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OPINION ON THE ROMANIAN DRAFT LAW 140/2017 ON ASSOCIATIONS AND FOUNDATIONS

as adopted by the Senate on 20 November 2017

Opinion prepared by the Expert Council

of the Conference of INGOs of the Council of Europe

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Foreword

In conformity with its mandate, notably that of monitoring and promoting an enabling environment for NGOs in the member countries of the Council of Europe, the Expert Council on NGO Law - a major organ of the Conference of INGOs of the Council of Europe - has carefully analysed the background to and wording of a draft Law (No. 140/2017) already adopted by the Senate of Romania and pending for imminent debate in the Chamber of Deputies.

The Expert Council Opinion which follows demonstrates lucidly and irrefutably that the draft Law ignores or contradicts many existing international standards and good practices concerning NGOs (Associations and Foundations). Romania is of course a member of both the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE). Both these intergovernmental institutions - the latter through the OSCE Office for Democratic Institutions and Human Rights - have documented and elaborated most of the existing standards and good practices in this area, and it would behove Romania to ensure that it remains in compliance with them.

Examples of the potential of the draft Law's provisions for non-compliance are given in many of the sections of the Opinion, such as the absence of prior impact analysis; inadequate meaningful consultation with NGOs during the drafting process; the need to protect NGOs from discrimination and over-regulation; and the requirement for administrative decisions to be subject to review by an independent court.

I urge the Romanian authorities, and notably the Romanian parliamentarians, to take under immediate advisement the Opinion's Conclusions (paragraphs 77-87) and step back from this text in order to uphold fundamental rights and the Rule of Law.

Cyril Ritchie
President, Expert Council on NGO Law

Executive summary

This opinion examines the compatibility with international standards and best practices of the amendments to Law 26/2000 on Associations and Foundations that would be effected through the adoption of draft Law 140/2017 on Associations and Foundations. It first outlines the content of the draft Law and then examines in turn each of the amendments proposed in it, as well as the other provisions in the draft Law.

The Expert Council on NGO Law finds that the changes that would be effected by the provisions in the draft Law give rise to a number of shortcomings as regards compliance with international standards and best practices. In particular:

(1) the proposal to prohibit associations and foundations from having the status of public utility if they engage in any kind of political activities is incompatible with the guarantees of the right to freedom of association and should not go beyond limiting their activities other than in the case of ones directly connected to those of an unambiguously party political character;
(2) the proposed provisions for selection of associations and foundations for recognition as ones of public utility, as well as for the actual allocation of public support, leaves unjustified scope for discriminatory treatment. Furthermore, there are no guarantees that the procedure leading to the withdrawal of recognition of public utility status will be governed both by a fair, judicial procedure and the principle of proportionality;
(3) the proposed reporting obligations are entirely incompatible with international standards and best practices and should not, therefore, be retained; and
(4) the arrangements made for the non-renewal of recognition of public utility status do not make proper provision for the completion of undertakings that were initiated on the basis that they were so recognised.

Taken, as a whole, it is not obvious that many aspects of the proposed provisions meet a pressing social need. Moreover, if adopted in their current form, the ability of NGOs to contribute to government policies, provide services and meet people's needs will be seriously weakened.

Insofar as further consideration is to be given to the draft Law or other legislative initiatives are to be taken by the Government, there ought first to be proper consultation with associations and foundations, with a view to establishing in particular the potential impact on them of possible changes. It is only this basis that both the substance of, and process leading to, any reform of the legislation relating to associations and foundations – which should always be designed to promote an enabling environment for them - will be consistent with international standards and best practices.

Introduction

1. This opinion examines the compatibility of draft Law 140/2017 on Associations and Foundations ("the draft Law") with international standards and best practices, and in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe ("Recommendation CM/Rec(2007)14") and the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association ("the Freedom of Association Guidelines").

2. In the present context, the aspects of international standards that are particularly pertinent are those concerned with the need to provide an enabling environment in which associations and foundations can pursue their activities[1], to assure them equal treatment and to protect them from discrimination[2] and for all decisions affecting them to be subject to control by an independent and impartial court[3].

3. The draft Law has already been adopted by the Senate of the Romanian Parliament and is currently pending before the latter's Chamber of Deputies. It does not embody a proposal made by the Romanian Government but has been tabled by parliamentarians from the governing Social Democratic Party; Nicolae Şerban and Pleşoianu Liviu Ioan Adrian, respectively a Senator and a Deputy.

