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**OPINION ON THE COMPATIBILITY OF AMENDMENTS TO THE CROATIA LAW ON  
ASSOCIATIONS AND THE LAW ON FOUNDATIONS WITH EUROPEAN STANDARDS**

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## EXECUTIVE SUMMARY

*This opinion is concerned with the compatibility of the 2022 amendments to the Croatia Law on Associations and the Law on Foundations with European standards governing freedom of association, and more broadly establishment and internal governance of NGOs.*

*The amendments give rise to a number of procedural and substantial issues as regards their compatibility with European standards.*

*As for the procedural issues, the lack of risk analysis and ex-ante impact assessment has prevented consideration of more targeted, proportionate and evidence-based measures that would have been better suited to serve the general and specific objectives being pursued, as well as of the feasibility of addressing the necessary legal measures targeting private legal persons in one piece of legislation - the Law on Combating Money Laundering and Terrorism Financing - whose revisions were also envisaged by the Government.*

*In addition, the lack of proper public consultation has prevented the public from contributing meaningfully to the process of drafting the amendments.*

*As for the substantive issues, the new restrictions imposed on the founders and legal representatives of an association and a foundation, as well as on members of a foundation's governing board, are problematic from the perspective of complying with the prescribed by law and proportionality requirements, and give the public authority a great deal of unwarranted discretionary power in the process of registration and supervision of NGOs. The same pertains to the new disclosure requirements imposed on NGOs.*

*In addition, the fines that can be levied on associations and foundations and their legal representatives for the breach of the newly imposed restrictions are also problematic as regards their proportionality, especially given the problems of the compatibility of the new restrictions with the prescribed by law requirement.*

*Overall, the newly-imposed restrictions on associations and foundations will increase the costs of the implementation of the Law on Associations and the Law on Foundations, and place additional and unnecessary burdens on NGOs in the process of registration—and depending on their implementation—may impose a grave financial burden on those NGOs that are fined.*

## A. Introduction

1. This opinion examines the compatibility of amendments ('the Amendments') to the Croatian Law on Associations ('the Associations Law')<sup>1</sup> and the Law on Foundations ('the Foundations Law')<sup>2</sup> with European standards governing freedom of association—and more broadly—establishment and internal governance of non-governmental organisations.
2. In particular, it examines the Amendments with respect to the requirements set out in the European Convention on Human Rights ('the ECHR') and the ensuing case law of the European Court of Human Rights ('the ECtHR'), Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe ('Recommendation CM/Rec(2007)14') and the Joint Guidelines on Freedom of Association of the European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights ('the Joint Guidelines'). The opinion also takes into due consideration the Financial Action Task Force ('FATF') Recommendations as they impact on 'non-profit organisations' ('NPOs').<sup>3</sup>
3. The opinion does not provide for a detailed account of the Amendments, but rather addresses some of the most problematic provisions which aptly reflect the ongoing challenges with the implementation of the MONEYVAL and FATF recommendations by the Member States as they pertain to NGOs. It was prepared against the background of the 2022 thematic study of the Expert Council on NGO Law which discusses those challenges at some length.<sup>4</sup>
4. The opinion first presents the background which led to the enactment of the Amendments. Thereafter, it outlines the overall scope of the amendments and presents some of the most critical issues addressed therein. Then it proceeds with consideration of their compatibility with European standards—both in terms of the process of their

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<sup>1</sup> "Official Gazette", No. 74/14, 70/17, 98/19, 151/22.

<sup>2</sup> "Official Gazette", No. 151/2022, dated December 22, 2022.

<sup>3</sup> Pursuant to FATF Recommendation 8, the term 'non-profit organisations' ('NPOs') refers to "legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of good works." (Interpretative Note to Recommendation 8, para. 1). Thus, it does not entail NGOs whose objectives are not linked to charitable services and assistance to those in need. FATF is the global money laundering and terrorist financing inter-governmental watchdog composed of 39-members which sets international standards to ensure national authorities can effectively go after illicit funds linked to drugs trafficking, the illicit arms trade, cyber fraud and other serious crimes. In total, more than 200 countries and jurisdictions have committed to implement the FATF's standards and recommendations, <https://www.fatf-gafi.org/en/the-fatf/who-we-are.html>

<sup>4</sup> Expert Council on NGO Law, *Non-Governmental Organisations and the Implementation of Measures Against Terrorism Financing and Money Laundering*, Thematic Study, CONF/EXP (2022)2, 17 May, 2022, Strasbourg. Among others, the study highlights the perceived challenges associated with the MONEYVAL and FATF evaluation compliance process as it impacts on NGOs, paras. 48-71, <https://rm.coe.int/expert-council-moneyval-study-17-05-2022-en/1680a68923>

enactment as well as substance. Key challenges the implementation of the amendments is likely to pose in light of European standards governing freedom of association and the establishment and internal governance of NGOs are summarised in the conclusion.

5. The term ‘non-governmental organisations’ (‘NGOs’) in the Opinion refers to that in Recommendation CM/Rec(2007)14, paras. 1-2, namely, “voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members”, which can be established both by individual persons (natural or legal) and by groups of such persons, and can be either membership or non-membership based—and which do not include political parties. This all-encompassing definition of NGOs thus includes both *associations* and *foundations*.

## B. Background to the Amendments

6. The Amendments were envisaged in the Government’s *Action Plan for Strengthening the Efficiency of the System of Combating Money Laundering and Financing Terrorism* (‘the Action Plan’).<sup>5</sup> The latter was developed with a view of addressing recommendations put forward in the Evaluation Report prepared by the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (‘MONEYVAL’),<sup>6</sup> following the fifth round of evaluation of the overall preparedness of Croatia to combat money laundering and terrorist activities.<sup>7</sup>
7. The general objective of the Amendments is to strengthen the overall legal regime combating the abuse of NGOs and other private legal persons for illicit purposes, as well as strengthen the regime of transparency of data pertinent to their registration and internal governance.<sup>8</sup> In this respect the Evaluation Report notes that:

mechanisms should be introduced by Croatia to ensure: (i) verification of all information provided at the stage of registration of a legal person; (ii) prevention of criminals (money laundering, predicate offences and terrorism financing) from acting as a shareholder, Beneficial Owner (‘BO’), or manager of a legal person, introducing a requirement for verification of criminal background of these persons,

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<sup>5</sup> “Official Gazette”, No. 56/2022, Chapter 5. *Prevention of the abuse of legal entities for illicit purposes and transparency of data related to legal persons*, Measure 5.2, Action Plan

<sup>6</sup> MONEYVAL is a permanent monitoring body of the Council of Europe entrusted with the task of assessing compliance with FATF Recommendations to counter money laundering and the financing of terrorism and the effectiveness of their implementation, as well as with the task of making recommendations to national authorities in respect of necessary improvements to their systems. Through a dynamic process of mutual evaluations, peer review and regular follow-up of its reports, MONEYVAL aims to improve the capacities of national authorities to fight money laundering and the financing of terrorism more effectively. More details available on the MONEYVAL home page, <https://www.coe.int/en/web/moneyval>

<sup>7</sup> MONEYVAL (2021)24, *Anti-money laundering and counter-terrorist financing measures: Croatia*, Fifth Round Mutual Evaluation Report, December 2021 (Evaluation Report), <https://rm.coe.int/moneyval-2021-24-mer-hr-en/1680a56562>. See also the Action Plan, p. 1.

