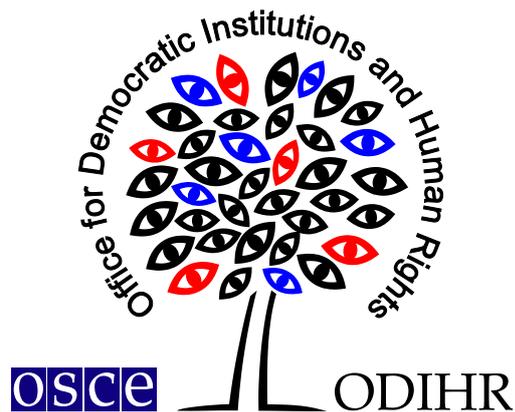


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## OPINION

# ON THE DRAFT ACT OF POLAND ON THE NATIONAL FREEDOM INSTITUTE - CENTRE FOR THE DEVELOPMENT OF CIVIL SOCIETY

**based on an unofficial English translation of the Draft Act commissioned by the  
OSCE Office for Democratic Institutions and Human Rights**

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## TABLE OF CONTENT

<b>I.</b>	<b>INTRODUCTION</b> .....	<b>3</b>
<b>II.</b>	<b>SCOPE OF REVIEW</b> .....	<b>3</b>
<b>III.</b>	<b>EXECUTIVE SUMMARY</b> .....	<b>4</b>
<b>IV.</b>	<b>ANALYSIS AND RECOMMENDATIONS</b> .....	<b>6</b>
<b>1.</b>	<b>International Standards on the Right to Freedom of Association and Public Support to Associations</b> .....	<b>6</b>
<b>2.</b>	<b>General Comments</b> .....	<b>8</b>
2.1.	<i>The Purpose of the Draft Act</i> .....	8
2.2.	<i>The Decisive Influence of the Executive Branch over the National Institute and in the Area of Civil Society Development</i> .....	11
2.3.	<i>Lack of Effective Co-ordination and Meaningful Inclusion and Participation of Civil Society in the National Institute's and in the Committee for Public Benefit Activity's Work</i> .....	13
2.4.	<i>Other Comments</i> .....	16
<b>3.</b>	<b>The Mandate, Governing Structure and Functioning of the National Institute</b> .....	<b>19</b>
3.1.	<i>Competences and Scope of Work of the National Institute</i> .....	19
3.2.	<i>The Appointment, Composition and Dismissal of the Governing Bodies of the National Institute</i> .	20
<b>4.</b>	<b>The Criteria and Procedure for Open Tender</b> .....	<b>23</b>
<b>5.</b>	<b>Law-making Process and Participatory Approach</b> .....	<b>25</b>

**Annex:** **Draft Act on the National Freedom Institute – Centre for the Development of Civil Society of Poland** (provided as a separate document, available at <http://www.legislationline.org/documents/id/21176>)

## **I. INTRODUCTION**

1. *On 1 February 2017, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) received a request from the Commissioner for Human Rights of Poland (hereinafter “the Commissioner”) to review the Draft Act on the National Centre for the Development of Civil Society of Poland.*
2. *On 2 February 2017, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on its compliance with international human rights standards and OSCE human dimension commitments.*
3. *On 3 March 2017, the Commissioner informed the OSCE/ODIHR that substantive modifications to the draft were being made and that the preparation of the Opinion should be put on hold.*
4. *On 27 June 2017, a new version of the draft Act on the National Freedom Institute - Centre for the Development of Civil Society (hereinafter “the Draft Act”) was endorsed by the Government and subsequently communicated to the Sejm on 4 July 2017.<sup>1</sup> This Draft Act is the subject of the current legal review, as agreed with the Commissioner on 10 July 2017.*
5. *This Opinion was prepared in response to the above-mentioned request.*

## **II. SCOPE OF REVIEW**

6. The scope of this Opinion covers only the Draft Act submitted for review and the Act on Public Benefit and Volunteer Work of Poland (2003) (hereinafter “the 2003 Act”) in so far as it is amended by the Draft Act. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the civil society<sup>2</sup> sector in Poland.
7. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the Draft Act. The ensuing recommendations are based on international and regional standards and practices, relevant OSCE human dimension commitments as well as the OSCE/ODIHR-Venice

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<sup>1</sup> See <<http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1713>>.

<sup>2</sup> For the purpose of this Opinion, given that the National Institute aims to develop “civil society” in general, the term “civil society organization”, understood to mean any form – formal or informal – of organized civil society, will be used as an umbrella term including “associations” and, more specifically, “non-governmental organizations”; this would also incorporate “non-governmental organizations” within the meaning of Article 3 par 2 of the Act of 24 April 2003 on Public Benefit Activity and Volunteer Work i.e., “1) entities which do not form part of the public finance sector as defined in the Act of 27 August 2009 on Public Finance, are not enterprises, research institutes, banks neither commercial partnerships being state or local government bodies; 2) which do not operate for profit – corporate and non-corporate entities, which according to separate legal provisions have capacity to perform acts in law, such as foundations and associations, subject to paragraph 4”. The term “association” is defined in the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association (2015), <<http://www.osce.org/odihr/132371>>, as “an organized, independent, not-for-profit body based on the voluntary grouping of persons with a common interest, activity or purpose” and shall thus include non-governmental organizations (NGOs) which are membership-based and have more than one founder (see pars 38 and 63). As noted in the Guidelines on Freedom of Association (par 63), there is no universal definition of what constitutes a non-governmental organization, although many relevant international and regional documents have attempted to outline the form that such organizations may take. See also e.g., Recommendation CM/Rec(2007)14 of the Committee of Ministers to Member States on the Legal Status of Non-governmental Organisations in Europe, which states that non-governmental organizations are “voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members”, and do not include political parties (pars 1-2).

Commission *Guidelines on Freedom of Association*<sup>3</sup> which provide guidance on how to draft human rights-compliant legislation on freedom of association-related matters. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Opinion's analysis takes into account the potentially different impact of the Draft Act on women and men.<sup>4</sup>

8. This Opinion is based on an unofficial English translation of the Draft Act commissioned by the OSCE/ODIHR, which is available at <http://www.legislationline.org/documents/id/21176>. Errors from translation may result.
9. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating the civil society sector in Poland in the future.

### **III. EXECUTIVE SUMMARY**

10. The Draft Act seeks to establish a new structure at the central level, i.e., the National Freedom Institute - Centre for the Development of Civil Society of Poland (hereinafter "the National Institute") to support the development of civil society and public benefit activity and volunteer work in Poland. The content of the Draft Act shows some improvements compared to its February version, particularly with regard to the enhanced, although still limited, involvement of civil society organizations and the new possibility for the National Institute to provide general institutional capacity support to them (pars 29, 36, 59 and 66 *infra*).
11. This new institutional set-up for civil society development in Poland generally seems to reflect schemes that can also be found in other OSCE countries. However, the Draft Act could provide more detail with respect to the modalities and procedures for effective co-ordination and meaningful inclusion and participation of civil society in the National Institute's work and in the oversight over this new body. This would render the Draft Act more in line with international and regional standards and recommendations on the right to participate in the conduct of public affairs, including the participation of civil society organizations in public decision-making processes, as a modality of good administration. Such additional information and detail would likewise be consistent with the National Institute's tasks to promote the involvement of citizens and civil society organizations in public life and decision-making processes and civic control over public institutions (Article 24 par 3 of the Draft Act).
12. Overall, the executive branch appears to have a decisive influence on the governance and operation of the National Institute and the Opinion therefore recommends to reconsider the current oversight and organizational structure, and to provide measures or safeguards limiting potential government interference in the National Institute's

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<sup>3</sup> OSCE/ODIHR-Venice Commission, *Guidelines on Freedom of Association* (2015), <<http://www.osce.org/odihr/132371>> (hereinafter "2015 Guidelines on Freedom of Association").

<sup>4</sup> See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

work. Moreover, this new civil society development scheme should not lead to a situation where, in practice, the responsibility of distributing the great majority of public funds or resources to civil society organizations would be assigned to just one entity. On the contrary, international and regional recommendations and good practices regarding public support to associations advise that the allocation of public funds or resources should fall under the responsibility of various bodies that are, to the extent possible, *free from government influence*, rather than just one executive body. Finally, while noting that the Draft Act was the subject of both online and in-person public consultations and that public authorities provided feedbacks to contributions that were received, the Polish legislator is encouraged to ensure that the Draft Act is subject to further inclusive, extensive and meaningful consultations up until its adoption, *including before the Parliament*.