4. There is an explanatory memorandum purportedly giving the background to the proposals found in the draft Law. However, this is a fairly vague document, referring firstly to debates in the public space regarding the transparency of financing obtained by the associations and foundations and then to the issue of restricting and clarifying the conferment of public utility status and thus the access of these entities to public resources. However, while there is no specificity regarding the matters concerning transparency that were supposedly debated, it is suggested that the current formula for conferring public utility status might lead to the opinion that, in reality, an association or foundation has nothing to prove in seeking or keeping this status. It is also suggested that the proposed areas on which the grant of the status would henceforth be based would represent ones of strategic importance for Romania and entail a degree of concrete activities and less subjective results. Furthermore, the proposed requirement of granting the status for

[1] Paragraph 8 of Recommendation CM/Rec(2007)14 ("The legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation") and Principle 2 of the Freedom of Association Guidelines ("The state's duty to respect, protect and facilitate the exercise of the right to freedom of association").

[2] Paragraph 87of Recommendation CM/Rec(2007)14 ("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") and Principle 5 of the Freedom of Association Guidelines ("Equal treatment and non-discrimination").

[3] Paragraph 10 of Recommendation CM/Rec(2007)14 ("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") and Principle 11 of the Freedom of Association Guidelines ("Right to an effective remedy for the violation of rights").

5 years, with periodic evaluation of compliance with standards, is something seen as increasing the accountability of those benefitting from it.

5. However, it is noted that there is no evaluation in the explanatory memorandum of any potential impact of the proposed changes on the operation of those associations and foundations that might be affected on them nor of the cost and practicality of the proposed requirement that their financial statements be published every six months in the Official Gazette. Such an impact analysis is not required where legislative initiatives, such as the present one, are proposed by parliamentarians themselves rather than by the Government. Nonetheless, the absence of such an analysis necessarily means that discussions concerning the proposals in the draft Law lack the benefit of a full appreciation of what is actually entailed by them. In this connection, it is also to be noted that there appears to have been no prior meaningful consultation – as required by international standards[4] - with the NGOs likely to be affected by their adoption.

6. In terms of the use of "transparency" as a justification for proposals in the draft law, this Council recalls that it has previously cautioned against unjustified use being made of this concept.[5]

7. It is understood that the Government is also contemplating making proposals to the legislation relating to associations and foundations. However, it has yet to make any public announcement in this regard or to identify the possible changes that it considers necessary in meetings held earlier this year with non-governmental organisations to discuss reform of this legislation. Nonetheless, it is unclear why there appears to be a rush to adopt the draft Law when the Government is itself still considering what, if any changes, to the legislation relating to associations and foundations might actually be required.

8. The opinion has been prepared by the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe and is based on an unofficial translation into English of the draft Law as adopted by the Senate.

9. The opinion first outlines the substance of what is being proposed in the draft Law. It then examines in turn each of the proposed amendments to the existing legislation, as well as the other provisions in the draft Law. It concludes with an overall assessment of its compliance with international standards and best practices, as well as a suggestion concerning any further consideration of the draft Law.

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[4] Thus, paragraph 77 of Recommendation CM/Rec(2007) 14 underlines that "NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation" and this is also a requirement of Principle 8: Good administration of legislation, policies and practices concerning associations in the Freedom of Association Guidelines, which state that: "Associations shall be consulted in a meaningful way about the introduction and implementation of any legislation, policies and practices that concern their operations". Similarly, such consultation is a key aspect of the Council of Europe Guidelines for Civil Participation in Political Decision-Making, adopted by the Committee of Ministers on 27 September 2017 at the 1295th meeting of the Ministers' Deputies.

[5] See *Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad*, April 2017; https://rm.coe.int/168070bfbb.

The proposed provisions

10. The draft Law is a short measure, comprised of just three Articles.

11. If adopted, the proposals in the draft Law would result in amendments being made to three provisions in Law 26/2000 on Associations and Foundations, namely, Articles 38, 41 and 42, as well as the introduction into it of an entirely new provision, Article 48[1].

