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# Comments to the Draft Law on the National Fund for Civil Society Development

*February 2018*

The European Center for Not-for-Profit Law (ECNL) is pleased to provide this opinion on the Draft Law on the National Fund for Civil Society Development in Ukraine (further called “the Draft Law”)<sup>1</sup>. ECNL is a leading European resource and research center, based in Hungary, which promotes the strengthening of a supportive policy and legal environment for civil society in Europe and beyond. ECNL has been working closely with Parliaments, governments, local governments and civil society organizations (CSOs) in Central and Eastern Europe and the Newly Independent States to support the adoption of legislation supporting freedom of association and greater CSO financial sustainability<sup>2</sup>. Together with the International Center for Not-for-Profit Law (ICNL) we have provided assistance to a number of countries to design their state funding systems such as Albania, Bulgaria, Croatia, Jordan and others. We have also made numerous researches on the sources of CSO financing and some of the research specifically focused on the mechanism of establishing state funds to support civil society<sup>3</sup>. We base our comments on our experience and specifically take into consideration the examples of 3 countries which have a background that is similar to Ukraine – Albania, Croatia and Estonia.

## General Comments

We would like to congratulate the drafters of the law for their efforts. We believe the draft represents a good basis to have a supportive law that would help civil society. State funding is one of the most important sources of funding for civil society internationally and it is important that CSOs have access to such resources in Ukraine as well. Moreover, the aim of the fund – the development of civil society and strengthening institutional capacity of civil society organizations – is especially important in a time when CSOs are still in a stage of growth. The lack of specific mechanisms for institutional support and capacity building for CSOs has been noted in a number of the other post-socialist countries and measures have been taken to change that. One of the mechanisms created is the establishment of specialized funds for civil society (the most developed examples being Croatia and Estonia).

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<sup>1</sup> The opinion is based on the version of the Draft Law from 27 December 2017.

<sup>2</sup> You can find more information about the activities of ECNL at [www.ecnl.org](http://www.ecnl.org)

<sup>3</sup>

<http://www.icnl.org/research/library/files/Transnational/National%20Funds%20Paper%20Final%20English.pdf>



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We would also like to stress our support for the key principles listed in the law:

- Competitive procedure for selecting of grant-recipients;
- Transparency and publication of all the information related to the funding provided and its recipients;
- The annual external audit of the finances of the Fund;
- The inclusion of an equal or higher number of CSO representatives in the governance bodies of the Fund and the fact that CSOs themselves will have the chance to choose their representatives.

There are, however, several important aspects of the Draft Law that we would like to comment. The aim is to ensure that the draft does not contain ambiguities and follows the best international principles and practices. The OSCE-ODIHR Opinion on the Draft Act of Poland on the National Freedom Institute - Centre for the Development of Civil Society<sup>4</sup> (a grant-making entity recently established in Poland) uses 4 principles to evaluate the planned establishment of a new funding entity in Poland and we have also relied on them in our comments. These are:

- Strategic approach when establishing the system that should be consulted widely with CSOs;
- Clear and well defined competences of all the involved entities in the system;
- Coordination with and inclusion of CSOs in the work of the entities;
- Programmatic and financial independence to avoid political interference.<sup>5</sup>

One **very important overall observation** is that even the best piece of legislation does not exist in vacuum and is related to the existing political context in the country. A good law can be implemented badly and a bad law can be implemented in a positive way, if there is the intention to do so. In the last year in Ukraine there have been heated debates about how CSOs should be regulated and there have been proposals for increased scrutiny over how they operate. In March 2017 anti-corruption CSOs and people associated with them (among others) have been subject to the requirement to submit e-declarations on their income and property. This measure was criticised by CSOs. Later in 2017 a new proposal was introduced to propose heavy reporting requirements for all CSOs. Again, this has been criticised by CSOs and a number of international organizations have commented on the need to reconsider the proposals for heavy CSO reporting and e-declarations<sup>6</sup>. This comes to show that there is a tension between a large segment of civil society organizations and some of the decision-makers. Such tensions may affect negatively the good intention of establishing a CSO support mechanism.

