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Bosnia-Herzogovina

THE LEA/LINK PROJECT LAW GROUP

TO THE LEA/LINK PROJECT INTERNATIONAL ADVISORY TEAM

The LEA/LINK Project Law Group held meetings on May 12th and 13th 1998 in Banja Luka and a telephone conference on May 16, 1998, discussing the commentaries and suggestions of the International Advisory Team (hereinafter referred to as: the IAT) on the working version of the Law on Associations and Foundations (hereinafter referred to as: the Draft), and made the following

CONCLUSIONS

1. The Law Group highly appreciates and extends respect towards the effort of the IAT members to present their positions and suggestions on the proposed Draft in detail. They shall certainly be very useful in the further work on this task and the Law Group shall treat them in this manner.

2. After a detailed reviewing of each of the positions and suggestions of the IAT, the Law Group assessed that among us there is a high level of concurrence on the potential legal provisions for the legal framework of foundation and operations of the association of citizens and foundations in Bosnia and Herzegovina. Certain differences existing in this are not only normal, but in this phase of seeking the legal provisions they are even desirable, so therefore, it would be useful to present those remaining ones as alternative solutions for the upcoming discussion on this document among the non-governmental organizations in Bosnia and Herzegovina.

3. As the starting conclusions, we would like to bring up the following:

a) certain unclarities and different perceptions of the contents and meanings of certain proposed provisions are the result of the problems in the translation, as well as the text of the law itself into English, as well as the commentaries provided by the IAT members into our language.

b) Some proposed provisions, among other things, are the reflection of certain features of our legal system itself and it is only possible to define their meaning in that context.
c) The direct contact of the Law Group and the IAT members would offer the possibility for an easier and safer exchanges of arguments for each specific proposed provision, which would (in addition to the aforementioned conclusions) certainly reduce the differences between us down to a very small number.

II

The further text provides the position of the Law Group on the specific commentaries and suggestions of the IAT, designating them by the names listed in the IAT Memorandum dated April 13, 1998.

GENERAL ISSUES

Simplification and Explanation

The Law Group concurs with the position of the IAT that the law needs to ensure consistency in the language expression and the use of terminology. However, we have in this noticed several cases of inadequate translation, particularly of the legal expressions and procedures, which was then inevitable to leave the impression as was presented by the IAT members.
In terms of the mentioned suggestion, the Law Group shall review this aspect separately after the public discussion of NGOs on this document, which is also expected to provide useful suggestions in this domain too.

The Role of the Government

The Draft Law emphasizes the government authorities in a total of 18 articles, among which 9 articles fall onto registration authorities (courts). In spite of the desire of the Law Group that the government administration have only a reasonable role towards non-

governmental organizations, we have not fully succeeded in this. This may be a consequence of the fact that the Law Group members have spent more of their work history in government authorities than in the non-governmental sector itself. Besides this, the Law Group members, in anticipation of the complaints of the government against the Draft - have in advance "met" those anticipated observations since the Law Group does not have the wish to open conflicts with the government, because it is clear that in that case the law shall be adopted in the parliamentary procedure in a much slower and much more difficult way.

In addition to this, the Law Group is nevertheless unanimous that the final version of the Draft to be offered to the governments should reaffirm a more restrictive approach to the role of the governmental agencies in the activities of the non-governmental sector. This is what we shall also try to provide for in this material.

Provisions on the Reciprocity between Entities

The IAT commentary pertains to Article 9 of the Draft. We have understood that the essence is in that this provision needs to create a clear conclusion that the freedom of action of associations of citizens and foundations from one entity in the territory of the other entity implies their obligation to respect the existing laws of this entity. We are in concurrence with this suggestion and we believe that it is ensured so that the word "this" shall be deleted from the provision of Article 9, so that its second part would state as follows: "unless their activity is contrary to the law". In our legislation practice, such a statement, with the use of the small letter "l" in the word "law", implies all applicable laws (regardless of whether it has been used in singular or in plural).
We would also like to draw attention here to the fact that we have defined this provision so that it does not pertain only to the registered associations and foundations, but on all the associations and foundations seated in the given entity.