<sup>8</sup> Action Plan, Chapter 5, Explanatory Note to the Amendments to the Law on Associations, p. 1. Explanatory Note to the Amendments to the Law on Foundations, p. 1

including implementation of the targeted financial sanctions ('TFS') of the United Nations; (iii) introduction of an ongoing monitoring mechanism for ensuring timely detection and registration of changes to basic and BO information, (iv) implementation of a mechanism for supervision to ensure the accuracy and timely update of information; and (v) imposition of effective, proportionate and dissuasive sanctions for failure to comply with the information requirements, and compiling and maintain statistics on application of sanctions. This should be followed by assignment of clear responsibilities for authorities with supervisory function, allocation of adequate resources, and regular supervision.<sup>9</sup>

8. These recommendations are *in verbum* incorporated in Chapter 5 of the Action Plan and its corresponding specific objectives (i)-(v), which also envisage amendments to the Company Law and the Law on Institutions.<sup>10</sup>
9. The *Action Plan* also envisaged the conduct of in-depth and comprehensive risk assessment analysis of the non-profit sector in participatory process, in order to determine the type of NPOs which, based on their activities, might be particularly vulnerable for abuse for the purpose of financing terrorism, in accordance with the target-based approach.<sup>11</sup> This was in response to the Evaluation Report's recommendation that Croatia should:

conduct an in-depth and comprehensive risk assessment of the NPO sector, with involvement of all relevant stakeholders and representatives of NPOs, to identify the subset of NPOs that may be vulnerable to terrorism financing ('TF') abuse by virtue of their activities. Provide targeted outreach to NPOs and the donor community on potential vulnerabilities of NPOs to TF, as well as develop and implement a risk-based approach to NPO sector monitoring, provide sufficient supervisory resources and ensure termination of inactive NPOs.<sup>12</sup>

10. Regarding the risk assessment, the MONEYVAL Evaluation Report noted that two national risk assessments were carried out in 2016 and 2020 respectively, without identifying the subset of NPOs that fall under the FATF definition of NPOs and are likely to be exposed to the risk of terrorism finance abuse. This was considered to have "affected the implementation of the targeted measures towards the sector and led to the lack of risk-based monitoring", rendering the measures taken for the implementation of the United Nations' terrorism financing sanctions ('TFS') and prevention of the abuse of NPOs for terrorism financing purposes "not deemed adequate as they are affected by the limited overall understanding of the terrorism finance risks in the country, as demonstrated by authorities".<sup>13</sup>
11. The Evaluation Report also noted that a general anti-money laundering and counter financing terrorism ('AML/CFT') outreach was conducted to the non-profit sector, but not on the sector vulnerabilities for terrorism financing and not reaching out to the donor

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<sup>9</sup> Evaluation Report, Immediate Outcome 5, b), p. 181.

<sup>10</sup> Action Plan. Measures 5.1.-5.2.

<sup>11</sup> Action Plan, Measure 1.5.

<sup>12</sup> Evaluation Report, Immediate Outcome 10, b), p. 104.

<sup>13</sup> Evaluation Report, p. 103.

community, and that “NPOs demonstrated no awareness that they could be abused for terrorism financing purposes”.<sup>14</sup>

12. The Amendments were enacted by Parliament under the urgent procedure, following a 15-day period of public consultation.<sup>15</sup>

### C. The Amendments

13. The Amendments bring about a number of changes, and most notably: envisage specific restriction for natural persons who have committed criminal offences related to money laundering and financing of terrorism on their right to be founders of an association and a foundation—and in case of an association dealing directly with children, impose the same restriction on natural persons who have committed criminal offences related to children’s sexual abuse and molesting;<sup>16</sup> envisage restrictions for natural persons who have committed criminal offences related to money laundering and financing of terrorism, as well as criminal offences related to other broadly defined financial matters,<sup>17</sup> as regards their capacity to serve as legal representatives and liquidators of an association, legal representatives and members of the governing board of a foundation—and in case of an association dealing directly with children, impose the same restrictions on persons who have committed criminal offences related to the sexual abuse and molesting of the children;<sup>18</sup> prescribe additional disclosure requirements for associations, foundations and branch offices of foreign NGOs in the process of registration;<sup>19</sup> prescribe measures an association and a foundation and a branch office of a foreign NGO must take in case their founder and a legal representative is a person who has committed any of the criminal offences referenced in the Amendments;<sup>20</sup> clarify and expend the oversight duty of registration and supervisory authority;<sup>21</sup> and levy fines on an association and a foundation and their legal representatives for the violation of the newly introduced restrictions and obligations.<sup>22</sup>

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<sup>14</sup> Evaluation Report, pp. 103, Chapter, 4.3.2., pp. 117-122.

<sup>15</sup> <https://www.sabor.hr/hr/prijedlog-zakona-o-izmjename-i-dopunama-zakona-o-udrugama-s-konacnim-prijedlogom-zakona-hitni>

<sup>16</sup> Article 1 of the Amendments (both the Associations Law and the Foundations Law).

<sup>17</sup> This *inter alia* includes the abuse of trust and fraud committed in commercial dealings, engineering liquidation of a legal person, unduly favouring creditors, and violation of book-keeping rules; Articles 1 and 2 of the Amendments (respectively the Foundations Law and the Associations Law).

<sup>18</sup> Articles 2 and 3 of the Amendments (respectively the Associations Law and the Foundations Law).

<sup>19</sup> Articles 3 and 7 of the Amendments in respect of the Associations Law and Articles 1 and 5 of the Amendments in respect of the Foundations Law.

<sup>20</sup> Articles 3 and 8 of the Amendments (respectively the Foundations Law and the Associations Law).

<sup>21</sup> Articles 3, 24a, 24b, 10 and 11 of the Amendments (the Associations Law) and Articles 2, 4, 24b, 24c, and 8 of the Amendments (the Foundations Law).

<sup>22</sup> Article 54a of the Amendments (the Associations Law) and Article 46a of the Amendments (the Foundations Law).

14. This opinion focuses on the Amendments governing the new restrictions for the founders and legal representatives of NGOs—and in case of a foundation, members of its governing board, the additional disclosure requirements imposed on NGOs, and fines levied on NGOs for misdemeanours, as those give rise to the issue of their compatibility with European standards, in particular.