12. The provisions to be amended concern, respectively, the conditions for recognising an association or foundation as one of public utility[6], the rights and obligations accruing from such recognition – including the activities in which they may engage - and the duration for which a particular act of recognition can be given.

13. The new provision concerns a reporting obligation that has to be fulfilled by all associations, foundations and federations, regardless of whether they are recognised as ones of public utility.

14. In addition, existing associations and foundations that are currently recognised as being of public utility would be required to re-apply for such a recognition under the amended version of the Law 26/2000.

15. Provision is also made for the elaboration of rules on procedures for the future recognition of public utility status and the abrogation of the provisions in Law 26/2000 insofar as they differ from what is proposed in the draft Law.

Compliance of the proposals with international standards and best practices

16. The substantive changes being proposed all give rise to certain concerns as to the likelihood of them being incompatible with international standards and best practices. Furthermore, the proposed authorisation of a power to elaborate rules on procedure for recognition of public utility status might prove to be problematic given the lack of any indication as to why there should be a need to change the existing recognition procedure.

Article 38 – public utility status

17. The proposed changes to this provision would entail the introduction of a restriction on what should be understood to be activities carried out for the general or community interest, which is the basis for conferring public utility status on associations and foundations. This would be achieved by specifying in the proposed sub-paragraph 1(a) certain areas of activity in which associations and foundations should be involved for this purpose, namely,

[6] Such a status is often termed “charitable” or “public benefit” in other European States.

- Social Services (Assistance-Protection-Inclusion-Cohesion-Security-Development-Social Economy), Charity and Humanitarian Aid, Health, Sport;
- Education;
- Science, Research, Innovation, Environment and Animal Protection, Consumer Protection;
- National and national minorities' values, Traditions and Cultural Assets; and
- Diplomacy and International Relations, Military-Defence-Respect for heroes

18. In addition, there would be: a reduction from 3 to 2 years in the period of operation required of associations and foundations for seeking this status; a new requirement that the value of assets for each year of operation being equal to the value of the initial assets; a bar on carrying out any kind of political activities, fundraising or campaigns to support or oppose a political party or a candidate for appointment or election to a public office or having done so in the past 2 years; and a specification of a percentage algorithm for recognising public utility status, with 40% being applicable to the first category, 30% to the second one and 10% each to the other three.

19. Furthermore, there would be deleted from the existing provision the requirements: to own the patrimony, logistics, members and staff needed to fulfil the anticipated purpose; to demonstrate the existence of collaboration contracts and partnerships with public institutions or associations or foundations from the country and from abroad; and to provide evidence of significant achievements in the field of the intended purpose or submit letters of recommendation from competent authorities in the country or from abroad, which recommend continuing the activity.

20. There is no requirement in international standards that States should establish the possibility of non-governmental organisations acquiring a status such as recognition of public utility with the possibility of thereby acquiring certain benefits, such as exemption from particular taxes and preferential access to funding or use of facilities. Nonetheless the possibility of acquiring such a status is a feature of most democratic States and the desirability of non-governmental organisations being assisted in this way is recognised in paragraphs 57-61 of Recommendation CM/Rec(2007)14[7] and in the Interpretative Notes to the Freedom of Association Guidelines[8]

[7] "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

21. As paragraph 59 of Recommendation CM/Rec(2007) 14 makes clear, the provision of this form of public support can be determined by the nature of the activities being undertaken by the non-governmental organisations concerned. There can, therefore, be no objection to the proposal to state in more specific terms what is to be regarded as being in "the general or community interest" as is proposed in the amendment.

Areas of activity

22. Moreover, the groups of activities that are stated as being in that interest are, at face value, wide and not inconsistent with those recognised as being charitable or of public benefit in many other countries. Furthermore, as the Explanatory Memorandum to Recommendation CM/Rec(2007) indicates, what might be seen as a priority and thus what forms of activity are regarded as worthy of public support is something that can change over the course of time. Nonetheless, it is surprising that the promotion and protection of democracy and human and legal rights is not explicitly mentioned in the list given the importance of this for all members of society and the view of other European States generally to recognise this as being of public benefit.[9]

23. However, there are three areas of concern regarding the content of the proposed amendment, namely, as regards the specificity of the listed groups of activities, the potential for discriminatory treatment of certain associations and foundations and the prohibition on them undertaking any kind of political activities. In addition, there is one matter on which some clarification is at least required.

