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**OPINION ON THE
DRAFT AMENDMENTS TO THE SERBIAN
LAW ON ACCESS TO INFORMATION OF PUBLIC
UTILITY**

as prepared by the Ministry of Public Administration and Local Self-Government

**Opinion prepared by the Expert Council on NGO Law
of the Conference of INGOs of the Council of Europe**

The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.

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Foreword

The Expert Council on NGO Law has just marked the tenth anniversary of its creation in January 2008 by the Conference of International NGOs of the Council of Europe. The Expert Council, through the Conference, is a major organ contributing to the realisation and enhancement of democracy, human rights and the Rule of Law throughout the 47 Member States of the Council of Europe.

The Expert Council has produced numerous thematic studies and reviews of international standards and case law affecting NGOs. It is also at the service of national NGOs and authorities to give advice and guidance on national legislation that relates to the functioning and operational environment of NGOs. This is naturally most pertinent when an Expert Council Opinion can be issued whilst the laws, or changes in laws, are in the preparatory stage.

This is the case of the present Opinion on draft Amendments to the Serbian "Law on access to information of public utility", which are being reviewed by Serbian NGOs and authorities during April 2018. The Expert Council, thanks to the meticulous work of the lead author Dragan Golubovic, presents in this Opinion the flaws and deficiencies in the proposed Amendments. The Opinion illustrates and underlines the many areas in which the Amendments do not conform to international standards, notably those of the Council of Europe and of OSCE/ODIHR. The Opinion pinpoints specific situations and texts where clarifications and corrections are required in order to meet these standards.

It is our hope and expectation that the Expert Council's Opinion will assist the Serbian authorities in revising the Amendments, thereby contributing to reinforcing a favourable and enabling environment for the essential work of NGOs serving the people of Serbia. Such action will equally serve democracy, human rights and the Rule of Law in Serbia.

Cyril Ritchie
President, Expert Council on NGO Law

Executive Summary

As detailed in the opinion, the draft amendments fall short of meeting international standards governing freedom of association and will have an adverse impact on NGOs. Specifically, the draft amendments fall short of meeting the ‘prescribed by law’ as well as the ‘proportionality’ requirement with respect to Article 11 of the European Convention. In order to bring the draft amendments in line with international standards, we respectfully recommend the following changes in Article 1 thereof, in particular:

- *Clarify provisions of Article 3. Par. 1. item 5) so that the notion of a “legal persons which pursue activities deemed in general interests” pertains only to legal persons which are otherwise subject to the Law on Public Enterprises.*
- *Clarify provisions of Article 3. Par. 1. item 6) so that that the notion of a “legal person which is predominantly funded by public authorities” pertains only to a narrow range of associations and other NGOs which are established by virtue of a separate law and are directly funded by public authorities referenced in Art. 3. Par. 1. Item 1)-4). Insert specific example references of such NGOs in the language of item 6) (e.g. associations of firefighters) to avoid uncertainty. Alternatively, consider deleting item 6) altogether.*

Introduction

1. This opinion examines the compatibility of the draft amendments to Law on Access to Information of Public Utility ('the Law') with international standards and best practices pertinent to freedom of association. Rather than providing a comprehensive assessment, therefore, the opinion is confined with assessing the impact of the draft amendments on associations and other non-governmental organizations ('NGOs').
2. The draft amendments have been prepared by the Ministry of Public Administration and Local Self-Government ('the Ministry') and are currently open for public consultations which run from March 22 through April 19, 2018.¹ The explanatory memorandum to the draft states that the purpose thereof is to ensure compliance of the (revised) Law with the "development of human rights, international instruments and practices of majority of the European Union states as well as with the intervening national legislation governing issues pertinent to the Law" (p. 1).
3. The web site of the Ministry reads that the baseline and impact assessment analyses of the draft were prepared with SIGMA technical assistance. The link to the baseline analyses leads to a table which merely provides a comparison of the current and amended provisions in the Law, whereas a link to the impact assessment analyses seems to be missing. The web site also reads that the Ministry established cooperation with the Commissioner for Information of Public Utility and Personal Data Protection ('the Commissioner') in preparation of the baseline analyses leading to the draft amendments. However, the preliminary comments which the Commissioner submitted to the Ministry are highly critical of the draft amendments.²
4. The opinion first outlines international standards pertinent to freedom of association, as set out in the European Convention on Human Rights ('the Convention'),³ the ensuing case-law of the European Court of Human Rights (ECtHR/'the Court'), and 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'). It also gives due consideration to the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association ('the Freedom of Association Guidelines') in which those standards are further elaborated. Thereafter, the opinion proceeds with the analyses of the pertinent provisions of the draft amendments as they pertain to freedom of association and NGOs. The opinion concludes with the overall evaluation of the impact of the draft amendments on freedom of association and NGOs, as well as recommendations for changes therein, in order to bring the draft

¹ <http://www.mduls.gov.rs/latinica/dokumenta-zakoni-javne-rasprave.php>.

