Governmental Organisations in Europe and the Secretary General's thematic report on freedom of association.

5. The CJ-S-ONG met twice in 2006 to prepare the draft recommendation on the legal status of non-governmental organisations in Europe. It was chaired by Mr Eberhard Desch (Germany), member of the CDCJ. Its scientific expert, Mr Jeremy McBride (United Kingdom), provided an invaluable contribution to its work.
6. Approved on 1 March 2007 by the CDCJ, the text of Recommendation CM/Rec(2007)14 was adopted by the Committee of Ministers on 10 October at the 1006th meeting of the Ministers' Deputies.
7. This instrument targets the legislator, the national authorities and the NGOs themselves. It aims to recommend standards to shape legislation and practice vis-à-vis NGOs, as well as the conduct and activities of the NGOs themselves in a democratic society based on the rule of law.
8. None of the provisions of this recommendation can be interpreted as implying a limitation of a right or safeguard already recognised by a member state vis-à-vis the NGOs, or as preventing a member state from recognising wider rights and safeguards.

Preamble

9. The success of efforts to bring about societies committed to democracy and human rights in all the member states of the Council of Europe owes much to the activities of NGOs, whether as formal entities or less formal ones. Their contribution is of historical importance and they continue to have a significant part to play in ensuring that this commitment is not weakened and that indeed democracy and human rights are more effectively secured. The importance of their role has been recognised recently at international level in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, United Nations General Assembly Resolution A/RES/53/144 (hereinafter the UN Declaration on Human Rights Defenders) and at regional level in the Action Plan of the 3rd Summit of Heads of State and Government of the Council of Europe (hereinafter the 3rd Summit). Without the extensive campaigning and educational work of NGOs, many would be unaware of, and uninvolved in, the decision making that will affect them and the societies in which they live. Although this

contribution to matters of public choice is vital, their part in developing and maintaining a rich cultural life and promoting and securing the social well-being of all in society is equally indispensable.

10. Moreover, NGOs, in view of their continuing contribution in the fields of culture, democracy, human rights and social justice, are inevitably central to the fulfilment of the goals for which the United Nations and the Council of Europe were established. They do so through their work in individual countries, whether as partners of the two organisations or through basing themselves on the standards that these organisations have developed, and through their participation in international and regional fora.

11. At the 3rd Summit, heads of state and government of the Council of Europe member states envisaged the Organisation “as the primary forum for the protection and promotion of human rights in Europe”, playing “a dynamic role in protecting the right of individuals and promoting the invaluable engagement of non-governmental organisations, to actively defend human rights.”

12. It is important to recognise the diverse ways in which NGOs can operate, not least because this needs to be borne in mind when establishing the legal framework applicable to them and determining the support (both direct and indirect) that public authorities can provide to ensure the success of their undertakings. The list of activities given in this preamble is illustrative of this diversity and should not be regarded as exhaustive.

13. Although NGOs play an essential part in securing human rights, the ability to establish and operate those that are membership-based organisations is itself a human right, guaranteed to everyone at regional level by Article 11 of the European Convention on Human Rights (hereinafter the Convention) (ETS No. 5) and for particular groups or forms of organisation by Article 5 of the revised European Social Charter, Articles 3, 7 and 8 of the Framework Convention for the Protection of National Minorities (ETS No. 157), and Article 3 of the Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144). Furthermore, the ability of NGOs to contribute to public life and to express a wide range of views is itself a key element of the pluralism that is the hallmark of a true democracy.

14. This recommendation is particularly concerned with the legal and fiscal framework required to ensure that NGOs can continue to make their various contributions to public and social life. It also draws attention to the

limitations on objectives and activities that NGOs must observe, particularly those that are anti-democratic or are concerned with the making and distribution of profits. In addition, it highlights the responsibilities that can arise from NGOs receiving public support for their activities as well as underlining their responsibility to be transparent and to observe the generally applicable law.

15. This text reflects and builds upon the interpretation of general guarantees of freedom of association and other human rights and fundamental freedoms that has been provided in rulings of the European Court of Human Rights (hereinafter the Court) and the views of the United Nations human rights treaty bodies. It also draws upon the formulation of standards specifically concerned with NGOs. This is important because these standards also deal with matters which are not directly based on the right to freedom of association.

16. Although most NGOs are established within, and restrict their operations to, the territory of an individual member state, there are many NGOs which have objectives of relevance to two or more member states and which also have a membership which is international in character. The European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations (ETS No.124, hereinafter Convention No. 124) was adopted in order to facilitate the operation of NGOs. While implementation of this recommendation could contribute to this objective, the absence from it of any requirement to recognise the legal personality of NGOs established in other member states means that a further increase in the number of contracting parties to Convention No. 124 remains highly desirable.

