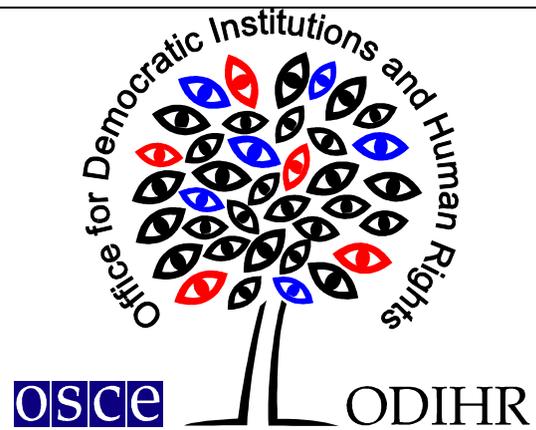


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COMMENTS

ON THE DRAFT LAW OF ALBANIA ON CIVIL SOCIETY DEVELOPMENT FUND

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1. INTRODUCTION

1. On 22 September 2008, the OSCE/ODIHR was requested by the OSCE Presence in Albania to review the draft Law of Albania on Civil Society Development Fund.

2. These Comments have been prepared on the basis on the English translation of the draft Law.

2. SCOPE OF REVIEW

3. These Comments analyze the draft Law of Albania on Civil Society Development Fund (hereinafter referred to as “draft Law” or “Draft”) from the viewpoint of its compatibility with the relevant international human rights standards and OSCE commitments. The Comments also examine the draft Law in light of the international best practices with regard to financing of civil society organizations (hereinafter referred to as “CSO”), in particular, State financing and State social contracting.

4. These Comments do not purport to provide a comprehensive review. The Comments look only at the provisions of the Draft Law and not other laws to which the Draft refers throughout.

5. The OSCE/ODIHR would like to mention that the recommendations provided herein are without prejudice to any further comments, opinions or recommendations that the ODIHR may wish to make on the issue under consideration.

3. EXECUTIVE SUMMARY

6. A full list of recommendations follows below.

- a) It is recommended that the Draft incorporate a definition of what constitutes public benefit. [para 8-9]
- b) It is recommended that the provision referring to “*strategic priorities of the public institutions regarding development of civil society*” be revised so that it is made more specific and clearer. [para 10]
- c) It is recommended that the reference to “*professional [...] support*” be removed from the text of the draft Law, CSDF being a funding agency rather than a resource center in its essence. [para 11]
- d) It is recommended that the Draft incorporate a list of acceptable expenses than may be incurred with the CSDF funding. It particular, it is recommended that the Draft specify whether re-granting the funds to other CSOs is acceptable, as well as general institutional support to CSOs. [para 12]
- e) It is recommended that the eligibility criteria for potential beneficiaries be clearly delineated. Thus, it is recommended that no reference be made to insurance companies since these do not fall into the CSO category. It is also recommended that, should Albanian law allow the State to found non-profit organizations (such

as public foundations), these should be expressly excluded from the ambit of the law. Furthermore, it is recommended that the reference to “natural persons be replaced with reference to “unregistered groups of natural persons.” The legislator, while not precluding the access of unregistered groups of natural persons to State funding altogether, may consider restricting it to a narrowed down group of funding options. Finally, it is recommended that a higher eligibility threshold apply in respect of CSOs that seek State financing. The organization should ideally have been active (and not simply registered) for a specified period of time in order to be eligible for State financing. *[para 14]*

