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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE/ODIHR)

ROMANIA

JOINT OPINION

ON DRAFT LAW No. 140/2017 ON AMENDING GOVERNMENTAL ORDINANCE NO. 26/2000 ON ASSOCIATIONS AND FOUNDATIONS

Adopted by the Venice Commission at its 114th Plenary Session (Venice, 16-17 March 2018)

On the basis of comments by
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Contents

I. Introduction

1. By letter of 14 December 2017, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe requested the Venice Commission to prepare an opinion on the compatibility of draft law 140/2017, amending Governmental Ordinance No. 26/2000 on Associations and Foundations) (CDL-REF(2018)011) with international standards on human rights and fundamental freedoms. In accordance with standing practice, it was decided that the Venice Commission prepares the Opinion jointly with the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR).

2. Mr Richard Clayton, Ms Sarah Cleveland, Mr Martin Kuijer, Mr Gediminas Mesonis and Ms Herdis Kjerulf Thorgeirsdottir acted as rapporteurs on behalf of the Venice Commission. Mr David Goldberger, Ms Muatar Khaydarova, Mr Serghei Ostaf and Ms Alice Thomas were appointed as legal experts for the OSCE/ODIHR.

3. On 5-6 February 2018, a joint delegation of the Venice Commission and OSCE/ODIHR, composed of Mr Richard Clayton, Ms Alice Thomas, Ms Herdis Kjerulf Thorgeirsdottir, accompanied by Mr Ziya Caga Tanyar, legal officer at the Secretariat, visited Bucharest and met with representatives of the Ministry of Foreign Affairs, of the Ministry of Justice, the People's Advocate, representatives of the Senate and of the Chamber of Deputies, representatives of the Constitutional Court and a number of civil society organisations. The Venice Commission and the OSCE/ODIHR are grateful to the Romanian authorities for the excellent organisation of the visit.

4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of unofficial translation of the draft law. Inaccuracies may occur in this opinion as a result of incorrect translations.

5. The Venice Commission remains at the disposal of the Romanian authorities and the Parliamentary Assembly for further assistance in this matter.

6. This opinion was examined by the sub-commission on fundamental rights and subsequently adopted by the Venice Commission at its 114th Plenary Session (Venice, 16-17 March 2018).

II. Scope of the Joint Opinion

7. The scope of this Joint Opinion covers only the draft law, submitted for review, and the legislation that it is amending. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the right to freedom of association in Romania.

8. The Joint Opinion raises key issues and provides indications of areas of concern relating to draft law. The ensuing recommendations are based on relevant Council of Europe and other international human rights standards and obligations, OSCE commitments, good national practices, and on previous recommendations where relevant.

9. In view of the above, the Venice Commission and the OSCE/ODIHR would like to note that this Joint Opinion does not prevent them from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation in Romania in the future.

III. Executive summary and conclusions

10. The declared aim of draft law no. 140/2017 amending the Government Ordinance 26/2000 is on the one hand to privilege, in the procedure for obtaining public utility status by

associations, some areas of activities which have priority in the satisfaction of the most important needs of the Romanian society and on the other hand, to reduce suspicions regarding the legality of the financing of associations and foundations operating in Romania and to increase public trust in the non-governmental associated life. First, the draft law states in specific terms what is to be regarded as being in the "general interest" and links the recognition of public utility status to the requirement that the respective NGOs pursue activities in those specific areas. Secondly, the draft law introduces a new financial disclosure regime which applies to all associations, foundations and federations regardless of whether they are recognised or not as public utility associations.

11. The Venice Commission and the OSCE/ODIHR welcome the endeavour of the draft law to be more specific in what is to be regarded as being in "the general or community interest" as 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. Nonetheless, to obtain clarity on such matters, it would have been important and useful to hold extensive consultations, not only with civil society, but also with the wider public. A significant concern in this regard is whether the draft provision is sufficiently clear and precise to avoid arbitrary decisions in its implementation and its exhaustive character, in the sense that it definitely excludes other areas not listed in the draft provision, such as human rights or the fight against corruption, from the benefit of public utility status. Another area of concern is the restriction imposed on public utility associations and foundations to carry out any kind of political activity. The Venice Commission and the OSCE/ODIHR accept that the State's role as a neutral and impartial organiser of public affairs may require that NGOs with an outspoken political profile, e.g. explicitly fundraising in favour of or against a political party or candidate, be excluded from being recognised as "public utility association". However, this should not undermine the right of associations to undertake advocacy on issues of public debate.

12. Concerning the new financial reporting obligations, which apply to all associations and foundations (regardless of whether they are recognised or not as public utility associations), the reference to the "public concern" and "suspicions" about the legality and honesty of financing of NGOs in Romania are not sufficient reasons to impose drastic reporting obligations on all associations, especially if these are not based on a substantiated concrete risk analysis pointing to the specific involvement of the civil society sector in the commission of crimes, such as money laundering, corruption or connected crimes. The Venice Commission and the OSCE/ODIHR recall that Principle no. 1 of the Joint Guidelines on Freedom of Association is the "Presumption in favour of the lawful formation, objectives and activities of associations." In their current form, the stringent disclosure requirements (the publication of detailed financial reports every six months including the identity of individual sources of income regardless of the amount), coupled with severe sanctions in case of non-compliance (suspension of the activities for a period of 30 days and in case of continuous non-compliance, immediate dissolution proceedings) are likely to have a chilling effect on civil society and conflict with the freedom of association and the right to respect for private life. The added value of public disclosure to achieve the purported aims of the draft law appears questionable given that substantive reporting obligations to a specialised body such as the Anti-Money Laundering Office already exist.

13. The Venice Commission and the OSCE/ODIHR note with satisfaction the fact that during the meetings in Bucharest, the initiators of the draft law have indicated their readiness to amend the draft law in several aspects and call upon the Romanian authorities to consider the following main recommendations:

- *Concerning the public utility status:*

• "Democracy, human rights, rule of law and fight against corruption" should be added to the list of specific areas of general or public interest under draft Article 38 (1)a). A "catch all" clause could also be inserted at the end of the list of specified areas under the same draft provision, in order to cover all other public interest areas which are not mentioned specifically in this provision; the civil society should be specifically consulted on this point;

• A clear provision should be introduced indicating the availability of legal protection (judicial review) before courts for associations or foundations, which have been denied "public utility" status;

• The specific algorithm provided in draft Article 38(2) and 41(a) does not satisfy the requirement that public support must "be governed by clear and objective criteria" nor the foreseeability criterion in the case-law of the ECtHR, and should be repealed;

• The provision imposing a ban on political activities for associations with public utility status should be limited to clear cases of support, e.g. explicit fundraising, in favour of or against a particular party or candidate, while ensuring that the provision is worded in such a way that it does not prevent public utility associations from "undertaking advocacy on issues of public debate".

- *Concerning the new financial reporting obligations:*

• New reporting and disclosure requirements foreseen by the draft law, including the sanctions of suspension of activities and dissolution in case of non-compliance are clearly unnecessary and disproportionate and should be repealed. At a minimum, the reporting obligations on financial sources should either be limited to reporting to a regulatory body at reasonable intervals or the obligation to disclose the identity of the donors should be limited to the main sponsors.