Informal Associations

The translation of this IAT commentary into our language is very unclear, which may indicate of the conclusion that even the English translation of the given provision did not ensure for the sufficient specificity of expression. However, we have understood that the IAT has expressed a standing that the Draft needs to include a "clear statement of the right to establish informal associations which do not have to meet the conditions set forth by the Draft for formal associations which enjoy the status of legal entities".
The Law Group believes that this request is fully and clearly ensured in Article 12, paragraphs 3 and 4 of the Draft. On the other hand, the consistency of the provisions on registered and informal associations is ensured by inconspicuous formulation. In judgment of the Law Group, any express statement in a different form could be significantly detrimental to the ultimate destiny of the proposed solution for the existence of informal associations.

ISSUES PERTAINING TO THE PROVISIONS LINKED BOTH TO THE ASSOCIATIONS AND THE FOUNDATIONS

Provisions Linked to the Term "Non-Profit"

The IAT observation is assessed to be quite appropriate.
Therefore the Law Group redefines Article 4 of the Draft so as to state:
"An association or a foundation may not perform profit activities as their predominant activities for the purpose of acquiring gain for their members.
The restriction from the previous paragraph does not preclude the possibility of payment of a reasonable fee amount or compensation to cover the costs of the member or associate of an association or a foundation.
If an association or a foundation is generating gain, it must be used to accomplish the goals and activities as determined in the statute."

Forbidden Activities

We believe that it is possible to improve this provision to a certain extent in order for ensure its safer application, so as to replace the wording "or any form of discrimination" with the wording "or discrimination forbidden by the law". The Law Group believes that with this change, this provision is fully in compliance with the provision of paragraph 2 of Article 11 of the European Convention of Human Rights and Fundamental Freedoms and to the provision of Article II.4. of the Constitution of Bosnia and Herzegovina.

Economic Activities and "the Basic Purpose"

The mistake indicated upon by the IAT is partially removed by the new formulation in Article 4, paragraph 1, of the Draft Law, which specifically regulates that the predominant part of the activity of associations or foundations may be only non-economic activities (argumentum a contrario).
Further, paragraph 4 would be added to the same article as to state: "An association of citizens or a foundation may found a stockholding company or a limited liability company, in accordance with a separate law, for the purpose of financing goals and activities determined by the statute."

The Contents of the Statute and "Usual" Provisions

The Law Group believes that the requirement presented in the first sentence of this paragraph has been met by the formulation used in the initial statement of Article 15, paragraph 2, of the Draft. Namely, this provision states what a statute "must" contain, and not what a statute "may" contain. In other words, what is listed in this provision is the mandatory minimum of the statute's contents, provided that full freedom remains to associations of citizens to integrated all other provisions too which they believe necessary into their statutes, under the condition that they are in compliance with the law.
As for the observation on Article 23 of the Draft, we emphasize that in printing of the text of the Draft, the printing mistake was made of putting "perform" instead of "may perform". With this correction we believe that all associations are put into the same position - that all of them may form their management bodies, provided that associations exceeding 10 members are obligated to do this (because all members could hardly perform this function),

and associations below ten members may do this (unless they decide that they should all perform it, which may be justified given their small number).

In general, the approach of the Law Group to the completion of the Draft Law was that the same needs to be as simple and as liberal as possible. The liberality implies freedom of the members of associations or foundations themselves to set the internal structure of organization, the method of performing activity, the method of decision making - the rules of voting, and other issues. If we are speaking about the legal definition of those issues, in respect of the presented principles, then it is logical that the same are regulated by statues, which has been envisaged by Article 15.

Duty of the Board Members and Individual Responsibility

The issue of responsibility of the membership, management body members, as well as other forms of responsibility are the issues also regulated by the statute. See Article 15, paragraph 2, line items 4 and 5.

Articles 21 of the Draft integrates the standard care required from the management body members, analogously to the standard care required from the management body members of a foundation. See Article 21, line item 4 (management board disposes of the property and is responsible for it).