² <https://www.poverenik.rs/sr/>.

³ Formally known as the European Convention for the Protection of Human Rights and Fundamental Freedoms.

amendments in line with international standards and best practices governing freedom of association.

International standards governing freedom of association

European Convention on Human Rights

5. The rights protected by the Convention are guaranteed to ‘everyone’. This includes natural but also legal persons—depending on the nature of the rights concerned—‘within the jurisdiction’ of a Contracting Party (“Party”) as stipulated in Article 1 of the Convention).⁴ The ECtHR interprets the notion ‘within jurisdiction’ to at least include all persons residing—or for that matter having a place of business—on a territory of a Contracting Party.⁵ Article 11 of the Convention guarantees freedom of association and reads as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

“2. 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”.

6. Once recognized as a legal entity a NGO⁶ is entitled not only to the right enshrined in Article 11, but also to the other rights protected by the Convention which pertain to legal persons, notably, the right to a fair trial, no punishment without law, freedom of thought, conscience and religion, freedom of expression, the right to an effective

⁴ The section on international standards governing freedom of association in this opinion is largely imported from the Expert Council on NGO Law, *The Opinion on the Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organizations Performing the Function of Foreign Agents*, OING Conf/Exp (2013) 1, Strasbourg, August 2013, paras 18-34. For the recent case law developments pertinent to freedom of association see Expert Council on NGO Law, *Non-Governmental Organizations: Review of Development in Standards, Mechanisms and Case Law 2015-2017*, CONF/EXP(2017)4, December 2017, Section D, par. 130 *at seq.*

⁵ See e.g. *Brankovic and others v. Belgium and others*, judgement of 12 December 2001, § 67.: "In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention". See also *Soering v. the United Kingdom*, judgment of 7 July 1989. On the application of the notion of 'everyone' with respect to Article 11 of the Convention see Expert Council on NGO Law, "Conditions of Establishment of Non-Governmental Organizations", OING Conf/Exp (2009) 1, First Annual Report, Strasbourg, January 2009, paras 20-24.

⁶ In international parlance, the terms ‘non-governmental organizations’ and ‘civil society organizations’ are used inter-changeably and entail both membership (associations) and non-membership organizations (foundations, endowments, trusts, etc.). In the context of *Serbia* the term entails *associations, foundations and endowments*.

remedy, prohibition of discrimination, and protection of property.⁷ However, only membership NGOs (associations)—including those without legal entity status—may invoke the protection afforded by Article 11 of the Convention.

7. The primary obligation of a Contracting Party with respect to Article 11 is a negative one: an obligation not to interfere with the enjoyment of freedom of association.⁸ This is in keeping with the overriding objective of Article 11: to afford protection to legal and natural persons in exercising those rights from undue interference by public authorities.⁹ The ECtHR shall primarily interpret pertinent national legislation and domestic case-law, as well as decisions and actions of government, against the background of the negative obligation of a Party.¹⁰ Legitimate interference of a Party ('positive obligation') is limited to instances in which its action is deemed necessary to ensure the full protection of those rights.¹¹ This *inter alia* includes an obligation of a Party to allow an association to acquire legal entity status and afford necessary legal protection during its life-cycle.¹²

Legitimate interference with freedom of association

8. The ECtHR has developed an analytical framework which sets a high threshold for a Contracting Party's legitimate interference with freedom of association. Accordingly, any alleged interference with freedom of association must be 'prescribed by law', must 'serve legitimate aim', and must be 'necessary in a democratic society'.¹³ The Court applies the same analysis with respect to the other qualified rights in the Convention, notably, the right to privacy, freedom of thought, conscience and religion, and freedom of expression, which are protected by Articles 8, 9 and 10 respectively.
9. *Prescribed by law.* The expression 'prescribed by law' requires that the impugned measure have a basis in domestic law. In addition, 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. Because it is impossible to attain an absolute precision in the drafting process, a law which confirms some degree of discretion on the side of public authorities is not itself inconsistent with this requirement—insofar as the scope of the discretion and the manner of its exercise are formulated with sufficient clarity. The ECtHR

⁷ Articles 6, 7, 9, 10, 13 and 14 of the Convention, respectively, Article 1 of the First Protocol to the Convention. See European Committee on Legal Co-operation, "Non-Governmental Organizations in the Case-law of the European Court of Human Rights", Strasbourg, 8 April 2010, CDCJ (2010) 12.