### ***Amendments to the Associations Law***

#### ***(i) Restrictions imposed on founders***

15. Article 1 of the Amendments introduces two additional paragraphs into Article 11 of the Associations Law—paras. (7) and (8) respectively - which read as follows:

(7) A founder of an association may not be a person who is:

1. having exhausted available legal remedies to appeal, rightfully convicted for a criminal offence related to terrorism financing or money laundering for the period for which the final judgment renders legal ramifications, as well as a person who is subject to international measures limiting his or her ability to dispose of his or her assets, during the period of enforcement of that measure;
2. having exhausted available legal remedies to appeal, rightfully convicted for a criminal offence by a third state, the key features of which materially correspond to criminal offences referenced in item 1 of this paragraph.

(8) A founder of an association which is in direct contact with children may not be a person who is, having exhausted available legal remedies to appeal, rightfully convicted for a criminal offence related to the sexual abuse and exploitation of children, pursuant to a law governing criminal offences and sanctions.

#### ***(ii) Restrictions imposed on a legal representative of an association***

16. Article 2 of the amendments inserts into Article 19 of the Associations Law two additional paragraphs—paras. (2) and (3), which read as follows:

(2) A legal representative of an association may not be a person who is:

1. having exhausted available legal remedies to appeal, rightfully convicted for a criminal offence related to terrorism financing or money laundering for the period for which the final judgment renders legal ramifications, as well as a person who is subject to international measures limiting his or her ability to dispose of his or her assets, during the period of enforcement of those measure;
2. having exhausted available legal remedies to appeal, rightfully convicted for a criminal offence by a third state, the key features of which materially correspond to criminal offences referenced in item 1 of this paragraph.



(3) A legal representative of an association which is in direct contact with children may not be a person who is, having exhausted available legal remedies to appeal, rightfully convicted for a criminal offence related to the sexual abuse and exploitation of children, pursuant to a law governing criminal offences and sanctions.

(iii) Additional disclosure requirement imposed on an association

17. Article 4 of the Amendments introduces two additional items into Article 23 of the Law— items 8 and 9 - which provide that a request (application) for entering into the Registry of Association (Registry) shall be accompanied with:

8. statements of founders, in the form of a public notary document, confirming that restrictions set out in Art. 11 paras. (7) and (8) of the Law do not apply to them;

9. statements of a legal representative and a liquidator, in the form of a public notary document, confirming that restrictions set out in Art. 19, paras. (2) and (3) of the Law do not apply to them.

(iv) Fines levied on an association and its legal representative for misdemeanour

18. Article 54.a, par (3) of the Amendments prescribes fines ranging from 3000 to 5000 Euros levied on an association which does not comply with the requirements set out in Article 19, paras (2) and (3) and fails to file with the registration authority a request for changes of data entered into the Registry as regards its legal representative within the deadline set by the supervisory authority.

19. Fines ranging from 500 to 3000 Euros are also levied on a legal representative of an association for the same misdemeanour.<sup>23</sup>

**Amendments to the Foundations Law**

(i) Restrictions imposed on founders

20. Article 1 of the Amendments stipulates a new paragraph in Article 15 of the Foundations Law - para. (3) - which is a replica of Article 11, para. (7) of the Associations Law and reads as follows:

(3) A founder of a foundation may not be a person who:

1. having exhausted available legal remedies to appeal, is rightfully convicted for a criminal offence related to terrorism financing or money laundering, for the period for which this conviction renders legal ramifications, as well as a person who is subject to international measures limiting his or her ability to dispose of his or her assets, during the period of enforcement of those measure;

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<sup>23</sup> Article 54.a, para. (4).

2. having exhausted available legal remedies to appeal, is rightfully convicted for a criminal offence of a third state, the key features of which materially correspond to criminal offences referenced in item 1 of this paragraph.

(ii) Restrictions imposed on a legal representative and a member of the board of a foundation

21. Article 1 of the Amendments introduces a new paragraph into Article 15 of the Foundations Law - para. (4) - which imposes the same foregoing restrictions on a legal representative and a member of the governing board and reads as follow:

(4) A legal representative and a member of the governing board may not be a person who:

1. having exhausted available legal remedies to appeal, is rightfully convicted for a criminal offence related to terrorism financing or money laundering, for the period for which this conviction renders legal ramifications, as well as a person who is subject to international measures limiting his or her ability to dispose of his or her assets, during the period of enforcement of those measure;
2. having exhausted available legal remedies to appeal, is rightfully convicted for a criminal offence of a third state, the key features of which materially correspond to criminal offences referenced in item 1 of this paragraph.

(iii) Additional disclosure requirement imposed on a foundation

22. Article 1 of the Amendments introduces a new paragraph into Article 15 of the Foundations Law - para. (5) - which provides that a request for entering into the Registry of Foundations (Registry) shall be accompanied with statements of a founder, a legal representative and a member of the management board, in the form of a public notary document, confirming that restrictions set out in Article 15, paras (3) and (4) of the Foundations Law do not apply to them.

(iv) Fines levied on a foundation and its legal representative for misdemeanour

23. Article 56.a, par (7) of the Amendments prescribes fines ranging from 3000 to 5000 Euros levied on a foundation which does not comply with the requirements set out in Article 15, par (4) of the Foundations Law and fails to file with the registration authority a request for changes of data entered into the Registry as regards its legal representative and a member of the board within the deadline set by the supervisory authority.<sup>24</sup>

24. Fines ranging from 500 to 3000 Euros can also be levied on a legal representative of a foundation for the same misdemeanour.<sup>25</sup>

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<sup>24</sup> Article 39, paras (5) and 9.

<sup>25</sup> Article 54.a, para. (4).

## D. Compliance of the Amendments with European standards

### (i) *Lack of risk and ex-ante impact assessment*

25. Although the *Action Plan* envisaged the conduct of in-depth and comprehensive risk assessment analysis of the non-profit sector in participatory process and pursuing a target-based approach—in order to determine the type of NGOs which based on their activities might be particularly vulnerable for abuse for the purpose of financing terrorism<sup>26</sup>—the Amendments were nonetheless enacted without the prior conduct of the risk assessment. This seems particularly problematic given that the national risk assessments carried out in 2016 and 2020 failed to identify the subset of NGOs that fall under the FATF definition of NPOs that are likely to be exposed to the risk of terrorism finance abuse.
26. In addition, the *Law on Impact Assessment* (‘the Impact Assessment Law’)<sup>27</sup> stipulates that impact assessment of a planned legislative measure (law, implementing regulation) shall be conducted and shall include assessment of direct impact of the measure on the regime of human rights guaranteed by the Constitution.<sup>28</sup> This obligation is consistent with the underlying goal of the impact assessment, which is to ensure *inter alia* that the rule of law and regime of human rights are strengthened, rather than weakened, by the introduction of a new legislation.<sup>29</sup>
27. Furthermore, the Impact Assessment Law specifically provides that the *overall* direct impact of the planned measure on *associations* and *foundations* must be assessed: this shall entail not only assessment of the impact on human rights afforded to NGOs, but also the economic, social market and labour, environmental and economic competition impact.<sup>30</sup>
28. The Impact Assessment Law provides for an exhaustive list of exceptions from an obligation to conduct impact assessment, which include *inter alia* ratification of international treaties and implementation of regulations and other mandatory legal acts

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<sup>26</sup> Action Plan, Measure 1.5; deadline: last quarter 2022.

