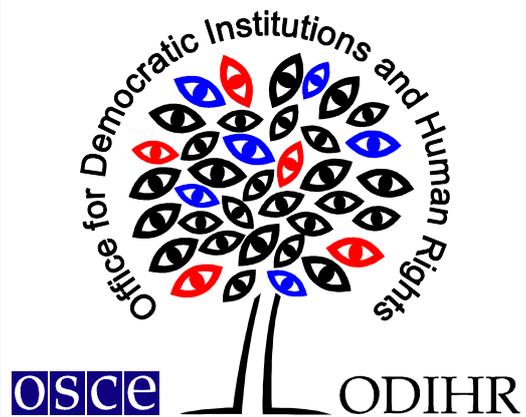


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**OVERVIEW OF GOOD PRACTICES
WITH REGARD TO
NGO REGULATION IN THE
OSCE PARTICIPATING STATES**

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1. INTRODUCTION

2. *On 25 May 2006, the OSCE/ODIHR was requested by the Institute of Law and Public Policy to prepare an overview of good practice with regard to NGO regulation in OSCE participating States, following the request of the Ministry of Foreign Affairs of the Russian Federation addressed to the Institute of Law and Public Policy.*
3. *The Overview will serve as a foundation for the preparation of the OSCE/ODIHR Guidebook on Legislative Regulation of Civil Society Organizations.*

2. SCOPE OF REVIEW

4. This Overview seeks to identify key issues in regulation of non-governmental organizations (NGOs), in the area of substantive as well as procedural law, and to crystallize acceptable legislative approaches to addressing these issues based on the pool of good practice examples from the OSCE participating States.
5. The good practice examples are selected on the basis on their compatibility with the relevant international human rights standards and the OSCE commitments, and overall efficiency in NGO regulation. The international standards referred to by the Comments may not be only those of legally binding nature, but may include documents of declarative or recommendatory nature which have been developed for the purpose of interpretation of relevant provisions of international treaties. In particular, the Overview makes extensive use of the Fundamental Principles on the Status of Non-Governmental Organizations in Europe.
6. The Overview is not intended as a set of “model” provisions but rather aims to supply drafters, implementators, academics and other potential users with information on the various legislative solutions, leaving it up to user to choose the one or ones best suited for his/her country’s context.
7. The Overview is not a comparative analysis of domestic laws but focuses on legislative good practice exclusively, and does not look into the implementation of the legislation quoted and analyzed.

3. ANALYSIS AND RECOMMENDATIONS

3.1 Legal entity status and informal association

3.1.1 The right to acquire legal entity status and the right to associate informally

8. Associations or groups are protected as such in reference to a number of criteria enabling them as “associations” and which cannot be left at the discretion of the state. If states were able, at their discretion, by classifying an association as “public” or “para-administrative” or by denying it the status of association to remove it from the scope of the freedom of association and the rights associated with it, *“that would give them such latitude that it might lead to results incompatible with the object and purpose of the [European Convention for the Protection of Human Rights and Fundamental Freedoms], which is to protect rights that are not theoretical or illusory but practical and effective”*¹. The criteria which enable a group as

¹ *Chassagnou and Others v. France*, judgment of the European Court of Human Rights (ECHR), 29 April 1999.

an “association” are essentially the origin, the objective and the means of organization of the body concerned. Origin primarily refers to the founders: an entity founded for instance by the legislature is not likely to be considered an association. The entity considered is also required to pursue an aim, which is in the general interest, for instance the protection of health or the promotion of human rights. Finally, an entity which “*employs processes of a public authority*”² would in principle not be considered an association. It is all a question of degree, however, and the jurisprudence evolved on some aspects of these issues.

9. The Fundamental Principles on the Status of Non-Governmental Organizations in Europe (hereinafter referred to as the Fundamental Principles) provide that “*NGOs can be either informal bodies, or organizations which have legal personality.*”³ The fact that non-governmental organizations may be formed as legal entities does not mean that individuals are required to form legal entities in order to exercise their freedom of association. The classifications operated in national law can only be a starting point, but in no way may result in banning informal associations on the sole ground of their not having legal personality⁴.
10. A number of OSCE participating States treat the issue of NGO legal entity status in strict compliance with the Fundamental Principles, providing for a possibility under the law to acquire legal entity status for the groups that so desire without, however, conditioning the exercise of the right to freedom of association on the acquisition of formal status.
11. The good practice examples include Armenia, where the Law on Public Organizations provides that “*[a] public association, if its objectives correspond to the objectives set forth in Article 1 of this law, may be registered as a public organization acquiring the status of a legal entity from the moment of its state registration. The state registration, promoting the implementation of the chartered goals of a public association by setting it up as a legal entity, does not impede the person's right to form associations in what regards creating such associations, being a member of or acting through the associations without state registration.*”⁵ The law goes on to clarify that “[w]ithout state registration an association shall not have the status of a legal entity with the ensuing rights and obligations, and shall not be vested with the rights set forth in Article 15 clauses 3 to 6 and shall not bear responsibilities stipulated by Article 16. That association shall operate in conformity with

² *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of the European Court of Human Rights (ECHR), 23 June 1981.

³ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Council of Europe, Principle 5 [full text in English and Russian available at http://www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Civil_society/, last visited on 10 March 2005]. It is worth mentioning that the Fundamental Principles, although not legally binding in general and with regard to Belarus in particular, still provide a valuable source of guidance in this regard as they allow to interpret the provisions of relevant binding international instruments.

⁴ See *Chassagnou and Others v. France*, judgment of the European Court of Human Rights (ECHR), 29 April 1999; *The United Communist Party of Turkey and Others v. Turkey*, judgment of the ECHR, 30 January 1998; *Artico v. Italy*, judgment of ECHR, 13 May 1980.

⁵ Armenia, Law on Public Organizations, Article 3(3).

*the principles set forth in Article 4, without violating other requirements of the law, other laws and legal acts.”*⁶

12. Likewise, the Croatian Law on Associations provides that “[a]n association acquires legal personality upon registration in registry book of associations,”⁷ however specifying that “[t]he provisions on partnership shall apply to the forms of associations that are not legal entities.”⁸
13. The Romanian Ordinance on Associations and Foundations stipulates that “(1) An association acquires legal status upon registration with the registry open with the clerks’ office of the court in whose territorial circumscription the association operates; (2) According to the constitutional right to association, natural persons may associate without establishing a legal person when the proposed goal permits it.”⁹
7. The freedom to informal association does not, however, preclude the possibility that certain institutional forms may be required if particular benefits are to be enjoyed or where the activities to be pursued by the organization legitimately require higher financial scrutiny. Foundations may be one such “formal NGO only” organizational category. For instance, the British Charities Act makes it mandatory for a charity to register if it has a permanent endowment, permanently uses or occupies land, or its aggregate annual income is equal to or exceeds £1,000.¹⁰ Also, the law may require that only formal NGOs be permitted to engage in fundraising activity.
8. Certain privileges (such as state contracts or access to tax preferences) may be legitimately conditioned upon the establishment of a formal association. This issue will be discussed in greater detail under *State financing* and *Social contracting*.

3.1.2 The acquisition of legal entity status: Procedural requirements

⁶ *Id.*, Article 3(4).

⁷ Croatia, Law on Associations, Article 2.

⁸ *Id.*, Article 3.

⁹ Romania, Ordinance of Associations and Foundations, Article 5.

¹⁰ United Kingdom, Charities Act 1993 (“The following charities are not required to be registered—
(a) any charity comprised in Schedule 2 to this Act (in this Act referred to as an “exempt charity”);
(b) any charity which is excepted by order or regulations;
(c) any charity which has neither—
(i) any permanent endowment, nor
(ii) the use or occupation of any land,
and whose income from all sources does not in aggregate amount to more than £1,000 a year;
and no charity is required to be registered in respect of any registered place of worship.”)