17. Implementation of this recommendation will require member states to take full account of the standards that it sets out in their legislation, policies and practices that have any bearing on the formation, operation and termination of NGOs. Moreover, as an elaboration of more general commitments, these standards should provide a useful basis for assessing how satisfactory the steps taken to fulfil those commitments have been. Implementation of this recommendation will only be fully successful through the widest possible dissemination of the standards set out in it. This would require them to be made available not only to all those who have some role in regulating NGOs and NGOs themselves, but also to the public which has a legitimate interest in the work of NGOs, in particular as beneficiaries of

their activities, and is the source of members for those that are membership-based. In addition, realisation of the standards will require them to be used in the training of all officials concerned with the activities of NGOs.

I. Basic principles

Paragraph 1

18. There is no universal definition of “NGO”, a term which can be used to cover a wide range of bodies operating within both states and inter-governmental organisations. The definition adopted for the purpose of this recommendation emphasises certain qualities regarded as constituting the essential character of these bodies, namely, that their establishment and continued operation is a voluntary act (that is, a matter of choice for those founding and belonging to them and, in the case of non-membership bodies, those entrusted with their direction), that they are self-governing rather than under the direction of public authorities and that their principal objective is not to generate profits from the activities that they undertake.

19. NGOs can go under various names such as associations, charities, foundations, non-profit corporations, societies and trusts, but it is their actual nature rather than their formal designation that will bring them within the scope of this recommendation. Thus, the designation of a particular entity as “public” or “para-administrative” should not prevent it from being treated as an NGO if that is an accurate reflection of its essential characteristics; see *Chassagnou v. France*, Application Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999.

20. Political parties are excluded from the definition as in many countries they are the subject of separate provisions from those applicable to NGOs generally. However, this exclusion does not preclude states from choosing to treat such parties as NGOs.

21. Moreover, those professional bodies established by law to which members of a profession are required to belong for regulatory purposes are also likely to fall outside the definition on account of their failure to comply with the requirement of voluntariness and freedom from direction by public authorities – this has led the Court to consider such bodies as falling outside the protection of freedom of association under Article 11

of the Convention (see *Le Compte, Van Leuven and De Meyere v. Belgium*, Application Nos. 6878/75 and 7238/75, 23 June 1981) – but, again, this exclusion does not prevent states from treating them as NGOs. Nonetheless, the voluntary aspects of their activities could be sufficient to bring sub-entities that they establish within the definition, for example, the human rights committee of a bar association.

Paragraph 2

22. The diversity of NGOs is reflected in the fact that they can be both membership and non-membership-based bodies, echoing the distinction in the explanatory report on Convention No. 124 between “associations” (“a number of persons uniting together for some specific purpose”) and “foundations” (“an identified property devoted to a given purpose”). Furthermore, the persons establishing NGOs can be natural or legal, including a combination of these, and groups of NGOs themselves (uniting several such bodies to pursue aspects of their objectives collectively).

Paragraph 3

23. In many instances, as the Court recognised in *Sidiropoulos and Others v. Greece*, Application No. 26695/95, 10 July 1998, and *Gorzelik and Others v. Poland* [GC], Application No. 44158/98, 17 February 2004, the right to act collectively would have no practical meaning without the possibility of creating a legal entity in order to pursue the objectives of an organisation. The absence of this possibility would thus result in a violation of Article 11 of the Convention. Nonetheless, those establishing NGOs may find that their objectives, particularly if they are relatively limited in scope or duration, can be achieved through a less formal structure and that there is, therefore, no need for them to have legal personality.

24. It should, therefore, be generally open to those forming NGOs (or their members if the decision is taken after they have been established) to choose whether they should become an entity which has legal personality or whether they will be (or remain) an entity that has no formal legal status. However, this does not preclude the law of a member state from conferring legal personality as an automatic consequence of the establishment of an NGO, that is, without the need for any formal approval before this status can be obtained.

Paragraph 4

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

Paragraph 5

26. Freedom of expression is especially important for NGOs in the pursuit of their objectives. However, although some human rights and freedoms are only enjoyed by those who found and belong to NGOs (see *X and Church of Scientology v. United Kingdom*, Application No. 7805/77, 16 DR 68 (1979) and *Wilson, National Union of Journalists and Others v. United Kingdom*, Application Nos. 30668/96, 30671/96 and 30678/96, 2 July 2002), there are many others which contribute to their ability to operate effectively, notably, the prohibition on discrimination, the right to a fair hearing, the prohibition on retrospective penalties, the right to respect for private life and correspondence, the right to freedom of assembly, the right to peaceful enjoyment of possessions and the right to an effective remedy.