<sup>27</sup> “Official Gazette”, No. 44/17.

<sup>28</sup> Article 9, para. 2, item 5, in connection with Article 2, para. 3, and Article 12.

<sup>29</sup> Article 3, para. 1, Law. See also Article 14, para. 1 of the Law and Article 30, paras. 1-3 of the Government’s *Rule of Procedure* (“Official Gazette”, No 154/11, 121/12, 7/13., 61/15, 99/16, 57/17, 87/19, 88/20) which both provide that along with a draft law or other regulation the responsible line ministry shall submit *ex-ante* impact assessment report for the Government’s consideration. The Government shall submit *ex-ante* report to Parliament, along with a proposal of a law or other regulation (Article 14, para. 2., Law).

<sup>30</sup> Article 9, para. 3.

of the European Union.<sup>31</sup> None of the exceptions provided in the list however seemed to have been applicable to the Amendments in question.

29. In addition, in exceptional cases, instead of *ex-ante* impact assessment, the Impact Assessment Law provides that *ex-post* assessment may be conducted in the course of two years following the enactment of a law, if it is deemed necessary for the protection of interest of the Republic of Croatia, urgent response to the impending harm to the public or protection of the legitimate economic and social interests. In such cases, pending Government's approval, an obligation to conduct *ex-post* assessment shall be stipulated in the final provisions of a law.<sup>32</sup> However, neither amendments to the Associations Law nor amendments to the Foundations Law contain final provisions to that effect.<sup>33</sup>
30. Thus, it is clear that evidence-based policy is a key element of the rule of law and therefore should have been observed before imposing additional restrictions on associations and foundations.<sup>34</sup>
31. This is further underscored by the FATF *Recommendations* regarding international standards on combating money laundering and the financing of terrorism and proliferation.<sup>35</sup>
32. Thus, Recommendation No. 8—which is solely concerned with terrorist financing abuse by NPOs—stipulates that:

countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such NPOs to protect them from terrorist financing abuse.<sup>36</sup>

33. The Interpretive Note further expands on the guiding principles of Recommendation 8:

Measures to protect NPOs from potential terrorist financing abuse should be *targeted* and in line with the *risk-based approach*. It is also important for such measures to be implemented in a manner

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<sup>31</sup> Article 15, para. 1, items 1-2. In exceptional cases, an *ex-ante* impact assessment may also be conducted with respect to an international treaty pending its ratification: Article 15, paras. 2-3.

<sup>32</sup> Article 17.

<sup>33</sup> Articles 17-19 of the Amendments (Associations Law) and Articles. 13-14 of the Amendments (Foundations Law).

<sup>34</sup> See also European Commission, *Better regulation: joining forces to make better laws* (COM(2021) 219 final), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0219&from=EN>. European Commission, *Better Regulation Guidelines*, working document, Brussels, 3.11.2021 SWD(2021) 305 final; Chapter IV: Guidelines on Impact Assessment, [https://commission.europa.eu/system/files/2021-11/swd2021\\_305\\_en.pdf](https://commission.europa.eu/system/files/2021-11/swd2021_305_en.pdf).

<sup>35</sup> FATF, *Recommendations*, as amended March, 2022, Paris, <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>

<sup>36</sup> FATF, *Recommendations*, p. 11.

which respects countries' obligations under the Charter of the United Nations and *international human rights law*" (emphasis ours).<sup>37</sup>

34. Recommendation No. 8 is reflected both in the Government's *Action Plan*, the measures of which seek to further align the pertinent legal framework with the FATF Recommendations<sup>38</sup> as well as *EU Directive 2015/849* on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.<sup>39</sup> With respect to the latter, the Directive calls on Member States to align their respective measures targeting those illicit purposes with the FATF Recommendations, while ensuring that this alignment is consistent with the EU data protection law and the EU Charter of Fundamental Rights.<sup>40</sup>
35. Although the Directive does not target NGOs specifically, it requires an operational approach—that is, the risk-assessment, evidence-based decision-making, and proportionate approach, which takes into account the specific needs and the nature of the business of the entities that will be affected.<sup>41</sup>

**(ii) Lack of proper public consultation**

36. As already noted, the Amendments were enacted by Parliament under the urgent procedure following a 15-day period for public consultation, despite the fact that the *Law on Access to Information* ('the Access to Information Law')<sup>42</sup> prescribes a 30-day period for public consultation.<sup>43</sup>
37. The only exception the Access to Information Law envisages from the observance of a 30-day period has to do with situations where public consultation is organised pursuant to the regulation governing impact assessment.<sup>44</sup> However, this exception is manifestly

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<sup>37</sup> FATF, Recommendations, Interpretative Note to Recommendation 8, p. 52.

<sup>38</sup> Action Plan, p. 3.

<sup>39</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance), Official Journal of the European Union L 141/73, 5. 06. 2015.

<sup>40</sup> Directive, Preamble, paras. (4), (42), (43).

<sup>41</sup> Articles 22.-27. As regards the general scope of application of the Directive to NGOs and in particular the underlying problems associated with the application of the 'beneficial owners' concept to NGOs, see Expert Council on NGO Law, *Non-Governmental Organisations and the Implementation of Measures Against Terrorism Financing and Money Laundering*, paras. 30-47.

<sup>42</sup> "Official Gazette", no. 25/13, 85/15 I 69/22.

<sup>43</sup> Article 11, par (3).