9. For an NGO to become established as a legal entity,¹¹ the law should ordinarily require that the founders hold a founding meeting and adopt the governing documents of the organization (charter or statute, bylaws, or the like). For instance, the Armenian Law on Public Organizations provides that “[a]t least two founding physical persons (founders) shall conclude an agreement, which shall specify the procedures for joint actions prior to state registration of the organization and the conditions for handing over their properties to the organizations.”¹² In addition to this, some countries may require that the minutes of the founding meeting and the governing documents be notarized, although it is not very common. The quoted Armenian law, for instance, makes notarization optional and leaves it to the discretion of the founders themselves,¹³ and a vast number of OSCE participating States¹⁴ do not mention notarization at all. It is a general consensus that the law should not require filing any documents in addition to the governing documents and the founding meeting minutes.
10. The only exception may be where the group seeks establishment in the form of a foundation, a fund or a trust, in which case a proof of sufficient financial means may be legitimately required.¹⁵ For instance, the Czech Act on Foundations and Endowment Funds provides that the foundation charter include “the amount or value of asset deposit which each founder pledges to deposit in the foundation/endowment fund; if it is a non-financial deposit, the subject of the deposit has to be defined and valued by an expert.”¹⁶
11. While it is clear that a minimum of two persons would be needed to form an association, the law may set a higher minimum number of founders where legal personality is sought. The number of founders required, however, “should not be set at a level that discourages the establishment of an NGO.”¹⁷
12. It is notable that an increasing number of the OSCE participating States require as few as two founders, which is considered a good practice. The examples include Armenia and France. Norway and Sweden have no minimum number requirement at all. A number of participating States (including Azerbaijan, Belgium, Bulgaria, Croatia, Czech Republic, Lithuania, Poland, Romania, Slovakia, and Slovenia) require a minimum of three founders.
13. The law should not leave room for bureaucratic judgment or discretion as to the permitted purposes of the organization and the means by which it intends to pursue those purposes. Any organization formed for a lawful purpose should be allowed to acquire formal status as

¹¹ A legal entity or person needs to be understood as a corporate entity, which is capable of enjoying and being subject to legal rights and responsibilities.

¹² Armenia, Law on Public Organizations, Article 9(1).

¹³ *Id.*, Article 9(2) (“On demand of one of the founders the agreement on founding the organization may be notarized.”)

¹⁴ For instance, Bulgaria, former Yugoslav Republic of Macedonia, Latvia, Lithuania, Montenegro, Slovakia, to name just a few.

¹⁵ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 28.

¹⁶ Czech Republic, Act on Foundations and Endowment Funds, Section 3(2)(d).

¹⁷ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 16.

long as the appropriate documents are filed. It is generally advisable that the state agency responsible for granting legal entity status be independent of control by the executive branch of the government, although it does not necessarily need to be a court.¹⁸

14. The law should also set a clear and reasonably short deadline within which the responsible state agency must review the application for establishment of an NGO as a legal entity. It should be made clear that a failure on the part of the state agency to act within the timeframe set will automatically result in the establishment of the organization as a legal entity, and the state agency will be required to issue whatever documents or certificates are ordinarily issued to prove establishment.
15. The Romanian law is the source of good practice both in terms of providing an extremely short deadline for review (only three days)¹⁹ and in that the power to grant or reject legal entity status is vested with the court rather than an executive authority. The Montenegrin Law on Non-Governmental Organizations sets a deadline for review of the application for registration at 10 days.²⁰ The Montenegrin legislation also provides that in case the registration authority fails to comply with the deadline, the organization is deemed registered. The Armenian Law on Public Organizations sets a deadline of 21 days, which can be extended by no more than 10 days and only if the set of documents submitted was incomplete.²¹ The Croatian law follows a similar approach by setting the deadline for review at 30 days and providing for 15 to 30 days extension where the group seeking registration fails to provide a complete set of documents.²² The Croatian legislation also provides for the

¹⁸ *Id.*, Principle 33.

¹⁹ Romania, Ordinance of Associations and Foundations, Article 8(2) (“*Within 3 days from submitting the petition for registration and the documents stipulated in article 7, section (2), the judge appointed by the president of the court checks their legality and orders by summation the association be registered in the Registry of associations and foundations.*”)

²⁰ Montenegro, Law on Non-Governmental Organizations, Article 16 (“*The Ministry of Justice shall decide upon registration within ten days after submission of the request for registration. If the Ministry disregards the foregoing deadline, it shall be assumed that the organization is registered on the first day following the expiration of the deadline.*”)

²¹ Armenia, Law on Public Organizations, Article 12(3) (“*Within 21 days upon receiving all requested documents and making an entry in the main register, the state registration body is obliged to consider the registration application and either register the organization or reject its registration. If not all the requested documents are submitted or if they are illegible, or contain faults not related to the main content, the state registration body shall notify the organization in written form within the period of seven calendar days. In this case the terms for considering the registration of the organization set forth by this article, shall be suspended but not for more than for 10 days.*”)

²² Croatia, Law on Associations, Article 16 (“*(1) The county office has a duty to make a decision on registration within 30 days from the date of application for the registration.*

(2) If the county office establishes that the statute of association is not in accordance with this Law, or if the required documents listed in Art. 15 par. 1 are not submitted, it shall notify the applicant by an act to that effect and shall set a period for compliance which cannot be shorter than 15 days nor longer than 30 days. There is no right to appeal against this act.”)

presumption of registration, i.e. failure of the registration authority to make a decision within the specified period automatically results in legal entity status for the group.²³

3.1.3 Refusal to grant legal entity status

16. In accordance with the Fundamental Principles, “[l]egal personality should only be refused where there has been a failure to submit all the clearly prescribed documents required, if a name has been used that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person in the country concerned, or if there is an objective in the statutes which is clearly incompatible with the law.”²⁴
17. The law should expressly require that the responsible state agency provide a detailed written statement of reasons for any refusal to establish an NGO. Any refusal to grant legal entity status should be appealable at a court, and a reasonable deadline for such appeals should be available.
18. An absolute majority of the OSCE participating States require that the registration body provide a detailed statement of reasons where the application for legal entity status is refused, as well as afford the group seeking registration the right to appeal the decision of the registration body in court.
19. As far as the permissible grounds for refusing legal entity status are concerned, some States have established even higher domestic standards than the minimum required by the Fundamental Principles. For instance, in Armenia the registration body cannot refuse legal personality to a group where the set of documents submitted is incomplete, but is required by the law to grant the applicant a 10-day extension period so that the group seeking registration may rectify the errors in the application rather than start the application process anew. Only if the group fails to rectify the errors within the extension period can its application for registration be rejected. Other grounds for refusing legal entity status are (a) failure to comply with the legal requirements for the name of the group (such as the name being misleading, not adequately distinguishable from another entity’s name, or using a person’s name without his/her or the heir’s authorization) and (b) clear incompatibility of the organizational charter with the Armenian Constitution and the law.²⁵

3.2 Balancing transparency in NGO activities with the presumption of lawfulness of activities

²³ *Id.*, Article 17 (“(1) If the county office fails to bring the decision within 30 days of the submitting of a complete application, registration shall be considered complete on the first day following the expiration of this period.”)

²⁴ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 31.

²⁵ Armenia, Law on Public Organizations, Article 12(3) and (5) (“The state registration of an organization is rejected if the requirements set forth in this law are not fulfilled. Those include: 1) If the organization did not fix the faults or did not apply to the state registration body for canceling its application within 10 calendar days after being notified that not all documents were presented or that they were illegible or contained faults not related to the main content. 2) The name of the organization, short name (abbreviation) and the logos did not correspond to the requirements of Article 10 of this law. 3) The presented charter contravenes the RA Constitution and laws.”).