13. In order to enhance the compliance of the Draft Act with international standards and good practices, the OSCE/ODIHR makes the following key recommendations:
  - A. to introduce new provisions in the Draft Act to ensure the effective co-ordination with and meaningful inclusion and participation of civil society in the National Institute's work, at a minimum by:
    - A.1. increasing the number of civil society representatives and/or representatives appointed by other independent entities, such as the Commissioner for Human Rights of Poland, in the Board so that they make up at least half of the total number of Board members (Article 9); [pars 33, 41 and 60]
    - A.2. actively involving civil society organizations in the designation of potential candidates for the positions of Director/Deputy Directors of the National Institute and their selection (Articles 5 and 7); [par 63]
    - A.3. ensuring the participation of civil society organizations in the development of the National Institute's draft annual activity and financial plans and reports (Article 8), and in the process of determining the rules of open tenders, including the type of tasks eligible for funding (Article 30), and templates for open bid tenders (Articles 19 and 19a of the 2003 Act), and when evaluating the applications and the selected projects; [par 41]
    - A.4. introducing in the Draft Act modalities for civil society organizations to be actively involved in the exercise of general oversight over the National Institute itself; [par 41]
    - A.5. ensuring that such participation of civil society organizations is inclusive and non-discriminatory, and based on a fair, public, transparent, open, non-discriminatory, inclusive and competitive selection process; [pars 42-44]
  - B. to ensure that, *in practice*, the responsibility of distributing the great majority of funds or resources provided by central authorities to civil society organizations, and other forms of support from abroad, is not centralized under the National Institute; [pars 22-25]
  - C. to limit the direct influence of the executive over the National Institute and civil society support schemes, including by reconsidering the supervision of the National Institute by a member of the Council of Ministers, transferring more decision-making powers to the Board, ensuring that the Chair of the Board is elected by the Board members themselves, and removing the power of the Council of Ministers to establish civil society development programmes, while

ensuring that civil society representatives participate in a meaningful manner when designing such programmes; [par 33]

- D. to remove from the list of grounds for the Director's dismissal the lack of approval or submission of the National Institute's annual report or annual financial statements and the "breach [of] the law, the principles of reliability, economy and expediency" (Article 6 par 2) and the reference to the improper performance of duties as a ground for dismissal of Board members in Article 10 par 5 of the Draft Act, or reformulate them to ensure that they are strictly circumscribed; [par 64]
- E. to consider including in the National Institute's tasks listed in Article 24 par 3 other activities pertaining to women's education about their rights and assistance in seeking remedies, preventing and combating violence against women and domestic violence, the rehabilitation and reintegration of victims of trafficking in human beings, women's access to justice, the promotion of the rights of persons with disabilities and of the rights of marginalized and minority groups and reformulate Article 24 par 3 (4) to broaden its scope to cultural heritage in general, and not limit it to only one religious heritage and national origin; [pars 47-53]
- F. to ensure that the Draft Act or other legislation provides that the operation of the National Institute is guided by the principles of subsidiarity, sovereignty of parties, partnership, efficiency, fair competition, transparency, equal treatment and non-discrimination and respect for the independence of associations; [par 54]
- G. to specify that out of the eleven Board members, no more than six should be of the same sex and include rules and procedures governing their appointment to ensure compliance with such gender balance requirements and provisions on the consequences of the violation of such rules; [pars 61-62] and
- H. to ensure that the National Institute publishes annual reports with detailed information about the types of beneficiaries of the funding/support provided by the National Institute, amount of allocated funds and purpose for which the funding was used. [par 70]

*Additional Recommendations, highlighted in bold, are also included in the text of the Opinion.*

#### **IV. ANALYSIS AND RECOMMENDATIONS**

##### **1. International Standards on the Right to Freedom of Association and Public Support to Associations**

14. Freedom of association is a human right, which is crucial to the functioning of a democracy, as well as an essential prerequisite for the exercise of other fundamental freedoms.<sup>5</sup> Associations often play an important and positive role in achieving goals that are in the public interest, and this has been recognized in international jurisprudence and in general comments and recommendations made by the UN treaty

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<sup>5</sup> *Op. cit.* footnote 3, par 8 (2015 Guidelines on Freedom of Association).

*OSCE/ODIHR Opinion on the Draft Act of Poland on the National Freedom Institute - Centre for the Development of Civil Society*

bodies, as well as in resolutions of the UN Human Rights Council and other international and regional documents.<sup>6</sup>

15. The right to freedom of association is enshrined in key international and regional human rights instruments, including Article 22 of the International Covenant on Civil and Political Rights<sup>7</sup> (hereinafter “ICCPR”) and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”).<sup>8</sup> In that respect, the ability to seek, secure and use financial (and other) resources from different sources, including public or private, domestic, foreign or international is recognized as an essential element of the right to freedom of association.<sup>9</sup> Specific standards, which also relate to the ability of associations to access financial resources can also be found in the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders),<sup>10</sup> which “requires States to adopt legislative, administrative or other measures to facilitate or, at a minimum, not to hinder the effective exercise of the right to access funding”.<sup>11</sup>
16. The Council of Europe has also issued *Fundamental Principles on the Legal Status of Non-governmental Organisations in Europe*,<sup>12</sup> which are a valuable tool for the interpretation of international treaty norms touching on freedom of association. The *Recommendation CM/Rec(2007)14 of the Committee of Ministers to Member States on the Legal Status of Non-governmental Organisations in Europe*<sup>13</sup> also provides that non-governmental organizations (NGOs) “should be assisted in the pursuit of their objectives through public funding and other forms of support” and states a series of guiding principles in that respect. In particular, any form of public support for NGOs should be governed by clear and objective criteria, which may include the nature and beneficiaries of the activities undertaken by an NGO.<sup>14</sup>
17. At the OSCE level, participating States have committed to “ensure that individuals are permitted to exercise the right to association, including the right to form, join and

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<sup>6</sup> *ibid.* par 9 (2015 Guidelines on Freedom of Association). See also e.g., UN Human Rights Council, *The rights to freedom of peaceful assembly and of association*, 8 October 2013, A/HRC/RES/24/5, which states that “Recognizing the importance of the freedoms of peaceful assembly and of association, as well as the importance of civil society, to good governance, including through transparency and accountability, which is indispensable for building peaceful, prosperous and democratic societies, Aware of the crucial importance of the active involvement of civil society in processes of governance that affect the life of people”, as well as the recital to the UN Human Rights Council, *Civil society space: creating and maintaining, in law and in practice, a safe and enabling environment*, 9 October 2013, A/HRC/RES/24/21, which states that “Recognizing the crucial importance of the active involvement of civil society, at all levels, in processes of governance and in promoting good governance, including through transparency and accountability, at all levels, which is indispensable for building peaceful, prosperous and democratic societies”.

<sup>7</sup> UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICCPR on 18 March 1977.

<sup>8</sup> The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”), signed on 4 November 1950, entered into force on 3 September 1953. The Republic of Poland ratified the ECHR on 19 January 1993.

<sup>9</sup> *Op. cit.* footnote 3, Principle 7 and pars 102 and 200-217 (2015 Guidelines on Freedom of Association). See also UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Report to the UN Human Rights Council (Funding of associations and holding of peaceful assemblies)*, par 8, UN Doc. A/HRC/23/39, 24 April 2013, <[http://www.ohchr.org/documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39\\_EN.pdf](http://www.ohchr.org/documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf)>.

<sup>10</sup> UN General Assembly, *Resolution adopting the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders)*, A/RES/53/144, 9 December 1998, <<http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>>.

<sup>11</sup> See UN Special Rapporteur on the situation of human rights defenders, *2011 Report*, A/66/203, 28 July 2011, par 68, <[http://www.un.org/ga/search/viewm\\_doc.asp?symbol=A/66/203](http://www.un.org/ga/search/viewm_doc.asp?symbol=A/66/203)>.

<sup>12</sup> Council of Europe, *Fundamental Principles on the Status of Non-governmental Organisations in Europe and Explanatory Memorandum*, 13 November 2002, particularly pars 62-65 on Public Support, <<http://www.legislationline.org/documents/action/popup/id/8082>>.

<sup>13</sup> Council of Europe, *Recommendation CM/Rec(2007)14 of the Committee of Ministers to Member States on the Legal Status of Non-governmental Organisations in Europe*, 10 October 2007, particularly pars 57-61 on Public Support and its Explanatory Memorandum, <<https://rm.coe.int/16807096b7>>.

<sup>14</sup> *ibid.* pars 58-59 (2007 CoE Recommendation CM/Rec(2007)14 on the Legal Status of NGOs in Europe); and pars 110-113 (Explanatory Memorandum to the CoE Recommendation CM/Rec(2007)14).

participate effectively in non-governmental organizations” (Copenhagen Document, 1990) and to the aim of “strengthening modalities for contact and exchanges of views between NGOs and relevant national authorities and governmental institutions” (Moscow Document, 1991). To that end, OSCE participating States should ensure that “appropriate mechanisms and procedures are in place for the participation of associations, as representatives of civil society, in public affairs providing for regular, ongoing, institutionalized and open dialogue to facilitate their effective participation”.<sup>15</sup> The OSCE/ODIHR-Venice Commission *Guidelines on Freedom of Association (2015)*<sup>16</sup> and OSCE/ODIHR *Guidelines on the Protection of Human Rights Defenders (2014)*<sup>17</sup> provide useful guidance on how to legislate on freedom of association-related matters, including on issues pertaining to state support to associations and their participation in public affairs, in a manner that is compliant with international standards and OSCE human dimension commitments.

## **2. General Comments**

### **2.1. The Purpose of the Draft Act**

18. The Draft Act aims to establish a new structure, the National Institute, as an executive agency within the meaning of the 2009 Public Finance Act (see Article 2 of the Draft Act). According to Article 1 of the Draft Act, the main purpose of the National Institute would be to “support the development of civil society and also public benefit activity and volunteer work”. As part of its general role pertaining to civil society development and support, the National Institute’s tasks also include the management of civil society development programmes (Article 23), capacity development of civil society, including for fundraising activities, the promotion of participation of citizens, non-governmental organizations and other organized forms of civil society in public life, and civic education, among others (Article 24 pars 1-3 of the Draft Act – see also Sub-Section 2.4 *infra*).
19. Currently, the institutional framework dealing with public support to civil society involves the Department of Economy and Public Benefit under the Ministry of Family, Labour and Social Policy,<sup>18</sup> the Public Benefit Works Council,<sup>19</sup> the Government’s Plenipotentiary for Civil Society and Equal Treatment in the Prime Minister’s Office,<sup>20</sup> and public administration authorities at the national and local level, which co-operate with civil society organizations and may allocate funds to them. The Draft Act will introduce a new body, the National Institute, which will take over some of the tasks of the Ministry of Family, Labour and Social Policy, but also a new government entity, the

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<sup>15</sup> See *Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes* (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <<http://www.osce.org/odihr/183991>>.

<sup>16</sup> *Op. cit.* footnote 3, Part D on “Participation in decision-making processes and property, income and assets” and Part E on “State support and access to other resources” of Sub-Section 2 of Section C (2015 Guidelines on Freedom of Association).

<sup>17</sup> OSCE/ODIHR, *Guidelines on the Protection of Human Rights Defenders (2014)*, <<http://www.osce.org/odihr/119633>>. See in particular pars 63-75 on freedom of association and the right to participate in public affairs, and in the Explanatory Report, pars 210-215 on access to funding and resources and pars 216-223 on the right to participate in public affairs.