<sup>44</sup> Article 11, par (3).

not applicable to the Amendments given that *ex-ante* impact assessment did not precede their enactment.<sup>45</sup>

38. The application of the urgent legislative procedure was justified on the ground that the deadline set out in the Action Plan for the Amendments to be enacted was the last quarter of 2022,<sup>46</sup> and due to the fact that Croatia would be joining the Euro zone as of January 1, 2023.<sup>47</sup> None of the stated grounds however seem sufficient to justify the decision on the minimum period for public consultation.
39. The 15-day period of consultation seems particularly problematic, given the lack of risk and *ex-ante* impact assessment. Both Recommendation CM/Rec(2007)14<sup>48</sup> and the Joint Guidelines<sup>49</sup> underscore that any regulation interfering with freedom of association should be adopted through a democratic, participatory, and transparent process.
40. Similarly, the *Check List on the Rule of Law* of the Venice Commission notes that an opportunity for the public to contribute meaningfully to a legislative process is one of key elements of a law-making process.<sup>50</sup>

### **(iii) Interference with freedom of association**

41. According to the ECtHR's case law, any legitimate interference with freedom of association, which is guaranteed by Article 11, para. 1. of the ECHR, must meet the

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<sup>45</sup> See 2021 *Annual Report on the Implementation of the Law on Access to Information*, prepared by the Information Commissioner, which notes the ongoing malpractice of public authorities shortening a 30-day period for public consultation (pp. 98-99). <https://pristupinfo.hr/wp-content/uploads/2022/03/1.-Izvjescje-o-provedbi-ZPPI-za-2021.pdf?x57830>

<sup>46</sup> Action Plan, Measure 5.2.

<sup>47</sup> Explanatory Note to the Amendments, para. IV

<sup>48</sup> Paragraph 77. The Explanatory Memorandum to the *Recommendation 2007(14)* further clarifies that: "it is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the law which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of the important contribution that they are able to make to democratic societies but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed" (para. 139, Explanatory Memorandum).

<sup>49</sup> Principle 9. See also Principle 8 and the Explanatory Note to the *Joint Guidelines*, para. 33., which provides that any legislation impacting on NGOs needs to be developed in a manner that is timely, free of political influence and transparent. The *Joint Guidelines* further clarifies that NGOs should be consulted in the process of introducing and implementing any regulations or practices that concern their operations (para. 106.). See also Venice Commission, *Opinion on the Law on nongovernmental organisations (Public Associations and Funds) as amended of the Republic of Azerbaijan*, CDL-AD (2014)043, 15 December 2014, para. 42.

<sup>50</sup> Venice Commission, *Rule of Law Checklist*, Strasbourg, 18 March 2016 Study No. 711 / 2013 CDL AD(2016)007, p. 13, para. 5 item iv, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

following cumulative requirements: 1) be *prescribed by law* and foreseeable;<sup>51</sup> 2) serve the *legitimate goals* set out in Article 11, para. 2;<sup>52</sup> and 3) be necessary in a “democratic society”, i.e., it must serve the “pressing social needs” (legitimate goals) and be *proportional* to the legitimate goal it purports to serve: this requires the *minimum* level of interference necessary to accomplish the legitimate goal.<sup>53</sup> Proportionality therefore requires striking a fair balance between the general interest and the requirements for the protection of fundamental rights, which is inherent in the whole of the Convention.<sup>54</sup> It is incumbent on a Member State to prove that the interference in question meets the ECtHR’s requirements.<sup>55</sup>

42. These requirements are reflected in the *Recommendation* CM/Rec(2007)14 which provides that 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”.<sup>56</sup> The same guiding principle applies to the *founders* of an association.<sup>57</sup>
43. As regards the legitimate aim, the ECtHR has ruled that restrictions imposed on freedom of association in order to combat terrorism financing and money laundering satisfy the

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<sup>51</sup> The expression “prescribed by law” requires not only that any interference with freedom of association must have a basis in domestic law, but it also refers to the *quality of the law* in question, and requires that it must be both accessible to the persons concerned and formulated with *sufficient precision* so that a *common person*, if need be with appropriate advice, can *reasonably foresee* the *consequence* of a particular action. See e.g. *Maestri v. Italy* [GC] no. 39748/98, 17 February 2004, para. 30. *Koretskyy and others v. Ukraine*, no. 40269/02, 3 April 2008, para. 47.

<sup>52</sup> Article 11(2), ECHR: “No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall 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”. The list of exceptions provided in paragraph 2 is exhaustive (*numerus clausus*) and therefore an interference with freedom of association may not serve any other legitimate aim. See *Sidiropoulos and Others v. Greece*, no. 57/1997/841/1047, 10 July 1998, para. 40. *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, no. 29221/95, 2 October 2001. *Gorzelik and Others v. Poland* [GC] no. 44158/98, 17 February 2004. *Emin and Others v. Greece*, no. 34144/05, 27 March 2008. *Tourkiki Enosi Xanthis and Others v. Greece*, application no. 26698/05, 27 March 2008.

<sup>53</sup> *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009, para. 68. *Refah Partisi (the Welfare Party) and Others v. Turkey*, [GC], 13 February 2003, para. 86.

<sup>54</sup> ECtHR, *Guide on Article 11: Freedom of assembly and association*, updated on 31 August, 2022, pp. 27-31, [https://www.echr.coe.int/Documents/Guide\\_Art\\_11\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf). See also Zvonimir Mataga, *The Right to Freedom of Association under the European Convention on the Protection of Human Rights, and Fundamental Freedom*, Strasbourg, October, 2006, <https://ecnl.org/sites/default/files/202009/Freedom%20of%20Association%20Handbook%20%28English%29.pdf>.

<sup>55</sup> See e.g. *Demir and Baykara v. Turkey*, application no. 34503/97, 12 November 2008 [GC], paras. 110, 119.

<sup>56</sup> Para. 22, Recommendation.

<sup>57</sup> The Joint Guideline, Guiding Principle 3, para. 28.

requirement for legitimate interference, insofar as they also meet the prescribed by law and proportionality requirement.<sup>58</sup>

44. In addition, it has ruled that “freedom of association with others” guaranteed by Article 11(1) of the ECHR does not pertain to prisoners convicted of criminal offences related to terrorism and serving their prison term concerning the prohibition of socializing with other inmates, established for security reasons. Thus, freedom of association “does not concern the right of prisoners to share the company of other prisoners or to ‘associate’ with other prisoners”, as such gathering does not serve the common aim which is one of key features of an association.<sup>59</sup>
45. However, the new restrictions set out in the Associations Law regarding the right to establish an association are imposed on persons convicted for terrorism financing and money laundering once the final verdict of a court is issued. Thus, they also pertain to a period *preceding* the actual time served in prison, thereby restricting the ability of those persons to exercise freedom of association with others, rather than with prisoners, in the intervening period.<sup>60</sup>
46. Given the foregoing, the restriction imposed on founders of an association in Article 11, para. (7), item 1 of the Associations Law gives rise to the issue of *proportionality* as it presumes criminality of any association whose founder(s) are persons convicted of terrorism financing and money laundering, or against whom the international measures restricting their ability to dispose with their assets are imposed, regardless of the nature of otherwise legitimate statutory goals that association seeks to pursue.<sup>61</sup>
47. The *Joint Guidelines* notes in this respect that “there shall be a presumption in favour of the lawfulness of the establishment of associations and of their objectives and activities, regardless of any formalities applicable for establishment”.<sup>62</sup>

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<sup>58</sup> See e.g. *Vinks and Ribicka v. Latvia*, no. 28926/10, 30 January 2010 and *Shorazova v. Malta*, no. 51853/19, 3 March 2022 as regards money laundering, and *Refah Partisi (the Welfare Party) and Others v. Turkey* and *Yefimov and Youth Human Rights Group v. Russia*, no. 12385/15, 7 December 2021 as regards terrorism. See also Expert Council on NGO Law, *Non-Governmental Organisations and the Implementation of Measures Against Terrorism Financing and Money Laundering*, para. 5. European Court of Human Rights, *Guide to the case-law of the European Court of Human Rights: Terrorism*, updated on 31 August 2022, p. 31, [https://www.echr.coe.int/Documents/Guide\\_Terrorism\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Terrorism_ENG.pdf).