In our legal system, the liability of a legal entity (in the specific case, this pertains to an association or a foundation), is often linked to the individual responsibility of the persons which is assigned an obligation or responsibility (responsible person) by the statute or another internal act. The very acceptance of the appointment and taking over the obligations also entails responsibility.

Therefore, the Law Group believes that grounds exist that an individual shall be held liable as the responsible person. In addition to this, quite specific provisions on this exist in the general acts, both in relation to the civic and the criminal and offensive liability.

Some specific issues of liability in relation with the loyalty obligation need to be determined by the statute.

Self-management and Other Restrictions of Conflict of Interests

If we were able to conclude correctly, the specific commentary pertains to Article 33 of the Draft. The Law Group is of an opinion that the mentioned provision does not prevent an interested person to participate under some concrete (market) terms in obtaining a deal or a right, provided that the same is only not entitled to participate in decision making.
We concur that the mentioned provision needs to be further specified.

Auditing, Reporting, and Access of Publicity

This observation seems to us to be contradictory to your observation on the "role of the government". All the time of the work on the Draft, the Law Group made maximum efforts to limit the possibility of interference on the part of the government authorities in the foundation, work and activity of associations and foundations, however, we have not been sufficiently successful in this.
In respecting the mentioned orientation, in Article 6 of the Draft, the Law Group has determined the obligation of the publicity of the work of associations and foundations, and the method of exercising the publicity of work principle is the issue which, as per the opinion of the Law Group, is to be regulated in the statute. See Article 6, paragraph 2.
We have not specifically stressed financial supervision because the same is performed by the existing financial regulations which need to be complied with by associations and foundations.
Publicity of work of associations and foundations of "public interest" needs to be viewed in the light of the fact that the legal regulations on the publicity of work pertain to them in the area in which an association or a foundation performs the activity of public interest.
Regardless of this, it has not been precluded that in the final version, a formulation finds its place which shall explicitly state the manner of how to make the operations of associations or foundations more transparent (publication of the year-end report, etc.).

Representation Activity

We have to stress that this commentary of yours has remained rather unclear from the aspect of the word "representation". If we have understood the translation correctly, and your commentary through it, we emphasize that the Law Group has had big dilemmas here.

The opinion has become predominant that explicit installation of the provision on the forbidding of political activities could be abused on the part of the government authorities. Namely, by extensive interpretation, a very large number of activities could be qualified as political activities, which could be used as the basis for a potential ban of work of an association or a foundation.

Therefore, the Law Group would not be glad to integrate such a provision into the law. Indeed, a potential formulation on the ban of participation in the political representative campaign is quite specified, but we believe that in the phase of initial accumulation of the non-governmental sector and the present general political environment in BH it is not appropriate that such a restriction (which also may be a catch if interpreted more freely) be proposed directly by the non-governmental sector.

International Organizations

First, we wish to reply to your commentary linked to Article 11. The same is acceptable, so that we make the correction so as to add the word "appropriately" after the word "this law shall be". We know that this word hardly has translation in English, but in essence, thus formulated provision means that this law shall be applied to international associations and foundations and their unions to the extent applicable on them "by the nature of the things" (per analogiam).

However. the Law Group believes the provision of Article 17 to be restrictive. In this, we specifically recognize the exceptionally positive role of international non-governmental organizations in BH over the past several years. Therefore, we propose that words "... with a previous approval obtained from the Ministry of Justice" be deleted in paragraph 1.

We did not believe that this required regulation by a separate provision, because each form of legal entity has specific qualities of its own, such as: registration, activity and organization, which are regulated by a separate law for that specific form of a legal entity. However, if the observation pertains to the possibility of transformation - change of the legal status from an association of mutual benefit into an association of public benefit, it is not ungrounded that is needs to be reviewed separately.

In this, our opinion is that such a possibility of change of status should not be restricted. Therefore, if the law does not say anything on this, the assumption is that the change is

possible (a general legal rule that anything not explicitly forbidden is allowed). However, we have proposed a separate provision (see explanation in head "Associations of Public Interest").