24. The explanatory memorandum for the draft Law indicates that the five groups of activities that would be specified as being in the general and community interest are strategic ones for Romania. However, given the generality in the formulation used for these five groups, this is hardly something that could be questioned. Nonetheless, there is no indication in the explanatory memorandum as to how concretely these areas are actually understood as a matter of Romanian law and, indeed, whether there is sufficient appreciation by officials and others as to how they ought to be interpreted when assessing the activities and objects of a particular association or foundation seeking public utility recognition. Some precision in such an understanding is essential since, as paragraph 58 of Recommendation

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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".

[8] Paragraphs 203-204.

[9] Thus, for example, the Preamble to Recommendation CM/Rec(2007)14 provides, inter alia, that "Noting that the contributions of NGOs are made through and an extremely diverse body of activities … the provision of assistance to those in need … the monitoring of compliance with existing obligations under national and international law" and the Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities in paragraph 2 calls on "member states to i) create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the European Convention on Human Rights" (adopted on 6 February 2008 at the 1017th meeting of the Ministers' Deputies).

CM/Rec(2007) 14 underlines, there is a need for public support to be governed by "clear and objective criteria".

25. At present, it is not obvious that the proposed criteria fulfil that requirement.
26. This also means that there would be scope for treating differently associations or foundations that are undertaking essentially the same sort of activities when decisions on recognition are made, the very thing that clear and objective criteria are designed to forestall or, if necessary to allow effective judicial challenge in the event of abuse.

27. There is, therefore, insufficient certainty that discriminatory treatment could be effectively tackled in the event of the proposed amendment being adopted. This would be inconsistent with the right to freedom of association under Article 11 of the European Convention when taken with the prohibition of discrimination in Article 14 of that instrument, as well as with Principle 5 of the Freedom of Association Guidelines that requires equality of treatment and non-discrimination in the treatment of associations.

A percentage-based algorithm

28. A further risk of discriminatory treatment might lie in the proposal to use a percentage-based algorithm to determine which associations or foundations will be recognised for public benefit status under the five subject headings. Thus, it is unclear from the proposed provision how the algorithm is intended to work. Thus, the recognition of associations by subject area on a percentage basis could just be at the time applications can first be made or there could be scope for enlarging the pool of recognised entities at a later stage so long as the percentage for each subject group is not exceeded.

29. However, apart from this uncertainty, there is no guidance as to how a choice is to be made between associations and foundations when determining whether or not they can be included in the allocated percentage for a subject area where the number of applications would not allow for recognition according to percentages identified. For example, if there are 105 applications for recognition and more than 40 of them want recognition under the Social Services heading or more than 10 want recognition under Diplomacy and International Relations, etc. heading, a choice would have to be made between applicants so as to keep within the respective percentages allocated for those headings. In making that choice, there would be plenty of scope for arbitrary treatment as there are no criteria specified for this purpose.

Political activities

30. The third concern relates to the prohibition envisaged in the proposed sub-paragraph 1(e) on any associations or foundations seeking or having public utility recognition if, respectively, they have in the past two years carried out "any kind of political activities" or do so while having that recognition.

31. The right of non-governmental organisations in general to engage in political activities in a broad sense is recognised in Recommendation CM/Rec(2007) 14[10]. However, it is also a feature of NGO legislation in many countries that some limitation on the scope of such an engagement is imposed on those entities that have charitable or public benefit status. However, where this occurs, the limitations are clearly prescribed in the law and specify the exact type of activities that are affected and they are clearly linked to activities related to political parties and elections.[11]

32. Although part of the restriction in the proposed amendment is consistent with the latter approach in that it concerns support or opposition to a political party or candidate, the scope of the restriction seems to go beyond this since it first refers to "any kind of political activities" before mentioning particular forms of them. Such a wide notion is likely - as the European Court has found[12] – to cover any engagement with public policy as associations or foundations pursue their objectives even though they have no wish to become involved in party political activity.

33. Indeed, involvement in public policy debates ought to an inevitable feature of the subjects that would be specified as being of general or community interest, given the expertise and knowledge gained by carrying out work in relation to them. The preclusion of engaging in "any kind of political activities" would not only be inconsistent with the international best practices but would also effectively neutralise the scope for the recognised associations and foundations actually being ones of genuine public utility.