<sup>59</sup> *McFeeley and others v. the United Kingdom* (dec.), no. 8317/78, 15 May 1980, para. 114. See also European Court of Human Rights, *Guide on the case-law of the European Convention on Human Rights: Prisoners’ Rights*, updated 31 August, 2022, [https://www.echr.coe.int/Documents/Guide\\_Prisoners\\_rights\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf) Mataga, *The Right to Freedom of Association under the European Convention on the Protection of Human Rights and Fundamental Freedoms*, pp. 5-6.

<sup>60</sup> Article. 11, para. (7), item 1, the Associations Law.

<sup>61</sup> Expert Council on NGO Law, *Opinion on the Romanian draft Law 140/2017 on Associations and Foundations*, as adopted by the Senate on 20 November 2017, CONF/EXP(2017) 3, 11 paras. 4-5, 56-59.

<sup>62</sup> Guiding Principle 1, para. 26, Guidelines.



48. In addition, any sentence issued for criminal offences related to the terrorism financing and money laundering—including more lenient sentences prescribed for cases of money laundering considered to be of lesser gravity<sup>63</sup>—automatically triggers the restriction set out in Article 11, para. (7), item 1 of the Associations Law.
49. Furthermore, the sweeping nature of the foregoing restriction is particularly problematic given that it is not evidence-based, due to the lack of prior-risk assessment which would have established to what extent associations have been abused as an institutional tool of choice for terrorism financing and money laundering, and identified the subset of associations deemed particularly vulnerable to those criminal offences.<sup>64</sup>
50. The restriction was also introduced without the conduct of *ex-ante* impact assessment which would have given consideration to other feasible policy options that might be better suited to accomplish the general and specific objectives of Chapter 5 of the *Action Plan*—and in particular its Specific Objective 2.<sup>65</sup>
51. Finally, the broad scope of the restriction in question runs afoul the FATF Recommendation No. 8, which has embraced a *functional*, rather than all-encompassing definition of a NPO, consistent with the underlying principle that measures against NPOs needs to be targeted, evidence-based and in line with the risk-based approach. The *Interpretative Note* clarifies that Recommendation 8 applies only to “legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of good works”.<sup>66</sup> Thus, the requirements in Recommendation 8 concerned with terrorist financing will not necessarily be relevant to the work of “entities whose objectives are not linked to charitable services and assistance to those in need and their application to them could indeed be inappropriate”.<sup>67</sup>

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<sup>63</sup> See Article 265 of the Criminal Code (“Official Gazette”, no. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21).

<sup>64</sup> Evaluation Report, pp. 103, Chapter, 4.3.2., pp. 117-122.

<sup>65</sup> Action plan, Chapter 5, Specific Objective 2: “Prevention of criminals (money laundering, predicate offences and terrorism financing) from acting as a shareholder, Beneficial Owner, or manager of a legal person, introducing a requirement for verification of criminal background of these persons, including implementation of the targeted financial sanctions of the United Nations”. The more suitable measures to meet Objective 2 might have entailed a temporary suspension of voting rights in the general assembly and/or additional supervision and oversight of associations which are found to be particularly vulnerable to the abuse for criminal purposes and whose founder(s) are convicted of terrorism financing, money laundering or are subject to international measures to that effect.

<sup>66</sup> Paragraph 1, Note.

<sup>67</sup> Expert Council on NGO Law, *Non-Governmental Organisations and the Implementation of Measures Against Terrorism Financing and Money Laundering*, para. 24. See also Recommendation CM/Rec(2007)14 , Basic Principles, points 1-3. *Joint Guidelines*, para 7.

52. Problems also arise with respect to the language of Article 11, para. (7) item 1 of the Associations Law as regards its compatibility with the *prescribed by law* requirement. There is lack of clarity as to the actual period for which restrictions imposed shall take effect, as two different standards seem to apply to those restrictions. Namely, the restriction imposed on founders who are convicted for a criminal offence related to terrorism financing or money laundering shall be put in place “for the period for which the final judgment renders legal ramifications”.
53. Presumably, this refers to the time spent in prison. However, it is not certain whether it is also in reference to additional measures that might be imposed on a convicted person for a certain period beyond the time spent in prison. On the other hand, restrictions imposed on a person who is subject to international measures limiting his or her ability to dispose of his or her assets shall take effect “during the period of enforcement of those measures”.
54. In addition, there is lack of clarity in the language of Article 11, para. (7), item 1 as regards the notion of *international measure* and what it precisely entails: does it refer to the measures imposed by any international organisation of which Croatia is a member or does it go beyond the membership requirement? This lack of clarity is particularly concerning, given that the *Action Plan* and MONEYVAL recommendations both make reference to international measures imposed by the *United Nations* only,<sup>68</sup> as well as the new disclosure obligations imposed on an association in the process of registration.<sup>69</sup>
55. Article 11, para. (7), item 2 of the Associations Law—which imposes restriction on founders convicted for criminal offence by a third state, the key features of which materially correspond to the criminal offences related to terrorism financing and money laundering stipulated in para. (7), item 1—also gives rise to the issue of its compatibility with the *prescribed by law* and *proportionality* requirements.
56. As for the former, there is lack of clarity in the language of para. (7), item 2 as to what is deemed to be the key features which materially correspond to the criminal offences related to terrorism financing and money laundering, in the absence of any reference as to what would be regarded as key features of those offences. In addition, para. (7) item 2 does not contain specific references as to a *period* for which the restriction is imposed—nor does it refer to item 1 of para. (7) to that effect. Therefore, there is no certainty as to the precise time period for which this restriction takes effect.
57. As regards proportionality, the language of para. (7), item 2 of the Associations Law seems to suggest that a final verdict of a court of *any third state*—including the one

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<sup>68</sup> Action Plan, Chapter 5, Specific Objective 2, MONEYVAL, Evaluation Report, Immediate Outcome 5, b), p. 181.

