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COUNTRY REPORT FOR NGO LAWS AND REGULATIONS IN POLAND

Consistency and Clarity of the Laws

While the specific term "Nongovernmental Organization" (NGO) remains undefined under the Polish law, there are two main laws that set forth conditions for the existence of the most common forms of NGOs; these are the Law on Foundations and the Law on Associations. In addition to these laws, however, there are countless other laws that define various kinds of NGOs. These include the Law on Higher Education, the Law on Physical Culture and the Law on Hunting. There are also at least six separate laws regulating the relations between the government and various religious denominations and define NGOs that can be established by them. In addition there is a Law on Labor Unions and a Law on Organizations of Employers. Finally, there is a separate administrative order, establishing the Polish Red Cross. All of these documents, and several more (the above list is not exhaustive), define organizations that can be categorized as NGOs. And many of them define various privileges and limitations under the law.

Given this very complex environment, there is a great lack of clarity and consistency in the law. Complicating matters further are many other laws that apply directly to NGOs. These include the Law on Registration, the Law on Economic Activity, the Law Limiting the Undertaking of Economic Activities by Public Officials, the Law on Procurement, the Budget Law, the Public Finance Law and the three separate laws on the operation of three different levels of self-government listed from the largest to the smallest: wojewodztwo, powiat and gmina. Of course also of great impact are the Law on Income Tax of Physical Persons and the Law on Income Tax of Legal Persons.

The legislative culture that has taken hold in the post-communist Poland is one that frequently rushes poorly conceived or unfinished draft laws to passage. The general approach is one of revisiting laws every so often in order to improve on them. The term for this, "nowelizacja," does not have a good English equivalent. The best translation is perhaps "overhaul." Thus laws are not just amended, but "overhauled" every few years. Almost all of the laws listed above have been subjected to this in the past five years, most in the past two to three years.

The Polish courts are hard pressed to keep up with the numerous conflicting laws and the frequent changes in the various laws. The result is a certain inconsistency and unpredictability of court decisions, leading to further lack of clarity.

Constitution

The Constitution, in force since October 17, 1997, states the following in the preamble: "...with the wish to forever guarantee civil rights and to ensure honesty and efficiency in

the operation of public institutions... ...we enact the Constitution of the Republic of Poland as the basic law of the land, based on respect for liberty and justice, cooperation of authorities, social dialogue and the principle of subsidiarity that strengthens the rights of citizens and their common good."

The Constitution, which was approved by a general national referendum, is modeled in many parts on other constitutions of free and democratic nations. It is based on the sovereignty of the people and guarantees basic human rights typically guaranteed in free and open societies, including the freedom of speech (art. 53), assembly (art. 57) and association (art. 58). The Constitution also expressly guarantees the freedom to form, among others, associations and foundations (art. 12).

Types of Organizations

Many different types of NGOs are recognized as legal persons based on a multitude of laws, as outlined above. The two principal types of NGOs, however, are Associations and Foundations. The formation and basic operation of these entities are governed by the Law on Associations and the Law on Foundations.

The Law on Associations defines an Association as a self-governing, lasting (membership) organization, formed of free will and with a nonprofit motive. The Law provides that Associations may be formed by Polish citizens or foreigners who are domiciled in Poland, who are not otherwise disqualified from performing legal acts. The qualifications to form an organization are distinguished from the qualifications to join the organization. The Law asserts that no one can be forced to join or prevented from freely withdrawing from an Association. There is also a prohibition on forming Associations that require unqualified obedience of the members to the Association leaders.

Interestingly enough, the Law on Foundations never defines what is a Foundation. Thus the specific definition must be inferred from other provisions of the Law. Generally speaking, a Foundation is a non-membership organization, established by a founder (who provides the Foundation with a starting capital) for a public benefit purpose. Note that this is a different understanding from many other countries, where a Foundation may be formed for any legal purpose not just a public benefit purpose. A foundation must also be formed for a nonprofit purpose and as of recently, may not be formed by the State Treasury.

The law presently does not explicitly distinguish NGOs that provide public benefit purpose. But note that Associations may be formed for any legal nonprofit purpose, thus providing for the possibility for either public benefit organizations or non-public benefit organizations (e.g. mutual benefit organizations), while Foundations may only be formed as public benefit organizations. Missing completely from the Polish legal scheme is the possibility of forming non-membership, non-public benefit nonprofit organizations.

Purposes

An Association is free to define its purposes, operational program, and organizational structure and to pass internal resolutions about its operations. It is limited in its purposes and activities only by other laws that are necessary to ensure national security, public order, protection of public health and morals and the protection of rights and freedom of others.

A Foundation may only be formed for purposes that are economically beneficial or useful to the welfare of the Polish Republic, particularly ones such as: protection of health, economic and scientific development, enlightenment and education, art and culture, public welfare, protection of environment and historical monuments.

Other types of NGOs, from volunteer fire fighting organizations to private schools to church sponsored charitable organizations are organized for the purposes specified in the applicable laws.