14. The draft law should be submitted to broad public consultations before it is adopted.

IV. General remarks

15. Draft law No. 140/2017 (hereinafter, "the draft law") amends the current Government Ordinance No. 26/2000 regarding associations and foundations (hereinafter, "the Government Ordinance"), which regulates the establishment, organisation and operations and dissolution of non-governmental organisations. The draft law, initiated by two members of the Parliament (one member of the Senate and one member of the Chamber of Deputies), does not amend all parts of the Government Ordinance, but it rather focuses on a set of regulations pertaining to a particular category of associations, namely "associations, foundations and federations recognised as public utility". At the same time, the draft law introduces additional financial reporting obligations for all associations, foundations and federations regardless of whether they are recognised or not as public utility associations.

16. The draft law falls under the category of draft laws that need to be reviewed by both chambers of the Parliament (the Senate, as first notified chamber and the Chamber of Deputies) according to Article 75(1) of the Constitution and is currently pending before the Chamber of Deputies. It was previously adopted by the Senate on 21 November 2017, in a silent vote, since the Senate did not manage to have a debate on the draft within the time

required by Article 75(2) of the Constitution.[1] Within the Chamber of Deputies, the Human Rights Committee issued comments in favour of the draft law.

17. According to an explanatory note prepared by the initiators of the draft law, the aim of the amendments is on the one hand to privilege, in the procedure for obtaining the public utility status by associations, some areas of activities which they consider as having priority in the satisfaction of the most important needs of the society and on the other hand, to reduce suspicions regarding the legality of the financing of associations and foundations operating in Romania and to increase public trust in the non-governmental associated life and in the honesty of their activities.

18. The Government of Romania issued a negative opinion on the draft law and considered that no solid grounds have been laid down to introduce changes to provisions regarding the public utility status of associations and that the new reporting obligations may adversely affect the associative life in Romania since they may generate additional bureaucracy and make the activities of associations more difficult.

19. On 22 November 2017, 70 non-governmental organisations from Romania addressed an open letter to the leadership of the Social Democratic Party (main party of the leading majority) and claimed, *inter alia*, that the existing regulations concerning the access to public resources were adequate and that there were no grounds to impose additional reporting obligations on associations. They noted that associations are currently subject to the same reporting obligations as all other legal entities in Romania and that the adoption of the draft law would discourage the philanthropic behaviour of citizens and have detrimental effects on the functioning of civil society organisations in the country.

20. On 11 December 2017, the Expert Council of the Conference of INGOs of the Council of Europe issued an Opinion on Draft Law 140/2017, which was taken into account in the preparation of the present Opinion.

21. There has been no meaningful public consultation or debate preceding the introduction of the draft law in Parliament. The Venice Commission and the OSCE/ODIHR have not analysed the rules in Romania concerning the requirement of public consultation prior to the submission of draft laws to Parliament and whether they differ depending on the author of the draft law (i.e. members of Parliament or the Government). In any event, Recommendation CM/Rec(2007)14 stipulates that *"NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation"* and the wording of this Recommendation does not attach any relevance in this regard as to initiator of the legislative process.[2] As the Venice Commission previously stated, conducting a public

[1] ARTICLE 75 (1) and (2)
(1) The Chamber of Deputies, as a first notified Chamber, shall debate and adopt the bills and legislative proposals for the ratification of treaties or other international agreements and the legislative measures deriving from the implementation of such treaties and agreements, as well as bills of the organic laws stipulated under article 31 (5) , article 40 (3) , article 55 (2) , article 58 (3) , article 73 (3) e) , k) , l) , n) , o) , article 79 (2) , article 102 (3) , article 105 (2) , article 117 (3) , article 118 (2) and (3) , article 120 (2) , article 126 (4) and (5) , and article 142 (5) . The other bills or legislative proposals shall be submitted to the Senate, as a first notified Chamber, for debate and adoption.
(2) The first notified Chamber shall pronounce within 45 days. For codes and other extremely complex laws, the time limit will be 60 days. If such time limits are exceeded, it shall be deemed that the bill or legislative proposal has been adopted.

[2] Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (hereinafter, "Recommendation"), adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies, para 77. See also CDL-AD(2014)046 Joint Guidelines of the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights

consultation with civil society organisations prior to the adoption of legislation directly concerning such organisations therefore constitutes part of the good practices that the European countries should strive to adhere to in their domestic legislative processes.[3] The Venice Commission and the OSCE/ODIHR recommend that inclusive and effective consultations concerning the draft law should be conducted at all stages of the law-making process, including during discussions before Parliament up until and in any case before its adoption.

V. Legislative framework

22. Under the current legislation (Government Ordinance 26/2000), associations and foundations that are recognised as being of public utility are entitled to specific rights and underlie specific obligations (Article 41 of the Government Ordinance). They are entitled, *inter alia*, to make free use of "assets under the public property" (Article 41(a)) and to mention their public utility status in all their documents (Article 41 c)). In return, those associations and foundations have the obligation to maintain at least a similar level of activity and performance that determined the recognition (Article 41 d)), to communicate to the competent administrative authority any amendments to their constitutive acts and statutes, as well as the activity reports and annual financial statements (Article 41 e)) and publish excerpts of their activity reports and annual financial statements in the Official Gazette and in the National register of non-profit making legal persons, within three months after the end of each year (Article 41 f)).

23. Under Article 39(1) of the Government Ordinance, public utility status is presently granted by government decision following an application made by an association or foundation. The criteria for obtaining such status are set out under Article 38 and require, *inter alia*, that the respective association or foundation carries out activities that are in general or community interest; has been operating for at least three years and shall demonstrate "the development of significant previous activities" with "programs or projects specific to its purpose". Moreover, the organisation also needs to show, based on its financial statements, that it has property, logistics, members and staff, corresponding to its purposes (Article 38 (1)d)).

24. In principle, public utility status is granted indefinitely (Article 42(1)), but the Government may withdraw the recognition of such status if the association or foundation in question no longer meets one or more of the conditions on which such recognition was based (Article 42(2)).

25. The Government Ordinance currently does not require all associations, foundations or federations to *submit and publicise* annual financial statements, although they are subject to accounting and reporting obligations, in particular to fiscal authorities. This obligation exists only for those associations and foundations which are conferred public utility status (Article 41 f)).

26. During the visit, the delegation was informed that only a minority of associations and foundations apply and obtain public utility status. According to the statistics provided by the Ministry of Justice, from a total of 100 000 registered associations and foundations[4] only

(OSCE/ODIHR) on Freedom of Association, adopted by the Commission at its 101st Plenary Session (Venice, 12-13 December 2014) (hereinafter, "Joint Guidelines"), para 106.

[3] CDL-AD(2017)015 Opinion on the draft law of Hungary on the transparency of organisations receiving support from abroad, adopted by the Venice Commission at its 111th Plenary Session (Venice, 16-17 June 2017), para. 27.

[4] This number includes associations and foundations from before 2000, it is not clear how many of them are still active

about 137 hold public utility status. The authors of the draft law base themselves on a larger figure of public utility associations and foundations (about 1 500), but they include in this number associations and foundations which are entitled to public benefits, such as grants, subventions and various types of benefits granted by public entities via other legislation than the Government Ordinance. The delegation was also informed that the reason for such a small number of associations/foundations with public utility status may be that there are other, presumably easier means to obtain public funding for the civil society sector. There appear to be numerous other government grants that associations and foundations may apply for; funds are then granted via a competitive procedure.