<sup>18</sup> See <<http://www.pozytek.gov.pl/About.the.Department.616.html>>.

<sup>19</sup> The Public Benefit Works Council (*Rada Działalności Pożytku Publicznego*) is a consultative and advisory body to the Minister of Family, Labour and Social Policy appointed on the basis of the 2003 Act on Public Benefit Activities and Voluntary Work; see <<http://www.pozytek.gov.pl/Public.Benefit.Works.Council.538.html>>.

<sup>20</sup> See <<http://www.spoleczenstwoobywatelskie.gov.pl/>>.

Committee for Public Benefit Activity (hereinafter “the Committee”) and its Chair, who will play a decisive role in supervising the National Institute and more generally in the field of civil society development and support in Poland.

20. The proposed objective of the new institutional set-up generally seeks to reflect national civil society support and development schemes that can be found in some other countries of the OSCE region, for instance in Croatia, Estonia, Latvia, the United Kingdom and Sweden. These are usually drawn up around the following three focus areas:

- enhancing the advisory role of civil society representatives and their participation in public decision-making processes;
- co-ordinating institutional and legislative efforts and activities for creating enabling conditions for dialogue, co-operation and partnership with civil society; and
- facilitating more co-ordinated, transparent and effective expert and financial support for civil society activities and development.

21. At the same time, for such a set-up to be fully functional, sustainable and able to effectively support civil society development, and to further the implementation of international and regional standards and good practices on participation in public life and freedom of association,<sup>21</sup> it needs to involve:

- a strategic approach when establishing such an institutional framework that is consulted widely and meaningfully with civil society organizations and the interested public<sup>22</sup> (see also Sub-Section 5 *infra*);
- clear and well-defined competences of entities within this framework, to avoid overlap in their work or oversight functions;<sup>23</sup>
- effective co-ordination with and meaningful inclusion and participation of civil society in these entities’ work;<sup>24</sup>
- a guaranteed level of programmatic and financial independence of said entities to ensure protection from political interference.<sup>25</sup>

The ensuing legal review was prepared based on these broad principles.

22. The Draft Act does not explicitly exclude other entities from allocating funds to non-governmental organizations. However, the Explanatory Statement to the Draft Act states that the draft legislation will make the National Institute “the institution

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<sup>21</sup> See *op. cit.* footnote 3, pars 106 and 183-189 regarding specifically the participation of associations in decision-making processes (2015 Guidelines on Freedom of Association); and *op. cit.* footnote 15, Recommendation 13 (2015 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes). See also e.g., UN Economic Commission for Europe’s (UNECE), *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention) of 25 June 1998, <<http://www.unece.org/env/pp/treatytext.html>>; *op. cit.* footnote 13 (2007 CoE Recommendation CM/Rec(2007)14 on the Legal Status of Non-governmental Organisations in Europe); UN Human Rights Committee, *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (Article 25 of the ICCPR) CCPR/C/21/Rev.1/Add.7, 27 August 1996, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.7&Lang=en)>; *op. cit.* footnote 10 (1998 UN Declaration on Human Rights Defenders); UN Human Rights Council, *Resolution on Protecting Human Rights Defenders*, 21 March 2013, A/HRC/RES/22/6, <<http://www.refworld.org/docid/53bfa8564.html>>; UN Human Rights Council, *Study on best practices, experiences and challenges and ways to overcome them with regard to the promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law*, A/HRC/30/26.

<sup>22</sup> *Op. cit.* footnote 3, pars 22, 106 and 183-184 (2015 Guidelines on Freedom of Association).

<sup>23</sup> *ibid.* par 105 (2015 Guidelines on Freedom of Association).

<sup>24</sup> *ibid.* pars 106 and 183-184 (2015 Guidelines on Freedom of Association).

<sup>25</sup> *ibid.* par 217 (2015 Guidelines on Freedom of Association).

responsible for the distribution of funds in [the] area [of tasks related to non-governmental organizations, public benefit and volunteer work]” (page 10). While the Explanatory Statement specifies that this body’s mandate will not take over the competences of other ministers or other public administration bodies, the law and decision-makers are encouraged to avoid a situation where, *in practice, the responsibility of distributing the great majority of funds or resources provided by central authorities to civil society organizations could be assigned to just one executive entity.*<sup>26</sup>

23. **Such a set-up would not be in line with relevant recommendations and good practices<sup>27</sup> regarding public support to civil society organizations, which advise states to assign the responsibility of distributing public funds or resources to various bodies that are, to the extent possible, free from government influence, rather than to just one ministry or other government body.**<sup>28</sup> Such an approach also helps ensure the transparency of fund distribution processes. A de-centralized distribution of funds is generally encouraged because it allows public authorities to form direct partnerships and provide more targeted support to NGOs in areas where these authorities are generally the most knowledgeable about relevant needs and priorities, as well as about which NGOs are working in this field. In countries where there is a central entity in charge of civil society support and development, its financial support to civil society does not replace but rather supplements the allocation of funds by other public entities.<sup>29</sup>
24. Also, the Committee’s tasks include, among others, collaboration in matters related to the development of civil society with other states, organisations and international and foreign institutions (new Article 34b par 2 (1) of the 2003 Act). It is unclear whether this could mean that funding and other forms of support for civil society development from abroad should be exclusively dealt with by the Committee, thus potentially limiting the access by civil society organizations to foreign or international resources. If this is the case, this would be contrary to the Principle 7 of the Guidelines on Freedom of Association whereby association shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international and should be reconsidered.

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<sup>26</sup> The OSCE/ODIHR is not in a position to assess the level of funding provided by central authorities as compared to the local government or other sources.

<sup>27</sup> Public support schemes whereby public funds are allocated through a number of different channels (i.e. state ministries, national foundations, Non-Departmental Public Bodies, etc.) can be found in various countries of the OSCE region such as Croatia, Slovenia, Hungary, Estonia, Scotland, Ireland, the Netherlands. In countries where there is a central entity in charge of civil society support and development, such as in Croatia and Estonia, its role is not only to financially support civil society organizations (a role which is generally marginal and supplements other public funding allocation schemes), but more importantly capacity development of civil society organizations, including by providing non-material support, research, community building, etc. See European Center for Not-for-Profit Law (ECNL), *Paper on Public Funding for Civil Society Organizations – Good Practices in the European Union and Western Balkans* (2011), <<http://www.icnl.org/research/resources/ngogovcoop/engb54.pdf>>.

<sup>28</sup> *Op. cit.* footnote 3, par 217 (2015 Guidelines on Freedom of Association). See also the National Strategy of Croatia for the Creation of an Enabling Environment for Civil Society Development (2012-2016), <[http://www.ohchr.org/Documents/AboutUs/CivilSociety/ReportHC/states/5\\_Croatia\\_National%20Strategy-Civil%20Society-Croatia-2012-2016-eng.pdf](http://www.ohchr.org/Documents/AboutUs/CivilSociety/ReportHC/states/5_Croatia_National%20Strategy-Civil%20Society-Croatia-2012-2016-eng.pdf)>, which seeks to further enhance the decentralization of the system of allocating grants to CSOs and civic initiatives (see Part I – Measure 4).

<sup>29</sup> See European Center for Not-for-Profit Law (ECNL), *Paper on Public Funding for Civil Society Organizations – Good Practices in the European Union and Western Balkans* (2011), Section II which provides an overview of funding mechanisms that exist in Croatia, England, Estonia, Hungary and former Yugoslav Republic of Macedonia, <<http://www.icnl.org/research/resources/ngogovcoop/engb54.pdf>>. For example, public funding in Estonia is distributed in a de-centralized way, through various bodies including ministries, policy implementation agencies (e.g., the Youth Work Centre, the Consumer Protection Board) and the National Foundation for Civil Society; funding is relatively predictable and stable for several years in a row and organizational support is also available, usually based on long-term co-operation. Similarly, in Croatia, the National Foundation for Civil Society Development supports a relatively small number of organizations, but in parallel to other forms of national and local government support in specific fields of operation. See also OSCE Project Co-ordinator in Ukraine, *Research on International Practices on Funding Civil Society Organisations* (December 2010), page 62, <<http://www.osce.org/ukraine/76889?download=true>>.

25. **In light of the above, the National Institute should complement other public funding schemes rather than be established as a centralized body responsible for the distribution of the great majority of funds or resources provided by central authorities to civil society organizations. Ideally, this should be stated explicitly in the Draft Act. Similar comments apply to funding and other forms of support for civil society development from abroad, which should not be exclusively dealt with by the Committee and/or the National Institute.**

***2.2. The Decisive Influence of the Executive Branch over the National Institute and in the Area of Civil Society Development***

26. The Draft Act introduces a new body within the executive, namely the Committee, whose Chair will be in charge of supervising the National Institute (Article 3 of the Draft Act and Article 39 par 11 of the Draft Act, which amends the 2003 Act). This new post-holder shall be a member of the Council of Ministers (new Article 34a par 2 of the 2003 Act). He or she will appoint and dismiss the Director of the National Institute and Deputy Directors upon the Director's request (Articles 5, 6 and 7), approve the National Institute's programmatic and financial plans and reports (Article 8), elect the Chair of the Board of the National Institute (Article 11 par 1), appoint five Board members among nominees proposed by non-governmental organizations (Article 9 par 1 (4) read together with Article 10 par 1) and take over a number of functions currently undertaken by the minister responsible for social security (Article 39 pars 4 to 7). The Chair of the Committee also determines, by way of regulation, the National Institute's Charter (Article 2 par 3 of the Draft Act) and approves the rules governing staff remuneration determined by the Director of the National Institute (Article 13 par 2). In addition, if the Chair of the Committee fails or refuses to approve the National Institute's annual report or annual financial statements, this may constitute a ground for dismissal of the Director of the National Institute (Article 6 par 2 sub-pars 1 and 2). Thus, the Chair of the Committee exercises control over key functions pertaining to the governance and operation of the National Institute.
27. The Committee is responsible for co-ordinating and monitoring collaboration between government authorities and civil society organizations, preparing and consulting with them regarding the programmes for the development of civil society, providing opinions on draft legislation related to the development of civil society, among others (new Article 34b of the 2003 Act). It is composed of the Chair, a Deputy Chair (Secretary of State in the Chancellery of the President of the Council of Ministers), representatives of the members of the Council of Ministers at the level of Secretaries of State and the Director of the National Institute (new Article 34a of the 2003 Act). Clerical support to the Committee is provided by the Chancellery of the President of the Council of Ministers (new Article 34g of the 2003 Act).
28. Articles 8 and 12 of the Draft Act specify the roles and responsibilities of the two National Institute's governing bodies i.e., the Director and the Board of the National Institute. The Director, who is appointed by the Chair of the Committee, directs the activities of the National Institute, makes decision on all matters not falling within the competence of the Board and is overall in charge of the annual programmatic and financial planning and reporting (Article 8 pars 1 and 3-4). The Board of the National Institute has primarily an advisory role concerning the preparation of all National Institute's draft annual programmatic and financial plans and reports and on the draft programmes for the development of civil society (Article 12). This Board consists of