- f) It is recommended that a sustainable funding mechanism be created to ensure that the Fund being established receives sufficient financial resources. In particular, the so-called “percentage philanthropy” model, now adopted by a growing number of nations, may be recommended. *[para 17]*
- g) The power to single-handedly decide on the Board agenda is overbroad and it is recommended that it be replaced with the power to approve the agenda. *[para 19]*
- h) It is recommended that that Article 8 be revised for better clarity, as well as a clearly defined representation formula (covering gender representation as well as the process of proposing candidacies by civil society organizations) be introduced. *[para 20]*
- i) It is recommended that the provisions concerning the decision-making on project proposal evaluation and funds allocation be revisited to either vest the power to make decisions exclusively in the Overseeing Board, or to incorporate rules on accountability and against the conflict of interest applicable to the Evaluation Commission. It is also recommended that the provision that allows for the participation of civil society representatives as invitees during the project proposal evaluation be revised to specify the procedure of selection of these representatives, as well as to clearly delineate their functions (preferably as monitors). *[para 21]*
- j) It is recommended that Chapter VII of the Draft be thoroughly revised to reflect the difference between the grant and social contracting mechanisms. *[para 22-24]*
- k) The provisions of the draft Law stipulating the annual CSDF budget for the first year of the operation of the law are welcome, as they will enable the CSDF to start functioning immediately once the Draft is adopted. *[para 25]*
- l) It is recommended that the provision requiring that the Council of Ministers adopt a set of requisite regulations to support the implementation of the law set a specific deadline by which the regulations must be adopted. *[para 26]*
- m) Since overreliance on regulations rather than on legislation may result in arbitrary and possibly abusive interpretation of the law, and runs contrary to the

principle of legality, it is recommended that key issues that are currently left at the discretion of the executive body issuing the regulations be instead elaborated upon in the law itself. [para 27]

- n) It is recommended that the Draft include a mechanism to ensure that the operation of the law once adopted be periodically reviewed, with the evaluation findings to be used to inform the process of reviewing and amending the law, if necessary. [para 28]

4. ANALYSIS AND RECOMMENDATIONS

4.1 Funding purposes and acceptable expenses

7. Article 4 of the draft Law defines the mission of the Civil Society Development Fund (hereinafter referred to as “CSDF” or “Fund”) as “[*promoting*] *sustainable development of the civil society and [establishing] favorable conditions for civil initiatives for the public good and interest.*”¹ The Draft further provides that the CSDF shall offer its “*professional and financial support and assistance to programs that promote and strengthen the sustainability of not-for-profit organizations, intersectoral and international collaboration, civil initiatives, philanthropy, voluntarism and democratic institutions in the society, as well as other programs facilitating the accomplishment of its mission.*”² Furthermore, the Draft requires that the Fund “*be guided by the strategic priorities of the public institutions regarding development of civil society.*”³

8. The Draft does not presently incorporate a public benefit test that would allow those implementing the law to assess which activities qualify as promoting “*public good and interest.*” In the absence of such a test, the implementing agency will have full discretion to interpret what constitutes public benefit and whether, for instance, activities that promote the interest of a certain disadvantaged segment of the public – rather than of the public as a whole – should be eligible for funding.

9. It is recommended that the Draft incorporate a definition of what constitutes public benefit inclusive of both benefits accessible to the general public and to disadvantaged segments thereof. Not only direct benefit to the intended beneficiaries should be covered, but benefit to organizations providing a direct benefit as well. It is also recommended that the relevant provisions specify that, should indirect commercial or private benefit be derived from the activity in question, the activity shall still be eligible for funding, provided that these indirect benefits do not diminish the public benefit, nor do they interfere with the general purpose of the activity. Finally, the draft Law should specify that public benefit access should not be conditional (such as subject to charges).

10. The reference in the Draft to “*strategic priorities of the public institutions regarding development of civil society*” is vague as it remains unclear which institutions are covered under this clause. It is recommended that the provision in question be revised for better specificity and clarity.

¹ Draft Law on Civil Society Development Fund, Article 4(1).

² *Id.*, Article 4(2).

³ *Id.*, Article 4(3).

11. Moreover, it is not clear what is implied under “*professional [...] support*” that the CSDF is supposed to provide to CSOs under the Draft. CSDF being a funding agency rather than a resource center in its essence, it is recommended that the reference to “*professional [...] support*” be removed from the text of the draft Law.