⁸ The negative obligation of a Contracting Party pertains to the right of privacy (Article 8) and freedom of thought, conscience and religion (Article 9) as well.

⁹ *Brega and Others v. Moldova*, judgment of 24 January 2012 (Article 11, Convention).

¹⁰ *Ramazanova and Others v. Azerbaijan*, judgment of 1 February 2007 (Article 11, Convention).

¹¹ *Demir and Baykara v. Turkey*, judgment of 12 November 2008.

¹² *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998.

¹³ *Handyside v. United Kingdom*, judgment of 7 December 1976.

acknowledged that a degree of precision required for a law in question may depend on a number of factors, including: the content of the instrument in question; the field it seeks to cover; and the status of those effected by a law.¹⁴ This is also in keeping with the subsidiary role of the Court in the protection of the rights guaranteed by the Convention: it is primarily for national authorities to interpret and apply domestic law. However, this cannot serve as a pretext for a Contracting Party to avoid obligations arising from the Convention.¹⁵

10. The subsidiary role of the ECtHR by no means implies that it may not proceed with its own independent analysis of the contested legislation, decisions and case-law of domestic authorities. Indeed, the Court has set high standards in applying the 'prescribed by law' requirement. In *Maestri v. Italy*, a case involving a justice who was reprimanded by the supervisory judiciary authority for violation of regulations prohibiting judges from membership of the Freemasons, the Court ruled violation of Article 11 because the contested regulations did not meet the 'prescribed by law' standard. The Court found regulations not foreseeable i.e. written with necessary quality which would have allowed for their unambiguous interpretation, even though the applicant was a well-informed person (justice). The Court noted that the expressions 'prescribed by law' and 'in accordance with the law' in Articles 8 to 11 of the Convention not only require that the impugned measure have some basis in domestic law, but the law is written with *certain quality*. It further noted:

"For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise".¹⁶

11. *Legitimate aims*. Any derogation from the aforementioned rights must serve 'legitimate aim'. The grounds for legitimate derogation set out in Article 11, par. 2 of the Convention are exhaustive i.e. *numerus clausus*, and therefore derogation (interference) may not legitimately serve any other goals (*supra*, par. 9.).
12. The ECtHR has acknowledged that a Contracting Party does have some margin of appreciation with respect to the manner and scope by which the legitimate derogation is applied. However, it goes hand in hand with rigorous supervision. As it noted in *Sidiropoulos and Others v. Greece*:

¹⁴ *Maestri v. Italy* [GC], judgment of 17 February 2004, § 30. *Koretskyy and others v. Ukraine*, judgment of 3 April 2008, § 47.

¹⁵ *Refah Partisi and Others v. Turkey* [GC], judgment of 13 February 2003, § 57.

¹⁶ *Ibid.* § 30. See also *Sunday Times v. the United Kingdom* (no. 1), judgment of 26 April 1979, § 49; *Hasan and Chaush v. Bulgaria* [GC], judgment of 26 October 2000, § 84.

"Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts."¹⁷

13. *Necessary in a democratic society*. The ECtHR has repeatedly noted that democracy is a fundamental feature of the European public order and the only regime compatible with the Convention.¹⁸ Therefore, it is incumbent on a Contracting Party to prove that interference with the right enshrined in Article 11 is not only prescribed by law and serves legitimate aim, but is also in response to "pressing social needs".¹⁹ In *Refah Partisi (the Welfare Party) and Others v. Turkey* the Court stated:

"Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from '*democratic society*'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it".²⁰

14. Furthermore, it is incumbent on a Contracting Party to prove that the interference in question is not only necessary in a democratic society i.e. serves pressing social needs, but is also *proportional* to the needs it purports to serve: a Party must prove that the interference in question is the *minimum level of interference* necessary to attain legitimate goals. The ECtHR aptly summarized this requirement in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*:

"When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".²¹

15. 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. In a significant number of cases involving violation of

¹⁷ *Sidiropoulos and Others v. Greece* § 40. See also *Handyside v. United Kingdom*, §48-49; *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, judgment of 2 October 2001; *Gorzelik and Others v. Poland* [GC], judgment of 17 February 2004; *Emin and Others v. Greece*, judgment of 27 March 2008; *Tourkiki Enosi Xanthis and Others v. Greece*, judgment of 27 March 2008.