27. Furthermore, a failure to respect the human rights and freedoms of those who belong to membership-based NGOs – especially the right to life, the right to liberty and security of the person, the right to freedom of thought, conscience and religion, the right to freedom of association, the right to political participation and freedom of movement – will often undermine the pursuit by those organisations of their objectives.

Paragraph 6

28. Although subject to the law like everyone else, the freedom from direction by public authorities is essential to maintain the “non-governmental” nature of NGOs. This freedom should extend not only to the decision to establish an NGO and the choice of its objectives but also to the way it is managed and the focus of its activities. In particular, there should be no attempt by public authorities to make NGOs effectively agencies working under their control (see the finding of a violation of Article 11 of the

Convention in *Sigurdur A. Sigurjónsson v. Iceland*, Application No. 16130/90, 30 June 1993, as a result of an attempt to use a taxi association to administer the provision of taxi services) or to interfere with the choice by an NGO of its leaders or representatives (see the finding of violations of freedom of religion under Article 9 of the Convention, which imposes a similar obligation to Article 11 in this regard, in *Serif v. Greece*, Application No. 38178/97, 14 December 1999, *Hasan and Chaush v. Bulgaria* [GC], Application No. 30985/96, 26 October 2000, and *Metropolitan Church of Bessarabia and Others v. Moldova*, Application No. 45701/99, 13 December 2001, following such interferences).

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

Paragraph 7

30. The conferment of legal personality on NGOs need not involve the grant of any greater legal powers than those enjoyed by other legal persons; the most essential ones for their operation are likely to be those inherent in such personality, namely, the ability to enter into contracts related to the pursuit of their objectives, to make payments for the goods and services thereby obtained, particularly through the operation of bank accounts, and the ability to own property. However, it ought always to be possible to confer greater capacities on certain types of NGOs and indeed this may be essential for the pursuit of their objectives. Thus additional rights that have been recognised as necessary for NGOs include: the observation of trials and other proceedings;¹ participation in public affairs and criticism of governmental actions;² promotion of human rights ideas;³ provision

1. United Nations Declaration on the Right and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Article 9(3)(b) and Document of the OSCE Moscow Meeting, 1991, paragraph 43.

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

3. United Nations Declaration on Human Rights Defenders, Article 7.

of advice;¹ provision of information to international organisations;² and information seeking.³ At the same time, the enjoyment of legal capacities carries with it the responsibility to act within the law and NGOs should not expect any exemption from the application of the administrative, civil and criminal law obligations and sanctions that are generally applicable to legal persons. The application of the general law to NGOs does not, as the following paragraph makes clear, preclude the extension to NGOs of financial and other benefits not available to other legal persons.

Paragraph 8

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

Paragraph 9

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

Paragraph 10

33. The recommendation recognises the need for some regulatory controls over the establishment and continued operation of NGOs. However, it is essential that such controls are not applied in either a mistaken or improper

1. Ibid., Article 9(3)(c).

2. Ibid., Article 9(4).

3. Aarhus Convention, Article 4.

manner. Fundamental safeguards against such a possibility occurring will be provided by the administration being prepared itself to review decisions that it has taken and by the supervisory control of the courts. Indeed, in a state governed by the rule of law it is essential that NGOs and their members should be able to challenge acts or omissions affecting them in an independent court which has the capacity to review all aspects of their legality. Without this latter possibility there is likely to be a violation of the right to an effective remedy under Article 13 of the Convention.

II. Objectives

Paragraph 11

34. NGOs should be able to pursue any objective that can be pursued by an individual, since a grouping of individuals cannot make that objective inherently objectionable. Although the pursuit of unlawful objectives can generally be prohibited, this should not preclude the pursuit of a change in the law (including the constitution) by lawful means, as it is of the essence of democracy to allow diverse political programmes to be proposed and debated; see *X v. United Kingdom*, Application No. 7525/76, 11 DR 117 (1978) (advocacy of criminal law reform) and *The Socialist Party and Others v. Turkey* [GC], Application No. 21237/93, 25 May 1998) (advocacy of a federal constitution).

35. Moreover, it is essential that activities prohibited by the law do not cover any of the activities that are protected under universally and regionally guaranteed rights and freedoms; see the reliance in *Sidiropoulos and Others v. Greece*, Application No. 26695/95, 10 July 1998, on the fact that Conference on Security and Cooperation in Europe documents allowing the formation of associations to protect the cultural and spiritual heritage had been signed by the respondent state, supporting the conclusion that the objective of preserving and developing the traditions and folk culture of a region was perfectly legitimate.