Amendments proposed by the draft law

27. The draft law amends the above process for obtaining public utility status quite significantly. First, the types of associations or foundations eligible for public utility status have been restricted: rather than allowing all associations/foundations carrying out activities in the general or public interest to apply for such status, under the new draft para. 1 (a) of Article 38 only certain categories of organisations may apply. These are associations/foundations carrying out activities in the general or community interest in the following areas: social services, charity and humanitarian aid, health, sports, education, science, research, innovation, environment and animal protection, consumer protection, national and national minorities' values, traditions and cultural assets, diplomacy and international relations, military defence, and respect for heroes.

28. Secondly, under draft Article 38(1) e, associations or foundations may not receive public utility status if they are carrying or have carried out in the past two years any kind of political activity, which means fundraising or campaigning to support or oppose a political party or candidate running for public office. Similarly, draft Article 41 c) introduces an obligation on associations which have already obtained public utility status to refrain from "any kind of political activity" which is also defined in the draft provision as "fundraising or campaigns to support or oppose political parties or candidates for public office in which he/she may be appointed or elected."

29. Public utility status shall be recognized following a specific algorithm under Draft Article 38(2) – social service organizations, charities and human aid organizations, as well as those engaging in health and sports shall receive 40% of the recognitions. 30% of the recognized associations/foundations shall be those engaging in education, and 10% will go to all other types of associations/foundations mentioned in para. 1 (a) of draft Article 38. The recognition as associations/foundations with public utility status is linked to the possibility of free use of public property and access to funding from central and local budgets, which is distributed following the same algorithm (amended Article 41).

30. Public utility status is no longer granted for an unlimited amount of time, but restricted to 5 years, with the possibility of renewal (amended Article 42 (1). Every year, the responsible administrative authority will, together with the Ministry of Justice, draw up a report for each association/foundation with public utility status to assess the respective organisation's compliance with the conditions that led to recognition of such status. All reports will be published on the website of the Ministry of Justice. In case of non-fulfilment of the required conditions, recognition as a public utility organisation will be withdrawn, as in the current Government Ordinance.

31. Finally, the draft law introduces a new article to the Government Ordinance, namely Article 48[1], which contains additional more frequent and detailed reporting obligations for all associations, foundations and federations, regardless of whether they have any special status, such as public utility status, or not. According to this new provision, these entities would be obliged to publish financial statements every six months (instead of once a year for

public utility associations according to the current legislation), within 30 days of the end of the previous semester, in the Official Gazette. These statements need to include "the individual or activity (whichever is the case) generating each income, as well as the value of each income […] separately".

32. The failure to publish such statements would lead to the suspension of the association, foundation or federation's functioning for a period of 30 days (Article 48¹(3)). If the respective entity fails once again to publish the financial statements within 30 days and according to the required conditions under Article 48[1] (2), it shall cease its activities immediately, according to the conditions provided in Chapter IX of the Government Ordinance, which deals with the dissolution and liquidation of associations, foundations and federations.

VI. International standards

A. General principles

33. The rights and freedoms of associations and their members are protected by the right to freedom of association, as set out in Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 of the European Convention on Human Rights and Freedoms (ECHR). This right also includes the right to seek, secure and utilize resources, as otherwise freedom of association would be deprived of all meaning.[5]

34. Given the importance of freedom of association in any democratic state, its exercise may only be restricted in exceptional cases, and following strict criteria set out in the above-mentioned international instruments. In particular, the enjoyment of this right must be weighed against the rights of others and other general interests of a democratic society. Therefore, the challenge is how to strike a balance between those competing interests. International human rights standards attach relevance to the following three criteria when assessing whether restrictions imposed on the right concerned may be deemed legitimate:

- Legality: any limitation must be prescribed by law in clear and precise terms. A limitation needs to have a basis in domestic law, i.e. the disputed measure should be based on a legal rule, originating from a competent (by virtue of attribution or delegation) legislative authority. In addition, the legal basis needs to be accessible.[6] Lastly, the relevant law needs to be foreseeable. A law is "foreseeable" if it is formulated with sufficient precision to enable the person concerned – if need be with appropriate advice – to regulate his/her conduct accordingly.[7] The law must be sufficiently clear and detailed in its terms to give individuals an adequate indication as to the circumstances and conditions in which public authorities are empowered to interfere with the right concerned.[8]

- Legitimacy: the interference or restriction must have a legitimate purpose, as set out in the exhaustive list of grounds of limitation listed in international instruments. Under Article 11(2) ECHR those legitimate aims are national security or public safety, the prevention of disorder or crime, the protection of health or morals or the rights and freedoms of others. Article

[5] See Joint Guidelines, para. 102. See also the Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/23/39, of 24 April 2013, para. 8, and Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies, para. 50.

[6] ECtHR *Khan v. UK*, no. 35394/97, 12 May 2000.

[7] See e.g., ECtHR *Koretskyy v. Ukraine,* no. 40269/02, 3 April 2008, par 47; and *The Sunday Times v. the United Kingdom (No. 1),* no. 6538/74, 26 April 1979, par 49. See also Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, par 58.

[8] Human Rights Committee, *De Groot v. The Netherlands*, no. 578/1994, 14 July 1995 and ECtHR, *Doerga v. The Netherlands*, no. 50210/99, 27 April 2004.

22 (2) of the ICCPR contains similar grounds, with the difference that it refers to public order (ordre public) instead of 'the prevention of disorder or crime'. As noted in the Joint Guidelines on Freedom of Association, "[t]he scope of these legitimate aims shall be narrowly interpreted" (para. 34).

- Proportionality: the restriction must be necessary in a democratic society and proportionate to the intended aim. Public authorities need to be able to demonstrate that the disputed measure is truly effective means of pursuing the declared legitimate aim and why the disputed measure is necessary in addition to already existing possibilities to achieve this aim. Further, the cumulative effect of all legal rules combined on the freedom concerned needs to be assessed, and whether there is a proportionate relationship between the effects of the measure concerned and the affected freedom.

B. Public support for associations

35. The not-for-profit nature of associations and their importance to society means that state support may be necessary for their establishment and operations.[9] State support in this context is also understood as access to public resources, including public funding.[10]

36. The recognition of associations or foundations as being of public utility is thus related to the concept of granting public support to NGOs as provided for in Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the Legal Status of Non-Governmental Organisations in Europe (NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support; para. 57) and in the Joint Guidelines (para. 203). This kind of support (irrespective of its form) must be governed by clear and objective criteria[11] ; grant of this support can depend on the nature and beneficiaries of the activities undertaken by an NGO[12], on its legal form, etc[13]. Any system of state support must be transparent[14].