¹⁸ *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, § 45.

¹⁹ *Handyside v. United Kingdom*, § 48.

²⁰ *Refah Partisi (the Welfare Party) and Others v. Turkey* § 86.

²¹ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, judgment of 8 October 2009, § 68.

Article 11 of the Convention the ECtHR found that the interference served a legitimate aim, however, the respondent failed to meet the proportionality test.²²

Recommendation CM/Rec (2007)14

16. The Recommendation on the legal status of non-governmental organizations in Europe, although not legally binding, represents a major milestone in the CoE efforts to promote democracy, rule of law and human rights. The Recommendation recognizes: "the essential contribution made by non-governmental organizations (NGOs) to the development and realization of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies". It also underscores the role of NGOs in "the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe".²³
17. The Recommendation sets out a number of principles governing the legal status of NGOs. Significantly, many of those principles have been specifically referred to in the ECtHR case-law. Thus in *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* the Court made specific references to the Recommendation's principle governing the dissolution, the internal governance, the permissible objectives, and the supervision and liability of an NGO.²⁴ The Court's case-law therefore underscores the point about the role of the Recommendation in the CoE overall structure designed to protect democracy, human rights and rule of law.

The draft Amendments to Law on Access to Information of Public Utility

Relevant provisions

18. Article 1 of the draft amendments to Law:

“In the Law on Access to Information of Public Utility (‘Official Gazette of the Republic of Serbia’, No. 120/04; 54/07; 104/09; 36/10) Article 3 shall be amended so as to read:

Article 3

Pursuant to this law, the notion of a public authority shall entail:

- 1) a body of the Republic of Serbia;

²² *Handyside v. the United Kingdom; Sunday Times v. the United Kingdom* (No. 1), judgment of 26 April 1979; *Yeşilgöz v. Turkey*, judgment of 20 December 2005; *Kjeldsen, Busk, Madsen and Pederson v. Denmark*, judgment of 7 December 1976; *Loizidou v. Turkey*, judgment of 23 March 1995. See also Compilation of Venice Commission opinions concerning freedom of association, Strasbourg, 16 July, 2013, CDL(2013)035 pp. 9-12.

²³ Preamble, Recommendation.

²⁴ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, § 39.

- 2) a body of the Autonomous Province;
- 3) a body of municipality, a city, a municipality within a city, and the city of Belgrade;
- 4) a public utility company, an institution, an organization, and other legal entity which is established pursuant to a regulation or a decision of bodies referenced in items 1) – 3) of this article;
- 5) a *legal* or natural person which either pursues activities deemed in general interest or is entrusted to perform public authority, with respect to the information relating to those activities or public authority it is entrusted.
- 6) A legal person which is predominantly funded by a legal person referenced in par. 1. items 1) – 4) of this article, with respect to the activities of the former which are being funded by the latter, except for political parties and religious organizations whose financial oversight is addressed by separate law.

For the purpose of this law, a public stock company shall not be deemed a public authority, irrespective of its ownership structure”.

Analyses

19. The foregoing provisions give rise to several substantive concerns as they pertain to freedom of association and NGOs.
20. Firstly, Article 1 envisages changes in Article 3, Par. 1. item 5) of the Law so as to expand the notion of public authorities to a “*legal* or natural person which either pursues activities deemed in *general interest* or is entrusted to perform *public authority*, with respect to the information *relating* to those activities or public authority it is entrusted” (emphasis ours). The draft amendments—or for that matter the current Law—does not provide any further guidance as to the scope and substance of activities deemed in “general interest”. The language of the explanatory memorandum to Article 1 is also ambiguous on that point (p. 1).
21. The lack of clarity on the foregoing issue needs to be viewed against the background of the NGOs framework regulation. Under the Law on Associations, an association may be established to pursue any not-for-profit goal deemed in mutual or “public interest” (Article 3(1)). The Law envisages a broad range of activities deemed in public interest for which an association is eligible to apply for state, provincial, and local government funds, respectively²⁵ Under the Law on Endowments and Foundation, an endowment may be established to pursue “public” or “mutual benefit” purposes, whereas a foundation may be established to pursue “public benefit” purposes only (Article 3). Provisions of the Law on Associations governing the eligibility of an organization to apply for state, provincial, and local government

²⁵ These may include: social security; care for disabled war veterans; care for persons with disabilities; social child care; care for internally displaced persons from Kosovo and Metohija and refugees; promotion of the birth-rate; assistance to senior citizens; health care; protection and promotion of human and minority rights; education; science; culture; information dissemination; environmental protection; sustainable development; animal protection; consumer protection; combating corruption; as well as humanitarian aid programs and other programs whereby the association pursues public interest purposes directly and exclusively (Law on Associations, Article 38).

funds apply to endowments and foundations accordingly (Law on Endowments and Foundations, Art. 46).