- one member appointed by the President, three members appointed by the Chair of the Committee, one member appointed by the Public Finance Minister, one member representing local government units and five members representing non-governmental organizations and other entities listed in Article 3 par 3 of the 2003 Act. Its Chair is elected by the Chair of the Committee from among Board members (Article 11 par 1).
29. While it is welcome that the number of representatives of non-governmental organizations in the Board has increased from two to five compared to what was provided in the February 2017 version of the Draft Act, they still constitute a minority within this body compared to representatives of the executive. Moreover, the Chair of the Committee who is a member of the Council of Ministers designates the Chair of the Board (Article 11 par 1 of the Draft Act). It is unclear why a representative of the executive should have such a responsibility and not the Board members themselves. Further, the resolutions of the Board are adopted by an absolute majority of votes cast in the presence of at least six Board members (Article 11 par 5), with the Chair of the Board having a casting vote, which means that such decisions could potentially be adopted in the absence of the representatives of non-governmental organizations. Overall, this means that representatives of the executive will *de facto* be able to control the work of the Board (see also a recommendation in that respect in par 60 *infra*).
30. In light of the above, the executive branch appears to have, directly or indirectly, a decisive influence over the governance, organization and operation of the National Institute, including over programmatic and financial planning and reporting, and internal decision-making processes. The executive would also have a direct influence on the identification of priorities to support civil society organizations since the Council of Ministers is responsible for establishing, by way of a resolution, the civil society development programmes that are then managed by the National Institute (Article 23 par 2). The Council of Ministers also decides whether to continue to fund civil society programmes or not (Article 27 par 2).
31. It is questionable whether such a strong executive influence in these matters is desirable or beneficial to the aims and processes of supporting civil society work. Rather, as stated in the Guidelines on Freedom of Association, “[t]o enhance transparency, it is [...] advisable to assign the responsibility of distributing funds or resources to various bodies that are, to the extent possible, *free from government influence*, rather than to just one ministry or other government body”.<sup>30</sup> Indeed, such a concentration of powers within the executive and its direct oversight over programmatic and financial decisions, and over the operation, of the National Institute may render support to civil society less flexible, independent or genuine, in contrast to the aim of such support mechanisms. In addition, the Draft Act does not specify the roles of civil society representatives or organizations themselves in the development of and support to civil society within the new proposed scheme (see Sub-Section 2.3 *infra*).
32. In principle, any system that establishes public support for associations in any form shall seek to avoid ‘state capture’ and ensure that the independence of associations is maintained.<sup>31</sup> When the executive has an overly decisive influence on civil society support schemes and funding priorities in this area, as would be the case here, this may indirectly influence the associations’ decisions and activities, and *de facto* shape the work of the civil society sector which often faces funding constraints – thereby

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<sup>30</sup> *Op. cit.* footnote 3, par 217 (2015 Guidelines on Freedom of Association).

<sup>31</sup> *ibid.* par 215 (2015 Guidelines on Freedom of Association).

jeopardizing the independence of associations in general. Schemes whereby government authorities interfere directly in associations' fundraising activities by controlling the distribution or reallocating grants from donors to certain NGOs or projects also interfere with the freedom of civil society organizations to seek and receive funding.<sup>32</sup>

33. **The legal drafters should therefore reconsider the current oversight and organizational structure contemplated in the Draft Act, particularly the supervision of the National Institute by a member of the Council of Ministers. Moreover, measures or safeguards should be included to limit the potential direct influence of the executive over the National Institute and civil society support schemes. This could be done by strengthening the participation or involvement of civil society representatives (and other entities) in the selection process of the governing bodies and enhancing their representation in governing structures, and more generally involving them more systematically in the National Institute's work and operation (see also Sub-Sections 2.3 and 3.2 *infra*). Similar comments apply concerning the work of the Committee. Moreover, other (independent) entities such as the National Human Rights Institution (the Commissioner for Human Rights of Poland) could be actively involved in both the work and/or the composition of the Board and of the Committee (see par 60 *infra*). The Chair of the Board should be elected by the Board members and not by the Chair of the Committee (Article 11). The legal drafters should also contemplate giving more decision-making powers to the Board (see also Sub-Section 3.1 *infra*). The fact that the Council of Ministers establishes the civil society development programmes managed by the National Institute should equally be reconsidered, while ensuring that civil society representatives participate in a meaningful manner when designing such programmes (see Sub-Section 2.3 *infra*).**

***2.3. Lack of Effective Co-ordination and Meaningful Inclusion and Participation of Civil Society in the National Institute's and in the Committee for Public Benefit Activity's Work***

34. The Draft Act refers to some forms of involvement of civil society in the National Institute's work by e.g., having five civil society representatives out of eleven Board members (Article 9 par 1 (4)), consulting civil society to design the civil society development programmes (new Article 34b par 1 (2) of the 2003 Act), providing for the possibility for the National Institute to commission to them the tasks listed in Article 24 pars 1-3 by way of an open tender (Article 24 par 5), and involving them in the open bid tender process in accordance with Chapter 2 of Title II of the 2003 Act. It is noted, however, that even though the Draft Act focuses on the development of civil society, including its enhanced participation in public life and promoting civic control over public institutions (Article 24 pars 1 and 3 sub-pars 1 and 2), it does not foresee a systematic approach for the National Institute and the Committee/Chair of the Committee to co-operate or partner with civil society organizations when carrying out their respective tasks.
35. It is worth noting that Article 28 of the Draft Act states that the provisions of the 2003 Act shall apply to the performance of the tasks referred to in Article 24 pars 1-3 of the Draft Act. It is unclear why the 2003 Act should only be applicable to these tasks and

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<sup>32</sup> *Op. cit.* footnote 17, par 221 (2014 ODIHR Guidelines on the Protection of Human Rights Defenders).

not to other areas of the National Institute's work. **If the intent of the law-makers was that the National Institute fully operates in accordance with the 2003 Act, the current wording of the Draft Act would benefit from more clarity to reflect this intention.**

36. The proposed new Article 34b of the 2003 Act provides that the Committee shall be responsible for consulting with non-governmental organizations when preparing the programmes for the development of civil society, which is an improvement compared to the earlier version of the Draft Act from February 2017. At the same time, the Draft Act does not specify that such consultations must be meaningful (see pars 21 and 33 *supra* and 42-44 *infra*), nor does it mention the possible consequences of the failure to hold such consultations.
37. In particular, civil society representatives are not involved when developing the National Institute's draft annual activity and financial plans and reports (Article 8). Similarly, civil society organizations are not consulted when determining the rules of tender, including when identifying the types of tasks eligible for funding (Article 30). It is understood, however, that the provisions of Chapter 2 of the 2003 Act will remain applicable, which means that the tender board shall involve representatives of non-governmental organizations or of other entities mentioned in Article 3 par 3 of the 2003 Act (Article 15 par 2d of the 2003 Act). Moreover, with respect to the new tasks that will now be carried out by the Chair of the Committee (e.g., the adoption of templates for bids, framework agreements and reports as per Article 45 of the Draft Act read in conjunction with Articles 19 and 19a of the 2003 Act), there is no mention of potential consultations or co-operation with civil society organizations, whereas these measures or documents will have a direct impact on their operation. More generally, the Draft Act does not outline any forms of co-operation of the National Institute with civil society organizations when carrying out its tasks listed in Article 24, apart from mentioning that the National Institute can proceed by open tender.
38. This contrasts with the provisions of the 2003 Act which define various modalities of co-operation between public administration authorities and non-governmental organizations, such as reciprocal feedback mechanisms, consultations on draft legislation, setting up joint advisory teams and more formal partnership agreements.<sup>33</sup> Additionally, the 2003 Act provides, for instance, that the representatives of non-governmental organizations shall make up at least half of the members of the Public Benefit Works Council (Article 36 par 1a of the 2003 Act)<sup>34</sup> – with civil society organizations having a direct influence on their selection since they nominate the candidates for appointment. Non-governmental organizations may also be invited to the Council's sessions (Article 38 par 2 of the 2003 Act) and those not represented on the Council are still able to participate in the Council's work/activities according to modalities determined in a regulation of the Minister responsible for social security issues (Article 40 of the 2003 Act). This latter provision also specifically refers to the importance of ensuring proper participation of all non-governmental organizations in the work of the Council as well as the diversity of types of public benefit activities.
39. On the contrary, the composition of the newly established Committee does not include representatives of civil society (see par 27 *supra*). Although the Committee meetings

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<sup>33</sup> See Article 5 par 2 of the 2003 Act.