20. NGOs should benefit from the presumption that their activity is lawful in the absence of evidence to the contrary.²⁶ This implies, for instance, that there may be no power to search the organization's premises or to seize any materials or other items present there without an objective ground for taking such action. Moreover, any search or seizure must be authorized by a judge and the terms of a warrant must be clear and precise.
21. The requirements of regular reporting provide a sufficient guarantee of visibility for non-profit organizations, and heightened scrutiny in the absence of evidence of any illegal activity would not serve any justifiable purpose.
22. A corollary of the presumption of lawfulness of activities is a strong preference against granting government officials unconditional right of access to the NGO events. Not only would such right be at odds with the presumption of lawfulness, but it may also potentially impede legitimate NGO activities which – for lawful reasons – require restricted access or should even be conducted in a confidential manner. This is, for instance, the case for NGOs working with crime victims, such as organizations operating shelters or counseling centers for domestic violence, child abuse or human trafficking victims.²⁷
23. Finally, it is essential to bear in mind that in many cases the issue of access to certain type of meetings (e.g. meetings on private property) may have direct implications for the right to privacy, and the organizing party should retain the right to deny access. This should not, of course, be interpreted as to preclude duly authorized access by law enforcement officials where there is evidence of illegal activity; however, this issue does not concern non-profit organizations only and is typically addressed in criminal procedure legislation.
24. It is, however, entirely permissible for an NGO-related act to include a provision which would exhaustively enumerate and clearly define the specific types of meetings to which registration authority representatives may have unimpeded access, e.g. to general or board meetings of the NGO.
25. The Armenian legislation may serve as a source of best practice on how sufficient visibility for non-profits may be ensured without imposing unnecessary restrictions. The Armenian Law on Public Organizations makes it obligatory for NGOs “*[u]pon well-grounded demand of the state authorized body in the field of justice of the Republic of Armenia (hereafter referred to as state authorized body) within reasonable time frames to provide the latter with*

²⁶ Cp. with presumption of innocence as guaranteed by Article 14, para 2, of the ICCPR (“*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*”)

²⁷ It is entirely legitimate and in fact necessary for normal operation of a victim assistance NGO that some of its activities and meetings (e.g. counseling sessions) be restricted to access by the victim and the professional worker to prevent further trauma to the victim, while others (e.g. shelter operations) be conducted in complete secrecy, for instance to prevent perpetrators from knowing the location of the shelter and thus enabling potential retaliation against the victim.

Another case may be various peer support groups, where the participants gather to share very personal experiences and to help themselves overcome their common problems. For instance, a group of Alcoholics Anonymous would find strangers' presence at their meetings extremely inhibiting due to the common social stigma against people with drinking problems, so a “monitoring” visit may ruin a many months' work.

other documents concerning the activities of the organization, and to allow the representatives of that body to be present at the general meeting of the organization.)”²⁸

Note that the request on part of the state body should be justified, and even in this case officials are only granted the right to attend the general meeting. More intrusive scrutiny needs a court warrant as a basis.

26. Similarly, the Polish law affords the governmental agency with monitoring powers the right to “1) to demand that the board of an association supply copies of acts passed by general assembly (assembly of delegates) within a specified period of time; 2) to review documents concerning activities of the association and to make notes, excerpts and copies of them at the seat of an association and in the presence of association authorities’ representative; 3) to demand appropriate explanations from the authorities of an association.”²⁹

3.3 Exercise of the right to freedom of association by specific groups

27. The right to freedom of association under the international law is accorded to everyone. Both natural and legal persons should be free to establish an NGO.³⁰ At the same time, it is permissible under the international standards for a State to impose lawful restrictions on the members of the police and/or the armed forces in their exercise of the right to freedom of association.³¹

28. It is central to the enjoyment of the right to freedom of association that the membership of an NGO be voluntary and no one be forced to join an association. The only permissible exception from the principle of voluntary membership is membership in organizations established by law to regulate a profession (such as bar associations, associations of judges, accountants, etc.) in jurisdictions which treat such organizations as NGOs. The Bulgarian law, for instance, expressly provides that “[m]embership in associations shall be voluntary.”³² Likewise, Slovakia’s legislation includes a provision that “[n]o one may be forced to associate, be a member in an association or to take part in its activities. Everyone may freely leave an association.”³³ In addition, it provides for an important guarantee of non-

²⁸ Armenia, Law on Public Organizations, Article 16.

²⁹ Poland, Law on Associations, Article 25.

³⁰ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 15.

³¹ International Covenant on Civil and Political Rights, Article 22(2) (“No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”) (Emphasis added.) See also the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 11(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.”) (Emphasis added.)

³² Bulgaria, Law on Non-Profit Legal Entities, Article 21(1).

³³ Slovakia, Law Concerning the Right of Association, Article 3(1).

discrimination by stipulating that “[n]o one [...] can be at a detriment because of associating, being a member of an association, taking part in its activities or supporting it nor because they remain apart from it.”³⁴ In a similar manner, the Armenian law provides that “[a] person’s right to form associations with other persons encompasses the right to freely set up an association, the right to become a member (participant) of an organization, and the right to freely withdraw from membership (participation) of an organization, regardless of nationality, race, sex, language, religion, political and other beliefs, social origin, welfare standards and citizenship. This right may be restricted, in cases and manner envisaged by law, for the servicemen of the military and law enforcement bodies.”³⁵

29. The international standards unequivocally state that “[n]ational law should not unjustifiably restrict the ability of any person, natural or legal, to join membership-based NGOs. The ability of someone to join a particular NGO should be determined primarily by its statutes, and should not be influenced by any unjustified discrimination.”³⁶ This principle should be interpreted as to preclude any unjustified government interference both with the right of the individual to join associations of his or her will, and with the right of the organization to decide who may join it. The law thus cannot oblige all NGOs to be open to membership by anyone wishing to join, and an NGO should be generally free to choose whether or not to limit its membership to a particular group of persons. The national laws of the OSCE participating States are generally consonant with this principle, and do not include provisions allowing the State to dictate NGOs who should or should not join them. The ability of everyone regardless of their status to join NGOs is discussed below.

3.3.1 Aliens’ right to freedom of association. Regulation of foreign NGOs

30. Aliens, i.e. foreign nationals or stateless persons, should be able to exercise freedom of association on equal terms with the citizens of the State.

31. This stems from both the provisions of Article 22 of the ICCPR and the general guarantee of equality and prohibition against discrimination as enshrined by Article 2, para 1,³⁷ and Article 26³⁸ of the ICCPR. The general thrust of the Covenant is further reinforced by the

³⁴ *Id.*, Article 3(2).

³⁵ Armenia, Law on Public Organizations, Article 3(2).

³⁶ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 21.

³⁷ International Covenant on Civil and Political Rights, Article 2, para 1 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”)

³⁸ *Id.*, Article 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”)

CCPR General Comment No. 15³⁹ which expressly notes that “[a]liens receive the benefit of the right of peaceful assembly and of freedom of association.”

32. Under European law, restrictions on political activity of aliens are permissible as far as their rights of freedom of expression, freedom of association and peaceful assembly are concerned. Article 16 of the ECHR⁴⁰ seeks to justify, on grounds of national security and territorial integrity, a lesser protection to those rights in relation to an alien’s political activities. The provision has been interpreted quite restrictively though, and the Court tends increasingly to require from governments to rely solely on the restrictions that are specific to the right in question. It is therefore recommended that no restrictions be placed on the aliens’ right to found or join NGOs other than those permissible in respect of the freedom of association specifically.⁴¹
33. As far as examples from individual participating States are concerned, some countries’ laws expressly provide for the right of aliens to freedom of association (e.g. the Armenian law mentions “*physical persons, including RA citizens, foreign citizens and those without citizenship*”⁴²), while in some other countries laws refer to a broad category of “everyone” or “all natural persons” (e.g. the Lithuanian law provides that “[a]ll capable natural persons above the age of 18 and (or) legal persons may found an association by drafting an association founding agreement”⁴³ and the Croatian law includes a provision allowing “[a]ny natural and legal person with capacity to act” to join associations⁴⁴).
34. Similarly, it is a good practice followed by many of the OSCE participating States to treat foreign-based NGOs equally with the locally founded organizations. For instance, the Slovak law provides that “[a] legal person with a seat outside of the territory of the Slovak Republic, which is a non-profit organization according to the Law of the state in which territory the non-profit organization or its organizational part resides, is entitled to operate on the territory of the Slovak Republic under same conditions and to the same extent as a

³⁹ CCPR General Comment No. 15 (On the Position of Aliens under the Covenant) [full text available at <http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument>, last visited on 15 April 2005.]

⁴⁰ “Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens”.

⁴¹ See para 3 through 5.

⁴² Armenia, Law on Public Organizations, Article 3(1) (“A public organization (hereafter referred to as organization) is a type of (not for profit) public association which does not pursue the purpose of gaining profit and redistributing this profit among its members, and into which (the organization), based on their common interests, in the manner prescribed by the law, physical persons, including RA citizens, foreign citizens and those without a citizenship, have joint for satisfying their non religious spiritual and non material other needs; for protecting their and other persons’ rights and interests; for providing material and non-material assistance to certain groups and for carrying out other activities for public benefit.”)

⁴³ Lithuania, Law on Associations, Article 4(1).

⁴⁴ Croatia, Law on Associations, Article 4.