Dissolution and Distribution after Dissolution

The Law Group is of an opinion that there are certain unclarities in Article 51 of the Draft, so the same need to be removed in the way that line item 2 is changes as to state: "if they act contrary to the purpose and programmatic goals envisaged by the statute".
Article 51, paragraph 2, shall be fully deleted as unnecessary. The possibility of initiating the dissolution of various entities, including associations, derives from general acts. On the other hand, the provision (partially modified) of Article 53 of the Draft is sufficient for institution of the procedure of dissolution of associations or foundations.
Article 52, after word "registered, instead of a full stop there will be a comma, and wording added as follows: "unless the law provides otherwise".
Article 53, paragraph 1, behind Article 51, words shall be added: "paragraph 1, line item 1". In Article 53, paragraphs 2,3, and 4 shall be replaced with a new paragraph 2 stating: "The procedure for dissolution of an association from the previous paragraph is conducted by appropriate application of the provisions of the Criminal Procedures Code". Such provision is a guarantee for a more adequate protection from the willful proceeding of the government administration.
The standing of the Law Group for the different prescribing of the issues related to distribution of property after dissolution of an association or a foundation is the consequence of the different definition of an association or a foundation. Starting from the standpoint that foundations have large social significance, this issue has been regulated in the law, while for associations a liberal approach has been retained that this issue is to be resolved in the statute. However, we allow for the possibility that for associations of public interest it may be ensured by a legal provision that in case of their dissolution the property is ceded to an association with identical or similar activity. In that line, the alternative is proposed in the Draft. We also agree that one general provision should be added which would annul any distribution of property among the members.

We have found out that the Draft does not even contain the appropriate provisions on some specific issues related to the social (state ?) property of the previous social and socio-political organizations which is of huge value because it has been created through decades. Indeed, this issue may be the object of regulation by a separate law, because this is a one-time problem in the present transition phase.

Punitive Provisions

The Law Group has only envisaged the punitive provisions and has deliberately not indulged into the complete definition of the amount of the fine imposed (the separate legal minimum and maximum amounts) leaving this for further development once the general minimum and maximum amount of fine as well as the single currency are more clearly defined. It is unquestionable that the provisions shall envisage a special legal minimum and maximum fines for the prescribed offenses.

The Legal Group does not consider the prescribed offenses from Article 57 "purely technical and insignificant offenses", but the same consist the measures of securing for the implementation of the provisions of this law. We believe that the same shall not lead to endangering associations and foundations, but that they shall provide for the legality of work of associations and foundations.

In terms of responsibility of representatives, general regulations are the guarantee that nobody may be responsible per the principle of objective liability in the criminal law system (crimes and offenses) because they are based on the theory of subjective liability of the perpetrator. The responsibility of a representative of an association or a foundation shall always require a certain degree of performance of unlawful actions.

Transitional Provisions

The Law Group has corrected Article 58, paragraph 1, in the way to delete the word "established" in the first row, and the words "in accordance with the law" in the second row.

In order to remove unclarities and non-precisions in Article 59 of the Draft, the wording "associations, that is, foundations, associations of foreign nationals and international non-

governmental organizations and their offices" shall be deleted. The remaining formulation assumes all actions begun and not completed. For the purpose of further specification and removal of potential complications, if the procedure upon appeal is in due course, the words "which are not completed" should also be replaced with wording "in which no decision in the first instance has been brought yet" in Article 59.

ISSUES PERTAINING TO PROVISIONS LINKED SPECIFICALLY TO ASSOCIATIONS

Founders and Members, Federations

The Law Group agrees that there are no special reasons that the founders and members of an association should not include legal entities. It is clear that this could not pertain to he state of BH, the entities, the municipalities, the government authorities, the state-owned companies and funds.

Therefore, Article 12, paragraph 1, shall be amended as to state: "An association may be founded by at least three persons, provided that the founders may not include BH, the entities, municipalities, local communities, government authorities, state-owned companies and funds."

In Article 18, paragraph 1, the wording "the citizen of BH" shall be replaced by the word "person". It is assumed that the word "person" is a generic term for a natural person or a legal entity.