34. This aspect of the proposed amendment would thus also be inconsistent with international standards and best practices.

Value of assets

35. An additional concern relates to the clarity and appropriateness of the requirement in the proposed sub-paragraph 1(d) that the value of assets for each year of operation for the association or foundation seeking public utility recognition be at least equal to the value of the initial assets.

36. The new provision differs from the present one in that its focus is not on the capacity to deliver activities but only on the maintenance of asset values, whatever

[10] "5. NGOs should enjoy the right to freedom of expression …; 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, subject to legislation on the funding of elections and political parties".

[11] See Expert Council on NGO Law, *Regulating political activities of non-governmental organisations*, OINGConf/Exp (2015) 3.

[12] See, e.g., *Zhechev v. Bulgaria*, no. 57045/00, 21 June 2007 and *Koretskyy and Others v. Ukraine*, no. 40269/02, 3 April 2008.

their level may be. This does not seem to take account of the fluctuating income experienced by many, if not all, entities serving public benefit objectives or the view that they ought to use rather than hoard funds raised for the objectives to be pursued.

37. There is thus a need for the aim of this provision to be clarified as the law governing associations and foundations should be precise, certain and foreseeable.[13]

Article 41 - rights and obligations of public utility organisations

38. The effect of this provision would first be to replace the unqualified right to be given free-of-charge use of public property assets with the specification that they will have the right to receive free use of public property and access to funding from central and local budgets, according to the same percentage algorithm discussed above.

39. In addition, the recognition of public utility status would entail "the obligation not to discharge any kind of political activities: fundraising or campaigns to support or oppose a political party or a candidate for a public office in which he/ she may be appointed or elected".

40. It is certainly a matter for the State to determine the level of public support that it is prepared to give to associations and foundations, both in terms of the total amount and the manner of its distribution between different objectives.

41. However, as already indicated, the present algorithm model that would be employed does not give any guidance as to how choices should be made between particular associations or foundations when there is a need to keep within the allocated percentages for particular subject headings. This basis for allocating support is thus likely to create a risk of discriminatory treatment, which would be inconsistent with international standards and best practices.

42. Furthermore, the concerns already expressed as to the breadth of the proposed prohibition on engaging in "any kind of political activities" is equally applicable to the proposed obligation regarding this in sub-paragraph (c).

Article 42 – duration of status

43. The effect of the proposed amendment would be to replace the indefinite recognition of public utility status by a specification that such recognition is to last for 5 years and may be renewed.

44. In addition, there would be provision for the competent administrative authorities, together with the Ministry of Justice, to draw up, for each public utility association or foundation, an annual report of compliance with the conditions that led to the Government's recognition of its public utility status, with the report for the previous year being published on the Ministry of Justice.

[13] Principle 9 of the Freedom of Association Guidelines.

45. The provision for the possibility of the Government withdrawing the recognition of public utility status in the event of an association or foundation no longer fulfilling one or more of the conditions underlying this recognition of public utility is retained.

46. As already indicated, it is consistent with international standards and best practices to allow for periodic changes in the types of activities for which public support is given. Furthermore, it is recognised in paragraph 61 of Recommendation CM/Rec(2007) 14 that a material change in the "activities of an NGO can lead to the alteration or termination of any grant of public support". There is, therefore, nothing objectionable in principle to setting some limit to the duration for which such support will last or to the monitoring of the activities of those entities in receipt of it in order to ensure that this is actually used by them for the prescribed conditions.

47. However, the proposed paragraph 3 of the present provision is problematic in that it only provides for the drawing up a report as to compliance with the conditions leading to recognition and does not indicate how the issue of compliance is to be determined. Undoubtedly, some use will be made of the reports to be required under the proposed Article 48[1] but there is no provision for involvement of the association or foundation in the process, notwithstanding that there may be errors in the assessment made by the competent administrative authority or the Ministry of Justice as to whether there has been a failure to comply with the conditions.

48. It may be that the general administrative law would ensure that there is ultimately observance of the requirement in paragraph 10 of Recommendation CM/Rec(2007) 14 that:

> 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.

49. Nonetheless, this is likely to be belated and will not be sufficient to undo the prejudice caused to the association or foundation concerned, as well as to its income, beneficiaries and employees. It is also not clear whether there is any arrangement in place to ensure compliance with paragraph 71 of of Recommendation CM/Rec(2007) 14, namely, that:

> 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.