*non-profit organization constituted according to this Law, if it fulfills the terms for registration as defined by this Law.*⁴⁵

3.4 Scope of activity. Fundraising

3.4.1 General activities

35. The Fundamental Principles state that “[a]n NGO is free to pursue its objectives, provided that both the objectives and the means employed are lawful.”⁴⁶ For the interpretation of this provision, it should be borne in mind that the international standards do not allow to impose restrictions “other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”
36. One of the features of a democratic society is pluralism, and therefore, the banning of an organization merely because its views are contrary to those expressed by or ascribed to the majority in that society cannot be justified. On that basis, this is only in exceptional cases that the European Court of Human Rights has sanctioned the proscription of a particular organization which was thought to pose a sufficient threat to the values of that society.⁴⁷
37. Associations or groups which advocate changes in legislation or to the legal or constitutional structure of the state are allowed the protection of their right to association provided the means used to those ends are lawful and democratic. Associations or groups whose leaders incite others to use violence and/or support aims with one or more of the rules of democracy cannot rely on their right to association to protect them from sanctions imposed as a result. Furthermore, the state could reasonably prevent the implementation of a program or activities which are incompatible with democratic rules and other norms associated with the protection of human rights before it was given effect through any specific acts. In this regard, it may be relevant to rely on Article 17 of the ECHR, which provides that nothing in the Convention gives any person or group any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms laid down in the Convention. This notion may be used to distinguish groups whose purposes and activities are inimical to the notions of democracy and human rights from those whose ideas are merely inconsistent with other democratic, majority, views.⁴⁸ Finally, it is noteworthy that because proscription is such a

⁴⁵ Slovakia, Law on Non-Profit Organizations Providing Generally Beneficial Services, Section 37.

⁴⁶ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 10.

⁴⁷ *Reefa Partisi Erbakan Kazan and Tekdal v. Turkey*, judgment of the ECHR, 2002: in this case, the Court held that the dissolution of the applicant’s party by the Turkish Constitutional Court on the ground that it had become a centre of activities against the principles of secularism was within the state’s margin of appreciation and thus justified within the terms of Article 11(2).

⁴⁸ Nevertheless, any measures taken under that Article must be proportionate to the threat to the rights of others. Article 17 shall be reserved for those rare cases where the person or group has resorted to acts of violence or clear racial hatred. This approach is supported by Article 18 of the ECHR, which provides that the restrictions permitted under the Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. Therefore, Article 17 may not be used to disqualify certain actions or bodies by reference only to the “unacceptability” of that body’s political or

draconian and severe step, based on potential harm, rather than specific criminal activities, the criminalization of political or other associations is commonly not held admissible.

38. Some of the individual OSCE participating States exhaustively enumerate the prohibited objectives in their legislation (for instance, the Serbian law prohibits organizations if their “*program and statutory objectives [...] and methods of their fulfillment are aimed at: violent destruction of the constitutional system; endangering the territorial integrity and independence of the country; violation of freedoms and human rights and rights of citizens guaranteed by the Constitution of the SFRY; inflammation of national, race and religious hatred and intolerance*”⁴⁹). Some other States’ laws include more specific provisions, as it is the case with the Latvian law which specifically bans paramilitary organizations and any military-type activities by NGOs.⁵⁰
39. The only restriction that may legitimately be imposed on the scope of activity of an NGO (apart from the unacceptability of objectives as discussed above) is a restriction on profit-making activities, which stems from the essence of freedom of association as a civil and political right rather than an economic one and the resulting basic principle that “*NGOs do not have the primary aim of making a profit.*”⁵¹ This limitation, however, does not imply that an NGO cannot engage in profit-making activities as a matter of principle, but rather means that any profits accruing are ploughed back into the pursuit of the common objectives of the association rather than distributed to its membership.
40. Virtually all OSCE participating States’ laws include a prohibition on profit distribution for non-profit organizations. Thus, the Bulgarian law provides that “*non-profit legal entities shall not distribute profit.*”⁵² The Latvian law includes a set of detailed provisions concerning the profit-making activities by non-profits. In particular, it provides that “*[t]he profit from the entrepreneurial or other economic activities shall be used for purposes stipulated by the by-laws of the public organisation or association of public organisations, and it shall not be allowed to distribute it to the members of the public organisation. In the case of a self-liquidation of a public organisation or an association of public organisations, it shall not be allowed to distribute the material and financial assets to the members of the public organisation.*”⁵³ In Latvia there also exists an interesting mechanism of response to breaches of profit-related restrictions by non-profits. The law provides that “*[i]n the event the Articles of Incorporation are violated by any non-profit organization or any profit is gained, within*

other ideals, thus sidestepping questions regarding the legitimacy and reasonableness of the particular measure.

⁴⁹ Serbia, Act on Association of Citizens in Associations, Social Organizations and Political Parties Which are Established for the Territory of the Socialist Federal Republic of Yugoslavia, Article 2.

⁵⁰ Latvia, Law on Public Organizations and Their Associations, Article 17 (“*Public organizations and their associations shall not be allowed to arm their members, organize military training for them and set up militarized units. The members of a public organization shall be allowed to wear military uniforms only in the case when the respective organization has received the permission of the Minister of Justice.*”)

⁵¹ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 4.

⁵² Bulgaria, Law on Non-Profit Legal Entities, Article 3(6).

⁵³ Latvia, Law on Public Organizations and Their Associations, Article 19.

*one month such non-profit organization shall be re-registered as an enterprise or an entrepreneurial company and the respective laws shall be applicable to such organization.”*⁵⁴

3.4.2 Fundraising

41. Formal NGOs should be generally permitted to engage in any legitimate fundraising activity. The law should not treat such fundraising activities as economic ones.
42. The law should make it clear that the government cannot screen or require approval of specific grants or sources of funds. It may, however, be appropriate to require advance notice (but not permission) of fundraising campaigns or issuing identification documents to the fundraisers participating in in-person solicitations.
43. Some OSCE participating States have passed specific legislation to regulate the area of fundraising by non-profits. The United States may be a source of good practice in this regard. The majority of U.S. States have enacted laws on charitable solicitations regulating solicitations of funds and/or property by or on behalf of charities.
44. For instance, the Connecticut law defines “solicit and “solicitation” as “*any request directly or indirectly for money, credit, property, financial assistance or other thing of any kind or value on the plea or representation that such money, credit, property, financial assistance or other thing of any kind or value is to be used for a charitable purpose or benefit a charitable organization. [...] A solicitation shall be deemed to have taken place whether or not the person making the same receives any contribution.*”⁵⁵ The law includes a set of detailed provisions concerning prohibited acts. In particular, the law makes it illegal for anyone “*to misrepresent the purpose or beneficiary of a solicitation*” or “*to misrepresent the purpose or nature of a charitable organization.*” It is also illegal under the Connecticut law for a charitable organization “*to engage in any financial transaction which is not related to the accomplishment of its charitable purpose, or which jeopardizes or interferes with the ability of the charitable organization to accomplish its charitable purpose,*” as well as for anyone to use or exploit the fact of registration so as to lead the public to believe that such registration constitutes an endorsement or approval by the state,” “*to misrepresent that any other person sponsors or endorses a solicitation,*” or “*to use the name of a charitable organization, or to display any emblem, device or printed matter belonging to or associated with a charitable organization without the express written permission of the charitable organization.*”⁵⁶ The law allows charitable organizations to use services of outsourced fundraisers to solicit charitable funds on the organization’s behalf. However, in order to ensure transparency and full public disclosure, the law introduces mandatory registration for all independent fundraising counsels and makes it illegal for a non-profit to hire a fundraiser who is not duly registered.⁵⁷ In addition, the law requires that the charitable organization file a registration

⁵⁴ Latvia, Law on Non-Profit Organizations, Article 12.

⁵⁵ United States, Connecticut, Solicitation of Charitable Funds Act (1963, P.A. 551, S. 1.), Sec. 21a-190a.

⁵⁶ *Id.*, Sec. 21a-190h.

⁵⁷ *Id.*, Sec. 21a-190h and Sec. 21a-190e.

prior to conducting any fundraising campaign.⁵⁸ Note that the registration procedure does not imply any authorization or permission by the responsible state agency, but is merely a requirement of notification aimed at better transparency.