36. However, it is not permissible either to use anti-democratic means to pursue a change in the law or the constitution or to seek a change that is inherently anti-democratic; see *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

Paragraph 12

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

Paragraph 13

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

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

Paragraph 14

40. The fact that NGOs are non-profit-making is one of their essential characteristics, distinguishing them in particular from commercial enterprises. However, NGOs will be unable to pursue their objectives without some source of income and this can be provided not only by fees, grants and donations but also through undertaking economic, business or commercial activities.

41. There should, therefore, be no obstacle to them undertaking such activities subject to the prohibition on the income thereby derived

being distributed to their members and founders (see paragraph 9 of the recommendation) and to the licensing and regulatory requirements generally applicable to those activities.

42. The ability to undertake economic, business or commercial activities should also not preclude a requirement that certain modalities be followed, such as the formation of a subsidiary company for this purpose.

Paragraph 15

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

III. Formation and membership

A. Establishment

Paragraph 16

44. As it is a fundamental principle that any person or group of persons should be free to establish an NGO, restrictions on the formation of NGOs either by persons who do not have the nationality of the state in which this takes place or by legal persons should not be imposed. In the case of non-nationals, this freedom is also specifically recognised in Article 3 of ETS No. 144.

45. Moreover, subject to their evolving capacities, the freedom of association explicitly guaranteed to children by Article 15 of the United Nations Convention on the Rights of the Child would enable them to found NGOs.

46. In the case of a non-membership-based NGO, establishment should be possible through the making of a gift where the founder is alive, or of a bequest following his or her death. However, this provision should not be interpreted as being applicable to all legal forms. In some countries, for instance, the possibility of establishment by will does not exist for all non-profit-making legal forms.

Paragraph 17

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

B. Statutes

Paragraph 18

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

Paragraph 19

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

Paragraph 20

50. The requirement that the membership should form the highest governing body of a membership-based NGO is a manifestation of the exercise

of freedom of association by its members. This does not mean that the members cannot delegate the authority to take action to other bodies, but that they should always be able to revoke that delegation and determine the matter themselves.

51. Such a consideration does not apply in the case of non-membership-based NGOs and so the highest governing body should be determined by the statutes, whether as originally drawn up by their founders or as subsequently amended in the prescribed manner.

C. Membership

Paragraph 21

52. Freedom of association has a very important negative dimension, namely, that persons should not be unduly coerced into joining or remaining members of an NGO to which they do not wish to belong on account of ethical, philosophical, political or religious grounds. In particular, individuals should not be required to forego their objections to membership of a particular NGO in order to retain a job or to continue to pursue their livelihood; see in the context of trade unions, *Young, James and Webster v. United Kingdom*, Application No. 7601/76 and 7806/77, 13 August 1981.

53. Outside of the context of work, it would also be unacceptable for someone to be compelled to belong to an NGO where they had a deep-seated objection to one or more of its objectives; see *Chassagnou v. France*, Application Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, with regard to enforced membership of a hunting association. It does not matter whether the constraints imposed on someone to belong to an NGO are directly imposed by the law or are merely facilitated by it.

54. However, a requirement that someone join a professional association as part of the regulatory control of that profession would not be objectionable as long as there is no restriction on the members setting up their own organisation in addition to the one which they were obliged to join; see *Le Compte, Van Leuven and De Meyere v. Belgium*, Application Nos. 6878/75 and 7238/75, 23 June 1981.

Paragraph 22

55. The guarantee of freedom of association in Article 11 of the Convention and in other human rights instruments is applicable to "everyone" within a

state's jurisdiction and the scope for imposing limitations will thus be quite narrow. Certainly children should not be excluded – particularly since this freedom is also specifically guaranteed to them by Article 15 of the United Nations Convention on the Rights of the Child – but that does not preclude the adoption of protective measures to ensure that they are not exploited or exposed to moral and related dangers. Any limitations on their ability to join membership-based NGOs will need to take account of their evolving capacities and, as well as being proportionate and respecting legal certainty, should never be such as to totally exclude them from becoming members.

56. Similarly, this freedom should normally be exercisable by persons who are non-nationals and any limitation on this would need to be compatible with the limited authorisation to restrict the political activity of non-nationals allowed under Article 16 of the Convention; see *Piermont v. France*, Application Nos. 15773/89 and 15774/89, 27 April 1995. It would thus be hard to justify a bar on political activity in the non-party context and impossible to do so for one where no politics was involved at all (for example, in the field of sport and culture).