As an example, in Poland the government decided to establish a similar funding entity to distribute state funds to CSOs. This happened in an environment of constant clashes

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<sup>4</sup> NGO-POL/303/2017, [file:///D:/Downloads/303\\_NGO\\_POL\\_22Aug2017\\_en.pdf](file:///D:/Downloads/303_NGO_POL_22Aug2017_en.pdf)

<sup>5</sup> Point 21 of the OSCE/ODIHR Opinion.

<sup>6</sup> See for example the letter of the OSCE/ODIHR to Mr. Rainin, Head of the Presidential Administration in Ukraine from 30 August 2017.



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between the ruling party and a large group of CSOs. The Polish Prime Minister Beata Szydło has clearly expressed the desire for the new funding entity to help “bring order to the whole sphere of NGOs”.<sup>7</sup> This is an example how a good idea – to provide state funding to CSOs may be transformed into a mechanism for possible political influence over CSOs. That is why, in the OSCE-ODIHR Opinion on the Draft Act of Poland on the National Freedom Institute - Centre for the Development of Civil Society it was clearly stated that CSOs should be the main participants in the debate on the need for establishing such a fund, they should be involved in the drafting of legislation and policies on state funding and support (point 71) and be able to provide input at an early stage and throughout the process (Point 72). As a conclusion, the OSCE/ODIHR Opinion has stated in point 74 that: “*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**. 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.**”*

So as a key starting point, we need to underline that as this is a mechanism for civil society **it is of paramount importance that civil society should have a decisive voice in the process of determining whether and how such mechanism should be established** as they are best aware of the current context in Ukraine and the possible implications that it may have on the creation and future operation of the National Fund for Civil Society Development.

Below we have listed our specific comments which aim to address some important points. Those may lead to ambiguities or create problems in the practical operation of the Fund. We only list the key issues here and will review them in more detail in the following section:

- The definitions of key terms in the Draft Law may lead to confusion.
- The Draft Law needs to describe more clearly the tasks of the National Fund and what activities (different from grant-making) it will undertake.
- The potential recipients include religious organizations, employers’ organizations and unions.
- The governance structure of the National Fund is overly complicated and there are unclear issues related to the election of members to some of the bodies of the Fund.

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<sup>7</sup> [https://www.theguardian.com/world/2016/nov/28/polish-pm-beata-szydlo-a-angers-human-rights-campaigners-ngos?CMP=tw\\_t\\_gu](https://www.theguardian.com/world/2016/nov/28/polish-pm-beata-szydlo-a-angers-human-rights-campaigners-ngos?CMP=tw_t_gu)



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- The Draft Law does not expressly specify the involvement of CSOs in determining the funding priorities or procedures.

## Specific Comments

### **Issue 1: The definitions of key terms in the Draft Law may lead to confusion**

#### **Discussion:**

The main purpose of the draft law as stated in the opening paragraph is *"to facilitate the development of the civil society in Ukraine by way of introduction of financial mechanisms of targeted support for the development of the civil society, tools for strengthening institutional capacity of civil society organizations, as well as efficient partnership between the civil society and public authorities."* This corresponds to the objectives listed in the laws establishing other similar structures in countries in the region. For example, the Croatia Act on the National Foundation for Civil Society Development states that it is created for *"promoting and developing the civil society in the Republic of Croatia"*<sup>8</sup> while the Albanian Law on the Organization and the Functioning of the Civil Society Support Agency states that the objective of the Agency is *"to encourage the sustainable development of civil society and the creation of favourable conditions for civic initiatives for the good of and in the interest of the public"*<sup>9</sup>.

The Ukrainian law, however, introduces specific definitions to further clarify the terms used. It tries to differentiate between institutional capacity and institutional development which complicates the possible interpretations and differentiates between these two terms, which may be unnecessary. For example, it is commonly accepted that if the organization increases its institutional capacity this leads to institutional development. The Draft Law states that institutional development is *"a constant process of improving the organization's activities in accordance with its purpose, tasks and state of development of society"*<sup>10</sup>. For institutional capacity, the definition provided states that it is the *"efficiency of using resources by recipients, including material resources, knowledge and skills of personnel to achieve the goals and objectives of their organizations"*<sup>11</sup>.