3.4.3 Public benefit activity. Charities and charitable goal

45. The understanding of what constitutes “public benefit activity” and a “charity” is key to much of non-profit regulation. In simple terms, a charity may be defined as an organization which provides public benefit and pursues one or more of the recognized “charitable goals.” While the catalog of “charitable goals” (which would typically include poverty prevention and relief, promotion and protection of human rights, advancement of education, sports, culture, promotion of public health, environmental protection, social and community development and similar goals) may vary from country to country, the test of public benefit has to be absolutely satisfied and thus may be considered as the first and foremost element of “charitability.”
46. It is essential to bear in mind that “charity” is a notion which is by no means congruent with the notion of NGOs and freedom of association, but is rather used for a convenient categorization of NGOs for a limited range of purposes, taxation being one of them.
47. The watershed between charity-related legislation and freedom of association legislation is key when it comes to the imposition of legitimate restrictions on the types of activity charities may engage in. It is pivotal to realize that “charities” are not an essentially new or distinct group within the NGO sector (and, actually, “charities” may often include non-profit organizations not normally treated under the NGO law, such as cooperative health providers, as it is the case in the U.S.), but a group that is afforded preferential treatment in terms of, for instance, taxation. Therefore, the charity-related legislation should not discuss whether or not a certain type of activity can be prohibited as incompatible with the internationally recognized restrictions on the exercise of freedom of association (this is left to the NGO legislation which is applicable to all NGOs irrespective of whether or not they are recognized as charities), but should instead proceed from the premise that charities as non-profit organizations working for public benefit should be afforded additional benefits. It is therefore legitimate and indeed necessary to introduce clear criteria of eligibility for those benefits.
48. As it has already been mentioned, the primary test that an organization has to satisfy in order to qualify as charitable is the test of public benefit. Translated into legislative provisions, this test has usually taken the form of a requirement that the absolute majority of the organizational resources must be used for charitable activities.

⁵⁸ *Id.*, Sec. 21a-19b (“Every charitable organization not exempted by section 21a-190d shall register with the department prior to conducting any solicitation or prior to having any solicitation conducted on its behalf by others. Application for registration shall be made on forms prescribed by the department and shall include payment of a fee of twenty dollars. Two authorized officers of the organization shall sign the registration form and shall certify that the statements therein are true and correct to the best of their knowledge. A chapter, branch or affiliate in this state of a registered parent organization shall not be required to register provided the principal office of the parent organization is located in this state and provided the parent organization files a consolidated annual report for itself and its chapter, branch or affiliate.”)

49. For instance, the Canadian Income Tax Act distinguishes between two types of charities: charitable organizations and charitable foundations. The Act defines a “charitable organization” as “*an organization [...] all the resources of which are devoted to charitable activities carried on by the organization itself.*”⁵⁹ The category of “charitable foundations” has been created to accommodate organizations which are primarily set up for grantmaking purposes and may not implement projects of their own. The Income Tax Act defines a “charitable foundation” as “*corporation or trust that is constituted and operated exclusively for charitable purposes, no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof, and that is not a charitable organization.*”⁶⁰ In addition, the Act provides that “charitable purposes” include “*the disbursement of funds to qualified donees*” (i.e. essentially to other charities), and sets a ceiling on expenditures (the so-called “disbursement quotas”) to ensure that all or most of the funds received by a charity from external sources are steered into charitable projects within a set period of time.⁶¹
50. The U.S. Code distinguishes for the purposes of tax exemption “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁶²

3.4.4 Lobbying and political activity

51. Lobbying lies at the core of a developed pluralistic democracy. As an important form of advocacy, it allows groups and individuals to protect and advocate their interests and to influence laws that affect their lives.
52. While no international standards address the issue of lobbying by NGOs specifically, some useful guidance can be drawn from the best practices in non-profit regulation. There is a general consensus internationally that a non-profit organization can engage in activities not specifically pursuing the primary purpose the organization was established for only insofar as these ancillary activities⁶³ are connected and subordinate to the organization’s main

⁵⁹ Canada, Income Tax Act, 149.1(1).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² United States, 26 USC 501c(3).

⁶³ Ancillary activities are commonly understood as serving and subordinate to the charity’s purposes. For instance, the Charity Commission for England and Wales provides the following definition of “ancillary”: “*To be ancillary, activities must serve and be subordinate to the charity’s purposes. They cannot,*

purpose.⁶⁴ For example, advocacy for a change in the law is a legitimate political activity as long as it is connected to the primary purpose of the NGO in question. There is, however, a clear and universally shared understanding that an NGO can under no circumstances engage in partisan political activity.

53. It is therefore essential that the law draw a line between lobbying and advocacy activity, on the one hand, and partisan political activity (e.g. supporting or opposing candidates for public office), on the other. Most countries do distinguish between these two types of activity and, while generally permitting lobbying and advocacy, restrict partisan political activity by NGOs.
54. For instance, in the U.S. non-profits are allowed to engage in lobbying as long as it does not become a “substantial part” of the organization’s activities.⁶⁵ Partisan political activity by tax-exempt non-profits is prohibited.
55. In the U.K., the Charity Commission Guidelines state that, although charities cannot have public policy purposes, they may nonetheless engage in activities directed at securing, or opposing, changes in law or government policy if there is a “*reasonable expectation that the activities will further the purposes of the charity*”.
56. Under Canadian law, charities can engage in political activities as long as these activities are “*ancillary and incidental to its charitable purposes*” and “*those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office.*”⁶⁶
57. In Hungary, NGOs that engage in partisan political activity are not eligible to receive subsidies from the nationwide Civic Fund.⁶⁷

3.5 Government-civil society relations, including state financing and social contracting. Government-NGO compacts

3.5.1 Policy documents for cooperation

58. The Fundamental Principles provide that “*NGOs should be encouraged to participate in governmental and quasi-governmental mechanisms for dialogue, consultation and exchange,*

therefore, be undertaken as an end in themselves and must not be allowed to dominate the activities, which the charity undertakes to carry out its charitable purposes directly.”

⁶⁴ This statement draws on the analysis of the general body of legislation, regulations and caselaw pertaining to the topic. The regulatory framework referred to is the Canadian Income Tax Act and CCRA regulations in the case of Canada; the U.K. Charities Act and the Charities Commission’s guidance on Political Activities and Campaigning by Charities in the case of the U.K., and the various IRS regulations concerning political campaign intervention by the tax-exempt organizations in the case of the U.S..

⁶⁵ See United States, 26 USC 501c(3) (“*no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office*”).

⁶⁶ See Canada, Income Tax Act, Subsection 149.1(6.1).

⁶⁷ Hungary, Act on the National Civic Fund Program, Article 3(4) (“*Civil organizations are not entitled to the subsidy of the Fund Program which carry out direct political activity according to Paragraph 26., point d) of Act CLVI/1997 on the organizations of public utility.*”)

*with the objective of searching for solutions to society's needs,"*⁶⁸ however, making a special mention that “[s]uch participation should not guarantee nor preclude government subsidies, contracts or donations to individual NGOs or groups thereof.”⁶⁹

59. The requirement that “NGOs should also be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation”⁷⁰ is of particular importance for the legislator seeking to improve the legal framework as it concerns NGOs.
60. In pursuit of efficient cooperation through a more institutionalized relationship, a number of OSCE participating States have adopted policy documents on cooperation between the government and the non-profit sector.⁷¹ While these policy documents are usually a result of participatory effort and negotiations between the affected parties, their actual form may differ and in fact ranges from bilateral documents of “agreement” type (the U.K. is one prominent example) to unilateral statements of commitment by the government (as it is in the case of Hungary).
61. One of the principal reasons why a government-NGO compact may be opted for is a better, more systematic framework for cooperation possible under such a compact, as well as better understanding of the public at large about it.
62. A significant (and growing) number of countries to date have pursued the adoption of compacts, among these countries being Austria, Croatia, Estonia, the United Kingdom, to name just a few. Individual countries which have chosen to adopt compacts have done so for additional reasons which may vary depending on the country. For instance, Austria has pursued government-NGO partnerships as an additional means of decentralizing power in the state. Numerous countries have opted for a compact in order to facilitate service delivery to the population based on subsidiarity.
63. It is noteworthy that in many countries there have been also adopted complementary compacts between the local governments and NGOs in the given locality, to streamline cooperation at the regional level as well.
64. The quality and implementability of a compact is of no less central importance than the quality and implementability of legislation in the strict sense of the word. A compact which is of purely declaratory nature may undermine the public sector-civil society cooperation rather than foster it. Moreover, since a compact may offer the government a very fine set of tools allowing to “steer” the NGOs and eventually impose on them certain policies, appropriate safeguards need to be envisaged by the compact, first and foremost the right for the NGOs to refuse to cooperate with the government. In general, irrespective of whether the idea of adopting a compact initiates within the government or civil society sector, it is of

⁶⁸ Fundamental Principles on the Status of Non-Governmental Organizations in Europe, Principle 74.