57. It is possible that a prohibition on involvement in NGOs might be a legitimate consequence of having committed certain offences but its scope and duration must always respect the principle of proportionality (see *X v. The Netherlands*, Application No. 6573/74, 1 DR 87 (1974)) and a ban on membership as an automatic consequence of imprisonment would never be justified.

58. The essence of freedom of association is that individuals should be free to choose with whom they associate, so the law should not normally enable someone to join an NGO against the wishes of its members. However, there would be a good justification for constraining the freedom of members of an association to determine whom to admit as new members where this was done in order to fulfil obligations to prevent discrimination on any inadmissible ground and thereby protect the rights of others, as permitted by Article 11, paragraph 2, of the Convention.

Paragraph 23

59. As with admission, the expulsion of someone from a membership-based NGO is generally a matter for the organisation itself. However, the rules governing membership in its statute must always be observed and

national law should thus ensure that someone facing expulsion or who has been expelled has available an effective means of insisting on such observance; see *Cheall v. United Kingdom*, Application No. 10550/83, 42 DR 178 (1985). Moreover the rules governing expulsion should not be wholly unreasonable or arbitrary; in particular there should be a fair hearing before any decision is taken.

Paragraph 24

60. Improper sanctions should not be imposed on persons merely because of their membership of an NGO. Thus there should be a remedy for anyone dismissed because he or she belongs to a trade union (see *Frederiksen v. Denmark*, Application No. 12719/87, 56 DR 237 (1988)) or because of the objectives of any other organisation to which they belong (see *Vogt v. Germany* [GC], Application No. 17851/91, 26 September 1995).

61. Similarly there ought to be protection for any other forms of sanction or pressures not to belong to an NGO, such as the loss of eligibility for certain benefits or posts; see *Grande Oriente D'Italia di Palazzo Giustiniani v. Italy*, Application No. 35972/97, 2 August 2001, and *Wilson, National Union of Journalists and Others v. United Kingdom*, Application Nos. 30668/96, 30671/96 and 30678/96, 2 July 2002.

62. There is also a need to provide protection against even more aggressive forms of action taken against persons on account of their membership of an NGO, namely, harassment, intimidation and the use of violence. However, some sanctions will be admissible where membership of an NGO is clearly incompatible with the performance of either a person's responsibilities as an employee or office-holder (see *Van der Heijden v. The Netherlands*, Application No. 11002/84, 41 DR 264 (1985)) or of other obligations that have been undertaken (such as where there is a conflict of interest between the interests of two organisations to which a person belongs).

63. The risk of incompatibility where the member is a public employee is expressly recognised in the stipulation in Article 11, paragraph 2, of the Convention that the guarantee of freedom of association does not "prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state". However, as with any other conflict of interest, the existence of such an incompatibility must be demonstrated by direct evidence and should not thus be a matter of supposition. Moreover the restrictions must always have

a basis in law and respect the principle of proportionality; see the *Vogt* case, *Ahmed and Others v. United Kingdom* [GC], Application No. 22954/93, 2 September 1998 and *Rekvényi v. Hungary* [GC], Application No. 25390/94, 20 May 1999. Furthermore those regarded as belonging to the administration of the state should be seen as covering only higher-ranking officials and not all employees paid out of public funds; see the *Vogt* and *Grande Oriente* cases.

Paragraph 25

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

IV. Legal personality

A. General

Paragraph 26

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

Paragraph 27

66. It follows from the fact that an NGO has a distinct personality from that of its founders and members that, in the event of a merger of two or more

existing organisations, it is the new organisation that is created that succeeds to their rights and liabilities.

B. Acquisition of legal personality

Paragraph 28

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

Paragraph 29

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

Paragraph 30

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

Paragraph 31

70. In order to ensure that those seeking to establish NGOs are not unduly burdened and that any decision-making process is appropriately focused,

the only information that should need to be filed with an application for legal personality is the statutes, the address of the NGO and the details needed to identify the persons concerned.

71. In the case of non-membership-based NGOs, which are likely to require some form of funding or property before they can pursue their objectives, there could be an additional requirement of demonstrating that such funding or property is available so that entities that will never operate cannot be created. However, it is not essential that there be such a requirement, particularly as the circumstances in a particular country may be such that the acquisition of the necessary funding or property is dependent upon the intended recipient first obtaining legal personality.