Instead of defining what each term means, it is better to follow the approach used in Estonia. There the Articles of Establishment of the National Foundation for Civil Society art. 2.1 lists the overall goal of the Foundation - *"to contribute to enhancing the capacity of not-for-profit associations and foundations acting in public interests of Estonia in development of the civil society and in formation of the environment favourable for civic initiative"*. Instead of providing definitions, the document only lists the means/activities through which this overall

<sup>8</sup> Art. 3, para 1 of the Croatian Act.

<sup>9</sup> Art. 4.1. of the Albanian Law.

<sup>10</sup> Art. 1.1.3 of the Draft Law.

<sup>11</sup> Art 1.1.2 of the Draft Law.



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objective will be realized. The Albanian law takes a similar approach – while it has a section with definitions, it does not attempt to define what is sustainable development of civil society (the term used in the law).

While we support the inclusion of clear and well-defined terms in the law, with regard to such complex terms as development of civil society, we recommend to use the approach of listing the types of activities undertaken to achieve the goal rather than trying to define it. Otherwise, interpreting the definitions might lead to confusion. In the case of the Ukrainian Draft Law, the following problems may arise:

- If it provides funding for institutional development, the state may decide to evaluate if there is constant improvement of the organization which may create problems with regard to who can do that, what methodology will be used, what is an improvement – a constant increase in the number of personnel, and increase in the amount of the annual budget used, or how the activities are implemented, etc.
- With regard to institutional capacity, its definition focuses on the efficiency of using resources. Here again, the same questions might be asked – how you evaluate efficiency and who can do that.

### **Recommendation:**

We recommend not to define the terms institutional development and institutional capacity in the draft law or avoid unclear terms that may lead to excessive state oversight and possibility for evaluation of the efficiency of CSOs by the state.

### **Issue 2: The Draft Law needs to describe more clearly the tasks of the National Fund and what activities (different from grant-making) it will undertake**

### **Discussion:**

The Funds in others countries that we have reviewed engage primarily in grant-making but they also develop additional programs. For example, the Albanian law also provides that funding can be granted to *“natural persons to support their research and studies, participation in international public activities and other forms of individual support, according to the specific programmes of the agency.”*<sup>12</sup> In Estonia, the National Foundation provides funding to individuals for:

- participation of an Estonian expert in an international event where they have an active role;
- participation of an Estonian NGO representative in an international umbrella organization event;
- participation in a preparatory meeting of an international project.

<sup>12</sup> Art. 5b of the Albanian law.



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- inviting a foreign expert to a civil society event in Estonia, if they have an active role;
- inviting a foreign trainer to conduct a training;
- travelling abroad when participating in a training.<sup>13</sup>

This type of support is based on application process. In Estonia, the only case when competition for services is organized relates to research when consultants are hired.

In the case of Ukraine, there is a plan to provide additional technical assistance in the form accounting, legal services, etc. We believe it is best to leave this type of support to CSOs themselves or provide grants to specialized organizations that can provide this type of support to other CSOs. We believe the most important function of the Fund is to provide financing to CSOs and that is why its focus should be on that, at least at the time of its initial establishment.

Moreover, while the law establishes a requirement that at least 80 % of the state funding is provided for institutional development of CSOs, this (as per the definition) includes also technical assistance so in the end grant-making could turn out to be less than the other activities of the Fund. We do not have information on the amount of the future budget of the Fund but 20 % of this state funding might be a substantial amount that might be spent on, for example, the administrative expenses of the Fund. In Albania, according to the law the administrative expenses are a separate budget item, different from the amount of the Fund itself:

*"The budget for salaries and expenditure of the administration of the Fund should be approved as a separate item in the Law of State Budget, along with the Civil Society Fund."<sup>14</sup>*

### **Recommendation:**

We recommend that at the beginning of the establishment of the Fund it should focus on grant-making, instead of on providing consulting and other services to CSOs. If any support is provided to individuals, this should cover a limited list of types of support and limited percentage of the Fund's budget.