If we have correctly understood the IAT suggestion in the presented situation, provisions of Article 10 (analogously of Article 29 for foundations too) of the Draft Law prove to be superfluous.

Associations of Public Interest

From the very beginning, the Law Group has understood the importance of the issue of defining associations of public interest. Regardless of this, it does not consider the provision presented either the best one or the sole one possible. In a possibly too much

anticipation of the increased interest of the government in this issue, the presented provision in the Draft is not the happiest solution for the non-governmental sector. Thence, the presented method of integrating the government into the solution of this issue creates concern.

The Law Group is also willing to offer the following alternative as a potential substitute for Article 16 of the Draft Law:

"An association may have the status of an association of public interest if its activity exceeds the interests of its members.

The acquisition of status of an association of public interest shall be decided upon by the registration authority in accordance with a separate law regulating the corresponding area.

The status of an association of public interest may be requested by the founders in registration, but it may also be acquired at the request of an already registered association.

In deciding upon the acquisition of the association of public interest, provisions on registration shall be appropriately applied.

An association of public interest shall exercise customs, tax, and other exemptions and benefits in accordance with a separate law".

We believe that the possibility of unequal practice would be significantly reduced if the competency for determining the status of public interest remained with the registration authority (that is to say, the court). On the other hand, the formulation of paragraph 1 leaves a smaller possibility for abuse in deciding on the acquisition of the status of an association of public interest. All the same, in case of an unfavorable decision, legal remedies would be available.

ISSUES PERTAINING THE PROVISIONS LINKED DIRECTLY TO FOUNDATIONS

The Relation between the Provisions Linked to Foundations and the Provisions Linked to Associations

There was no intention on the part of the LG members to stress the difference between associations and foundations, at least not to make this difference look larger than it actually is. However, the fact is that differences do exist and that they have to be taken into

account. The IAT members may be a bit confused by our approach in this law, but it is based on the tradition of this country, and in that tradition foundations have always been a separate category, separate even to that extent that all the existing foundations in the RS have been founded under separate laws. Due to this, the Draft consists a big progress in comparison with the existing practice already by the fact that it proposes one law for all foundations, that this law is common for the associations of citizens also, that it contains may provisions pertaining to associations and foundations which are identical and that the differences between them have factually been reduced to a minimum level. We agree that these differences could be further minimized by equalizing the terminology used - the term "common good" used when speaking about foundations may without any essential difference be replaced with the term of "public interest" used when speaking about associations (although in stricto sensu there are differences between these two terms).

The Relation between the Provisions Linked to Foundations and Other Legal Regulations

We believe that the concern of the IAT members in relation with the potential contradictions between the draft and the provisions in the other presently applicable provisions pertaining to treatment of gifts, wills and inheritance is unnecessary, because we believe that there are no such contradictions. Nevertheless, we shall again review this warning and we shall inspect all the necessary regulations.

The Role of the Founders in Managing Foundations

As the IAT members have well noticed, the LG has left certain rights to the founders because the LG did not start from the concept of irrevocability of the decision on the establishment of a foundation. Therefore, later, Article 49 envisages the right of the founder to dissolve the foundation, but this right is reserved only for the founder, but not for his successors (this is at the same time the response to the question of the IAT members as to what we meant by Article 26, when speaking of the non-transferability of the right of founders to successors); therefore Article 56 of the Draft envisages that the founder who is

a legal entity be returned his property in case of dissolution of the foundation during his life.

We agree that the approach proposed by the IAT members is also acceptable to the very same extent like ours, and that it can be well argumented. The biggest weight lies with the argument that nobody shall bring a decision to establish a foundation without previously having a good thought and weighing of all the aspects and consequences of such a decision. Therefore, this law could envisage that such a decision be irrevocable. On the other hand, we had in mind that such decisions are brought either in older age or by testament, so, since we did not envisage the transferability of the founders' rights, we did not consider that the possibility of revoking the decision on establishing a foundation serious or dangerous. Since, after this explanation, it is clear that the differences between the standings of the IAT and the LG are not so large as it seemed at the first sight, they can be resolved so that the LG accepts this suggestion by the IAT although, of course, this may cause the question to arise as to whether this limitation shall deter the founders from establishing foundations. However, we also believe this question to be more of rhetoric rather than of practical nature because we do not believe that any serious consequences could derive from any of the two provisions. Besides, we also believe that - should there be many foundations registered over the upcoming period and should their activity become socially more significant than it is at present - anyway there will be a need to bring a separate law on foundations.