Paragraph 32

72. The requirement that the members of a membership-based NGO should first adopt a resolution in favour of acquiring legal personality is a reflection of the fact that they are its highest governing body. In order for the members to have an opportunity to take part in such an important decision, the invitation to the meeting at which such a resolution is to be adopted must be one that gives them a reasonable prospect of attending – two weeks' notice might be appropriate for this purpose – but not every member can be expected to attend and the use of proxies should be permitted.

73. Proof that the necessary meeting has been held could be provided by a copy of the invitation, evidence of how the invitation to attend was communicated, a record of the proceedings and the signatures of those attending, as well as any authorisations for proxies.

Paragraph 33

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

Paragraph 34

75. The grounds stipulated for refusal of legal personality reflect the only considerations relevant for such a decision. With regard to names belonging

to another organisation or which are confusing, see *Apeh Üldözötteinek Szövetsége and Others v. Hungary*, Application No. 32367/96, 31 August 1999, and with regard to inadmissible objectives, see *Metropolitan Church of Bessarabia and Others v. Moldova*, Application No. 45701/99, 13 December 2001. This underlines the structured nature of the discretion that must be established by national law.

Paragraph 35

76. The case law of the Court demonstrates the real risk of authorities being too ready to assume the worst about the objectives of an NGO; see, for example, *United Communist Party of Turkey and Others v. Turkey*, Application No. 19392/92, 30 January 1998 and *Sidiropoulos and Others v. Greece*, Application No. 26695/95, 10 July 1998. As the Court has established, it is particularly difficult to draw adverse conclusions about broadly framed objectives where an NGO has yet to undertake activities which demonstrate a commitment to the pursuit of inadmissible objectives.

77. It is not appropriate to rely on suspicions or to draw conclusions simply from the use of certain terms in a statement of objectives. While an NGO's stated aims might conceal certain inadmissible objectives and intentions, this is likely to be demonstrated only by concrete action and not in an application for legal personality. Although past behaviour might give some indication as to the way in which someone will behave in the future, there will be a need for significant corroboration that a risk exists before such personality could be legitimately refused.

78. Furthermore, the importance of political pluralism in a democracy means that the establishment of NGOs with objectives that challenge the established order must be permitted unless there is compelling evidence that they will be pursued in a manner that is anti-democratic, and this cannot be assumed simply because change is being proposed; see *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

Paragraph 36

79. Although in some countries the responsibility for decisions relating to the grant of legal personality to NGOs is vested in courts, this is not an essential means of ensuring that the process is not affected by political considerations. It is sufficient that the body with this responsibility is

genuinely independent not only of an executive elected or chosen as part of the political process, but also of any other entity whose interests might be affected by the coming into being of a new NGO; see *Metropolitan Church of Bessarabia and Others v. Moldova*, Application No. 45701/99, 13 December 2001.

80. The body concerned may thus be an administrative one but, whatever its formal status, it is essential that it have an appropriate level of staff to ensure that the requirement of expeditious decision making is fulfilled and that those staff be persons who are suitably qualified and trained for the task expected of them.

Paragraph 37

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

Paragraph 38

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

Paragraph 39

83. The separation of decision making with regard to the grant of legal personality from decision making with regard to the grant of financial or

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

Paragraph 40

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

Paragraph 41

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

C. Branches; changes to statutes

Paragraph 42

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

Paragraph 43

87. Approval for a change in the statutes of an NGO should only be required where this concerns a matter that might be the basis for a refusal to grant legal personality (see paragraph 34 of the recommendation). However, the legitimate interest of members of the public in being able to verify the content of the statute of an NGO with which they have dealings would justify a requirement that other changes are notified prior to their coming into force. Therefore, a member state may require that a change in the statutes must be entered in the register before it can be applied. This requirement may be necessary for members, those intending to join as members and creditors, bodies granting subsidies, authorities and other contact groups.

88. Although seeking approval for a change should be governed by the procedure already set out with respect to the initial grant of legal personality, the grant of approval should not involve the NGO concerned first having to establish itself as an entirely new entity. The term “approval” for the purpose of this paragraph does not cover any involvement of a lawyer or notary in preparing the change to the statutes.

D. Termination of legal personality

Paragraph 44

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

E. Foreign NGOs

Paragraph 45

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

V. Management

Paragraph 46

91. In a membership-based NGO the members should ultimately determine who carries out its management. While in some cases they might decide this directly, they should be free to delegate the task to an intermediary body. This may be especially desirable where the membership is particularly large. Nonetheless, the status of the membership as the highest governing body must mean that any such delegation cannot be irrevocable.

92. In the case of a non-membership-based NGO the statutes do not have to protect the rights of members and are thus not subject to any particular limitations regarding the choice of management.