50. More fundamentally, the provision for withdrawal of support is framed in terms of breach of the conditions leading to recognition without any distinction being made as to the significance of any alleged non-compliance with them. This is clearly, inconsistent with the approach specified in paragraph 72 of Recommendation CM/Rec(2007) 14, namely, that:

> 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.

51. It would, therefore, be inconsistent with international standards and best practices for this provision to be retained without establishing a fair procedure for determining whether or not there has been some non-compliance with the conditions leading to recognition and a requirement that, where such non-compliance has occurred, a withdrawal of support should not be automatic but only applied where this is in accordance with the principle of proportionality.

Article 48[1] – reporting requirements

52. This new provision – which would follow the existing provision in Article 48 allowing for associations, foundations and federations to engage in any other direct economic activity if they are of auxiliary nature and are closely related to their primary purpose – would require all associations, foundations and federations to publish each six months, by 31 July and 31 January, in Part IV of the Official Gazette their financial statements for the previous semester.

53. This requirement is not limited to those associations and foundations recognised as ones of public utility, which are already required each year – under the existing terms of Article 41(1)(f) – to publish in summary their activity reports and annual financial statements. It is unclear whether the annual financial statement submitted under this provision would count a one of the two that the new provision would require associations and foundations to submit.

54. Furthermore, these statements would have to mention separately "the individual or activity (whichever is the case), generating each income, as well as the value of each income".

55. Moreover, any failure to publish such a declaration would lead to the suspension of the association, foundation or federation's functioning for 30 days and the immediate cessation of its activities entirely if the statement is not then published within 30 days according to the conditions provided for in Chapter IX, which provides for the dissolution and liquidation of associations and foundations.

56. The proposed provision is inconsistent with international standards and best practices both as regards the extent of the reporting obligation and the consequences envisaged as flowing from the failure to fulfil this obligation.

57. Thus, the frequency of the reporting required is excessive and the level of detail required is not only unduly onerous but is also inconsistent with the legitimate privacy rights of donors, as is clear from the following paragraph of Recommendation CM/Rec(2007) 14:

> 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.

58. Similarly, the Interpretative Notes to the Freedom of Association Guidelines make it clear that:

> 225. Reporting requirements, where these exist, should not be burdensome, should be appropriate to the size of the association and the scope of its operations and should be facilitated to the extent possible through information technology tools … Associations should not be required to submit more reports and information than other legal entities, such as businesses, and equality between different sectors should be exercised. Special reporting is permissible, however, if it is required in exchange for certain benefits, provided it is within the discretion of the association to decide whether to comply with such reporting requirements or forgo them and forsake any related special benefits, where applicable.
> 226. For instance, insofar as associations utilize public funding to achieve their goals and objectives, legislation may establish guidelines to ensure that tax payers have access to information regarding the statutes, programmes and financial reports of associations. The publication of such documents may be considered necessary to ensure an open society and prevent corruption. However, any such reporting requirements should not create an undue and costly burden on associations and should also be proportional to the amount of funding received.

59. The present provision is introducing this requirement for all associations and foundations without any reasoning being advanced as to why the present level of scrutiny over the funding of NGOs is inadequate. Certainly, the explanatory memorandum does not refer to any actual problems that have arisen in practice or give any indication as to why existing legal provisions are insufficient for supervisory purposes. The invocation of "transparency" and "accountability" in support of this provision is thus entirely hollow. In the circumstances, such a requirement cannot, therefore, be seen as having a legitimate aim, as required under Principle 9: Legality and legitimacy of restrictions in the Freedom of Association Guidelines.[14]

60. Moreover, the fact that such a requirement is not proposed for political parties or corporate bodies despite these being equally open to the possibility of improprieties connected with the receipt and use of funding – points to an unjustified difference in treatment, which would entail a violation of Article 11 of the European Convention when taken with the prohibition on discrimination in Article 14.

61. In addition, the level of detail that will be required of all reports by associations and foundations will be extremely burdensome since there will be a need to cover every single donation and donor no matter how small.