⁶⁹ *Id.*, Principle 75.

⁷⁰ *Id.*, Principle 78.

⁷¹ Policy documents on cooperation between the government and the non-profit sector are commonly called “compacts” and will be termed so in this paper.

paramount importance to ensure that the compact is developed and drafted through a highly participatory, negotiations-based process.

65. As far as the content of a compact is concerned, a compact should clearly recognize the right of an NGO to refuse to cooperate with the government. On a larger scale, this would be one of the provisions reflecting the recognition of different and specific roles and interests of the parties to the compact, alongside with, for instance, the right of civil society organizations to advocacy and criticism of the government. However, this recognition should not be misunderstood as unduly favoring a party. It should be made clear that certain specifics of the public sector have to be recognized by civil society, among them being the recognition of the statutory framework for the government's work and public accountability of the government spending.
66. The great diversity of civil society also prompts for including a set of provisions regarding representation. The compact should clearly state that no single body is entitled to represent the complete range of the NGO sector interests, although it may allow recognized representative bodies to deliver their opinions to the government. If this option is chosen, special care needs to be taken in order to give equal voice to unrepresented groups such as grassroots organizations or informal associations.
67. The Scottish Compact may serve as a good practice example in this regard by providing that *“[n]o single body or group of bodies can represent the complete range of interests that the voluntary sector pursues with the Executive. However, where there are recognised representative lead bodies, these bodies commit themselves to:*
- *ensure clear and accessible channels of communication to the sector;*
 - *represent accurately and honestly the views of their sectoral constituencies;*
 - *publicise NDPB appointment vacancies as appropriate to relevant voluntary organisations;*
 - *promote collaborative working between voluntary sector partners;*
 - *promote the development of the voluntary sector infrastructure to allow particular interests and groups to develop and communicate their views to the Executive and other interests;*
 - *demonstrate how they consult their members and supporters and are accountable to them;*
 - *contribute as appropriate to consultation and policy development exercises; and*
 - *consult fully and to timetables agreed with the Executive.”*
68. Likewise, the Estonian Civil Society Development Concept acknowledges that *“no citizens' association or umbrella organization can represent the interests of the whole nonprofit sector in relations with the public sector. Widely acknowledged representative councils or umbrella organizations of certain areas of activity proceed from the following principles in the performance of their representational function with regard to the public sector.”*
69. An indispensable and indeed central part of a compact is a set of provisions describing the acceptable methods of resource allocation and the accountability over their use. A compact

should establish a clear and consistent resource allocation procedure by the government as well as a minimum set of standards for the accountability of NGOs for the use of public money. It is important that all types of funding be covered by the compact, i.e. core (strategic) funding, project funding and contract funding, as well as due consideration be given to the allocation and use of in-kind resources. For instance, the Compact between the Government and the Voluntary Sector in Wales establishes two parallel sets of commitments with regard to resource allocation and use for the Government and the voluntary sector, respectively. In particular, the Compact establishes a set of criteria for government funding schemes, including *“clarity in the objectives of grant schemes and their eligibility criteria; transparency and objectivity in the administrative and assessment procedures; consistency between funding programmes; arrangements that assist voluntary organisations to meet their legal and regulatory obligations; arrangements for agreeing meaningful objectives and performance indicators, commensurate with the level of funding, by which an organisation is to be monitored and evaluated; progress towards three year funding arrangements for core-grants as a means of promoting effective long-term planning; effective arrangements for co-operating between departments over grant aid for activities that do not readily fit within one department’s responsibilities; targeting resources effectively.”* In its turn, the voluntary sector in its use of the government funding has to ensure that the following conditions are met: *“clear and effective employment policies, management arrangements and procedures; effective and proportionate systems for the management, control, accountability, propriety and audit of finances; systems for planning and implementation of work programmes; systems for monitoring and evaluation of activities against agreed objectives; systems for quality assurance and accountability to users, including complaints procedures; policies for ensuring equality of opportunity in both employment practice and service provision; public acknowledgement of Government support.”* It is of special interest that the Compact includes a Government commitment *“to promoting good practice to other funders.”*

3.5.2 State financing

70. Direct government support can come in a number of forms, such as subsidies (government funding providing general support and not linked to a specific activity; usually provided by an administrative decision by a central or local government body); grants (support towards implementation of a specific activity; normally awarded based on competition/bidding results),⁷² procurement (purchase by the government of goods and/or services produced by a non-profit);⁷³ and vouchers (under this system, vouchers for social services are provided by municipalities to residents who then choose their provider).
71. Similarly, indirect government support may take the form of tax benefits or exemptions, use of public property at no or reduced cost, or tax percentage mechanism. The tax percentage mechanism is not something new (in fact, it dates back to 19th century church financing laws) but it received a new lease on life when rethought and relaunched in 1996 by Hungary’s so-called “1% Law.” Under tax percentage laws, individual taxpayers have an option of

⁷² The USAID Glossary of ADS Terms defines grants as *“legal instruments used where the principle purpose is the transfer of money, property, services or anything of value to the recipient in order to accomplish a public purpose of support or stimulation authorized by statute and where substantial involvement by the state is not anticipated.”*

⁷³ Some procurement-related issues are discussed under the separate subsection on *Social contracting*.

supporting what, in their view, is a worthy cause by allocating a portion of their previous year's paid personal income tax to an eligible non-profit organization of their choice.

72. Currently tax percentage mechanism is in place in a number of countries, including Italy, Spain and a number of Central and Eastern European jurisdictions such as Hungary,⁷⁴ Lithuania,⁷⁵ Poland, Romania⁷⁶ and Slovakia. The actual percentage varies between 1% (Hungary) and 2% (Lithuania).

⁷⁴ See *id.*, Section 1 (“(1) With due consideration of the provisions of Section 45 of the Income Tax Act, for the purpose of this Act, the tax amount which remains after deductions have been made from the tax amount due on the consolidated tax base, as stated in the individual's tax return or in the employer's statement in lieu of a tax return shall be regarded as paid tax, under the condition that the individual has paid such tax before the filing deadline and has not received a deferment or installment of payment extending past the 30th of September of the year of the instruction statement.(2) Private individuals may file separate statements of instruction to donate a) one per cent of the paid tax to a beneficiary selected from among those described in Section 4, b) and another one per cent to a beneficiary selected from among those described in Section 4/A, under the condition that the amounts described in Paragraphs a) and b) are at least HUF 100 each.(3) Each one per cent donation may only be donated in its entirety to one selected beneficiary each from Section 4 and/or from Section 4/A”) and Act on the National Civil Fund Program, Article 2 (“(1) The realization of the objectives of the Fund Program is served by the section of the central budget in the Prime Minister's Office source titled as National Civil Fund Program; over which the member of the Government assigned by this task (hereinafter: minister) disposes. (2) Sources of the Fund Program: 1 percent of the personal income tax of the previous budgetary year, reduced by the ratio of the personal income tax actually paid to the beneficiaries indicated by the tax-payers, as defined in Paragraph 4 of the Act CXXVI/1996. The supporting amount transferred to the Fund Program cannot be less than 0.5 percent of the personal income tax actually paid by private persons in the previous budgetary year, voluntary contributions and donations of legal persons, other organizations without legal personality, as well as natural persons; budgetary supports; other revenues determined by the law.”)

⁷⁵ See Lithuania, Order of the Minister of Finance of the Republic of Lithuania Regarding Approval of the Procedure For Transferring Up To 2 Per Cent of Income Tax Amount to Lithuanian Entities Entitled to Sponsorship Under the Law on Charity and Sponsorship of the Republic of Lithuania (“1. This procedure contains provisions for transferring a sum (up to 2 per cent) of the income tax payable by a permanent resident of Lithuania to Lithuanian entities (hereinafter referred to as sponsorship beneficiaries) which are entitled to sponsorship under the Law on Charity and Sponsorship of the Republic of Lithuania (Official Gazette, 1993, No. 21-506; 2000, No. 61-1818) (hereinafter referred to as the Law on Charity and Sponsorship)”).