22. We note that there is not a clear-cut definition of a “general interest”, “public interest”, and “public benefit interest” respectively in the Serbian legislation. Rather, those terms are often times used inter-changeably. Thus, the lack of clarity in the draft amendments gives the supervisory authority a great deal of unwarranted discretionary power to decide on whether a (private) legal person is deemed to pursue activities in “general interest”. As a result, an NGO which is otherwise established to pursue activities deemed in “public interest” or in “public benefit interest” might as well fall under the notion of a “public authority” i.e. a legal person which pursues activities deemed in “general interest”. This in turn would trigger the full range of disclosure obligations which are otherwise envisaged in the Law (*infra*, par. 25.). Significantly, these obligations can be triggered *irrespective* of whether an NGO is the recipient of public funds.
23. The Commissioner’s preliminary comments on the draft amendments duly note problems with the lack of clarity on the foregoing issue. The comments suggest further revisions in Art. 3. Par. 1. item 5) of the Law so that it is clear that the contested notion pertains only to legal persons which pursue activities deemed in “general interests” and are subject to the Law on Public Enterprises.²⁶ However, it will not necessarily resolve problems of associations and other NGOs which are entrusted to perform public authority. Pursuant to Art. 3. Par. 1. item 5) those NGOs are subject to disclosure requirements with respect to activities relating to public authority they are entrusted to perform. We recognize that this approach is largely consistent with the Recommendation (2002)2 of the Committee of Ministers to member states on access to official documents.²⁷ However, the draft amendments—or for that matter, the current Law—does not provide any further guidance which would facilitate drawing a clear-cut line between the NGO activities relating to public authority and the other activities it performs. In the ECtHR case-law the fact that an association is entrusted with performing public authority does not necessarily lead to a conclusion that it is no longer perceived as a person in private law, which is otherwise afforded protection under Article 11 of the European Convention. Rather, insofar as an association combines public and private law elements, the fact that it performs public authority is but one of the contributing factors in the ECtHR’s deliberation on whether such an association is still deemed a person in private law.²⁸
24. Given the foregoing analyses, therefore, there is a manifest lack of clarity in the draft amendments as to whether the notion of a “legal person which pursues activities deemed in general interest” pertains to associations and other NGOs. This renders

²⁶ Commissioner for Information of Public Utility and Personal Data Protection, Opinion on the draft amendments to Law on Access to Information of Public Utility, No. 073-12-45012018 of April 10, 2018, p. 2.

²⁷ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c6fcc.

²⁸ See, for example, *Chassagnou and others v. France* [GC], no. 25088/94, 28331/95 and 28443/95, §§ 99-102, *Sigurdur A. Sigurjonsson v. Iceland*, judgment of 30 June 1993, Series A no. 264. *Mytilinaios and Kostakis v. Greece*, judgement no. 29389/11 of 3 December 2015.

provision of Article 3, Par. 1. item 5) of the Law as falling short of meeting the ‘prescribed by law’ requirement with respect to Article 11 of the European Convention (*supra*, paras. 9-10). In addition, there is a lack of clarity as to what sets apart an association and other NGOs activities relating to public authority from the other activities it carries out in course of business. Insofar as public authority which an association performs has no bearing on its private law status, the lack of clarity on this point gives rise to Article 3. Par. 1. item 5) falling short of the ‘prescribed by law’ requirement with respect to Article 11 of the Convention.