62. Furthermore, the need to provide it is imposed as a general measure, without any suspicion of criminality on the part of the entities concerned, which – if this did

[14] As paragraph 110 of the Interpretative Notes underlines: "any legal provision restricting the right to freedom of association must serve a legitimate purpose, in that such a provision must be based only on the legitimate aims recognized by international standards, namely: national security or public safety, public order (*ordre public*), the protection of public health or morals and the protection of the rights and freedoms of others".

exist - might afford some basis for trawling through the financial records of the particular organisation concerned.

63. Furthermore, the twice-yearly reporting requirement is inconsistent with general practice regarding the production of financial statements and the need to provide this information will be very costly for associations and foundations; the current charge for publication in the Official Gazette is 13 euro per page and 1 euro per row for anything in a tabular form.

64. In addition, the time involved in preparing these additional reports will also inevitably be a distraction from the activities which associations and foundations are established to pursue as part of the right to freedom of association.

65. Moreover, not only is the substance of this proposed reporting obligation inconsistent with international standards and best practices, the sanctions envisaged for any non-fulfilment of that obligation – suspension and dissolution - are in clear breach of the right to freedom of association.

66. Suspension of activities for 30 days is proposed as the automatic consequence of the non-submission of a single report. Although the European Court is prepared to accept that a temporary ban on the activities of a non-governmental organisation on account of its past conduct would not necessarily be an inadmissible sanction, it is clear from its case law that such a ban must be a response to a particularly serious problem and must not be disproportionate in its effect.

67. It was, for example, not prepared to accept as consistent with Article 11 of the European Convention where the activities of a political party were banned because authorisation for previous gatherings had not been obtained in accordance with the Assemblies Act; children had been present at those gatherings; and some statements made at them had amounted to calls to public violence3 In responding to these grounds the Court indicated, respectively, that (a) it was not convinced that the failure to comply with legislation which otherwise was punishable with an administrative fine of up to EUR 40 could be considered as a relevant and sufficient reason for imposing a temporary ban on the activities of an opposition party, (b) the presence of children was not shown to be the result of any action or policy on the part of the applicant since anyone (including children) could attend gatherings held in a public place, it was a matter of personal choice for the parents to decide whether to allow their children to attend those gatherings and it appeared to be contrary to the parents' and children's freedom of assembly to prevent them from attending such events and (c) it was not persuaded that the singing of a fairly mild student song could reasonably be interpreted as a call to public violence.[15]

68. In the light of such a ruling, the failure to submit a financial report in time – or for it to be published in time by the Official Gazette[16] - could hardly be expected to be

[15] *Christian Democratic People's Party v. Moldova, n*o. 28793/02, 14 February 2006.

[16] The explanatory memorandum does not address the issue of the capacity to publish the additional financial statements of associations and foundations.

regarded by the European Court as being of such gravity as would warrant the suspension of the activities of the association or foundation concerned.

69. As regards the proposed dissolution following a further failure to submit the report, this would also be regarded unfavourably by the European Court since such a measure is seen by it as only appropriate for conduct by an association or foundation which entails:

> a sufficiently imminent prejudice to the rights of others threatens to undermine the fundamental values on the basis of which a democratic society exists and functions[17]

which there could hardly be any reason to conclude was the possible consequence of failing to publish financial statements every six months.

70. Moreover, it is unclear whether or not dissolution would be an automatic consequence of the second failure to submit financial statement since the reference to dissolution being governed by Chapter IX of Law 26/2000 on Associations and Foundations is insufficient to establish whether there is any court procedure involved. This Chapter provides for dissolution to occur both by law and by decision of a court or tribunal but the present provision does not indicate which is to apply. It would, however, be inconsistent with the right to freedom of association for dissolution to be imposed as a sanction for any misconduct were this to occur without a court order following a fair hearing for the association or foundation concerned.[18]

71. The uncertainty as to whether or not there would be a court procedure under the present provision is an additional ground for concern about it. However, even if this were not in doubt, this would not alter the fact that the use of dissolution as a sanction for not submitting financial statements would be viewed by the European Court as an entirely disproportionate response to it.

