



EUROPEAN PRACTICES OF REGULATING THE PUBLIC BENEFIT STATUS **Background information submitted by the European Center for Not-for-Profit Law**

The European Center for Not-for-Profit Law (ECNL) hereby submits this background document with comparative information on European practices of regulation of the public benefit status (or public utility status)¹.

During its meetings with the Ministry of Justice and the Council of NGOs, ECNL discussed the pending amendments Nr. 140 from 28-01-09 to Law Nr.837-XIII of May 17, 1996 on Public Associations that deal with provisions on the public benefit status. The Council of NGOs supports the adoption of the pending provisions. The Ministry of Justice, on the other hand, would like to initiate a new and participatory process for preparing a separate law on public benefit status.

Currently the Law on Public Associations is the framework law that includes provisions on public utility status, and established the Certification Commission, whose aim is to confer the public utility status for associations (Art.34 and 35 of the Law on Public Associations). These articles, however, do not apply to other legal forms of nonprofit organizations in Moldova, such as foundations and institutions. Foundations are regulated under the Law on Foundations of 1999 and the situation is further complicated by the fact that institutions, the third legal form of non-profits in Moldova, are currently not regulated in detail.

ECNL was requested by both the Ministry and the NGO Council to provide a short overview of European good regulatory practices relating to public benefit status. These comments do not seek to address the substance of the registered amendments Nr. 140 from 28-01-09 to Law Nr. 837-XIII of May 17, 1996 on Public Associations; instead, the aim is to provide comparative information on various regulatory approaches to public benefit status, as applied in some European countries.

More information about the concept and application of the public benefit status can be found in the article “A Comparative Overview of Public Benefit Status in Europe” prepared by ECNL and published in the International Journal of Not-for-Profit Law, volume 11, issue 1, November 2008 (available at: http://www.icnl.org/KNOWLEDGE/ijnl/vol11iss1/special_1.htm), which we are attaching here for ease of reference; and on ICNL’s² and ECNL’s webpages: www.icnl.org, www.ecnl.org.

¹ The terms “public utility” and “public benefit” are used here interchangeably.

² The International Center for Not-for-Profit Law (ICNL) is ECNL’s affiliate organization based in Washington DC.

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1. What is Public Benefit Status?

In general, public benefit status aims to differentiate and recognize civil society organizations (CSOs) engaged in certain activities that promote the public good, regardless of their legal form. By providing fiscal and other benefits to public benefit organizations, the State aims to promote public benefit activities. Organizations that engage in such activities and receive the public benefit status are required to comply with higher standards of accountability and transparency than the other CSOs in exchange for receiving additional benefits.

To emphasize, the public benefit status focuses on the activities rather than the underlying legal form of the organization. In most European countries, public benefit status is made available to a range of organizational forms. For instance, in Hungary associations, foundations and non-profit companies can apply for a public benefit status.

Often the law provides a list of public benefit activities that a CSO must pursue in order to qualify for public benefit status. The list of activities may include a “catch-all” category (e.g., “other activities”) to allow for greater flexibility in granting public benefit status. The law in some countries excludes certain activities or goals from qualifying as public benefit, e.g. in Hungary and in some other countries organizations with public benefit status are prohibited from engaging in direct political activities or from providing financial aid to political parties. Other conditions related to the activities may apply, e.g. to provide the activities for a certain target group (e.g., to the needy), or without discrimination.

It can generally be seen that the public benefit status in European countries is established with regard to the activities of the nonprofit organization, not its legal form. In general, therefore, public benefit status should be applicable across different legal forms of non-profits.

2. Regulatory Approaches to Public Benefit Status

There is no single or “standard” European practice in regulating the public benefit status. Below we review the most common regulatory approaches to confer public benefit status on CSOs.

A. Adopting a separate Law on Public Benefit Status

One of the most common approaches in Europe is to adopt a separate law on the Public Benefit Status, which clearly and consistently establishes the conditions of gaining such status, the procedures of conferring the status, the obligations of CSOs receiving the status and the benefits that they are entitled to. The scope of such law extends to different organizational forms as defined in the law, usually including associations, foundations and any other nonprofit form in the given country. This is a typical regulatory approach

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for countries where associations, foundations and other legal entities are regulated through separate laws. Examples include countries from all parts of Europe, e.g. Hungary, Poland, Latvia, the Netherlands, or Italy.