Dissolution of Foundations

The IAT observation is logically consistent, if the irrevocability of the decision to establish a foundation is accepted. The LG believes that both the former and the latter suggestions may be accepted, that is, that the rule may be accepted that the decision to establish a foundation is irrevocable, and that in the case of dissolution of a foundation, the property given by the founder as the initial share shall not be returned to him. This means that line item 8 of Article 49 of the Draft should be deleted (the provision giving the right to the founder to bring a decision to dissolve a foundation), and paragraph 2 should be deleted from Article 56 (according to which all the property shall be returned to the founder if he brings a decision to dissolve a foundation).

Property of Foundations

The IAT members are only formally right in bringing our attention to the fact that the Draft contains no provisions on the property of foundations because there has been a mistake in Article 43, paragraph 1, omitting that this article pertains not only to the property of associations but also that of foundations. This is only logical, if it is accepted that no essential difference exists between these two types of organizations, except for the administration structure. Therefore, the property of foundations is directly regulated by Articles 43 (what consists the property of a foundation), 44 (supervision of the property) and 45 (obligation of keeping business books and completing financial statements), and indirectly also by articles 27 (obligation that the act of incorporation should contain the listing of property and the proof of its origin), 28 (the obligation that the statute of a foundation should regulate the issues of use the foundation's property, the procedure for management and disposal of the foundation's property, transfer of property in the case of the foundation's dissolution), 32 (the obligation of the management board to manage the foundation's property with the care of a good businessman) and 33 (the obligation that the management board member may not take vote on the issues in which he himself has any economic interest, or his spouse or relatives). Of course, property could be attached bigger attention, but the LG believes that this is sufficient to cover the fundamental issues.

The Role of the Government in Relation to Foundations

Article 25 of the Draft, when speaking about establishment of foundations, actually does provide for the prior approval of the related ministry because based on the LG concept, the goal of establishing foundations is inevitably common benefit or their aim is charity. Since classification into some of these categories entails economic benefits (which shall be regulated in other laws), somebody must assess whether the appropriate requirements have been met. The LG members have discussed the option of assigning this task to an independent body or a government authority. The opinion is however dominant that this be a government authority because it has been assessed that the risks inherent with this option is relatively small. The complaint is justified that the ministry may deny registration to a

politically undesirable foundation, as it has happened in the immediate vicinity (the instance of the Soros Foundation which is undesirable in Croatia and Serbia), but this can be mitigated by introducing objective indicators such as has been done in Article 16 of the Draft for associations, or the IAT position may be accepted to introduce for the foundations also the principle of registration instead of the principle of approval, with the emphasizing of the fact that some countries which are counted among liberal countries have also introduced prior approval of the related ministry for foundations.

ADDITIONAL DETAIL

Within the non-governmental sector in BH, there are special expectations from the LEA/LINK project in the part pertaining to bringing of fiscal regulations, whose present inadequacy is a separate limiting factor for the development of the non-governmental sector. The Law Group has accepted the IAT suggestion that the fiscal regulations have no place in the integral text of the Draft, both for practical and for legal reasons. The letter dated March 11, 1998, contains a justified suggestion that the Law on Associations and Foundations is a "wrong place" for provisions on the tax treatment on the part of the tax authorities, which shall always attempt at applying the general tax law rules. Therefore, the Law Group shall prepare separate annexes to amend the tax laws. This job shall be completed until the end of May, in order to put these materials into discussion together with the mother law on associations and foundations.

Best regards,

Head of the Legal Task Force
Dr. Nedjo Milicevic

In Sarajevo, May 16, 1998