12. Finally, the Draft does not list acceptable expenses that may be incurred with the CSDF funding. Leaving this gap unfilled would lead to lack of clarity in the future about the eligibility of certain types of activities for funding, for instance, the eligibility of grant making activities whereby grant making organizations re-grant their funding to other CSOs. Likewise, it remains unclear whether general institutional support to CSOs (it may be argued that it implies public benefit as well by strengthening overall institutional capacity of the organization engaged in public benefit activities) would be eligible for CSDF funding. It is recommended that the Draft incorporate a list of acceptable expenses than may be incurred with the CSDF funding. The drafters may wish to consider using Hungary’s Act on the National Civil Fund Program as a source of inspiration.⁴

4.2 Beneficiaries

13. The draft Law targets as beneficiaries “*civil society organizations which are registered by law and perform their activity in compliance with the object defined in their charter, with the exception of political parties, trade unions, insurance and religious institutions, and organizations carrying out direct main political activities,*” as well as purports to support “*natural persons and civil initiatives to the public good and interest.*”⁵

⁴ Hungary, Act L. /2003 on the National Civil Fund Program, Article 1(2) (“*The Fund Program provides payments for the following purposes:*

- a) *supporting operational expenses of civil organizations;*
- b) *supporting public benefit activities of civil organizations;*
- c) *supporting anniversaries, festivals, domestic and foreign events involving civil organizations;*
- d) *ensuring the presence of Hungarian civil organizations in international civil relations; supporting participation in domestic and foreign events, festivals; ensuring financial support for international membership fees; support programs promoting European integration;*
- e) *supporting scientific research related to the civil sector; supporting monitoring activities and tasks related to registration;*
- f) *supporting educational, service, advisory, development and assistance activities and institutions related to the civil sector;*
- g) *supporting promotional materials introducing the civil sector, supporting electronic and written media specialized in this field;*
- h) *supporting civil organizations to raise their own contributions for tenders;*
- i) *supporting grantmaking organizations based on the decisions of the Fund Program Council and the Colleges, such decisions pertaining to automatic provision of resources determined by unified principles;*
- j) *covering the expenses related to the operation and administration of the Fund Program;*
- k) *supporting activities of civil society representation.”)*

⁵ Draft Law on Civil Society Development Fund, Article 5 (“*The CSDF and other funding authorities shall, in compliance with this law and in line with the strategic priorities, support and assist non-for-profit initiatives, programs and activities:*

- a) *of civil society organizations which are registered by law and perform their activity in compliance with the object defined in their charter, with the exception of political parties, trade unions, insurance and religious institutions, and organizations carrying out direct main political activities;*
- b) *of natural persons and civil initiatives to the public good and interest.”)*

14. The provision in question is problematic as the eligibility criteria for potential beneficiaries are not sufficiently elaborated. First, it is not clear why insurance companies are at all mentioned in this context, since their not being CSO should effectively preclude them from seeking CSDF funding without any express provision thereto. Second, should Albanian law allow the State to found non-profit organizations (such as public foundations), these should be expressly excluded from the ambit of the law. Third, the inclusion of natural persons as potential beneficiaries can hardly be justified. While the intent behind the inclusion of natural persons may have been to cover also informal, unregistered CSOs – and should be welcomed as such -, it is recommended that the provision in question be reworded to refer to “unregistered groups of natural persons.” It should be noted, however, that although freedom of association includes as its integral part freedom to associate informally, international standards do not preclude States from imposing the registration requirement where access to special benefits, such as State financing or tax benefits, is sought.⁶ Since State financing and contracting requires a reasonably high threshold of accountability that can be effectively ensured through the formation of a legal entity, the legislator, while not precluding the access of unregistered groups of natural persons to a State funding altogether, may consider restricting it to a narrowed down group of funding options. Finally, while the access to bidding for State contracts may be left to an unlimited circle of non-profit organizations, it is recommended that a higher eligibility threshold apply in respect of CSOs that seek State financing (i.e. direct subsidies, grants, etc.). The organization should ideally have been active (and not simply registered) for a specified period of time in order to be eligible for State financing.