2. At the end of the taxing period, a permanent resident of Lithuania shall have the right to submit an application to the tax administrator asking to transfer a part of the income tax payable by them (up to 2 per cent) to the sponsorship beneficiaries specified in the Law on Charity and Sponsorship (hereinafter referred to as Application).

⁷⁶ See Romania, Fiscal Code, Article 90 (“(2) Natural person taxpayers may decide to designate an amount representing up to 1% of their payable annual tax to sponsor non-profit entities, operating under Government Ordinance 26/2000 on associations and foundations, as subsequently amended and supplemented.

(3) The employer or the competent fiscal authorities, as the case may be, shall be responsible to calculate, withhold and transfer the respective amount.

(4) The application procedure of the provisions contained by paragraphs (2) and (3) is to be established through an order of the minister of public finances.”)

73. One interesting feature of and an important rationale for introducing tax percentage legislation as spelled out by Hungary's Government Program 1994 is the *"opportunity for the citizens to bring autonomous decisions as to which public services and to what extent they wish to support and which ones they entrust to the re-distribution of the state budget."*
74. However, there exist also pitfalls the drafter should take care to avoid when preparing legislation on tax percentage. In particular, it is important to ensure that designations (choice of a particular NGO) made by taxpayers be treated as confidential under data protection laws, since taxpayers' choices would often be influenced by their personal convictions and beliefs and making these convictions and beliefs public may constitute direct encroachment on the right to privacy. For instance, in Hungary the law extends protection applicable to sensitive data to information contained in the designation form by providing that *"[t]he information on the envelope and on the statement of instruction shall be considered confidential tax information and consequently subject to the rules of data protection, with the exception that the tax authorities may only a) allow inspection by authorized persons acting in such legal proceedings as specified in Subsection (4); b) provide the private individual with information regarding his own data and the contents of his own statement of instruction; c) provide information to the beneficiary on the funds transferred to it."*⁷⁷
75. With regard to the state-provided benefits it should be noted that the law may and should require that organizations receiving more than minimal benefits from the state or intensely engaging in public fundraising report regularly (e.g. annually) on their finances and operations to the responsible state agency. The reporting requirement, however, should not apply to all organizations without exemption. The law should rather establish a level of activity that would trigger reporting and audit requirements. For instance, in Slovakia the audit requirement applies where *"the subsidies from the state budget, budget of the state fund or the community fund are more than one million Slovak crowns in the year, which is reported in the Annual Accounts Report"* or *"the total income of the non-profit organization exceeds five million Slovak crowns."*⁷⁸

⁷⁷ Hungary, Act on the Use of a Specified Amount of Personal Income Tax in Accordance with the Taxpayer's Instruction, Section 5(3).

⁷⁸ Slovakia, Law on Non-Profit Organizations Providing Generally Beneficial Services (*"Section 33. (1) A non-profit organization keeps accounting books according to a separate rule[14]. (2) A non-profit organization must keep separately incomes and expenditures related to the beneficial services from incomes and expenditures related to [unrelated] business activity. (3) The Annual Accounts Report must be authorized by an Auditor, a) if the subsidies from the state budget, budget of the state fund or the community fund are more than one million Slovak crowns in the year, which is reported in the Annual Accounts Report, b) the total income of the non-profit organization exceeds five million Slovak crowns. (4) One copy of the Annual Accounts Report authorized by the Auditor according to the Section 3 shall be submitted for publication in the Business Review[15]not later then by April 15th.*

Section 34. (1) The non-profit organization shall prepare the Annual Report on the date determined by the Board of Directors or by the Founder's Deed after the end of the calendar year, but not later than by March 31. (2) The Annual Report includes: a) A review of activities performed in that calendar year specified according to their relationship to the purpose of establishment of the non-profit organization, b) The Annual Accounts Report and evaluation of the basic data included therein, c) The Auditor Statement to the Annual Accounts Report if authorized by an Auditor, d) A review of monetary incomes and expenditures, e) A review of the extent of income specified according to its source, f) The status and

3.5.3 Social contracting

76. Social contracting is indeed a very beneficial practice allowing to avoid unnecessary bureaucracy and to boost the efficiency in providing social services to the population through outsourcing specialized NGOs; at the same time, it reinforces the cooperative spirit of the government-public at large relationship since social services provided not directly by the government but through an NGO are less likely to be considered as a state intervention into private life. Legislation on social contracting needs to be premised on the clear and full understanding that social contracting is not just another means of unilateral government “support” for NGOs, but presents a mode, and indeed an efficient one, of an entirely business-style exchange of funds for service. Moreover, social contracting is beneficial to the NGOs, society as well as the government itself.
77. It is of utmost importance that the recognition of the role and the capacity of NGOs to provide social services not remain a mere declaration, but be buttressed by a solid set of provisions in relevant laws actually allowing the NGOs to engage in such contracting. To achieve this end, the laws would need to provide for essential details such as what kind of services may be outsourced; what sources shall be used for contract payments (central budget, local budgets, individual donations, lotteries, special funds, etc.); and the bidding procedure (including whether non-profit bidders shall be treated equally with for-profit organizations). It is pivotal that the law establish incentives for the government agencies to contract NGOs. This can be done, for instance, through mandatory contracting of certain services. Needless to say, the legal framework for social contracting should include a set of provisions aimed at the prevention of abuse and unfair or improper allocation of resources.
78. For instance, in Poland social contracting is largely regulated by the Law on Public Benefit Activity and Volunteerism. The law designates certain activities,⁷⁹ including provision of

overview of handling the property and duties of the non-profit organization, g) Changes in and new composition of the bodies of the non-profit organization which happened during the year, h) Other data determined by the Board of Directors. (3) The Annual Report must be published in the manner set forth in the Statute. One copy of the Annual Report shall be sent to the Registration Office by April 15th. (4) The Annual Report must be accessible to the public at the seat of the non-profit organization.”)

⁷⁹ Poland, Law on Public Benefit Activity and Volunteerism, Article 4(1) (“*The domain of public tasks mentioned in the Law covers tasks in the following fields:*

- 1) social care, including assisting families and individuals in difficult life situations, and providing equal opportunities to such families and individuals;*
- 2) charitable activities;*
- 3) sustaining national tradition, cultivating Polishness, and the development of national, civil, and cultural identity;*
- 4) activities for the sake of national minorities;*
- 5) protection and promotion of health;*
- 6) activities for the sake of the handicapped;*
- 7) promotion of employment and job-related motivation of individuals who are unemployed or who are threatened with redundancies;*

social care, public health and education, as public benefit activities, and makes contracting of NGOs to perform these services mandatory.⁸⁰ The Law establishes a procedure for contracting non-profit providers of such activities (termed “*commissioning of public tasks*” by the law). Contractors are selected through open bidding which has to be duly advertised at least 30 days prior to the bidding date.

79. In Bulgaria, the Law on Social Support provides for a detailed inventory of funding sources for social contracting,⁸¹ as well as establishes a specialized supervision body tasked with monitoring the performance of social contracts, including the use of funds.⁸²

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- 8) *protection and promotion of women’s rights and activities for the sake of equal rights for men and women;*
 - 9) *activities that support economic development, including the development of entrepreneurship;*
 - 10) *activities supporting the development of communions and local communities;*
 - 11) *science and humanities, education and upbringing;*
 - 12) *tourism and leisure of children and adolescents;*
 - 13) *culture, arts, protection of national heritage and tradition;*
 - 14) *promotion of sports;*
 - 15) *natural environment and animal welfare and the protection of environmental heritage;*
 - 16) *public order and social safety and prevention of social pathologies;*
 - 17) *promotion of knowledge and skills for the State defense;*
 - 18) *protection and promotion of human rights and freedoms, as well as activities supporting the development of democracy;*
 - 19) *protection of people and emergency rescuing;*
 - 20) *assistance to the victims of catastrophes, natural disasters, military conflicts and wars in the territory of the State and abroad;*
 - 21) *protection and promotion of consumer rights;*
 - 22) *activities for the sake of the European Integration and development of relations and co-operation among nations;*
 - 23) *promotion and organization of volunteerism;*
 - 24) *activities that provide technical support, training, information and/or financial assistance to non-governmental organizations and units mentioned in Art. 3 par. 3, within the scope of points 1–23.”)*

⁸⁰ *Id.*, Article 5 (“Public administration organs perform activities in the field of public tasks that are mentioned in Art. 4 in co-operation with non-governmental organizations and entities mentioned in Art. 3 par. 3, which perform public benefit activities, taking into consideration the territorial division of public administration bodies.”)