37. The very nature of the public support presumably provides a State with wider discretion (as compared to other matters related to the establishment and activities of NGOs) to legally regulate the conditions for providing it. The provision of public support, therefore, can be conditional upon certain objectives being pursued or certain activities being undertaken.[15] It may be made conditional, among others, on the requirement that NGOs that are about to receive such support address those needs of society considered to be a particular priority; in addition, what is seen as a priority and thus what forms of activity are regarded as worthy of public support can change over time.[16] In case the objectives or activities pursued by the NGO which is granted public support change, the provision of public support may be reviewed.[17]

38. The criteria for determining the distribution of public funds must be objective and non-discriminatory, and need to be clearly stated in laws and/or regulations that are publicly

[9] UN Special Rapporteur on the situation of human rights defenders, Report to the UN General Assembly, A/66/203, 28 July 2011, para 68.
[10] CDL-AD(2014)046 Joint Guidelines of the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on Freedom of Association, adopted by the Commission at its 101st Plenary Session (Venice, 12-13 December 2014) (hereinafter, "Joint Guidelines"), para 203.
[11] Recommendation, para. 58 ; Joint Guidelines, para. 205.
[12] Recommendation, para. 59 ; Joint Guidelines, para. 205.
[13] Recommendation, para. 60 ; Joint Guidelines, para. 205.
[14] Joint Guidelines, para. 206.
[15] Explanatory Memorandum to the Recommendation CM/Rec 2007 (14), para. 113.
[16] Explanatory Memorandum to the Recommendation CM/Rec 2007 (14), para. 111.
[17] Explanatory Memorandum to the Recommendation CM/Rec 2007 (14), para. 113.

available and accessible.[18] When distributing public funds among different non-governmental organisations, it is thus essential that the state follow clear, pre-determined and objective criteria which allow for a neutral and objective selection of possible recipients.[19]

C. Reporting obligations for associations

39. Generally, NGOs that have been granted any form of public support can be required to submit reports on their accounts and an overview of their activities each year to a designated supervising body[20]. However, such a reporting obligation should not be unduly burdensome and should not require the associations to submit excessive details on either their activities or their accounts[21].

40. All reporting requirements, regardless of whether NGOs have been granted a form of public support or not, 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.[22] Associations should not be required to submit more reports and information than other legal entities, such as businesses.[23] In addition, all reporting should at the same time ensure respect for the rights of members, founders, donors, beneficiaries and staff, as well as the right of the association to protect legitimate business confidentiality.[24] Obligations to report should be tempered by other obligations relating to the right to security of beneficiaries and to respect for their private lives and confidentiality; any interference with respect for private life and confidentiality should observe the principles of necessity and proportionality.[25] States shall refrain from imposing burdensome administrative requirements on NGOs and must always limit interference with the right to freedom of association based on necessity and proportionality requirements.

41. According to the Joint Guidelines on Freedom of Association, "*the right to privacy applies to an association*" (para. 228) and "*[l]egislation should contain safeguards to ensure the respect of the right to privacy of the clients, members and founders of the associations, as well as provide redress for any violation in this respect*" (para. 231). Moreover, as noted in the Committee of Ministers' Recommendations (2007)14, *"[a]ll 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*". According to the Explanatory Memorandum to the Fundamental Principles, *"[…] reporting requirements must be tempered by other obligations relating to the respect for privacy and confidentiality. In particular, a donor's desire to remain anonymous must be observed. The respect for privacy and confidentiality is, however, not unlimited. In exceptional cases, the general interest may justify that authorities have access to private or confidential information, for instance in order to combat black market money transfers. Any exception to business confidentiality or to the privacy and confidentiality of donors, beneficiaries and staff shall observe the principle of necessity and proportionality"*[26].

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[18] Joint Guidelines, para. 208.
[19] Joint Guidelines, para. 208 and 211.
[20] Recommendation, para. 62; Joint Guidelines, paras. 225-226.
[21] Explanatory Memorandum to the Recommendation, para. 114.
[22] joint Guidelines, para. 225.
[23] Joint Guidelines, para. 225. See also the 2015 Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and association, A/70/266, of 4 August 2015.
[24] Recommendation, para. 64. See also, Joint Guidelines, paras. 228 and 231.
[25] Explanatory Memorandum to the Recommendation, para. 116.
[26] Council of Europe, *Fundamental Principles on the Status of Non-governmental Organisations in Europe* and Explanatory Memorandum, available at <http://www.coe.int/T/E/NGO/public/Fundamental_Principles/Fundamental_principles_intro.asp>.See in particular par 67 of the Explanatory Memorandum.

42. Sanctions must be proportionate to the seriousness of the misconduct, and the dissolution of an association should only be applied as a measure of last resort for extremely serious violations of the legislative obligations. Restrictions must never entirely extinguish the right to freedom of association nor deprive it of its essence[27].

VII. Analysis

A. Public Utility Status

43. The current process of granting public utility status appears to base itself on the focus of the associations/foundations' work, the types of activities or projects that they implement, and their overall financial stability. The wording of the Government Ordinance is relatively wide, and flexible enough to provide all associations/foundations engaging in activities that further the public/communal interest with the same access to public support (at least in principle). The draft law seeks to tighten the process, and enhance oversight over those who benefit from the advantages that public utility status brings with it.

1. Process and criteria for granting the public utility status

44. The draft law, as opposed to the Government Ordinance currently in force, contains specific requirements as to which associations/foundations may receive public utility status in its amendments to Article 38. The list of organisations eligible for public utility status ranges from social to charity/humanitarian organisations to those engaging in health, sports, and educational matters, to associations/foundations focused on science and research and environmental/animal rights' issues. Although only certain areas are specifically listed under draft Article 38 (1) as related to general or community interest, the draft law, generally, does not preclude or limit the possibility to establish NGOs aimed at pursuing other activities than those included in the list**.**

45.The nature, category or regime of an association may, among others, be a relevant consideration when deciding to grant it public support and states have considerable discretion to decide which societal objectives are of a general interest and, therefore, more encouraged to be pursued within the means of NGOs (for instance, by providing state financial support). According to Recommendation CM/Rec(2007)014 of the Committee of Ministers, "*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*".[28] It follows that linking the recognition of public utility status to the requirement that an NGO pursues activities in certain specific areas, i.e. activities considered to be related to general or community interest according to law, should not be *per se* considered as having harmful effects on the freedom of association.

46. However, first, the current amendments appear to undertake a form of pre-selection of the types of associations that would deserve additional state benefits, a list which, interestingly, does not include human rights-related associations or foundations, or those engaging in gender or diversity or corruption issues, which arguably also engage in the interests of the public. International and regional standards provide that states should ensure that financial support is provided to associations working on certain issues,[29] for instance to

[27] Joint Guidelines, para. 24.
[28] Recommendation, para. 59 and Joint Guidelines, para. 205. See also, CONF/EXP(2017)3 Expert Council on NGO Law, Opinion on the Romanian Draft Law 140/2017 on Associations and Foundations, December 2017, p. 21 (" 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".)
[29] Joint Guidelines, para. 204.

prevent and combat violence against women, domestic violence[30] and trafficking of human beings[31]. In its most recent Concluding Observations on Romania, the UN Committee on the Elimination of Discrimination against Women specifically noted the limited support granted to NGOs providing support to victims of trafficking[32]. Even though in Romania, public utility status is not a pre-condition for obtaining all public grants, since there are numerous other means of obtaining state funding for NGOs, the list contained in the draft Article 38(1) would still benefit from further additions. More specifically, it should also cover human rights related activities, broadly interpreted as naturally including gender or diversity issues or trafficking of human beings or the fight against corruption, among others. The establishment of the list of priority areas for civil society engagement would have certainly benefited from consultations with Romanian civil society representatives who in recent times have been very vocal in particular on the need to fight corruption.