25. Secondly, the revised Article 3. Par. 1. item 6) of the Law extends the notion of public authority to a *legal person* which is *predominantly* being funded by a legal person referenced in Par. 1. Items 1) – 4), with respect to activities of the former which are being funded by the latter, except for *political parties* and *religious organizations* whose *financial oversight* is addressed in *separate law*. There is little doubt that the revised Article 3. Par. 1. item 6) pertains to associations and other NGOs which are recipient of public funds (*supra*, par. 21). If those organizations are predominantly funded by public bodies referenced in Art. 3, Par. 1. Items 1) – 4) (*supra*, par. 18.) they will be subject to a full range of disclosure obligations which otherwise pertain to public authorities. This includes, among others: providing an information of public utility per request of “everybody” (Art. 5 (1) of the Law); providing such an information timely i.e. within a 15 day deadline, or within 48 hours if an information is deemed significant for the protection of life and freedom, public health and safety, and environmental protection (Art. 15(1)(2) of the Law); preparing and making available to public a “personal card” i.e. a manual which contain hosts of information, including the organizational structure of the organization, information on income and expenses as well as employees’ salaries (Art. 39 of the Law as revised by the draft amendments), and preparing a detailed annual activity report for the Commissioner (Art. 43 of the Law). An NGO and its legal representatives shall be subject to monetary fines if the organization is found in violation of any of those as well as other obligations arising from the Law (Art. 46-48 of the Law).
26. The foregoing disclosure obligations for NGOs-recipients of dominant public funds need to be viewed against the fact that public funding is a major source of income for NGOs in Serbia.²⁹
27. According to the explanatory memorandum, the underlying goal of revised Article 3. Par. 1. item 6) of the Law is to ensure the same level of information transparency of public authorities which are referenced in Article 3, Par. 1. items 1)–4) and private legal persons which are referenced in item 6), insofar as the latter is the recipient of public funds (p. 2.). We note however that invoking the transparency argument to stifle NGOs ability to receive funds has become a recurring—and troublesome—

²⁹ <http://www.civilnodrustvo.gov.rs/podsticajno-okruzenje/transpar%D0%B5ntno-finansiranje/transparentno-finansiranje.373.html>.

trend in a number of CoE countries and beyond.³⁰ With respect to the general framework governing transparency of public funding of NGOs, the Recommendation CM/Rec(2007)14 provides as follows:

“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....

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

28. It is thus legitimate to hold NGOs accountable for the use of public funds received, however, those requirements must be proportional. The Interpretative Note to the Freedom of Association Guideline states in this respect:

“225. 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.”

29. Given the foregoing principles underpinning NGOs transparency, Article 3, Par. 1. item 6) gives rise to several concerns. At the outset, the draft amendments do not provide any guidance whatsoever as to how the “predominant” public funding threshold is established. For example, does the notion of “predominant” entail a simple majority of the overall public funds received by an NGO in a given time, or a qualified majority? In case of the latter, what constitutes a qualified majority of the public funds received: a two-thirds majority or another? In addition, how is the “predominant” threshold calculated: does it include *all funds* an NGO has received in a given period from public authorities referenced in Art. 3. Par. 1. Item 1) - 4), or the threshold is triggered only in case funds received from a *single* public authority are established to have reached the prescribed threshold? Furthermore, what is the time frame to trigger the dominant threshold: public funds received in the prior financial year, or those received in the current financial year? In the case of the latter, what are the legal implications in case public funds received by an NGO no longer meet the predominant threshold requirement, because an NGO was successful in raising funds from other sources in the intervening period? Is an NGO subject to the disclosure obligations set out in the Law on the day it has entered into a public funding agreement which triggers the predominant threshold requirement, or on a day the actual implementation of a project supported by those funds sets in? What are the

³⁰ See, for example, Venice Commission, *Hungary: Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad*, (CDL-AD(2017)015, 20 June 2017; Expert Council on NGO Law, *Opinion on the Romania draft Law on Associations and Foundations 114/2017*, CONF/EXP 2017 (3), 11 December 2017; *Non-Governmental Organizations: Review of Development in Standards, Mechanisms and Case Law*, paras 64-137.

legal implications if an NGO subsequently decides to withdraw from a dominant public funding agreement, because the public authority is in default with distribution of committed funds or decides to significantly reduce the amount of those funds? Does the dominant funding threshold include *any* public funds to support an NGO or is there a difference in this respect between institutional and operational grants? Related to the previous question, does the threshold include only monetary or also in-kind contribution to an NGO? Finally, does it also pertain to EU funds as well as bilateral assistance which are being distributed to NGOs through public bodies referenced in Art. 3. Par. 1 item 1)-4)?