Paragraph 47

93. Although the decision-making process of an NGO must always comply with the requirements of its statutes, the limited requirements as to what these must contain and the principle of self-regulation (see paragraphs 1 and 67 of the recommendation) mean that there should be no other con-

straints on how they decide to pursue their objectives and manage the organisation.

94. Thus the NGO should be free to adopt organisational arrangements that it considers appropriate and to change them as and when it considers this to be necessary. Such internal matters should not require the approval of anyone outside the organisation concerned.

95. The freedom that NGOs ought to have with respect to decision making should not, however, lead their management to ignore the wide range of persons with a legitimate interest in the way in which the organisations concerned conduct themselves. The taking into account of these interests will require the use of a number of different techniques – notably consultation and reporting – and their precise form and scope will vary according to the character of the interest in question.

Paragraph 48

96. The freedom of NGOs to determine the arrangements for pursuing their objectives also extends to the choice of officers and the admission and exclusion of members.

97. It is possible that, as with the ability to form an NGO (see paragraph 30 of the recommendation), a prohibition on acting as an officer in an NGO might be a legitimate consequence of committing certain offences. In all cases the scope of such restrictions would need to be clearly connected with the activities constituting the offences and their duration should also not be disproportionate.

98. The freedom of NGOs to determine the admission or exclusion of members is subject to the prohibition on discrimination and the right to be protected against arbitrary exclusion.

Paragraph 49

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

VI. Fundraising, property and public support

A. Fundraising

Paragraph 50

100. The ability of NGOs to solicit donations in cash or in kind will, notwithstanding the possibility of them also engaging in some economic activity, always be a crucial means for them to raise the funds required in order to pursue their objectives. It is important that the widest range of possible donors can be approached by NGOs.

101. The only limitation on donations coming from outside the country should be the generally applicable law on customs, foreign exchange and money laundering, as well as those on the funding of elections and political parties. Such donations should not be subject to any other form of taxation or to any special reporting obligation.

B. Property

Paragraph 51

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

Paragraph 52

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

Paragraph 53

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

Paragraph 54

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

Paragraph 55

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

Paragraph 56

107. National law should permit an NGO to designate, whether in its statutes or by resolution of its highest governing body, another NGO to receive its assets in the event of its termination. This should, however, only apply to assets left after all the liabilities of the NGO being terminated have been met and this would include the fulfilment of a condition on donations that funds unspent on the purpose for which they were given should either be returned to the donor or transferred to an NGO specified by the donor.

108. The freedom otherwise left to the NGO to determine who should succeed to its assets will, however, be subject to the prohibition on distributing any profits that it may have made to its members (see paragraph 9 of the recommendation) and may also be restricted by an obligation to transfer assets obtained with the assistance of tax exemptions or other public benefits to other NGOs pursuing objectives for which such exemptions or benefits are granted. In addition, an NGO whose objectives or activities have been found to be inadmissible for reasons set out in paragraph 11 of the recommendation should not have any right to determine the successor to its assets, but these should instead be applied by the state for public purposes.

C. Public support

Paragraph 57

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

Paragraph 58

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

Paragraph 59

111. In deciding whether to grant public support, or particular forms of it, to an NGO or a certain category of NGO, it will be appropriate to take into account the nature and beneficiaries of any activities undertaken by such

an organisation or category of organisation, and thereby establish whether they address those needs of society considered to be a particular priority. What is seen as a priority and thus what forms of activity are regarded as worthy of public support can change over the course of time.

Paragraph 60

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

Paragraph 61

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

VII. Accountability

A. Transparency

Paragraph 62

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

Paragraph 63

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

Paragraph 64

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

Paragraph 65

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

Paragraph 66

118. Although there is no reason to differentiate between foreign and other NGOs as regards the applicability of reporting and inspection requirements,

it is only appropriate to subject foreign NGOs to them in respect of the activities that they actually carry out in the host country.

B. Supervision

Paragraph 67

119. The best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation in this sector at national and international level. Responsible NGOs are certainly conscious of the fact that their success depends to a large extent on public opinion with regard to their efficiency and ethics. Nonetheless, states have a legitimate interest in regulating NGOs so as to guarantee respect for the rights of third parties (whether donors, employees or members or the public) and to ensure the proper use of public resources and respect for the law.

120. In most instances the interests of third parties can be adequately protected by enabling them to bring the relevant matter before the courts; there should generally be no need for a public body to take any other action on their behalf.

121. Whatever the form of regulatory control employed, it is essential that it be governed by objective criteria and be subject to the principle of proportionality so that its exercise can be amenable to control by the courts. It is also vital that public authorities, in supervising the activities of NGOs, apply the same assumption that holds good for individuals, namely that their activities are lawful unless the contrary is proved.