4.3 Availability of a sustainable funding mechanism

15. The draft Law specifies the following sources of CSDF funding: “*funding from the State Budget and in-kind contributions approved by decision of the Council of Ministers;*” “*its own revenues;*” “*other lawful donations*” and “*other income as provided for in the law.*”⁷ The Draft

⁶ Explanatory Memorandum to Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the Legal Status of Non-Governmental Organisations in Europe, para 112 (“*The provision of public support (in the form of financial or other benefits) for the activities of NGOs is something that can be made contingent upon them qualifying for a special category or regime (e.g., a charity), or even a specific legal form (e.g., a trade union, church or religious association). A failure to obtain such a status or classification or to be allowed to take on such a legal form should not, however, lead to the loss of any legal personality already acquired.*”). Also *id.*, para 30 (“*The conferment of legal personality on NGOs need not involve the grant of any greater legal powers than those enjoyed by other legal persons; the most essential ones for their operation are likely to be those inherent in such personality, namely, the ability to enter into contracts related to the pursuit of their objectives, to make payments for the goods and services thereby obtained, particularly through the operation of bank accounts, and the ability to own property.*”). The full text version of the Explanatory Memorandum is available on the web at http://www.coe.int/t/e/legal_affairs/legal_co-operation/civil_society/Basic_texts/Explanatory%20memorandum.pdf

⁷ Draft Law on Civil Society Development Fund, Article 17(1) (“*CSDF funding resources are as follows:*

- a) funding from the State Budget and in-kind contributions approved by decision of the Council of Ministers;*
- b) its own revenues;*
- c) other lawful donations;*
- ç) other income as provided for in the law.”)*

provides that “the annual financing allocated from the State Budget cannot be smaller than that for the successive year.”⁸

16. Despite the requirement that the annual State budget allocation to the CSDF makes an amount equal to or greater than the amount of the previous year’s allocation, the Draft still does not eliminate the risk of insufficient funding to implement the law. If implemented properly, the draft Law would carry with it the risk to create a burden on the State budget. The provision for supplementary donor funding does not adequately resolve this problem due to the inherent instability of voluntary donations.

17. It is recommended that a sustainable funding mechanism be created to ensure that the Fund being established receives sufficient financial resources. In particular, the so-called “percentage philanthropy” model, now adopted by a growing number of nations, may be recommended. Under the “percentage philanthropy” system, taxpayers may designate a portion of the taxes they pay (often 1%) to support civil society. One variety of the “percentage philanthropy” system (that exists in Italy and in Hungary in particular) allows taxpayers to channel their designated portions of taxes to support a specific theme, rather than a specific CSO. If adopted by Albania, this mechanism may prove highly beneficial for creating a viable source of CSDF funding. The drafters may consider using the Hungarian example as a source of inspiration.⁹

4.4 Powers of the Chair

18. The draft Law vests in the Chair of the Overseeing Board the powers to convene the Board meetings, to set the agenda and to run the meetings; to represent the Board in its relations with third parties; to oversee the execution of the Board decisions; to coordinate the activities of the CSDF bodies; to propose the election, appointment or dismissal of the Board members and the Executive Director; and to perform any other duties as defined by the CSDF statute or assigned by the Board.

19. The power to single-handedly decide on the Board agenda is overbroad and it is recommended that it be replaced with the power to approve the agenda.

4.6 Composition and scope of powers of the Overseeing Board

⁸ *Id.*, Article 17(2) (“The funding of the CSDF is represented as a separate code of expenditure in the law on the Annual State Budget. As a rule, the annual financing allocated from the State Budget cannot be smaller than that for the successive year.”)