<sup>69</sup> Article 23, item 8, the Associations Law. The Action Plan also envisages the enactment of the new Law on International Restrictive Measures (Measure 8, 2, deadline: last quarter of 2022).

which does not necessarily espouse the principles underpinning the rule of law, separation of power, due process and independence of judiciary—would suffice to trigger the prescribed restriction. The sweeping interpretation of the notion “third state” would certainly be problematic and at the expense of the regime of human rights guaranteed by the ECHR—or for that matter, the Constitution.

58. The foregoing analysis is equally applicable to the same restrictions imposed on a *legal representative* of an association who is convicted for the broadly defined scope of criminal offences related to financial crimes, which go beyond terrorism financing and money laundering. These are set out in Article 19, para. (2), items 1-2, the language of which otherwise mirrors the language of Article 11, para. (7) of the Associations Law.
59. Article 11, para. (8) of the Associations Law also gives rise to the issue of its compliance with the *prescribed by law* and *proportionality* requirement. It provides that a founder of an association which is in “direct contact with children” may not be a person who is convicted for a criminal offence related to the sexual abuse and exploitation of children, pursuant to a law governing criminal offences and sanctions. The same restriction is imposed on a legal representative of such an association.<sup>70</sup> This restriction was not originally envisaged in the Action Plan, but was rather inserted in the Law as a result of the feedback received from public consultation on the draft amendments.
60. As regards the prescribed by law requirement, there is lack of clarity in the language of Article 11, para. (8) and Article 19, para. (3) of the Associations Law as to whether these restrictions apply to founders and a legal representative of an association whose *statutory goals* specifically include the overall well-being and work with the children (education, sport, leisure, etc)—or whether it also pertains to an association whose statutory goals do not necessarily include the well-being of and work with the children, however, per their stated *statutory activities*, children may or may not participate in some of those activities.<sup>71</sup> This is particularly significant given that the new disclosure requirements imposed on an association in the process of registration also pertains to Article 11, para. (8) of the Associations Law.
61. With respect to proportionality, the language of Article 11 para. (8) and Article 19, para. (3) seems to suggest that the foregoing restriction applies *indefinitely* and thus also pertains to persons who duly served their time, and have proven and long-standing track-record of the successful rehabilitation against sexual abuse and exploitation of children. At least for those persons consideration should have been given to the feasibility of introduction of less severe measures that would serve the same legitimate

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<sup>70</sup> Article 19, para. (3).

<sup>71</sup> See Article 13, para. 3 which provides *inter alia* that a statute of an association must contain information about its *statutory goals* as well as *statutory activities* envisaged to serve those goals.

goal and ensure the full protection of children, and might be better suited to satisfy the requirement of proportionality.<sup>72</sup>

62. It is noteworthy that the amendments to the Foundations Law do not envisage restrictions set out in Article 11 para. (8) of the Associations Law, despite the same type of restrictions and language otherwise imported from the latter law.

63. It is also noteworthy that restrictions set out in Article 11, paras (7) and 8) of the Associations Law do not seem to apply to natural persons who are already *members* of a registered association, but rather to founders of a new association only. A different treatment of founders and members who have committed the same criminal offences as regards their exercise of freedom of association gives rise to the issue of compliance of the Associations Law with Article 14 of the ECHR (prohibition of discrimination), in connection with Article 11 of the ECHR.<sup>73</sup>

64. As regards the prohibition of discrimination, the *Joint Guidelines* note that

the principle of non-discrimination prohibits both direct and indirect discrimination, requiring that all persons receive equal protection of the law and should not be discriminated against as a result of the practical application of any measure or act.<sup>74</sup>

65. This is not to suggest however that the restrictions imposed by the new amendments should have also included the suspension of membership rights, given their problematic nature.

66. As already noted, Article 23, para. (7) of the Associations Law imposes additional disclosure requirements on an association in that it provides that a request for entering into the Registry of Association shall be accompanied with statements of founders, a legal representative and a liquidator, in the form of a public notary document, confirming that restrictions set out in Articles 11 paras. (7) and (8) and 19, paras. (2) and (3) of the Associations Law do not apply to them. This obligation gives rise to the issue of *proportionality*, given that the Amendments specifically prescribe a duty of the

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<sup>72</sup> See Article 41 of the Criminal Code which provides that the purpose of criminal punishment *inter alia* is to allow a convict's re-integration in the society.

<sup>73</sup> Article 14 of the ECHR: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". On the application of Article 14 in connection with Article 11 of the ECHR see *Bączkowski and Others v. Poland*, 2007, no. 1543/06, 3 May 2007. On the recent case law and scope of application of Article 14 see the European Court of Human Rights, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, updated 31 August, 2022, [https://www.echr.coe.int/Documents/Guide\\_Art\\_14\\_Art\\_1\\_Protocol\\_12\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf).

<sup>74</sup> Guiding Principle 5. Equal treatment and non-discrimination, para. 94, the Joint Guidelines.

registration authority to *ex-officio* verify if the request for registration complies with these restrictions.<sup>75</sup>

67. In light of the new disclosure requirements, the lack of clarity in the language Articles 11, paras (7)-(8) and 19, paras. (2)-(3) gives the registration authority a great deal of unwarranted discretionary power in the implementation of the new restrictions. In this respect *Recommendation* CM/Rec(2007)14 provides that 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”.<sup>76</sup>
68. Furthermore, the noted lack of clarity in the language of Article 19 paras. (2) and (3) of the Associations Law as regards the scope of application of the restrictions imposed on a legal representative needs to be viewed in light of the obligation imposed on an association to file a request with the registration authority for changes of data entered into the Registry of Associations with respect to its legal representative and a *liquidator* who fall within the ambit of the restrictions set out in Article 19, paras (2) and (3), within 15 days following a decision of its competent body to that effect.<sup>77</sup>
69. However, the provisions in Article 19, paras. (2) and (3) make no reference to a liquidator, which further compounds the problem with their lack of clarity. This overall gives the supervisory authority an unwarranted discretionary power to decide whether an association has complied with a duty to initiate the necessary data changes in the Registry.
70. The lack of clarity regarding Article 19, paras. (2) and (3) is particularly concerning given that fines ranging from 3000 to 5000 Euros are levied on an association which fails to comply with the change of data obligation within the deadline set by the supervisory authority, which can be no longer than 30 days following the supervision.<sup>78</sup> Fines ranging from 500 to 3000 Euros are also levied on a legal representative of an association for the same misdemeanour.<sup>79</sup>
71. As regards the prescribed fines, it is commendable that the Amendments envisage that fines shall be levied on an association and its legal representative only if it fails to rectify the established lack of compliance with Article 19, paras. (2) and (3) of the Associations Law within the deadline set by the supervisory authority.<sup>80</sup>

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<sup>75</sup> Article 24a.

<sup>76</sup> Paragraph. 28, Recommendation.

<sup>77</sup> Article 27, para. (2).

<sup>78</sup> Article 54.a, para. (3), in connection with Article 44.