Paragraph 68

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

Paragraph 69

123. This provision requires that NGOs should have the benefit of the guarantees applicable to the search of persons and premises under Article 8 of the Convention; see, for example, *Funke v. France*, Application No. 10828/84, 25 February 1993.

124. Judicial authorisation should normally be obtained prior to any such search taking place, but this can be dispensed with where the power is subject to both very strict limits and subsequent judicial control, providing a sufficient guarantee against arbitrary interference with the right to respect for private life; see *Camenzind v. Switzerland*, Application No. 21353/93, 16 December 1997.

Paragraph 70

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

Paragraph 71

126. The possibility of seeking suspension of administrative action is something expected of all administrative law systems – see Recommendation CM/Rec(2003)16 of the Committee of Ministers on the execution of administrative and judicial decisions in the field of administrative law – but it is especially important that this is available in respect of directions to an NGO to desist from particular activities, as these are often tied to particular moments in time and so could not usefully be undertaken at a later date, after a challenge to the directions has been successfully pursued.

127. Although there may be good reasons in a particular case for refusing suspension of an order to desist from certain activities or of any other measure taken in respect of an NGO, the significance of so doing is such that there should then be the possibility of this being subjected to a prompt judicial challenge.

Paragraph 72

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

Paragraph 73

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

Paragraph 74

130. The need to respect the principle of proportionality should mean that resort to the sanction of enforced termination of an NGO for the reasons set out in paragraph 44 of the recommendation should be very rare. An extremely well-founded basis for such drastic action as enforced termination is essential; see *United Communist Party of Turkey and Others v. Turkey*, Application No. 19392/92, 30 January 1998, *Socialist Party and Others v. Turkey* [GC], Application No. 21237/93, 25 May 1998, and *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

131. Moreover, in making any assessment about the need for enforced termination it will be important to be sure that the reprehensible activities of members and even office-holders of an NGO can justifiably be regarded as engaging the responsibility of the latter; see *Dicle for the Democratic Party (DEP) v. Turkey*, Application No. 25141/94, 10 December 2002.

132. Where enforced termination does appear to be justified, it is a measure that must be adopted by a court and should be subject to appeal. Only in the most exceptional cases should the effect of a termination ruling not be suspended until the outcome of an appeal (see the contribution of the absence of such a possibility to the measure being found to be disproportionate in the *United Communist Party* and *Socialist Party* cases).

C. Liability

Paragraph 75

133. The principles set out in this provision are a necessary consequence of the legal personality of an NGO. Such personality confers on it a separate existence from its members and founders and it should normally, therefore, be the only one liable for its debts, liabilities and obligations. However, legal personality cannot operate as a barrier to liability on the part of an NGO's members, founders and staff for any professional misconduct or neglect of duties with regard to its functioning that affects the rights or other legal interests of third parties.

134. In some countries it is possible to choose to establish an NGO with legal personality where the officers can be held personally liable for the NGO's debts, liabilities and obligations (for example, informal associations in the Netherlands).

VIII. Participation in decision making

Paragraph 76

135. Notwithstanding the different perspective of NGOs and public authorities, it is in their common interest, and that of society as a whole, for them to have available effective mechanisms for consultation and dialogue so that their expertise is fully exploited. Certainly competent and responsible input by NGOs to the process of public policy formulation can contribute greatly to efforts to find solutions to the many problems that need to be addressed.

136. Although direct consultation and dialogue with all interested NGOs may not be feasible in every instance, the adoption of techniques to facilitate their input through bodies playing a co-ordinating role should be encouraged.

137. No NGO should be excluded from participation on a discriminatory basis and the expression of a diversity of views should be ensured.

138. The quality of the input of NGOs should not be undermined by inappropriate restrictions on access to official information.

Paragraph 77

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

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This recommendation covers the creation, functioning and activities of non-governmental organisations (NGOs). It underlines their role in every democratic society and aims at strengthening the legal framework for civil society in Europe.

The recommendation's basic principles, applicable to NGOs, mirror and build upon the interpretation of the guarantees of human rights and fundamental freedoms set out in the case law of the European Court of Human Rights.

This text, which represents considerable progress in the promotion of the activities of NGOs, places an emphasis on their legal and fiscal framework. It deals in particular with NGOs' objectives and activities, their legal personality, their obligations and responsibilities as well as cases of public support.

Aimed at lawmakers, national authorities and the NGOs themselves, the goal of the recommendation is to be incorporated into member states' legislation and practices.



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