<sup>34</sup> Article 36 par 1a of the 2003 Act states: "Representatives of NGOs, trade agreements and non-governmental organizations and entities mentioned in art. 3 paragraphs. 3 constitute at least half of the composition of the Council".

may be attended by “persons who have relevant knowledge or experience in the area of responsibilities of the Committee”, such participation may only take place upon the invitation of the Chair of the Committee on his or her own initiative or at the request of individual members (new Article 34a par 5 of the 2003 Act). The Chair of the Committee may also, on his or her own initiative or at the request of one of the Committee members, set up working groups and then decides on their composition and scope of responsibilities. Apart from consultations when preparing the programmes for the development of civil society (see par 36 *supra*), the Draft Act does not state the possibility for or modalities of the specific participation of civil society representatives in the work of the Committee and in any of the Committee working groups that may be set up.

40. The right for individuals to participate in the conduct of public affairs has been recognized globally and in domestic settings, and regional standards and models have been developed to support public participation, including that of associations, in decision-making processes, as a modality of good administration.<sup>35</sup> OSCE participating States have also committed to the aim of “strengthening modalities for contact and exchanges of views between NGOs and relevant national authorities and governmental institutions” (Moscow 1991, par 43.1). To that end, OSCE participating States should ensure that appropriate mechanisms and procedures are in place for the participation of associations, as representatives of civil society, in public affairs providing for regular, ongoing, institutionalized and open dialogue to facilitate their effective participation.<sup>36</sup> Such public engagement of civil society organizations represents a crucial element of a healthy civil society and of a functioning democracy.<sup>37</sup> It is also in the common interest of NGOs and public authorities, as well as society as a whole, to have mechanisms in place to help better understand public concerns and also capitalize on the capacities, knowledge and skills of civil society organizations.<sup>38</sup>
41. In light of the above, and in addition to increasing the number of civil society representatives in the National Institute’s governing structures and enhancing their involvement in the appointment process of its governing bodies (see Sub-Section 3.2 *infra*), **the legal drafters should contemplate including in the Draft Act modalities similar to the ones stated in the 2003 Act. At a minimum, they should ensure the meaningful participation of civil society representatives in relevant activities, particularly when developing the National Institute’s draft annual activity and financial plans and reports (Article 8) and when determining the rules of tender, including the type of task eligible for funding (Article 30).**<sup>39</sup> **Civil society organizations should also be actively involved in the exercise of general oversight**

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<sup>35</sup> See *op. cit.* footnote 3, Principle 8 and pars 183-189 (2015 Guidelines on Freedom of Association). See also *op. cit.* footnote 22, par 8 (UNHRC General Comment No. 25); *op. cit.* footnote 10 (1998 UN Declaration on Human Rights Defenders), which declares that everyone has the right to have effective access, on a non-discriminatory basis, to participating in the government of his or her country and in the conduct of public affairs (Article 8); and *op. cit.* footnote 15 (2015 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes); and *op. cit.* footnote 17, Section II, Sub-Section G on the Right to Participate in Public Affairs (2014 ODIHR Guidelines on the Protection of Human Rights Defenders).

<sup>36</sup> *ibid.* in the Introduction and Recommendations 3 and 13 (2015 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes).

<sup>37</sup> *Op. cit.* footnote 17, par 218 (2014 ODIHR Guidelines on the Protection of Human Rights Defenders).

<sup>38</sup> *ibid.* par 220 (2014 ODIHR Guidelines on the Protection of Human Rights Defenders). See also OSCE/ODIHR, *Annotated Agenda of the Supplementary Human Dimension Meeting on Freedom of Peaceful Assembly and Association*, 16-17 April 2015, <<http://www.osce.org/odihr/144421>>.

<sup>39</sup> For instance, in Croatia, public consultations are conducted when developing strategic plans and priorities of work for the National Foundation for Civil Society Development, as well as to determine the priorities of financing from the EU structural funds for Croatian civil society. In addition, consultations are conducted within specific programmatic areas for developing the European Social Fund tenders (i.e. for volunteering and social learning). Such consultations are organized by either the Government’s Office for NGOs or the National Foundation for Civil Society Development.

- over the National Institute itself. Similarly, the provisions concerning the Committee, its composition, and working modalities should be amended and/or supplemented to ensure that civil society organizations can take part in a meaningful manner in its work and decision-making processes. The Chair of the Committee should furthermore co-operate with civil society organizations when performing the above-mentioned functions. Additionally, the Draft Act could state more generally that when performing their tasks and carrying out their activities, the National Institute, its Director/Deputy Directors, the Board, the Committee and its Chair as well as the Council of Ministers should co-operate with non-governmental organizations within the meaning of Article 5 par 2 of the 2003 Act.
42. **Ideally, civil society organizations should participate in the management, decision-making and programming of the National Institute through partnership/joint decision-making rather than via mere consultation, which only allows them to provide their views on an already existing proposal.<sup>40</sup> Similar comments apply to the participation in the decision-making and planning processes of the Committee, particularly when preparing the programmes for the development of civil society (new Article 34b par 2 of the 2003 Act).**
43. **In principle, associations should be able to appoint representatives to take part in public decision-making processes, including in consultative bodies and appointed government bodies.<sup>41</sup> A mechanism should be in place to ensure that such representatives are chosen via a fair, public, transparent, open, non-discriminatory, inclusive and competitive selection process.<sup>42</sup> Such selection should be based on clear and predefined criteria – while ensuring the diversity of selected civil society organizations, with vacancies advertised broadly and in a manner that maximizes the potential number of candidates from a wider array of civil society organizations. Moreover, to ensure the transparency of the selection processes, it would be advisable to specify that the list of admissible candidates (those who comply with the criteria) is published prior to the appointment and to see to it that basic information on civil society organizations participating in such processes should be made available to the public.<sup>43</sup> It is recommended to supplement the Draft Act accordingly.**
44. **In determining the criteria and modalities for such participation and co-operation, it is further recommended that the legal drafters also consult with various stakeholders, including civil society organizations.**

#### **2.4. Other Comments**

45. The Preamble of the Draft Act and certain of its provisions (Article 24 par 3 (3) and (6)) currently refer to “citizens” as opposed to “individuals”. In this context, it is noted that certain rights may apply only to citizens. However, while e.g., Article 25 of the ICCPR protects explicitly only the right of “citizens” to take part in the conduct of public

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<sup>40</sup> See e.g., Council of Europe, *Code of Good Practices for Civil Participation in the Decision-Making Process* (2009), page 8, <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802eed5c>>.

<sup>41</sup> *Op. cit.* footnote 15, Recommendation 13 (2015 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes).

<sup>42</sup> *ibid.* Recommendation 13 and Part I (2015 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes).

<sup>43</sup> *ibid.* Recommendation 13 (2015 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes).

affairs, to vote and to be elected, and to access public services, it does not preclude that other groups may enjoy certain elements of this right too.<sup>44</sup> On the other hand, it is worth reiterating that guarantees of fundamental rights and freedoms, including the right to freedom of association, apply to everyone, and not just to citizens.<sup>45</sup> Hence, the reference to “citizens” should not be interpreted in a manner that would prevent civil society organizations established by foreigners or non-citizens, or established jointly by citizens and non-citizens, from accessing to public funding from the National Institute or other structures (see also par 49 *infra* regarding non-discriminatory access to public funding).

46. The Preamble also mentions a number of underlying ‘values’ or ‘concepts’ and contextual aspects that should frame state support to civil society development. In particular, it refers to the “foundations for national and local cultures”, “[citizens’] commitment to freedom and Christianity”, the “development of mature patriotism” and also specifies that the Polish state will strive to “extend special protection to small organizations that foster community attitudes and nurture local heritage”. While they are not legally binding, preambles generally help to explain the purpose and intent behind a normative instrument. Article 24 par 3 (4) further states that the National Institute’s tasks shall also include “upholding and disseminating culture and the national and local traditions that are rooted in Christian heritage, nurturing Polishness and developing national, civic and cultural awareness as well as social solidarity and sensitivity”.
47. Referring to their common European culture and shared values, OSCE participating States have committed to protect and promote their “cultural and spiritual heritage, in all its richness and diversity” (OSCE Charter of Paris for a New Europe, 1990). In the OSCE Copenhagen Document (1990), they have also recognized “the important role of non-governmental organizations, including political parties, trade unions, human rights organizations and religious groups, in the promotion of tolerance, cultural diversity and the resolution of questions relating to national minorities” (par 30). In the OSCE Document of the Cracow Symposium on the Cultural Heritage (1991), while noting the key importance of protecting cultural heritage and the role of non-governmental associations in that respect (pars 14 and 19), it is also stated that “[t]he preservation and interpretation of the values and the cultural heritage of diverse groups will be enhanced with the involvement of those groups, which is conducive to the tolerance and respect for different cultures which are of paramount importance”. The narrow focus of Article 24 par 3 (4) which refers to only one religion and national origin appears to be at odds with these principles.
48. Moreover, pursuant to Article 18 of the ICCPR, Article 9 of the ECHR and OSCE commitments on freedom of religion or belief,<sup>46</sup> the State has the duty to respect, promote and facilitate the right to freedom of religion or belief without discrimination. As specifically held by the European Court of Human Rights, in principle, “the State has a duty to remain *neutral and impartial in exercising its regulatory power* and in its

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<sup>44</sup> *Op. cit.* footnote 22, par 3 (UNHRC General Comment No. 25).

<sup>45</sup> See Article 22 of the ICCPR and Article 11 of the ECHR regarding specifically the right to freedom of association. See also *op. cit.* footnote 3, par 93 (2015 Guidelines on Freedom of Association).