47. Secondly, the list of areas of activities as an eligibility condition to obtain the status of public utility under draft Article 38 appears to be an exhaustive list and associations whose activities are not considered as covered by this list of areas under the draft provision seem to be excluded from applying for public utility status. The effects of this will largely depend on how the draft provision will be implemented in practice, but the explicit intention of restricting the types of associations/foundations that may apply for public utility status already raises concerns that the interpretation of the revised Article 38 on eligibility would be narrow, rather than wide. However, a narrowly interpreted rigid and exhaustive list of activities that should be pursued by the associations in order to be eligible for the status of public utility could raise concerns with regard to the prohibition of discrimination in the exercise of the freedom of association which also protects associations' access to public resources.

48. Moreover, although the aim of the law drafters to privilege some areas of activities which they consider as having priority in the satisfaction of the most important needs of the Romanian society is welcome, creating an exhaustive and rigid list of activities that render associations/foundations eligible for public utility status is not the best solution for adapting the provisions on public utility to the changing circumstances and evolving needs and priorities of the society. It would thus be more functional, and better guaranteed against any breach of the prohibition of discrimination in case the list is regarded, not as an exclusive, but rather an indicative list, subject to interpretation in light of the evolving needs of the society and based on the principle that the public utility associations' activities should be in general or public interest.

49. It is therefore recommended, first, that "democracy, human rights, rule of law and fight against corruption" be added to the list of specific areas of general or public interest under draft Article 38 (1)a). Romanian civil society should be consulted on this specific point before the law is adopted. Secondly, a "catch all" clause could also be added at the end of the list of specified areas under the same draft provision, in order to cover all other public interest areas which are not covered by individual terms under this provision. Similarly, a paragraph could also be added

[30] Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)*, 12 April 2011, ETS 210, Article 8, <https://www.coe.int/en/web/istanbul-convention/text-of-the-convention>. Romania ratified the Istanbul Convention on 23 May 2016.

[31] UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, United Nations, Articles 6, 9 and 10. Romania ratified the Protocol on 4 December 2002.

[32] UN Committee on the Elimination of Discrimination against Women, Concluding Observations on the Combined 7th and 8th Periodic Reports of Romania, 24 July 2017, pars 20-21, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/ROU/CO/7-8&Lang=En>.

at the end of this list, stipulating that further rules will be elaborated by the responsible authority that will provide further guidance on how this provision will be implemented by the executive in practice. Lastly, there should be a clear provision indicating the availability of legal protection before the – administrative - courts for associations or foundations which have been denied "public utility" status.

50. As mentioned earlier, the draft law sets out a particular algorithm according to which public utility status is recognised for NGOs and the ensuing funding is bestowed (draft articles 38(2) and 41 (a))[33] (see para. 29 of the present Opinion). Accordingly, certain associations and foundations, such as those engaging in international relations, national minorities, and environmental matters, will always be less likely to obtain public utility status, whereas organisations engaging in social services, humanitarian matters, health, sports and education will have a greater chance to do so. In addition, the draft law actually seems to limit the number of NGOs that may acquire the status of public utility not because their activities may not serve general or community interests, but only because certain NGOs performing similar activities have already acquired this status. It is not foreseen for example that the amount of public funding available for a certain sector be divided among all the NGOs that qualify for it. According to the Recommendation CM/Rec(2007)14 of the Committee of Ministers, NGOs should be free to pursue their objectives if the objectives and the means employed are consistent with the requirements of a democratic society. It is to be assumed that NGOs should also be free to acquire the mentioned status (if they meet the conditions set by law) if their activity meets the needs of general interest. Thus, the mentioned limitation could hardly be justified and may be inconsistent with limitations on the right to freedom of association guaranteed by Article 11(2) of the European Convention on Human Rights and Article 22(2) of the ICCPR. In addition, Article 38 in this respect seems somewhat obscure and there is a concern that the draft law might be open-ended and not reasonably foreseeable in this respect, as well as that it might create preconditions for the adoption of arbitrary/discriminatory decisions. In its current form, the draft provision does not meet the benchmark of Recommendation CM/Rec(2007)14 that public support must "be governed by clear and objective criteria" nor the foreseeability criterion established in the case-law of the ECtHR. It is therefore recommended to repeal the specific algorithm in the draft Articles 38(2) and 41(a).

51. Given these challenges, it is welcome that the legal drafters, during the visit in Bucharest, indicated that following negative feedback on the above draft provisions by the Ministry of Justice and NGO representatives, they would delete the provisions referring to the particular algorithm.

2. The ban on engaging in political activities

52. According to draft Article 38(1)e, associations and foundations may not obtain public utility status if they carry out, or have in the past 2 years carried out any kind of political

[33] Draft Article 38(2) : (2) The Government of Romania shall recognize the of public utility status for foundations or associations according to the following percentage algorithm:
40% - Social Services (Assistance-Protection-Inclusion-Cohesion-Security-Development-Social-Economy), Charity and Humanitarian Aid, Health, Sport; 30% - Education;
10% - Science, Research, Innovation, Environment and Animal Protection, Consumer Protection;
10% - National values and national minorities - Traditions and Cultural Assets;
10% - Diplomacy and International Relations, Military-Defense-Respect for Heroes.
Draft Article 41(a): the right to receive free use of public property and access to funding from central and local budgets, according to the following percentage algorithm:
40% - Social Services (Assistance-Protection-Inclusion-Cohesion-Security-Development-Social-Economy), Charity and Humanitarian Aid, Health, Sport; 30% - Education;
10% - Science, Research, Innovation, Environment and Animal Protection, Consumer Protection;
10% - National values and national minorities - Traditions and Cultural Assets;
10% - Diplomacy and International Relations, Military-Defense-Respect for Heroes.

activity. The same provision specifies that this implies fundraising for or against a political competitor or campaigning to support or oppose a political party, candidate or campaigning to support an individual candidate to be nominated for public office.

53. 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 (this support should be subject to legislation on the funding of elections and political parties).[34] In general, the requirement of non-involvement in political activities in order to receive state support may be justified by the very nature of public support and the resulting discretion of the State to determine the conditions for obtaining it. Providing financial support to an NGO with an outspoken political profile could be at odds with "the State's role as the neutral and impartial organiser" of public affairs[35] and open to abuse. Nonetheless, even when exercising this discretion, the State should (taking into account the freedom of NGOs to participate in political activities) respect the requirements of the permissible limitations on the right to freedom of association foreseen by Article 11(2) of the ECHR.

54. While draft Article 38(1)(e) can be seen as a legitimate attempt to avoid indirectly funding political parties or individual candidates, it may in practice be difficult to differentiate between political campaigns in support of or in opposition to a particular party or candidate, and statements made as part of a public discourse on matters of general public concern. The Draft Law uses very broad terms ("any kind of political activities") to express the mentioned requirement. There is, therefore, a concern that the legal provision in this respect might be open-ended and unduly restrict the right of civil society organisations to "undertake advocacy on issues of public debate" and "to support a particular candidate or party in an election or a referendum".[36]

55. Although there is somewhat further explanation in the draft provision as to the meaning of "any kind of political activities" specified as "*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*", this does not preclude a broader understanding of "any political activities" in practice. The nature of the concept of political activity, accordingly, preconditions a very wide range of activities. More specifically – if an NGO representative makes a public statement in which he or she criticizes potentially hateful statements made by representatives of a party, or by an individual candidate, would this already be seen as a prohibited political activity, i.e. a campaign to oppose a political party or candidate? And would this statement then potentially lead to the loss of this NGO's public utility status, or prevent this organisation from obtaining such status?