We recommend to provide that the salaries and administrative expenses of the Fund come from a separate budget item (as in Albania) to ensure that the funds, planned for the Fund will go for CSO grants.

**Issue 3: The recipients include religious organizations, employers' organizations and unions**

### **Discussion:**

<sup>13</sup> <https://www.kysk.ee/international-cooperation>

<sup>14</sup> Art. 15.4 of the Albanian law.



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The aim of the establishment of special mechanisms for financing nonprofit organizations is to provide support mainly to “*non-profit associations and foundations acting in the public interests*” (The Strategy of the Estonian Foundation 2014-2020). The Albanian law has a special exclusion for “*political parties, labour unions, religious institutions and political organizations*”<sup>15</sup>

The Ukrainian law in art. 1.1.5 defines civil society organizations to include also religious organizations, trade unions, employers’ organizations and other associations of private law entities. While all of these are civil society organizations from a legalistic perspective, the state is not necessarily interested to support financially many of these. With regard to religious organizations, there are usually special mechanisms through which the state may support them. Another example relates to business associations – it would be strange for the state to provide funding to the association of, let’s say, wine producers. This may qualify even as state aid which is limited under the EU regulations.

#### **Recommendation:**

We recommend to provide a special exclusion for religious organizations, trade unions, employers’ organizations or business associations so that they may not benefit from the National Fund grants.

**Issue 4: The governance structure of the National Fund is overly complicated and there are unclear issues related to the election of members to some of the bodies of the Fund**

#### **Discussion:**

The law requires that the Fund has 3 supervisory/oversight bodies – the Conference, the Supervisory Council and the Board. In addition, the Fund has an executive body – the Executive Director. We believe this structure is unnecessarily complex and does not guarantee any additional checks and balances between these bodies.

In the other countries reviewed, similar structures usually have 2 main bodies – a Management Board and an Executive Director (Croatia) or Supervisory Board and Executive Director (Albania). Only in Estonia there are 2 collective bodies in addition to the Executive Director – Supervisory Board and Management Board. In this case, however, it is the Supervisory Board that has the responsibility, for example, to amend the Statute (in Ukraine this is the prerogative of the Council of Ministers). The Management Board is composed of up to 3 members and it has the powers to represent and manage the Foundation. If it has more than 1 member, it has to elect a Chairperson who has the main managerial/executive functions such as:

- Be responsible for organisation of accountancy of the Foundation;

<sup>15</sup> Art. 5a of the Albanian law.



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- Decide making expenses necessary for Foundation's activity within the scope and subject to budget approved by the supervisory board;
- Work out and present to the supervisory board for approval the structure of the Foundation, the procedure of electing and employment of salaried workers and concept of salary schedule and remuneration of workers;
- Take on job and dismiss the workers of the Foundation by making, changing and terminating employment contracts with them; etc.<sup>16</sup>

According to the Ukraine Draft Law all the CSO members of the 3 different bodies are elected at the same elections so it is difficult to claim that the higher body controls the lower body. The Conference can only approve the members of the other bodies elected during the voting – it cannot change them or replace them. The Supervisory Council has no real power over the Board and its members as it cannot fire them or appoint other members.

There are several important questions that come up when looking at the governance structure and the way its members are selected:

- It is unclear what is the added value of the Conference which only meets once every 4 years (unless summoned by the other bodies). Its main power is to approve the Strategy of the Fund and propose amendments to the Statute of the Fund to the Council of Ministers.
- It is unclear how the state representatives are selected in the Council and the Board and is there any requirement to have such members at all (with regard to the Conference there is clear list of how state representatives are selected).
- There is no requirement for the state representatives to have knowledge of the CSO sector which is an important prerequisite for working in such a structure. On the other hand, experience of working for a CSO is not accepted as experience as the requirement is to have 5 years in governing bodies of CSOs.