⁹ Hungary, Act L. /2003 on the National Civil Fund Program, Article 2(2) (“Sources of the Fund Program: a) The amount equal to the proportion of personal income tax that was actually transferred to the beneficiaries, defined in Article 4 of the Act CXXVI/1996 on the Use of a Specified Portion of Personal Income Tax According to the Designation of the Taxpayer, from the 1% [one percent] of the amount of personal income tax actually paid in the previous budgetary year. The amount of support transferred to the Fund Program cannot be less than 0,5 percent of the personal income tax actually paid by private persons in the previous budgetary year. b) Voluntary contributions and donations of legal persons, organizations without legal personality, as well as natural persons; c) Budgetary supports; Other revenues determined by the law.”). See also Hungary, Act CXXVI of 1996 on the Use of a Specified Amount of Personal Income Tax in Accordance with the Taxpayer's Instruction (full text of the Act available at <http://www.legislationline.org/legislation.php?tid=220&lid=6346&less=false>).

20. Article 8 of the draft Law¹⁰ provides that civil society representatives may be appointed “on the basis of their experience and contribution according to the proportional representation in the main fields of development and the strategic priorities of the civil society development” (Article 8.3.). This provision is, however, rather vague since it does not delineate the meaning of the term “main fields of development” nor of “strategic priorities of civil society.” It also does not specify what is understood by “proportional representation.” Moreover, it is silent with regard to gender representation of Board members. Finally, while Article 8(4) of the Draft states that “civil society organizations registered by law are entitled to forward their proposed nominees to the Overseeing Board to the Secretary General of the Council of Ministers”, it does not include any legal safeguards to provide for an all-inclusive process of proposing candidacies. It is therefore recommended that that Article 8 be revised for more clarity, and that a clearly defined representation formula (covering gender representation as well as the process of proposing candidacies by civil society organizations) be introduced.

21. Another major concern is due to the fact that, rather than to be vested in the Overseeing Board, the decision-making power on funds allocation is left in the hands of an Evaluation Commission.¹¹ The Commission is set up by the CSDF Executive Director rather than according to provisions of the law. This provision effectively annihilates the potential of positive impact of the provisions concerned with the conflict of interest, since these do not apply to the Evaluation Commission. Although the draft Law provides for “the participation [in the work of the Evaluation Commission] of representatives from civil society organizations as invitees,”¹² it does not specify how these representatives are selected or assigned, nor what their role should be. It is recommended that the provisions concerning the decision-making on project proposal evaluation and funds allocation be revisited to either vest the power to make decisions exclusively in the Overseeing Board, or to incorporate rules on accountability and against the conflict of interest applicable to the Evaluation Commission. It is also recommended that the provision that allows for the participation of civil society representatives as “guests” during the project proposal evaluation be revised to specify the procedure of selection of these representatives, as well as to clearly delineate their functions (preferably as monitors).

4.6 Distinction between State financing and State social contracting

d) ¹⁰ Draft Law on Civil Society Development Fund, Article 8 (“1. The CSDF is run by the Overseeing board composed of 9 (nine) members. 2. The CSDF Overseeing Board is composed of 5 members representing the civil society organizations and 4 members representing central public administration bodies. 3. In compliance with section 2 of this article, the Council of Ministers appoints 4 members of the Overseeing Board among representatives of the central public administration institutions and 5 members among representatives of civil society organizations. 4. Representatives of the civil society are appointed to the Overseeing Board pursuant to section 3 of this article on the basis of their experience and contribution according to the proportional representation in the main fields of development and the strategic priorities of the civil society development. The civil society organizations registered by law are entitled to forward their proposed nominees to the Overseeing Board to the Secretary General of the Council of Ministers. 5. The procedures and rules for the implementation of this article shall be defined in a decision issued by the Council of Ministers.”)

e) ¹¹ *Id.*, Article 21(3) (“The Evaluation Commission:

f) a) opens, examines and assesses the qualification criteria of project proposals received, on the date, venue and time announced in the bidding documents, in the presence of the bidders and of the representatives invited from the civil society;

g) b) declares the winner, by announcing, accordingly, the individual conditions that make the project proposal a winner.”)