56. In order to avoid such problems with implementation, it is recommended to limit this provision to clear cases of support, e.g. explicit fundraising, in favour or against a particular party or candidate. The provision should be worded in such a way that it does not prevent associations which benefit from public utility status from "undertaking advocacy on issues of public debate".

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[34] Recommendation, para. 13.

[35] See ECtHR [GC], *Refah Partisi and others v. Turkey* (appl. nos. 41340/98, 41342/98, 41343/98 and 41344/98), 13 February 2003, para. 91.

[36] See, Recommendation, paras. 12 and 13. Such a broad prohibition to engage in political activities would also run contrary to the case-law of the European Court of Human Rights. Although in a different context, in the *Zhechev* case, the Court found the refusal by the Bulgarian authorities to register an association on the ground that its aims were 'political' a violation of the Convention (ECtHR, *Zhechev v. Bulgaria* (appl. no. 57045/00), 21 June 2007). The Court emphasised the uncertainty surrounding the term 'political'. In the Bulgarian case, this seemed to encompass "a campaign for changes in the constitution and the form of government" (para. 55).

3. Oversight mechanisms

57. The current Government Ordinance (Article 41 (e)) obliges associations/foundations with public utility status to inform the competent administrative authority about any amendments to their constitutive acts and statutes, as well as their activity reports and annual financial statements. In addition, under paragraph f) of the same provision, those associations and foundations have the obligation to publish excerpts of their activity reports and annual financial statements in the Official Gazette once a year, as well as in the National Register of non-profit making legal persons.

58. In addition to this, draft Article 42 (2) now obliges the competent administrative authority, together with the Ministry of Justice, to draw up an annual report of compliance with the conditions that led to the Government's recognition of public utility status *for each individual association or foundation*. Each of these reports will then be published on the Ministry of Justice website until 30 January of the following year.

59. While this aim to increase transparency of the process of supporting certain entities with public funds is no doubt legitimate, it is questionable whether the publication of such reports (as opposed to an internal evaluation of continued eligibility) would truly be necessary to assess whether or not an association or foundation remains eligible for public utility status. Moreover, public reports declaring that certain associations no longer fulfill the criteria for maintaining public utility status could have negative, and not always justified repercussions for the reputation of the respective association or foundation, and could possibly lead to a loss of support from members and donors. It should also be borne in mind that the adoption of this provision would constitute a considerable and again potentially unnecessary increase in the workload of both the competent administrative authority, and the Ministry of Justice.

60. Rather than impose this additional oversight mechanism, it would be advisable to retain the current system, whereby the competent administrative authority and Ministry of Justice review compliance with the requirements of the Government Ordinance internally, and then recommend withdrawal of public utility status if needed. In these cases, associations and foundations should be involved in this process, and should have the opportunity to refute any impressions that they do not fulfill the criteria for maintaining public utility status. Moreover, not all cases of non-fulfillment should automatically lead to withdrawal of recognition of public utility status. Rather, a proportionate approach should be adopted, that would allow the relevant association or foundation to remedy themselves cases where they do not fulfill the relevant requirements prior to being struck off the list of public utility organisations. Minor violations of the respective provisions could also lead to fines, or suspension of benefits, rather than to outright withdrawal of public utility status.

B. Financial Reporting Obligations for All Associations, Foundations and Federations

1. Financial Reporting Obligations

61. The current Government Ordinance, under its Article 41 e) and f) merely contains reporting obligations for associations and foundations with public utility status, but not for other associations and foundations. The draft law, on the other hand, introduces financial reporting obligations for all associations, foundations and federations, in a new Article 48¹. Accordingly, associations, foundations and federations have the obligation to publish every six months, by 31 July and 31 January, in the Official Gazette, the financial statements of the previous semester (Article 48[1] (1)). Under Article 48[1] (2), such financial reports shall outline in detail each item of income for the respective semester, while indicating its source (either an individual donor, or an income-generating activity).

62. According to the initiators of the draft law, the new regulation results from the public concerns regarding the legality and honesty of financing of the NGO sector: the draft would thus on the one hand almost completely eliminate any suspicions regarding the legality of the financing of associations and foundations operating in Romania and on the other hand, would increase public trust in the non-governmental associated life and in the honesty of their activities, by creating certain premises for increasing the support that these activities can receive both from the authorities and from citizens or private entities. According to statistics provided by the initiators of the draft law on the basis of a report drawn up by the Ministry for Public Consultation and Civic Dialogue in 2015, more than half of the public-benefit NGOs did not comply with the transparency requirements of the law at the time when the report was published: 49% of those associations had not published their activity reports in the Official Gazette and 61% had not sent the data to the Ministry of Justice. The initiators of the draft law therefore came to the conclusion that the current reporting obligations are not adequate and sufficient to ensure the transparency of the NGO sector and note that the fact that the legislation does not provide for any sanction in case of non-compliance with those obligations reduces the efficiency of their implementation.

63. As the Venice Commission and the OSCE/ODIHR previously stated, the resources received by associations may legitimately be subjected to reporting and transparency requirements.[37] However, such requirements shall not be unnecessarily burdensome, and shall be proportionate to the size of the association and the scope of its activities, taking into consideration the value of its assets and income.[38] These new reporting requirements undoubtedly impose additional burdens on the respective organisations, and thus affect them in their right to freedom of association (Article 11 of the ECHR and Article 22 of the ICCPR), which also includes the right to access to resources. In order to be compatible with international standards, and the conditions regulating whether restrictions of this right are permissible or not, these obligations would need to pursue a legitimate aim, as set out in Article 11(2) ECHR (and Article 22 (2) ICCPR).

64. The legitimate aims listed therein include national security or public safety interests, the prevention of disorder or crime/public order, the protection of health or morals and the protection of the rights and freedoms of others. Conceivably, reporting obligations could be introduced to prevent disorder or crime (including money-laundering or acts of terrorism), or to ensure the protection of the rights and freedoms of others. As noted in the Joint Guidelines on Freedom of Association, *"[t]he scope of these legitimate aims shall be narrowly interpreted*" (para. 34). Bearing this in mind, the aim of 'enhancing transparency' of the NGO sector would by itself not appear to be a legitimate aim as described in the above international instruments;[39] rather, transparency may be a means to achieve one of the above-mentioned aims set out in Article 11 (2) ECHR. Thus, publicity or transparency in matters pertaining to funding may be required as a means to combat fraud, embezzlement, corruption, money-laundering or

[37] Joint Guidelines, para. 104. CDL-AD(2017)015, Opinion on the draft law on the transparency of organisations receiving support from abroad of Hungary, para. 52; CDL-AD(2013)030, Joint Interim Opinion on the Draft Law amending the Law on non-commercial Organisations and other legislative Acts of the Kyrgyz Republic, para. 69; CDL-AD(2013)023, Interim Opinion on the Draft Law on Civic Work Organisations of Egypt, para. 40.