⁸¹ Bulgaria, Law on Social Support, Article 24 (“The funding of the social support shall be implemented with resources from: 1. the republican budget; 2. the municipal budgets; 3. national and international programmes; 4. donations from local and foreign individuals and corporate bodies; 5. resources from fund “Social support”; 6. other sources. (2) The Agency for social support shall be administrator of the following incomes: 1. incomes from fines for violations under this law; 2. revenues from advertising – information and publishing activity; 3. donations and wills from local and foreign individuals or corporate

80. In Hungary, the Act on the National Civic Fund Program establishes a highly detailed procedure whereby civic sector support funds are raised and distributed and their use monitored. It is noteworthy that the monitoring body represents both the State and the NGO sector both at national and regional levels.⁸³ It also provides for a set of transparency requirements concerning the internal workings of the National Civic Fund administration body.⁸⁴

bodies; 4. incomes from other sources.”), Article 25 (“At the Minister of Labour and Social Policy shall be established fund “Social support” – secondary administrator with budget credits.”); Article 26 (“The resources of fund “Social support” shall be collected from: 1. purposed subsidy from the republican budget in extent determined annually with the Law for the state budget of the Republic of Bulgaria; 2. donations and wills from local and foreign individuals or corporate bodies; 3. thirty percent of the amount of the fees, paid by the persons, using social services, financed by the republican budget; 4. incomes from organised additional and specialised issues of the State pecuniary - subject lottery and of the Bulgarian sport totaliser; 5. restored unlawfully and unconscientiously received resources from the fund and the interests for them; 6 fees for issued licenses; 7. incomes from other sources.”)

⁸² *Id.*, Article 31 (“ (1) (amend. SG 120/02) The Minister of Labour and Social Policy shall exercise overall control over the observing of this law and the other normative acts in the field of social support. (2) (amend. SG 120/02) The specialised control of the lawful application of the normative acts in the field of social support at the territorial divisions of the Agency for social support and at the specialised institutions for social services and the social services, conceded in the community, as well as of the observing of the criteria and the standards for implementing of social services, shall be implemented by the inspectorate of art. 5, para 4. (3) (amend. SG 120/02) The control of observing of the standards for quality of the social services for children, determined in ordinance for the criteria and the standards for social services for children, shall be implemented by the State agency for protection of child.”) and Article 32 (“ (1) Implementing the control functions the inspectors shall have the right to: 1. visit without restriction the bodies for social support and the places where are implemented activities for social support; 2. require explanations and conceding documents, information and data; 3. receive directly from the supported persons the necessary information. (2) (Amend., SG 45/02) The inspectors shall be obliged to observe the normative requirements for protection of the classified information that has become known to them at and in connection with the implemented checks as well as to respect the honour and the dignity of the supported persons. (3) At establishing breaches of law containing data about committed crime the inspectorate shall notify immediately the bodies of the prosecutor’s office.”)

⁸³ *See* Hungary, Act on the National Civic Fund Program, Article 4(1) (“The Council is the principal governing body of the Fund Program. Within the frame of the present Act, it determines the basic regulations of the functioning of the Fund Program, the regulation guidelines of the subsidies provided from the Fund Program, the maximum decree of subsidies to be given for a civil organisation in a budgetary year; the rate at which subsidies will be divided among Colleges and performs other tasks determined by the present Act.”) and Article 12 (“(1) Through the civil representation system the national civil organisations shall elect five members of the Council in a way to elect one-one member from civil organisations in the area of: health-conservation, illness prevention, recovery, health rehabilitation activity, social activity, family-assistance, tending, assistance of the socially disadvantaged; cultural activities, educational, pedagogical activities, activities concerning Hungarian national and ethnical minority, activities related to Hungarians outside Hungary; nature protection, animal protection, environmental protection and cultural heritage protection; child and youth representation, protection, sport, leisure-time; the protection of public order and safety, voluntary fire-fighting, rescuing, prevention of catastrophes, protection of human and constitutional rights, consumer protection, improvement of Euro-Atlantic integration, services, support and donations for the non-profit civil sector, other non-profit activities. (2) One-one member of the Council per regions shall be elected through the civil representation system.”)

⁸⁴ *Id.*, Article 9 (“(1) The meetings of the Council and the Colleges are open to the public. The place, date and agenda of the meetings shall be disclosed on a homepage described in Section (2) at the same time as

3.6 Liability and sanctions

81. It is essential that the law make available a range of graduated sanctions imposable on organizations in compliance with the principle of proportionality, and a sanction that is being imposed is no more than absolutely necessary. Termination or dissolution should only be used as a measure of last resort.
82. For instance, in Bulgaria a non-profit may be dissolved pursuant to a court decision for repeated breaches of applicable legislation (such as repeated failure to submit reports or to pay state duties). A dissolved non-profit retains the right to apply for 2nd registration after one year has elapsed since the dissolution.⁸⁵ In Slovakia a court “*may appoint a time period for the non-profit organization to eliminate a reason for which its termination was proposed, before deciding about the motion.*”⁸⁶
83. As already mentioned under *General activities*, some countries have even designed and out in place mechanisms to deal with breaches by NGOs of the prohibition to make and distribute profit without resorting to dissolution. In Latvia, the law provides that “[i]n the event the

sending the invitations. On the motion of the Chairman of the Council or the leader of the College, the Council or the College with a 2/3rd majority may decide on a secret session if the protection of personal rights, of data or if fair competition related to tenders should be ensured. Even in this case the announcement of the resolution shall be public as well.

(2) Publicity of the functioning of the Fund Program is ensured by a separate homepage. The decisions of the Council and the College are to be made public on this homepage within 30 days after adoption. On the homepage the following should be accessible: laws in connection with the functioning of the Fund Program, all resolutions concerning the operation of the Fund Program and the managing bodies and the members' names (of the Council and the Colleges). The Chairman of the Council and the leader of the Colleges ensure the disclosure of such information.

(3) Announcements shall be disclosed on the homepage described in Section (2) and at least two national newspapers and in a civil professional press.

(4) The Government Assign as often as necessary but at least by the 31st of March each year shall report to the minister on the previous year activities and operation of the Fund Program and the experiences of application of the present Act.

(5) The minister by the 31st of June each year shall report to the Committee on the previous year activities and operation of the Fund Program and the experiences of application of the present Act, further it examines the necessity of modifications of the present Act. The Committee shall send the minutes of the ministerial hearing to the Chairman of the Council within 30 days, and the Chairman ensures the disclosure of the minutes in accordance of Section (2) within 30 days.”

⁸⁵ Bulgaria, Law on Non-Profit Legal Entities, Article 48 (“(1) The registration shall be deleted by request of the public prosecutor or the bodies of the State Financial Control, ex officio by the Minister of Justice, where the non-profit legal entity pursuing activities for public benefit: 1. systematically fails to submit the information about circumstances subject to entry within the specified terms; 2. pursues activities contrary to the provisions of the law; 3. systematically fails to pay public amounts receivable; 4. has reduced number of members less than the minimum required by law for a period of more than 6 months. (2) The deletion of the registration shall not relieve the non-profit legal entity pursuing activities for public benefit and its managing bodies from their obligations and responsibilities under this Act.”) and Article 49 (“(1) A non-profit legal entity pursuing activities for public benefit the registration of which has been deleted, may apply for second registration not earlier than one year following the removal of the reasons for deletion. This right may be exercised only once.”)

⁸⁶ Slovakia, Law on Non-Profit Organizations Providing Generally Beneficial Services, Section 15(3).

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Articles of Incorporation are violated by any non-profit organization or any profit is gained, within one month such non-profit organization shall be re-registered as an enterprise or an entrepreneurial company and the respective laws shall be applicable to such organization.”⁸⁷

⁸⁷ Latvia, Law on Non-Profit Organizations, Article 12.