¹² *Id.*, Article 21(2).

22. The draft Law appears to merge the concept of State financing with that of State contracting, and it remains unclear whether the intention is to introduce a grant or a procurement (State social contracting) mechanism. While the Draft refers to “grants” throughout, the procedure it delineates is not clear-cut and resembles the procedure commonly used to bid for contracts. This impression is reinforced by constant references to the Law on Public Procurement.

23. Both State financing and State social contracting are widely used in the OSCE region to fund CSO activities. The grant mechanism is commonly used where the desired outcome may be achieved in a number of ways, and the decision on what steps to take is left largely at the discretion of the implementing organization. As far as contracting out for social services is concerned, it may be defined, albeit in a very simplified form, as a way to divide labor between the State and the implementing CSO. Social contracting can be seen as implementing a broader social contract between citizens and the State, through establishing partnerships whereby governments transfer some of their public functions to non-governmental actors. These non-governmental actors may be CSOs as well as for-profit entities. Under the social contracting scheme, rather than receive grants, CSOs are commissioned to perform specified services of social importance on the basis of a contractual agreement with the central or local government. Since CSOs are in a good position to participate in public decision-making, social contracting provides an indispensable opportunity for citizens, both as taxpayers and as end users of services, to make their voices heard in the decision-making process.

24. It is recommended that Chapter VII of the Draft be thoroughly revised to reflect the difference between the grant and social contracting mechanisms.

4.7 Transitory provisions

25. The provisions of the draft Law stipulating the annual CSDF budget for the first year of the operation of the law¹³ are welcome, as they will enable the CSDF to start functioning immediately once the Draft is adopted.

26. The Draft requires that the Council of Ministers adopt a set of requisite regulations to support the implementation of the law.¹⁴ While this provision is certainly welcome, it is recommended that it set a specific deadline by which the regulations in question must be adopted.

27. Moreover, overreliance on regulations rather than on legislation may result in arbitrary and possibly abusive interpretation of the law. It runs contrary to the principle of legality that requires that law be clear, ascertainable and non-retrospective. It is recommended that key issues that are currently left at the discretion of the executive body issuing the regulations (such as the composition, procedures and rules for the functioning of the Overseeing Board¹⁵; the structure of

¹³ *Id.*, Article 42 (“*The CSDF budget for 2008 is constituted by the fund allocated by Law No.9836, dated 26.11.2007, “On 2008 State Budget”, aimed at supporting the civil society, in accordance with the last sentence of article 8 and table 1 attached to the law referred to above.*”)

¹⁴ *Id.*, Article 43 (“*The Council of Ministers is responsible for issuing the necessary sub legal acts for the implementation of articles 8, 9, sections 2, 15, sections 2 e 3, 16, section 3, 18, and of Chapter VII of this law.*”)

¹⁵ Draft Law on Civil Society Development Fund, Article 8(5) (“*The procedures and rules for the implementation of this article shall be defined in a decision issued by the Council of Ministers.*”).

the administration of the fund¹⁶; and the transparency rules of the Overseeing Board¹⁷) be instead elaborated upon in the law itself.

28. Finally, it is recommended that the Draft include a mechanism to ensure that the operation of the law once adopted be periodically evaluated, with the evaluation findings to be used to inform the process of reviewing and amending the law, if necessary.

¹⁶ *Id.*, Article 15(1) (“*The structure of the CSDF administration is determined in its charter.*”).

¹⁷ *Id.*, Article 10(3) (“*The decisions of the Overseeing Board are published in the publications corner at the CSDF headquarters or through any other appropriate medium in compliance with the provisions anticipated in the CSDF charter or acts.*”).