72. It should also be noted that the provisions with respect to reporting and dissolution are likely to be considered contrary to European Union law given their potential to discourage citizens from Romania and other Member States to donate to Romanian NGOs because of their concerns regarding privacy and the use made of the information to be reported. Certainly such a finding would seem to be a necessary consequence of the view taken by the European Commission of a Hungarian law imposing requirements over foreign funding, in which it was stated that the:

> number of administrative formalities and burdens on the recipient of capital and are liable to have a stigmatising effect on both recipients and donors. Thus, they may dissuade people from making donations from abroad to civil society organisations in Hungary. The free movement of capital is one of the four fundamental freedoms of the European Single Market. In addition to these concerns, the Commission is also of the opinion that Hungary violates the right to freedom of association and the rights to protection of private life and personal data

[17] *Vona v. Hungary*, no. 35943/10, 9 July 2013, at para. 57.
[18] As occurred, for example, in the *Vona* case.

enshrined in the Charter of Fundamental Rights of the European Union, read in conjunction with the EU Treaty provisions on the free movement of capital.[19]

Applying to renew an existing recognition

73. Article II of the draft Law would require those associations and foundations currently recognised as being of public utility to seek a new recognition pursuant to the requirements discussed above. This must be done within 90 days of the entry into force of the proposed amendments. If this deadline is observed those associations and foundations currently recognised as being of public utility will retain this status until a final decision has been taken on their application by the competent public authority. However, if the deadline is not observed, the public utility recognition of the association or foundation concerned will be automatically terminated.

74. The requirement of seeking fresh recognition as being an association or foundation of public utility is not, in itself, problematic since it has already been noted that the basis on which public support is provided can legitimately change from time to time.

75. However, the time-scale for making decisions on the renewed applications is unclear and no allowance is made for any transitional arrangements once a decision has been taken that a particular association or foundation will not be recognised as being one of public utility. Furthermore, such an association or foundation cannot anticipate the outcome and thus prepare itself for the changed assessment of its activities, which may have detrimental implications for its commitments to beneficiaries and donors, as well as its staff. In particular, it does not take account of the fact that particular projects undertaken by associations and foundations may have a duration of several years and they may find themselves in a position where the completion of a particular undertaking that has previously been seen to be one of public utility is seriously handicapped by the change in their status. This is not consistent with the principles of good administration generally observed in modern democracies.

76. There is thus a need for a provision such as the present one to ensure that a change in the status of an association or a foundation is not prejudicial to the completion of undertakings that were treated as ones of public utility at their outset.

Conclusion

77. The changes that would be effected by the provisions in the draft Law give rise to a number of serious shortcomings as regards compliance with international standards and best practices.

[19] Infringements -European Commission refers Hungary to the Court of Justice for its NGO Law, December 7, 2017; http://europa.eu/rapid/press-release_IP-17-5003_en.htm.

78. In particular, there is a need to limit any possible restriction on the activities of associations and foundations recognised as being of public utility to ones that are directly connected to ones that are unambiguously of a party political character.

79. In addition, the existing scope for discriminatory treatment in the selection of associations and foundations for recognition as ones of public utility, as well as in the actual allocation of public support, needs to be eliminated.

80. Furthermore, any procedure leading to the withdrawal of recognition of public utility status needs to be governed both by a fair, judicial procedure and the principle of proportionality.

81. Moreover, the proposed reporting obligations are entirely incompatible with international standards and best practices and should not, therefore, be retained.

82. Finally, any arrangements made for the non-renewal of recognition of public utility status should make proper provision for the completion of undertakings that were initiated on the basis that they were so recognised.

83. These suggestions are made on the basis that there is a wish to continue consideration of the draft Law but it should be noted that, in the absence of any developed rationale for many aspects of its provisions, it is not obvious that they can all be regarded as meeting a pressing social need.

84. However, should its consideration be continued - which seems possible in view of the Government's apparent interest in making changes to the legislation – it will not be enough to take account of all the points just made.

85. There will also be a need to ensure that there is proper consultation with associations and foundations in either any further elaboration or revision of the draft Law or any fresh legislative initiatives. This is, as already noted[20], an essential requirement of international standards and best practices.

86. However, in this connection, it also important to note that the Interpretative Notes to the Freedom of Association Guidelines indicate that:

> All consultations with associations should allow access to all relevant official information and sufficient time for a response, taking account of the need for the associations to first seek the views of their members and partners.[21]

87. It is only this basis that both the substance of, and process leading to, any reform of the legislation relating to associations and foundations – which should always be designed to promote an enabling environment for them - will be consistent with international standards and best practices.

[20] See para. 5 above.
[21] Para. 188.