<sup>46</sup> See, in particular, OSCE Vienna Document (1989), pars 11 and 16-17, <<http://www.osce.org/mc/40881>>; and OSCE Copenhagen Document (1990), par 9.4, <<http://www.osce.org/fr/odihr/elections/14304>>.

relations with the various religions, denominations and beliefs” as this is crucial for “the preservation of pluralism and the proper functioning of democracy”.<sup>47</sup>

49. Further, Article 23 par 1 specifies that the National Institute shall manage programmes for the development of civil society performing the tasks referred to in Article 24. This means that the National Institute will specifically support civil society organizations that carry out activities linked to the dissemination of “traditions that are rooted in Christian heritage [...], nurturing Polishness [...] and developing national [...] awareness”. This may imply that associations focusing on these issues may receive preferential treatment as opposed to other religious or belief communities or organizations, thus being *prima facie* discriminatory as this provision does not seem to pursue a legitimate aim or otherwise have an objective and reasonable justification and also constituting an interference with the freedom of religion or belief of religious or belief communities or organizations.<sup>48</sup> As stated in the Guidelines on Freedom of Association, the criteria for determining the level of public funds available for each association must be objective and non-discriminatory.<sup>49</sup> In principle, there should be no discrimination against associations owing to their fields of operation when providing state support,<sup>50</sup> although there may be a justifiable need to support associations working on certain issues of public interest<sup>51</sup> (see pars 51-52 *infra*). Moreover, the wording of Article 24 par 3 (4) could infer that the National Institute may not prioritize activities related to the protection of the rights of national minorities, foreigners, stateless persons, refugees, migrants, etc.
50. **In light of the above, and to dispel any misconception, it is thus recommended to reformulate Article 24 par 3 (4) of the Draft Act to broaden its scope to cover cultural heritage in general, and not limit it to only one religious heritage and national origin, while emphasizing the importance of tolerance, coexistence and equal treatment.**
51. At the same time, international and regional standards and recommendations provide that states should ensure that financial support is also provided to associations whose activities contribute to achieving the goals pursued by international or regional instruments. This includes e.g., associations that provide education to women about their rights and assistance in seeking remedies for violations of their right to equality and non-discrimination,<sup>52</sup> work to prevent and combat violence against women and domestic violence (including by providing shelters and rehabilitation support),<sup>53</sup> work with women victims of trafficking to facilitate their rehabilitation and reintegration,<sup>54</sup> facilitate women’s access to justice, including through the provision of legal aid,<sup>55</sup> and

<sup>47</sup> ECtHR, *Supreme Holy Council of the Muslim Community v. Bulgaria* (Application no. 39023/97, judgment of 16 December 2004), par 93, <<http://hudoc.echr.coe.int/eng/?i=001-67795>>.

<sup>48</sup> See *op. cit.* footnote 3, pars 93-94, 96, 123 (2015 Guidelines on Freedom of Association).

<sup>49</sup> *ibid.* par 208 (2015 Guidelines on Freedom of Association). See also OSCE/ODIHR-Venice Commission, *Guidelines on the Legal Personality of Religious or Belief Communities* (2014), pars 38-42, <<http://www.osce.org/odihr/139046>>.

<sup>50</sup> *ibid.* par 210 (2015 Guidelines on Freedom of Association).

<sup>51</sup> *ibid.* par 96 and 204 (2015 Guidelines on Freedom of Association).

<sup>52</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December 2010, par 34: “States parties should financially support independent associations and centres providing legal resources for women in their work to educate women about their rights to equality and assist them in pursuing remedies for discrimination”.

<sup>53</sup> Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)*, 12 April 2011, ETS 210, Article 8, <<http://www.coe.int/en/web/istanbul-convention/basic-texts>>. Poland ratified the Istanbul Convention on 27 April 2015 and it entered into force in Poland on 1 August 2015.

<sup>54</sup> 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, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>>.

<sup>55</sup> See, for instance, CEDAW Committee, *Concluding Observations on Kazakhstan*, CEDAW/C/KAZ/CO/3-4, 10 March 2014, par 13.

- work with marginalized or minority groups.<sup>56</sup> The UN Human Rights Committee has also recognized that these areas were requiring enhanced efforts in its latest Concluding Observations on Poland in November 2016.<sup>57</sup>
52. It is also worth mentioning that Article 29 of the UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”)<sup>58</sup> emphasizes the key role played by non-governmental organizations and associations to promote an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs.
53. In light of this, **the legal drafters should consider supplementing Article 24 par 3 to ensure that the National Institute will also support organizations working in those areas.** It is worth highlighting that the tasks related to increasing the scope and forms of support for groups at risk of social exclusion, and their inclusion in decision-making processes, have now been removed from Article 24 par 3, whereas this was a particularly welcome provision. The legal drafters are encouraged to consider re-introducing this form of support.

### **3. The Mandate, Governing Structure and Functioning of the National Institute**

54. It is noted that the Draft Act does not contain overall principles that should guide the functioning and decision-making of the National Institute. In this context, it is noted that the Constitution of the Republic of Poland is based on “the principle of subsidiarity in the strengthening [of] the powers of citizens and their communities” (Preamble) and states that it “shall ensure freedom for the creation and functioning of [...] voluntary associations and foundations” (Article 12). Moreover, Article 5 par 3 of the 2003 Act refers to principles that should guide the co-operation between public administration authorities and non-governmental organizations i.e., “the **principles of subsidiarity, sovereignty of parties, partnership, efficiency, fair competition, and transparency**”. If the above-mentioned recommendation regarding the applicability of the 2003 Act is not implemented (see par 35 *supra*), such principles could be expressly included in the Draft Act, as should the **principle of equal treatment and non-discrimination and respect for the independence of associations, which are not currently mentioned in the 2003 Act. It is recommended to supplement the Draft Act accordingly.**

#### **3.1. Competences and Scope of Work of the National Institute**

55. As part of its general role pertaining to civil society development and support, the National Institute’s tasks include the management of civil society development programmes (Article 23 par 1), and increasing the institutional efficiency and professionalism of “non-governmental organizations and other organised forms of civil society” (Article 24 par 1). The Institute shall also strengthen the capacities of non-governmental organizations and further support NGOs in raising non-budgetary funds for their activities aimed at promoting civil society development (Article 24 par 2), help

<sup>56</sup> See OSCE Copenhagen Document (1990), par 30. See also *op. cit.* footnote 3, par 204 (2015 Guidelines on Freedom of Association).

<sup>57</sup> UN Human Rights Committee, *Concluding Observations on the 7<sup>th</sup> Periodic Report of Poland*, 23 November 2016, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en)>.

<sup>58</sup> UN Convention on the Rights of Persons with Disabilities (hereinafter “the CRPD”), adopted by General Assembly resolution 61/106 on 13 December 2006. Poland ratified the CRPD on 25 September 2012.

promote the participation of citizens and civil society organizations in public life, particularly decision-making processes, and help promote civic control over public entities and civic education (Article 24 par 3 (1) and (6)), among others.

56. Chapter 4 of the Draft Act on the “Procedures for the Performance of the National Institute’s Tasks” details issues pertaining to only one aspect of the National Institute’s tasks - namely, the implementation of the civil society development programmes referred to in Article 23 par 1 either independently or by way of an open tender. However, the Draft Act does not specify the procedures and modalities for carrying out the other tasks defined in Article 24 of the Draft Act, or the implementation of regulatory sub-legal documents, which would in turn include detailed procedures for the implementation of these tasks. This may create uncertainty and potentially diverging interpretations as to the actual competences of the National Institute, and could lead to potential overlaps with the mandates of other public bodies. **While not every aspect of the National Institute’s mandate needs to be provided in the Draft Act, it should at least specify the overarching framework of the National Institute’s tasks and refer further elaboration of these aspects to secondary legislation or other documents.**<sup>59</sup>
57. In light of Article 12 par 1 of the Draft Act, the Board of the National Institute seems to primarily have an advisory role, as the list of its tasks includes only the issuance of opinions. At the same time, other provisions of the Draft Act imply some form of decision-making powers, e.g., the approval of the rules of the tender (Article 30 par 2). To clarify this point, **the Draft Act should prescribe more clearly the role of the Board and its competences regarding the adoption of binding decisions, in addition to transferring more decision-making powers to the Board** (see par 33 *supra*).

### ***3.2. The Appointment, Composition and Dismissal of the Governing Bodies of the National Institute***

58. Article 5 of the Draft Act lists the requirements for becoming the Director of the National Institute, who is appointed by the Chair of the Committee. This includes the fact of “hav[ing] an untarnished reputation and provid[ing] a guarantee of proper performance of the tasks entrusted”. Similarly, Article 9 par 2 details the eligibility criteria for becoming a Board member, which also refers to an “untarnished reputation”. It is noted that both provisions already refer to convictions for intentional offences, which are objective elements to assess the eligibility of a candidate. **The reference to “untarnished reputation”, on the other hand, is rather vague and broad, and should be either reconsidered or reformulated in a more precise fashion, in the interests of legal clarity and foreseeability and to avoid discretionary application. If the intent of the law-makers was to also cover certain unintentional offences considered as being particularly reprehensible, the Draft Act should make a cross-reference to the relevant provisions for the sake of clarity.**
59. As recommended in par 41 *supra*, greater participation or involvement of civil society representatives in the selection process of the National Institute’s governing bodies should be ensured. It is welcome that the representatives of non-governmental organizations to the Board are now nominated by non-governmental organizations or

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<sup>59</sup> For instance, the Articles of Association of the National Foundation of Civil Society in Estonia states: “The Foundation shall follow in its activities the national strategic documents relating to the development of civil society”; see [http://www.kysk.ee/failid/Upload/files/ENG/ARTICLES\\_OF\\_ASSOCIATION.pdf](http://www.kysk.ee/failid/Upload/files/ENG/ARTICLES_OF_ASSOCIATION.pdf).

similar entities, whereas the February 2017 version of the Draft Act did not mention the modalities for selecting them. This is in line with the principle that associations should be able to choose their representatives to take part in public decision-making processes, including in consultative bodies and appointed government bodies.<sup>60</sup> At the same time, the Chair of the Committee, who is a member of the Council of Ministers, is entitled to appoint and dismiss such board members upon the request of the organizations they represent. This means that, should there be more than five nominees, the Chair appears to have unlimited discretion and ultimate decision-making powers regarding their appointments. It is also not clear whether the Chair may refuse to appoint certain nominees and if so, under what conditions and on which grounds he or she can exercise this power. **This should be clarified.**

60. **As already stated earlier, the legal drafters should consider a more balanced composition of the Board to counter-balance the influence of the executive, for instance by requiring that at least half of the Board members are civil society representatives<sup>61</sup> and/or representatives appointed by other independent entities such as the Commissioner for Human Rights (see par 33 *supra*). At the same time, it is worth emphasizing that given the primarily advisory role of the Board in the governance of the National Institute, such changes *per se* may not necessarily confer more influence of civil society representatives on the operation of the National Institute.**
61. Additionally, the Draft Act does not specify any conditions and modalities to ensure a gender balanced composition of the Board. It must be highlighted that the CoE Committee of Ministers in its Recommendation 2003(3) recommends to Member States to provide for gender-balanced representation in all appointments made by a minister or government to public committees and in posts or functions whose holders are nominated by government and other public authorities, meaning a representation not falling below 40%.<sup>62</sup> **The legal drafters should therefore specify that out of the eleven members, no more than six Board members should be of the same sex.**<sup>63</sup>
62. Furthermore, the introduction of such rules should be enhanced by introducing gender requirements to both the nomination process to identify candidates, as well as the respective rules and procedures governing the appointment.<sup>64</sup> Based on good practices from other countries, examples of how to achieve this could be, for instance, proposing two nominees for appointment, a woman and a man,<sup>65</sup> and/or adapting the appointment modalities to ensure overall gender balance.<sup>66</sup> Finally, in order for such requirements to

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<sup>60</sup> *Op. cit.* footnote 15, Recommendation 13 (2015 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes).