B. Regulating Public Benefit Status in Tax Law

Since public benefit status is closely tied to specific fiscal benefits, the provisions on public benefit status can be incorporated into the tax law, which sets the operational basis for organizations with this status. This is a fairly common approach especially in Western Europe (e.g., Germany), but it is also applied in some of the new EU member states (e.g. Estonia). In these countries tax legislation enlists public benefit activities as well as conditions for acquiring the status and defines the concrete fiscal privileges for CSOs.

C. Including Public Benefit Status in laws regulating CSOs (Framework Laws)

In several countries, especially from Central and Eastern Europe, the public benefit status is regulated in the same law that establishes the legal framework for the registration and operation of all CSOs in the country (so-called ‘framework laws’). These are typical in countries where one framework law was created to govern both associations and foundations (and possibly, other CSO legal forms). This law can be easily amended to introduce the public benefit status as the amendments would apply to all CSO forms. This is the case e.g., in Bulgaria, Bosnia, Kosovo, or the pending draft law in Macedonia.³. At the same time, we are not aware of a case when public benefit status is incorporated into a framework law that regulates associations only, which is the current approach in Moldova.

D. Regulating Public Benefit Status in Different Laws

A clearly less favored approach is to assign specific privileges to organizations that pursue public benefit activities through provisions in a number of laws, such as tax laws, government grant laws, humanitarian assistance laws and donations laws. Countries that have followed this approach (e.g., Lithuania, Croatia, etc.) have struggled with inconsistent application of the public benefit concept. Indeed, Croatia is currently seeking to reform its legal system to introduce a more coherent approach to public benefit concept.

3. Advantages and disadvantages of the regulatory approaches

In analyzing the advantages and disadvantages of the above – most common - solutions, we can refer to one main issue. Experience from European countries demonstrates that for public benefit status to be meaningful, the legal system must link concrete benefits to

³ In Romania, while there is also a Law on Foundations and Associations (*Law #246/18 July 2005*), a new, separate draft law on Public Benefit Organizations was developed by the NGOs and to our knowledge is still being planned to be introduced.

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public benefit status. Framework laws or a separate public benefit law are usually not able to ensure that the fiscal benefits for the CSOs with a public benefit status that were envisioned in the law will actually be introduced. Since these laws do not directly amend the tax laws, there is a need for strong political will or political consensus and continued lobbying by the CSOs in order to enact follow-up amendments in the tax laws or other laws (e.g., those regulating government grants, social contracting). It should be noted in this regard that from among the two approaches, in our experience, a separate law on public benefit status is still more favorable than the framework laws, as it usually elaborates the benefits in more detail and is more “visible” in the political arena.

In contrast, the biggest advantage of the regulation through tax laws, compared to the others presented here, is that the benefits for CSOs are immediately secured; and it is also simpler to arrange and apply the provisions administratively. However, the disadvantage is that tax laws usually do not prescribe operational requirements for organizations with the public benefit status, e.g. internal governance and reporting, which are nevertheless important for accountability of public spending.

4. Conclusions

As shown above, there are a number of regulatory approaches to promoting public benefit activities. Regarding the situation in Moldova, developing separate public benefit legislation would certainly be more consistent with the European practice in applying public benefit status to CSOs. However, every context is unique and regulatory solutions need to fit the local context. We are keenly aware of the political challenges in Moldova and recognize the difficulties involved in either of the proposed solutions. Provided the provisions of public benefit status apply to both associations and foundations, adopting the current amendments may be a viable, if unusual, solution.⁴

Based on the experience of other countries from the region, as described above, it seems that there will be the need to amend a number of other laws in order to make available the benefits envisioned in the provisions on public benefit status - regardless of the regulatory approach taken. ECNL shall be pleased to stay involved and provide comparative information in order to promote this process.

⁴ For example, we are aware that the registered draft amendments to the Law on Public Associations contain provisions on the scope of application in Article II Final and Transitory Provisions, paragraph 3. According to this paragraph “Until the adoption of special acts, provisions of this law shall be properly applied to foundations and private institutions.” Be the decision made to proceed with adopting the proposed amendments, we would recommend including these revisions regarding the scope of application in Part I, General Provisions of the Law on Public Associations, where the scope of application for public benefit status would be recognized in order to ensure its consistent application to other organizational forms.

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