<sup>79</sup> Article 54.a, para. (4).

<sup>80</sup> Article 44, paras. (1) and (2), in connection with Article 11 of the Amendments.

72. However, the scope of fines levied on an association and its legal representatives gives rise to the issue of *proportionality*, nevertheless, given that the minimum amount of the fine prescribed seems excessive and thus can put the targeted association into grave financial jeopardy.
73. The guiding principles enshrined in *Recommendation (2007)14* with respect to sanctions against NGOs is that, in most instances, the appropriate sanction against NGOs for breach of the legal requirements should merely be the requirement to rectify their affairs. Insofar as administrative, civil or criminal penalties are imposed on NGOs and/or any individuals directly responsible, they should be based on the law in force which is otherwise applicable to legal entities, and observe the principle of proportionality.<sup>81</sup>
74. Likewise, the *Joint Guidelines* states that sanctions levied on NGOs should observe the principle of proportionality. This entails that the least intrusive option shall always be chosen, that a restriction shall always be narrowly construed and applied, and shall never completely extinguish the right nor encroach on NGOs essence. In addition, restrictions must be based on the particular circumstances of the case, and no blanket restrictions shall be applied.<sup>82</sup>
75. In elaboration of the foregoing principles the Expert Council on NGO Law has noted that:
37. As all sanctions must observe the principle of proportionality, those of a financial nature ought to take account both of the seriousness of the particular infraction giving rise to it and the impact that the penalty would have on the NGO concerned. In particular a financial penalty that would entail the bankruptcy of the NGO concerned.<sup>83</sup>
76. Last, but certainly not least, the case law of the ECtHR suggests that the gravity of fines would not necessarily be a decisive factor in the Court's deliberation as to whether a particular interference with freedom of association meets the prescribed requirements. Rather, depending on circumstances, the Court might as well deem lighter sanctions levied on NGO an interference failing the *proportionality* test. Thus, in *Karaçay v. Turkey* the ECtHR considered that the sanction imposed on the applicant, although light (warning), did not meet the proportionality test. In this particular instance, it found violation of freedom of peaceful assembly. However, the principles underpinning the Court's analyses are equally applicable to freedom of association and the other related rights.<sup>84</sup>

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<sup>81</sup> Paragraph 72, Recommendation. See also Explanatory Memorandum to *Recommendation (2007)14*, para. 128.

<sup>82</sup> Principle 10.

<sup>83</sup> Expert Council on NGO Law, *Sanctions and Liability with Respect to NGOs*, OING Conf/Exp (2011) 1, Strasbourg, January, 2011, <https://rm.coe.int/1680306eb5>

<sup>84</sup> *Karaçay v. Turkey*, no. 6615/03, judgment of 27 March 2007, para. 37. See also *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, no. 37083/03, judgment of 8 October 2009, para. 63; *Vona v. Hungary*, no. 35943/10, judgment of 9 July 2013, para. 57.

77. The foregoing analysis of the amendments to the Associations Law applies in equal measure to the relevant amendments to the Foundations Law. While a foundation is a non-membership organisation and thus is not afforded a direct protection of Article 11 of the ECHR, it nevertheless shares the same voluntary and not-for-profit features with an association, and therefore the law should not unduly discriminate against non-membership NGOs.

## **E. Conclusion**

78. As has been seen, the amendments to the Associations Law and the Foundations Law give rise to a number of procedural and substantive issues.

79. As for the procedural issues, the Amendments were enacted without prior risk or *ex-ante* impact assessment and proper period of public consultation.

80. The lack of risk-assessment denied the Government an opportunity to consider more targeted, proportionate and evidence-based measures that would have been better suited to serve the general and specific objectives set out in Chapter 5 of the Action Plan.

81. Similarly, the lack of *ex-ante* impact assessment denied the Government an opportunity to consider not only more targeted, proportionate and evidence-based measures, but also to consider feasibility of addressing the necessary legal measures targeting private legal persons in one piece of legislation, the Law on Combating Money Laundering and Terrorism Financing<sup>85</sup>, whose revisions were also envisaged by the Action Plan.<sup>86</sup>

82. In addition, the lack of proper public consultation denied the public of an opportunity to meaningfully participate in the process of drafting of the Amendments.

83. As for the substantive issues, the restrictions imposed on founders and legal representatives of an association give rise to problems of compliance with the prescribed by law and proportionality requirement as regards Article 11 of the ECHR. The same pertains to the restrictions imposed on founders, legal representatives and members of the board of a foundation: they should enjoy the same standards of scrutiny and protection, despite the fact that foundations are not directly protected by Article 11 of the ECHR.

84. The lack of clarity and proportionality also creates an unwarranted discretionary power of public authority in the process of registration and supervision of associations and foundations.

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<sup>85</sup> "Official Gazette", no. 108/17 and 39/19.

<sup>86</sup> Action Plan, Measure 4.11

85. Problems with restrictions imposed on founders of an association and a foundation are reflective of the larger issue of Member States expanding the concept of the so called “beneficial owners” in the FATF Recommendations 24 so as to include NGOs.<sup>87</sup> Thus, as regards restrictions imposed on terrorism financing and money laundering, the founders of an NGO are put on equal footing with owners of a commercial company, despite the fact that the former are not permitted to have any proprietary interest in an NGO, dispose of its property, or gain from its distribution during its life-cycle or in case of voluntary dissolution.<sup>88</sup>
86. In addition, the fines levied on associations and foundations and their legal representatives give rise to the issue of proportionality, especially given the noted problems of the new restrictions with the prescribed by law requirement.
87. Overall, it is far from certain that the newly imposed restrictions on associations and foundations will contribute meaningfully to the accomplishment of the general and specific objectives set out in Chapter 5 of the *Action Plan*. This is particularly so given that the restrictions imposed on founders of an association do not pertain to members of the already registered association—nor do they pertain to natural persons who are charged with criminal offences related to terrorism financing and money laundering however are not yet convicted for those crimes by virtue of a court’s final verdict.
88. This is not to suggest that the restrictions should be expanded, given the problems detailed in the Opinion, but rather to illustrate challenges associated with the implementation of legislative measures which are not evidence-based.
89. Rather, the new Amendments will increase the overall costs of the implementation of the Associations Law and the Foundations Law and place additional and unnecessary burdens on NGOs in the process of registration—and depending on their implementation—may impose a grave financial burden on those NGOs that are fined.

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<sup>87</sup> Expert Council on NGO Law, *Non-Governmental Organisations and the Implementation of Measures Against Terrorism Financing and Money Laundering*, paras. 150-206. Action Plan, Chapter 5, Specific Objective 2, Measure 5.2.

<sup>88</sup> Article 30, para. 2 and Article 53, in connection with Article 19, para (1), item 1 of the Associations Law and Article 35, in connection with Articles 9, 27, and 28 of the Foundations Law.