<sup>61</sup> For instance, the Croatian National Foundation for Civil Society Development has a Management Board composed of nine members, out of which five come from civil society organizations or from among civil society experts, one is a representative of local and regional self-government units, and three are representatives of ministries (ministry of education, ministry of finance and ministry of foreign affairs). In Estonia, the National Foundation for Civil Society is managed by a Supervisory Board, which consists of five representatives of civil society, two representatives of the Parliament (one from the majority coalition and one from the opposition), one representative of the Ministry of Finance and one of the Ministry of the Interior, and one representative of the Council of Churches.

<sup>62</sup> Council of Europe, *Recommendation Rec (2003)3 of the Committee of Ministers to Member States on the Balanced Participation of Women and Men in Political and Public Decision-making*, adopted on 30 April 2002, Preamble and pars 9-10 of the Appendix, <<https://wcd.coe.int/ViewDoc.jsp?id=2229>>.

<sup>63</sup> See also e.g., ODIHR, *Comments on the Draft Law of Albania on Civil Society Development Fund (2008)*, par 20, <<http://www.legislationline.org/documents/id/15486>>.

<sup>64</sup> See e.g. regarding the nomination and election of judges to international tribunals and court, the International Criminal Court Discussion Paper No. 4 on Nomination and Election of Judges by Thordis Ingadottir (June 2002), <[http://www.pict-pcti.org/publications/ICC\\_paprs/election.pdf](http://www.pict-pcti.org/publications/ICC_paprs/election.pdf)>.

<sup>65</sup> For instance, in cases where public bodies or organizations nominate candidates for appointment, certain countries have introduced an obligation to always propose two nominees, a woman and a man (e.g. the example in Denmark, Appendix IV to the Explanatory Memorandum on CoE Recommendation CM/Rec(2003)3).

<sup>66</sup> This could be done in the Draft Act by requiring that out of the three members appointed by the Chair of the Committee, no more than two members should be of the same sex, and that among the five members representing non-government organisations, there should be

be effective, the Draft Act should also include provisions pertaining to the consequences of the violation of the gender balance requirements.<sup>67</sup> **The Draft Act should accordingly specify the rules and procedures governing the appointment to ensure compliance with gender balance requirements, and include provisions on the consequences of the violation of such rules** (see also pars 51 and 53 *supra* regarding public funding for associations working on specific issues).

63. **Regarding the appointment of the Director/Deputy Directors of the National Institute by the Chair of the Committee, it is also recommended that civil society organizations in general be effectively involved. This could be done by providing that they participate in the designation of candidates for these positions and their selection.** This would be in line with the very purpose of the National Institute i.e., promoting the involvement of civil society in public life and decision-making processes (see Article 24 par 3 (1)). **The selection mechanism for the Director/Deputy Directors should also be fair, public, transparent, open and competitive to ensure that the best candidates are selected. Vacancies should be advertised broadly and in such a manner that would maximize the potential number of candidates from various backgrounds. Lists of admissible candidates should be published prior to the appointment.**
64. Article 6 sets out a number of circumstances which may lead to the dismissal of the Director, which as mentioned above, includes the lack of approval or submission of the National Institute's annual report or annual financial statements (Article 6 par 2 (1) and (2)). This appears to be a disproportionate sanction since obtaining such approval is not entirely within the Director's powers and it is also not clear why a mere lack of approval *per se* should constitute a sanctionable offence. As to the lack of submission of such documents, rather than immediately dismissing the Director, he or she should have the opportunity to rectify such omission. Additionally, the ground for dismissal of the Director mentioned in Article 6 par 2 (3) (i.e., "breach [of] the law, the principles of reliability, economy and expediency") is quite vague, as is the one mentioned in Article 10 par 6 (3) for Board members (i.e., the improper performance of his or her duties as Board member). **The legal drafters should therefore consider removing such grounds for dismissal from Articles 6 and 10 of the Draft Act or reformulate them to ensure that they are strictly circumscribed.**
65. Finally, the Draft Act also introduces, compared to the February 2017 version, a new ground for compulsory dismissal of the Director, Deputy Directors and Board members, i.e., when he or she has submitted an untrue lustration declaration as determined by a

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no more than three members of the same sex – while providing that the appointments of the representative of local government units will happen next, and that at last, the appointments made by the President of the Republic of Poland and by the Public Finance Minister should be in compliance with the gender balance requirements stated in Article 9. Moreover, rules governing replacement – if applicable – should specify that the alternate shall be of the same sex as the exiting member. See par 8 of the General Assembly Resolution 66/130 adopted on 19 March 2012, <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/66/130&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/130&Lang=E)>, which encourages States "to appoint women to posts within all levels of their Governments, including, where applicable, bodies responsible for designing constitutional, electoral, political or institutional reforms". See also, for reference, pars 9-10 of the Appendix to the CoE Recommendation CM/Rec(2003)3.

<sup>67</sup> See UN Working Group on the Issue of Discrimination Against Women in Law and in Practice, *2013 Report*, A/HRC/23/50, 19 April 2013, par 39, <[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.50\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.50_EN.pdf)>, which states on a different though related matter, that "[q]uotas work best when accompanied by sanctions and closely monitored by gender-responsive independent bodies". The practice varies greatly amongst countries. As an example, according to the new French Law on Equality between Men and Women dated 4 August 2014, the appointments of the members of the executive board of certain administrative bodies shall be annulled if gender balance is not respected (except for appointments of members from the under-represented gender); at the same time, the annulment of the appointments will not render null and void the decisions that may have already been adopted by said body (see Articles 66 and 75, <[http://www.legifrance.gouv.fr/affichTexte.do?jsessionid=84EC2437366E2DFFB5DEEEFEB386BB2B.tpdjo15v\\_3?cidTexte=JORFTEXT000029330832&categorieLien=id](http://www.legifrance.gouv.fr/affichTexte.do?jsessionid=84EC2437366E2DFFB5DEEEFEB386BB2B.tpdjo15v_3?cidTexte=JORFTEXT000029330832&categorieLien=id)>).

final court judgment (Articles 6 par 1 (4), 7 par 2 and 10 par 5 (5) of the Draft Law). Related amendments are made to the Act of 18 October 2006 on the Disclosure of Information about State Security Authorities' Documents from the 1944–1990 Period and their Contents. While the assessment of the legitimacy and compliance with international standards of lustration legislation goes beyond the scope of the Opinion, it is worth referring to the *Guidelines of the Parliamentary Assembly of the Council of Europe to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law* (1996).<sup>68</sup> In that regard, it is questionable whether lustration should apply to the above-mentioned positions at all and whether new positions for which lustration is applicable should be added twenty years after the adoption of the first lustration Law in Poland in 1997.

#### **4. The Criteria and Procedure for Open Tender**

66. The not-for-profit nature of associations and their importance to society means that NGOs should be assisted in the pursuit of their objectives through public funding and other forms of public support.<sup>69</sup> Public funding to associations may be provided through a variety of different mechanisms including the procurement of services, grants for the implementation of specific projects or for institutional support to the association, in-kind support or tax incentives, among others.<sup>70</sup> It is welcome that the revised Draft Act now envisions general institutional capacity support to non-governmental organizations/associations,<sup>71</sup> as opposed to the February 2017 version. The Draft Act also specifies that the general open bid tender procedure provided in the 2003 Act that is applicable to all public administration authorities commissioning “public tasks” would be applicable to the National Institute, unless provided otherwise in the Draft Act. This is an improvement compared to the February 2017 version of the Draft Act which created an *ad hoc* competition procedure for the financing/co-financing of projects by the National Institute.
67. The nature and beneficiaries of the activities undertaken by an association may be relevant considerations when deciding whether or not to grant it different forms of public support; the granting of public support can also be contingent on whether an association falls into a particular category or regime defined by law, or whether an association has a particular legal form.<sup>72</sup> However, above all, any system of state support must be open, transparent and fair.<sup>73</sup> Public support for associations should be governed by clear, objective and non-discriminatory criteria<sup>74</sup> stated in laws and/or

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<sup>68</sup> Available at <<http://assembly.coe.int/nw/xml/xref/x2h-xref-viewhtml.asp?fileid=7506&lang=en>>.

<sup>69</sup> *Op. cit.* footnote 3, par 203 (2015 Guidelines on Freedom of Association). See also *op. cit.* footnote 13, par 57 (2007 CoE Recommendation CM/Rec(2007)14 on the Legal Status of NGOs in Europe).

<sup>70</sup> *ibid.* par 206 (2015 Guidelines on Freedom of Association).