30. The foregoing illustrative list of issues arising from Article 3. Par. 1. item 6) needs to be viewed against the fact that the draft amendments do not provide any guidance which would facilitate determination of the precise scope and substance of activities of an NGO which has reached the dominant public funding threshold, and which are relating to its corresponding disclosure obligations ((*supra*, par. 25).
31. In addition, Article 3. Par. 1. item 6) of the Law exempts political parties and religious organizations, which in Serbian law are also deemed associations (Article 2(2), Law on Associations), from the disclosure requirements on a pretext that their financial oversight is regulated by separate law. We note that this justification does not sustain close scrutiny, as the financial oversight of associations other than political parties and religious organizations—as well as other NGOs—is also *regulated by separate law*. Specifically, the financial oversight of NGOs is governed by the 2013 Law on Accounting and the 2018 Regulation on financing and co-financing of associations' programmes deemed in public benefit. In addition, there is the 2012 Regulation on financing and co-financing of projects and programmes deemed in public benefit in the sector of youth, as amended, and the 2016 Regulation on financing of programmes deemed in public benefit in the sector of sport, respectively.
32. According to the Accounting Law, associations and other NGOs with a legal person status are obliged to keep account of its financial transactions pursuant to the prescribed standards and submit annual financial report to the regulatory authority, along with the necessary supporting documents (Art (2(2), 25(1), 33-34). The reports must be prepared in electronic form and are available on the web site of the regulatory authority (Art. 36). The 2018 Regulation on financing and co-financing of associations' programmes deemed in public benefit (which was prepared by the same Ministry) provides that associations-recipient of public funds are subject to a whole range of oversight and reporting requirements, including the obligation to submit quarterly and final activity and financial reports (Art. 13). Thus, pertinent Serbian legislation *already provides* the level of NGO financial transparency which fully complies with international standards (*supra*, paras. 27.-28.). Should additional information of public utility with respect to public funds provided to an NGO be required, it is incumbent on *public authority*-the fund provider referenced in Art. 3. Par. 1. Item 1)-4) of the Law to provide such an information.

33. We also note that the revised Article 3. Par. 2. exempts public stock companies from the application of the Law, even if the majority or wholly owner of such a company is public authority referenced in par. 1. item 1-4). As a result, a company which is majority or wholly-owned by public authority is exempt from the application of the Law, however, an NGO is fully subject to the onerous disclosure requirements just because they receive public funds.
34. Taken as a whole, the concept of public authority in the revised Article 3 of the Law is entirely inconsistent: it pertains to commercial companies which are entrusted to perform public authority, however, it does not pertain to public stock companies in which public authority holds a majority or all of the shares;³¹ it pertains to associations and other NGOs which are predominantly funded by public authority, however, it does not pertain to political parties and religious organizations on the hollow justification that financial oversight of the latter is governed by separate laws.
35. Given the foregoing analyses, there is a manifest lack of clarity in Article 3. Par. 1. Item 6) of the Law with respect to the notion of predominant public funding. This renders these provision falling short of the ‘prescribed by law’ requirement with respect to Article 11 of the European Convention. In addition, the notion of dominant funding threshold falls short of the ‘proportionality’ requirement. It unduly burdens NGOs with onerous disclosure requirements, despite the fact that pertinent regulation provides sufficient protection and transparency of public funds awarded to NGOs. For the same reasons, these provisions unduly discriminate against NGOs which are not political parties and religious organization.
36. If the purpose of the foregoing provisions however was to extend the notion of public authorities to associations and other NGOs which are established by virtue of a separate law and are directly funded by public authorities referenced in Art. 3. Par. 1. items 1)-4), it has to be clearly spelled out. The 2013 Croatia Law on Access to Information might be a good starting point in this respect (Art. 5(2)).
37. As already noted, the explanatory memorandum to the draft amendments state that one of the goals of the proposed revisions is to bring the Law in line with practices of “majority of the European Union states” (*supra*, par. 2). Our cursory review of legislation governing freedom of information however seems to suggest there are relatively few EU countries which chose to extend the notion of public authorities in legislation governing access to public information to NGOs (we managed to identify two: Croatia and Denmark). For example, the United Kingdom 2002 Freedom of Information Act does not envisage NGOs being subject to disclosure obligations arising from the Law under any circumstances.³² In Finland, the notion of public authorities in the 1951 Act on the Openness of Public Documents pertains to state, municipalities, and registered religious communities. In Estonia, the 2000 Public

³¹ See, for example, Sections 3 and 6 the 2002 United Kingdom Freedom of Information Act which stipulates that a company wholly owned by the Crown, wholly-owned by the wider public sector, or wholly-owned by the Crown and the wider public sector do fall within the notion of public authorities.

³² https://ico.org.uk/media/for-organisations/documents/1152/public_authorities_under_the_foia.pdf

Information Act extends the notion of public authorities to government and local government bodies, legal persons in public law and legal persons in private law insofar they are performing public services (providing health, education etc.). In the Czech Republic, the 1999 Law on Free Access to Public Information defines public authorities so as to include the state agencies, territorial self-administration authorities and public institutions managing public funds, as well as anybody authorised by the law to reach legal decisions relating to the public sector, to the extent of such authorisation. In Ireland, the 2014 Freedom of Information Act does not envisage NGOs being subject to the Law.