[38] Joint Guidelines, paras. 104 and 225.

[39] See paragraph 224 of the 2015 OSCE/ODIHR-Venice Commission Joint Guidelines on Freedom of Association, which states that*"[t]he need for transparency in the internal functioning of associations is not specifically established in international and regional treaties owing to the right of associations to be free from interference of the state in their internal affairs. However, openness and transparency are fundamental for establishing accountability and public trust. The state shall not require but shall encourage and facilitate associations to be accountable and transparent.* " See also the Preamble of the CoE Recommendation CM/Rec(2007)14, which states that "the best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation".

terrorism-financing. Such measures may qualify as being in the interests of national security, public safety or public order.[40]

65. However, for the Venice Commission and the OSCE/ODIHR, it is questionable whether requiring all associations, foundations and federations to publish detailed financial reports of all their income, including the identity of the individual sources of income (individual donors), and regardless of the amount, is indeed necessary and proportionate to achieve one of the above legitimate aims.

66. First, even matters such as a country's national interest and the fight against corruption do not justify imposing new reporting requirements for all associations without a concrete threat for the public and/or the constitutional order or any concrete indication of individual illegal activity.[41] As implied by the European Union's Anti-Money Laundering Directive 2015/849, additional obligations should only be based on a prior risk assessment. Restrictions to the freedom of association can only be justified if they are necessary to avert a real, and not only hypothetical danger.[42] "Pressing social need" for such restrictions, as described in the case-law of the ECtHR, presupposes "plausible evidence" of a sufficiently imminent threat to the State or to a democratic society.[43] The initiators of the draft law refer to the "public concern" and "suspicions" about the legality and honesty of financing of NGOs in Romania, without, however, pointing to a substantiated concrete risk analysis concerning any specific involvement of the NGO sector in the commission of crimes such as corruption, money-laundering and connected crimes. Even if there were indications of money laundering activities on the side of individual NGOs, the correct response to this would be criminal investigations against these particular associations, and not blanket reporting requirements that affect numerous other organisations engaging in entirely legitimate activities.

67. In this context, during the visit in Bucharest, NGO representatives informed the delegation that the national Anti-Money Laundering Office already undertakes extensive checks of all entities in Romania, including associations and foundations, which involve unannounced visits and regular review of all financial and other relevant documents pertaining to the establishment and running of such entities. Additional safeguards are in place to avoid abuse of funds, e.g. automatic reports to the Money Laundering Office of any transfers that go beyond 10 000 EUR, and reporting requirements to the National Bank in cases where foreign funds are received or transferred. The added value of making this

[40] Joint Guidelines, para. 220.
[41] See e.g. ECtHR, *Sindicatul "Păstorul cel Bun" v. Romania*, no. 2330/09, 31 January 2012, para. 69.
[42] See e.G. the U.N. Human Rights Committee, Mr. Jeong-Eun Lee v. Republic of Korea, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002(2005), para. 7.2.
[43] See e.g. ECtHR, Case of *Sindicatul "Păstorul cel Bun" v. Romania*, Application no. 2330/09, 31 January 2012, para. 69. In addition, in the case of *Animal Defenders International v. United Kingdom*, (appl. no. 48876/08, para. 108), the Court considered that "in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation." Moreover, a well-reasoned balancing of interests in the legislative process may lead to a greater margin of appreciation awarded by the European Court. The domestic authorities demonstrate in a transparent manner that they have carefully considered the manner of implementation of Convention rights and the choices that they made in that process. Given the subsidiary character of the Convention mechanism the European Court is then more likely to accept the choices made on the domestic level (see, M. Kuijer, "Margin of Appreciation Doctrine and the Strengthening of the Principle of Subsidiarity in the Recent Reform Negotiations", in: 36 *HRLJ* 7-12, pp. 339-347).

information available to the public as a means to fight money laundering is therefore questionable.

68. Secondly, the publication of donors' personal information would make them publicly identifiable and information about their affiliation, political opinion or belief, may be deduced from the fact that they are donating to or dealing with certain NGOs and not others, which is likewise protected by the right to respect for private life. The fact that such information will be publicly available may have a chilling effect on them and other potential donors, thus running the risk of limiting public associations' access to resources. Moreover, draft Article 48¹, as it stands now, does not contain a particular monetary threshold. Thus associations and foundations would be obliged to report all funding received, regardless of the amount. Non-governmental organisations would be required to include in the respective financial reports also minor sums received via crowd-funding, including SMS donations, or funds received via the existing regulation that individuals may decide to donate 2% of their tax payments to the civil society sector.

69. While it is understandable that the public has an interest in knowing how public funds are spent, there is no apparent 'pressing need' for the public to obtain detailed information with respect to private funding sources of associations' or foundations' activities (reports concerning the activities and financial statements of associations with public utility status should be published in Section IV of the Official Gazette according to Article 41 f) of the Government Ordinance). Under the EU's Anti-Money Laundering Directive 2015/849, additional obligations would only involve reports to the Anti-Money Laundering Office, not the public. The Venice Commission and the OSCE/ODIHR also consider that in the current context in Romania, transparency as a means to combat fraud, corruption, money-laundering and other crimes may be ensured by imposing some reporting obligations concerning the financial sources to a regulatory body. However, it is doubtful whether the respective provisions are a proportionate means to achieve the intended aim, given the dangers that they pose for the privacy rights of the respective donors under Article 8 ECHR, and the considerable additional burden that such extensive and frequent reporting will pose for individual organisations. If all donors, regardless of whether public or private, or of the sum donated,[44] need to be mentioned by name in published reports, this may seriously affect the willingness of individuals to donate funds. Particularly in the case of smaller organisations, the above obligations will seriously impact their ability to function, and to implement their activities, especially as the required publication in the Official Gazette is quite costly, at 122 Lei (around 20 EUR) per page. The larger the number of donors, the more such publication will cost.

70. Thirdly, the frequency of the reporting (obligation to publish the financial statements each six months, by 31 July and 31 January, in the Official Gazette instead of once a year in the current Ordinance) is unduly onerous and costly, all the more so as this reporting obligation will in the practice overlap with other existing reporting obligations such as the extensive checks undertaken by the Anti-Money Laundering Office on all entities in Romania including associations and foundations. This could create an environment of excessive State monitoring over the activities of non-commercial organisations which could hardly be conducive to the effective enjoyment of freedom of association.[45] Even concerning the associations which have been granted any form of public support, Recommendation CM/Rec(2007)14 states that they

[44] The Venice Commission considered previously that in order to ensure transparency, it could be legitimate to publicly disclose the identity of the main sponsors. Disclosing the identity of all sponsors, including minor ones, is, however, excessive and also unnecessary, in particular with regard to the requirements of the right to privacy as enshrined under Article 8 ECHR (CDL-AD(2017)015, paras. 52 and 53.)

[45] See, CDL-AD(2013)030, Joint Interim Opinion on the Draft Law amending the Law on non-commercial Organisations and other legislative Acts of the Kyrgyz Republic, para. 69.

can be required *each year* to submit reports on their accounts and overview of their activities to a designated supervising body.