Another issue related to the membership in the various bodies is that there is a contradiction between art. 5.3.2 and articles 7.2 and 8.2. Art. 5.3.2 states that *"in the case of early termination of powers by one of the elected members of the Supervisory Council/Board of the National Fund, additional rating Internet voting shall be conducted to elect a new member."* On the other hand, art. 7.2. (and similarly 8.2) state that *"if the chairman or member of the Supervisory Council submits a written statement on the termination of his or her powers as the Chairman or the member of the Supervisory Council or loses the ability to exercise his powers, the Supervisory Council shall approve as the Chairman or the member of the Supervisory Council the person who received the next largest number of votes for the period lasting until the convocation of the Conference of the National Fund."*

In general, it may also be a good idea to introduce some limitations for the participation in the voting process e.g. to provide that right to vote have only organizations registered at least 1 year before the elections. In such a way you will avoid the process of registering new organizations simply to have more votes.

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<sup>16</sup> Art. 4.6 of the Statute of the Estonian Foundation for Civil Society.





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### **Recommendation:**

We recommend to try and simplify the governance structure and merge the Conference and the Supervisory Council. Moreover, you should consider whether the members of the Board should be appointed directly based on the voting or the Supervisory Council may have greater powers in determining who should be Board members based on some additional criteria and the expertise/qualifications of the potential members. In Albania, after a similar voting, the CSO members in the Board are appointed by the Council of Ministers but the it is free to choose 5 out of the top 15 candidates in the voting.

In addition, we recommend to:

- Allow for replacement of members of the bodies without the need to hold new elections (but possibly use the results of the previous elections);
- Introduce an additional requirement for knowledge of the CSO sector for all members of the Fund bodies;
- Introduce possible limitations on the number of consecutive mandates a Board or Council member can have e.g. not more than two.

**Issue 5: The Draft Law does not expressly specify the involvement of CSOs in determining the funding priorities or procedures**

### **Discussion:**

One of the main principles of such funding mechanisms is the involvement of CSOs in the various processes related to the provision of grants. The OSCE/ODIHR have clearly noted this in their Opinion on the Polish Draft Law to set up such a structure (the National Freedom Institute):

*"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>17</sup>

We suggest that the drafters of the Ukraine Draft Law take a similar approach. Currently there is no regulation on how and whether CSOs will be consulted with regard to funding priorities and procedures for grant-making. We suggest that such processes are as open as possible.

### **Recommendation:**

We recommend that the Draft Law expressly provides for public consultations on such important issues as funding procedures and priorities.

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<sup>17</sup> Point 41 of the OSCE/ODIHR Opinion on the Draft Act of Poland on the National Freedom Institute – Centre for the Development of Civil Society.



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### Other issues:

1. We suggest that you include several other Principles in the Draft Law that are important for such structures. Some examples include:
  - a. Non-interference in the operation of CSOs – regardless of their source of funding, CSOs are independent and self-regulating entities.
  - b. Good governance – in its operation the Fund is ensuring the highest possible standards of operation.
2. It is a good idea to introduce requirements for experience for the Executive Director.
3. In addition to the requirement for audit (which would mainly review the financial performance of the Fund), we recommend to include also the requirement that once every 4 years the Fund undergoes also an independent evaluation to study the impact of its activities.
4. We suggest to introduce a prohibition of conflict of interests – when providing financial support or making decisions. For example the Croatian Act states that *“a member of the Management Board or other body of the Foundation may not vote or decide on issues in which he or she, his or her spouse, his or her adoptive parent or adopted child, his or her blood relative in the direct line or a relative in a collateral line up to the fourth degree, or his or her in-law up to the second degree has an economic interest, nor on issues relating to the legal person whose member he or she is, in the management of which he or she participates or in which he or she has an economic interest.”*<sup>18</sup>

We remain committed to provide further support in the development of the Draft Law.

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<sup>18</sup> Art 11, par. 1 of the Croatian Act.