Conclusion and Recommendations

38. The foregoing analyses suggest significant problems with Article 1 of the draft amendments (which seeks to revise Article 3 of the current Law) as it pertains to freedom of association and NGOs.
39. Firstly, Article 1 envisages changes in Article 3, Par. 1. item 5) of the Law so as to expand the notion of public authority to a legal or natural person which either pursues activities deemed in general interest or is entrusted to perform public authority, with respect to the information relating to those activities or public authority it performs. However, the draft amendments—or for that matter the current Law—does not provide any further guidance as to the scope and substance of activities deemed in “general interest”. The language of the explanatory memorandum to Article 1 is also ambiguous on that point (p. 1). This is particularly of concern given that there is no a clear-cut definition of public interest, public benefit interest and private interest, respectively, in the Serbian law. Rather, those terms are used inter-changeably. The lack of clarity on this issue gives the supervisory authority a great deal of unwarranted discretionary power to decide on whether a (private) legal person is deemed to pursue activities in “general interest”. As a result, an NGO which is otherwise established to pursue activities deemed in “public interest” or in “public benefit interest” might as well fall into the notion of public authority i.e. a legal person which pursues activities in “general interest”. This in turn would trigger the full range of disclosure obligations which are otherwise envisaged in the Law; these obligations could be triggered *irrespective* of whether an NGO is the recipient of public funds. The lack of clarity on this issue renders Article 3, Par. 1. Item 5) falling short of meeting the ‘prescribed by law’ requirement with respect to Article 11 of the European Convention (*supra*, paras. 9-10).
40. Secondly, the revised Art. 3. Par. 1. item 5) does not provide any further guidance which would facilitate drawing a clear-cut line between activities relating to public authority which an association and other NGO are entrusted to perform and the other activities it carries in course of business. While the wording of these provisions is largely consistent with the CoE Recommendation (2002)², it nevertheless falls short of the foregoing ‘prescribed by law’ requirement, insofar as public authority which

an association is entrusted to perform does not alter the private law nature of an organization (*supra*, paras. 20.-24.).

41. Thirdly, the revised Article 3. Par. 1. item 6) of the Law also gives rise to the ‘prescribed by law’ requirement with respect to Article 11 of the European Convention. The draft amendments do not provide any guidance whatsoever as to how the “predominant” public funding threshold is being established. This lack of clarity needs to be viewed against the fact that the draft amendments do not provide any guidance which would facilitate determination of the precise scope and substance of activities of an NGO which has reached the dominant public funding threshold, and which are relating to its corresponding disclosure obligations. In addition, the concept of dominant funding threshold falls short of the ‘proportionality’ requirement with respect to Article 11 of the Convention. It unduly burdens NGOs with onerous disclosure obligations, despite the fact that pertinent regulation provides sufficient protection and transparency of public funds awarded to NGOs. For the same reasons, these provisions unduly discriminate against NGOs which are not political parties and religious organization.
42. Taken as a whole, the concept of public authority in the revised Article 3 of the Law is entirely inconsistent: it pertains to commercial companies which are entrusted with public authority, however, it does not pertain to public stock companies in which public authority holds a majority or all of the shares; it pertains to associations and other NGOs which are predominantly funded by public authority, however, it does not pertain to political parties and religious organizations on the hollow justification that their financial oversight of the latter is governed by separate law (*supra*, paras. 25. - 36.).
43. As they stand now, the draft amendments fall short of meeting the international standards governing freedom of association and may have adverse impact on NGOs. Therefore we respectfully suggest the following **changes** in Article 1 of **draft amendments**: 1) clarify provisions of Article 3. Par. 1. item 5) so that the notion of “legal persons which pursue activities deemed in general interests” pertains only to legal persons which are otherwise subject to the Law on Public Enterprises; 2) clarify provisions of Article 3. Par. 1. Item 6) so that that the notion of “legal person which is predominantly being funded by public authorities” pertains only to a narrow range of associations and other NGOs which are established by virtue of a separate law and are directly funded by public authorities referenced in Article 3. Par. 1. Items 1)-4). Insert specific example references of such NGOs in the language of item 6) (e.g. associations of firefighters) to avoid uncertainty. Alternatively, delete provisions of item 6) altogether.