71. The reasons put forth by the initiators of the draft law, to the effect that NGOs do not comply with the transparency and reporting requirements under the current regulations cannot justify the imposition of new and extensive reporting obligations for all associations. This is rather a question of the efficiency of implementation of the current reporting obligations by the competent state authorities.

72. It is well understood that the need to respect private life and for confidentiality are not absolute and should not be an obstacle to the investigation of criminal offences.[46] In the present case, however, the initiators of the draft law have not substantiated any possible risk that the current legislation may hamper the investigation of criminal offences.

73. It is welcome that during the visit to Bucharest, the legal drafters informed the delegation that they would exempt smaller donations, in particular those received via SMS and the 2% rule, from the need to be listed explicitly in the financial statement; instead, the entire sum of funds received in this manner should be mentioned, but without individual amounts and donors. However, in view of the above considerations, the Venice Commission and the OSCE/ODIHR conclude that the new reporting and disclosure requirements foreseen by the draft law conflict with the freedom of association and the right to respect for private life. Therefore, they recommend that the new reporting and disclosure requirements foreseen by Article 48[1] of the draft law be repealed.

2. Proportionality of Sanctions

74. Under the draft Article 48[1] (3), the failure to publish the above six-monthly reports will lead to the suspension of the relevant association, foundation or federation for a period of 30 days. If the report is not published within that time following the requirements set out in paragraph 2 of the same provision, the organisation in question will be required to cease its activities immediately, pursuant to the conditions set out in Chapter IX of the Government Ordinance on dissolution and liquidation.

75. According to relevant international standards, "[a]*ny sanctions introduced in this context must always be consistent with the principle of proportionality, that is, they must be the least intrusive means to achieve the desired objective*".[47] Suspending the work of an organisation for up to thirty days is already a quite serious interference with this entity's freedom of association, and should only be contemplated in cases involving potential threats to democracy, and following a court order.[48] The mere failure to submit a financial report would not appear to constitute such a grave breach of law, and should under no condition lead to the automatic suspension of work of an association, foundation or federation.

76.The second half of Article 48[1] (3) states that in case the respective association, foundation or federation still fails to issue its financial report within the 30 days' suspension period, or fails to issue it with the required contents, this may lead to the dissolution of the respective entity. In this context, it should be noted that the dissolution of associations shall always be a measure of last resort, such as when an association has engaged in conduct that creates an imminent threat of violence or other grave violation of the law,[49] where the respective violation of law or of constitutional values cannot be met in any other, more lenient way. In particular, associations

[46] See the Explanatory Memorandum to Recommendation Rec(2007)14, para. 116.
[47] Joint Guidelines, para. 237.
[48] Ibid., par 255.
[49] Ibid., para. 35.

shall not be dissolved for minor infringements.[50] As the ECtHR considered in the case of *Tebieti Mühafize Cemiyyeti and Israfilov,* a mere failure to respect certain legal requirements on internal management of NGOs cannot be considered such serious misconduct as to warrant outright dissolution.[51] Similarly, a failure to respect reporting requirements appears to be equally minor and not deserving such a serious sanction. Hence, the Venice Commission and the OSCE/ODIHR are not convinced that failure to fulfil the reporting or disclosure obligations stemming from the draft law could be qualified as serious misconduct which justifies the imposition of such a drastic measure as dissolution.[52] As the Venice Commission previously stated, two different situations should be distinguished from each other: either a given civil society organisation is engaged in a criminal activity, for instance money laundering or terrorism financing, in which case its dissolution can be proportionally pronounced by courts on the basis of general provisions of the respective legislation, or the only misconduct which can be reproached to this organisation is its failure to fulfil the obligations under the draft legislation.[53] For the Commission and the OSCE/ODIHR, in this last case, the dissolution appears to be a disproportionate measure. In this light, the suspension/dissolution measures set out in Article 48¹ (3) are disproportionate to any professed legitimate aim.

77. While Article 48¹ (3) refers to Chapter IX on dissolution and liquidation of the Government Ordinance, it is not quite clear on the basis of which provision in that chapter, proceedings for dissolving the organisation in question shall be pursued. According to Article 54 of the Government Ordinance, associations and foundations may be dissolved "by right" or by court decision. Dissolutions "by right" are also declared by court, based on the request of an interested person, but are based on objective grounds, e.g. the inability to fulfill the purpose of organisation or to constitute management bodies, or where the number of members has dropped below the limit required by law (Article 55).

78. Dissolutions by court decision, on the other hand, may take place under Article 56 if the competent court, based on the request of "an interested person", finds, *inter alia*, that the purpose or activity of an association has become illicit or contrary to the public order, or where such purpose is accomplished by illicit means or means that are contrary to the public order.

79. It is unclear which of the above cases would apply in the context of dissolution for not fulfilling the reporting obligations stemming from draft Article 48[1]: if the mere failure to submit a report would lead to dissolution "by right", then this would imply that this failure would be seen as so fundamental that it would call into question the right of the association to exist per se, which would hardly be appropriate or proportionate. Moreover, the failure to submit financial reports is currently not listed as one of the reasons for dissolving an association by right under Article 55.

80. If the dissolution for failing to submit the reports set out in Article 48¹ should lead to dissolution by court decision under Article 56, then it is similarly unclear which of the cases set out in this provision would apply. During the visit to Bucharest, the legal drafters admitted that they would need to ensure consistency between the proposed draft Article 48¹ and Articles 55 and/or 56 of the Government Ordinance.

81. Regardless of this inconsistency, any automatic dissolution without recourse to a court which would be in breach *inter alia* of the right of access to court, should be excluded. The judge involved in the procedure needs to have sufficient discretion in order to be able to make an appropriate proportionality assessment of the sanction to be imposed on the association or

[50] Ibid., paras. 35, 114 and 253.
[51] ECtHR, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan* (appl. no. 37083/03), 8 October 2009, para. 82.
[52] CDL-AD(2017)015, para. 62.
[53] Ibid., para. 62.

foundation based on the seriousness of the breach of obligation stemming from the draft law. In light of these considerations, there exists no conceivable scenario where the dissolution of an association merely for failing to submit a financial report would be proportionate under international law. Also for this reason, the draft provision should be repealed. On previous occasions, the Venice Commission has expressed its clear preference for penalties to be imposed along a gradual scale of sanctions,[54] including the issuance of warnings and imposition of fines before deciding the dissolution of the association, proportional to the gravity of the wrongdoing and offering the possibility to rectify the breach.[55] In any case, even before the issuance of a warning, the public association should be offered the possibility to seek clarifications about the alleged violation. It is therefore recommended that a gradual sanctions scheme be introduced in the draft law, on the basis of an assessment made by the judge, which shall be proportional to the nature of the obligation stemming from the law and to the seriousness of the breach of such obligation. Moreover, the relevant associations/foundations should have the right to appeal, with suspensive effect[56] (which is currently not mentioned in the Government Ordinance).

[54] CDL-AD(2017)015, para. 59.
[55] Joint Guidelines, para. 234.
[56] Joint Guidelines, para. 120, states that "[a]ny appeal against or challenge to a decision to prohibit or dissolve an association or to suspend its activities should normally temporarily suspend the effect of the decision, meaning that the decision should not be enforced until the appeal or challenge is decided [except where] there exists exceptionally strong evidence of a crime having been committed by an association".