<sup>71</sup> “Institutional capacity” means the operational or core funding directed at supporting organizational expenses of CSOs that cannot be allocated to a specific project, but are necessary for the organization’s successful operation (see ECNL, *Paper on Public Funding for Civil Society Organizations – Good Practices in the European Union and Western Balkans* (2011), page 23, <<http://www.icnl.org/research/resources/ngogovcoop/engb54.pdf>>). For instance, such institutional support or operational grants exist in countries such as Hungary, Slovenia, Estonia, Scotland, Croatia and the Netherlands.

<sup>72</sup> *Op. cit.* footnote 3, par 205 (2015 Guidelines on Freedom of Association); see also *op. cit.* footnote 13, pars 59-60 (2007 CoE Recommendation CM/Rec(2007)14 on the Legal Status of NGOs in Europe).

<sup>73</sup> *Op. cit.* footnote 3, pars 206 and 208 (2015 Guidelines on Freedom of Association).

<sup>74</sup> *ibid.* par 205 (2015 Guidelines on Freedom of Association). See also *op. cit.* footnote 12, par 63 (2002 CoE Fundamental Principles on the Status of NGOs in Europe); and *op. cit.* footnote 13, par 58 (2007 CoE Recommendation CM/Rec(2007)14 on the Legal Status of NGOs in Europe).

- regulations that are publicly available and accessible.<sup>75</sup> In principle, States should ensure equal and non-discriminatory access to public funding, and hence refrain from imposing restrictions or conditions that directly or indirectly discriminate against certain associations or groups.<sup>76</sup> Moreover, clear rules should be provided to guarantee the objectivity and transparency of the procedures for selecting NGOs.<sup>77</sup>
68. One of the main tasks of the National Institute is to manage civil society development programmes in accordance with the procedure set forth in Chapter 4 of the Draft Act. The projects that are funded pursuant to the Draft Act should fall within the broader framework of the National Institute's other tasks detailed in Article 24. The Council of Ministers is responsible for establishing, by way of a resolution, such civil society development programmes (Article 23 par 2). Within that framework, the rules of the tender, including the type of task eligible for funding and entities eligible to participate in the tender, are determined by the Director of the National Institute and approved by the Board (Article 30 par 2) – two entities which are under the overall influence of the executive due to their appointment modalities and reporting lines (see Sub-Sections 2.2 and 3.2 *supra*).
69. Overall, there are no clear provisions in the Draft Act on the detailed criteria and standards that would constitute the basis for determining eligible tasks and entities. As mentioned above, any form of public support for associations should be governed by clear and objective criteria, while ensuring that there is no discrimination against associations owing to their fields of operation.<sup>78</sup> This means that the rules of the tender should not be directly or indirectly discriminatory on certain types of associations. It is not clear whether these criteria have already been adopted in some other regulation or by other entities or whether they will be defined at a later stage. As mentioned in par 54 *supra*, the principles of equal treatment and non-discrimination and respect for the independence of associations are not currently mentioned in the 2003 Act. **The Draft Act should clearly include the overall principles and criteria for the rules of open tender, particularly the principle of non-discrimination, either directly or by referring to other relevant legislation.** As mentioned in par 41 *supra*, civil society representatives should also participate when determining the rules of tender.
70. Article 25 provides that the National Institute shall carry out the evaluation of the civil society development programmes. It also states that the Director of the National Institute shall submit to the Board information about evaluation results by 30 June of each year. Additionally, pursuant to Article 15 par 2j of the 2003 Act, the results of open bid tenders shall be published immediately after the selection of the bid. It is also worth noting that Article 34 par 1 point 9 of the Act on Public Finance requires public finance sector bodies to public annual financial and operational reports. While such provisions are welcome, the Draft Act do not seem to require the publication of detailed information about beneficiaries and types of activities that will be supported by the National Institute and the drafters may consider including in the Draft Act additional requirements to ensure further transparency. Notably, the Draft Act should require the National Institute to report annually by providing data on the beneficiaries and the

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<sup>75</sup> *ibid.* par 205 (2015 Guidelines on Freedom of Association); and pars 62-65 on Public Support (2002 CoE Fundamental Principles on the Status of NGOs in Europe).

<sup>76</sup> *Op. cit.* footnote 17, par 215 (2014 ODIHR Guidelines on the Protection of Human Rights Defenders).

<sup>77</sup> *ibid.* par 211 (2015 Guidelines on Freedom of Association). See also e.g. the Article on Co-operation in the Area of Social Services Delivery and Mechanisms of State Financing of NGOs (Sample Models) by Radost Toftisova, Legal Advisor, ICNL – Budapest (2001), <[http://www.icnl.org/research/journal/vol3iss4/special\\_3.htm](http://www.icnl.org/research/journal/vol3iss4/special_3.htm)>.

<sup>78</sup> *Op. cit.* footnote 3, pars 205 and 210 (2015 Guidelines on Freedom of Association).

quantities of funding allocated to each, as well as on the purpose for which the funding has been used. Such reporting should be disaggregated by types of beneficiaries, to render transparent information on the types of groups to which funding has been allocated, as well as information on the amounts of funding and in-kind resources allocated to each group.<sup>79</sup> **It is recommended to supplement the Draft Act in that respect.**

## **5. Law-making Process and Participatory Approach**

71. OSCE commitments require legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (Moscow Document of 1991, par 18.1).<sup>80</sup> The Guidelines on Freedom of Association, while recommending that associations always be consulted about proposals to amend laws and other rules that concern their status, financing and operation,<sup>81</sup> also provide that they should be *involved in the drafting* of legislation and policies on state funding and support.<sup>82</sup> It is understood that the Draft Act was the subject of both online and in-person public consultations, including at the local level.<sup>83</sup> It is also noted that the Plenipotentiary for Civil Society and Equal Treatment in the Prime Minister's Office has prepared a report on all the contributions received, also explaining why certain contributions were or were not taken on board.<sup>84</sup> Although the OSCE/ODIHR has not reviewed all the documents pertaining to the consultation process to assess whether it was indeed meaningful and effective, such process appears overall in line with the aforementioned commitments and recommendations whereby states should provide for an adequate and timely feedback mechanism allowing public authorities to acknowledge and respond to contributions.<sup>85</sup>
72. However, to guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,<sup>86</sup> meaning not only when the draft is being prepared by relevant ministries or the government but also when it is discussed before Parliament (e.g., through the organization of public hearings).
73. By conducting inclusive and meaningful public consultations, public officials and institutions engaged in legislative processes are able to gather views and experiences from different stakeholders, representing various groups and backgrounds, on matters that are to be regulated.<sup>87</sup> Public consultations also constitute a means of open and democratic governance; they lead to higher transparency and accountability of public

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<sup>79</sup> *ibid.* par 209 (2015 Guidelines on Freedom of Association). For instance, the Government's Office for Co-operation with NGOs in Croatia collects data and publishes annual reports on the allocation of state budget funds to civil society organizations, which include comprehensive and diverse quantitative and qualitative information on allocated support, recipients, territorial division and funded projects or programs; see <<https://udruge.gov.hr/en>>.

<sup>80</sup> Available at <<http://www.osce.org/fr/odihr/elections/14310>>.

<sup>81</sup> *Op. cit.* footnote 3, par 186 (2015 Guidelines on Freedom of Association).

<sup>82</sup> *ibid.* par 207 (2015 Guidelines on Freedom of Association).

<sup>83</sup> See <<http://www.konsultacje.gov.pl/node/4378>>, with possibility to submit comments on the Draft Act from 20 December 2016 to 31 January 2017. See also the list of planned conferences/meetings on the Draft Act organized by the Government's Plenipotentiary for Civil Society at <<http://www.spoleczenstwoobywatelskie.gov.pl/aktualnosci/spotkania-regionalne-poswiecone-projektowi-narodowego-centrum-rozwoju-spoleczenstwa>>.

<sup>84</sup> Available at <[http://www.spoleczenstwoobywatelskie.gov.pl/sites/default/files/raport\\_z\\_konsultacji.pdf](http://www.spoleczenstwoobywatelskie.gov.pl/sites/default/files/raport_z_konsultacji.pdf)>.

<sup>85</sup> *Op. cit.* footnote 15, Recommendation 16 (e) (2015 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes).

<sup>86</sup> *Op. cit.* footnote 17, par 221 (2014 ODIHR Guidelines on the Protection of Human Rights Defenders).

<sup>87</sup> See e.g., OSCE/ODIHR, *Opinion on the Draft Law of Ukraine “On Public Consultations”*, 1 September 2016, par 11, <<http://www.legislationline.org/documents/id/20027>>.

institutions, and help ensure that potential controversies are identified before a policy, law, or other public decisions are adopted.<sup>88</sup> Public discussions and an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation, and ultimately tends to improve its implementation. Such a participatory approach to the adoption of laws not only leads to greater democratic legitimacy of a regulation, but also nourishes confidence in institutions.<sup>89</sup>

74. In light of the above, **the Polish legislator is therefore encouraged to continue to ensure that the Draft Act is subject to inclusive, extensive and meaningful consultations, according to the principles stated above, up until its adoption, including during discussions before Parliament. As an important element of good law-making, a consistent monitoring and evaluation system of the implementation of the Act and its impact on civil society should also be put in place that would efficiently evaluate the operation and effectiveness of the Act, once adopted.**<sup>90</sup> This requirement should be distinguished from any oversight and reporting mechanisms envisaged for the National Institute established under the Draft Act. The latter focuses on the functioning of the Institute, but does not necessarily include evaluating the implementation of the new Act and its impact on civil society and freedom of association or assessing whether the Act has succeeded in achieving the goals its authors had in mind.

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<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

<sup>90</sup> See e.g., OECD, *International Practices on ex post Evaluation (2010)*, <[http://www.oecd-ilibrary.org/governance/evaluating-laws-and-regulations/international-practices-on-ex-post-evaluation\\_9789264176263-3-en](http://www.oecd-ilibrary.org/governance/evaluating-laws-and-regulations/international-practices-on-ex-post-evaluation_9789264176263-3-en)>.