Registration Requirements

In order to form an Association that is recognized as a legal person, the law requires that at least fifteen persons approve a statute and elect an organizing committee. The committee registers the association by filing with a regional Registration Court a petition for registration, together with 1) the statute, 2) a list of the organizers, including their names, places and dates of birth, addresses and signatures, 3) minutes of the meeting at which the organizing committee was elected, and 4) the interim address of the Association. An Association may be formed by Polish citizens or foreigners domiciled in Poland, who are of legal age and have no limitations of their rights (i.e. through felony conviction, etc.). Legal persons may not be founders, but may become members of an Association, and are limited to a status of "supporting members." This status is poorly defined, but seems to imply that they are nonvoting members. Additionally, Associations of Associations (umbrella Associations) may be formed by just three Associations.

The Registration Court is obligated to make a determination with respect to the petition within three months. However there is no default provision should the court not meet this timeframe. The Court must deliver copies of the registration documents to the regional government authorities that may also render an opinion. Should the court find a need it may order a hearing with the participation of the organizing committee. The only justification for denying registration is that the filing documents do not meet the requirement of the law. Upon a favorable decision on registration, the Association may begin its activities and is formally entered into the Register.

There is also a special form of a Simplified Association that does not need to be registered. The organizers only need notify the authorities about the formation of the Simplified Association (providing the appropriate information). Just three persons are

needed to form a Simplified Association, but such Associations are not legal persons and are severely limited in their activities.

A Foundation may be formed by Polish citizens or foreigners, who are of legal age and have no limitations of their rights (i.e. through felony conviction, etc.). It may also be formed by legal persons, foreign or domestic. A foundation formed under Polish law, however, must be based in Poland. Foundations may be established through a notarized document expressing the wish of a founder to form a Foundation, or by a will. The founding document must be filed with the appropriate regional Registration Court together with the proposed statute of the proposed Foundation. (In the case of a Foundation to be established by a will, where no statute is provided, the Civil Code provides the appropriate regulations.) The statute should provide the concrete purpose of the Foundation. In the case where the Foundation plans to engage in economic activities, a minimum starting capital of 1,000 zł (\$250) is required.

The Registration Court examines the filed documents and makes a registration determination based on whether the documents meet the requirements of the law. There is no legally proscribed timeframe in which this must happen. However, since a Foundation may only be formed for public benefit purposes (see above), the court must most significantly make a determination whether the proposed statutory purposes meet this requirement.

A consistent determination of this has proven elusive in recent years as the court has often struggled with trying to make a determination of what is and what is not a public benefit purpose, guided only by the few brief examples contained in the Law on Foundations (see above). Also, through the year 2000 all of the Foundation registration procedures were handled by only one central court. Beginning January 1, 2001, however, this responsibility has been divided among sixteen regional courts. It is unclear exactly what effect this will have on the registration of prospective Foundations, but one may speculate that this will only further add to the unpredictability of decisions.

A Foundation gains legal person status upon a favorable determination on registration by the Registration Court and subsequent entry in the Register. At this time, the Registration Court also designates the "appropriate minister" to oversee the operations of the Foundation. This "appropriate minister" may be designated by the Foundation in its statute. Typically, it is the minister whose competency comes closest to the purposes of the Foundation. If the Foundation has a limited geographical scope of operation, the appropriate wojewoda (regional public official) is also notified.

NGO Register

The Law on National Court Register establishes a separate register for associations, other civic and professional organizations, foundations as well as public health clinics. The Register is maintained by the Central Information of the National Registration Court in cooperation with the Regional Registration Courts.

In the section on Associations the following information is entered: 1) name of the Association as well as the region where it operates, 2) the date of the entry in the Register, 3) purposes of the Association and the proposed means of their realization, 4) names of the members of the organizing committee, 5) composition of the governing organ and the address of the Association, 6) information on who may represent the organization and how it undertakes financial obligations. After registration, all resolutions of the court with respect to the organization are also entered. The governing body of the Association is also obligated to inform the court within one month of any changes to the above information and changes in its governing statutes, and these are also entered in the Register. Thus with respect to Associations, the Register is generally accurate and up to date. Organizations that are denied Association status are not entered in the Register. Defunct Associations are purged from the Register.

In the section on Foundations the following information is entered: 1) entry number, 2) name, address and purpose of foundation, the date of formation and a few words about the founder, 3) the designation of the appropriate minister, and identification of the appropriate wojewoda (regional public official), 4) a note on the foundation statute, 5) names of the members of the governing body (and other organs) of the Foundation as well as the scope of their authority, and in the case of suspension of the governing body - the name of the court appointed caretaker, 6) the type and scope of proposed economic activities, 7) other notes, but particularly ones dealing with motions by the appropriate minister or wojewoda to suspend the Foundation's governing body, the court's appointment of a caretaker and the rescission of such appointment.

Like an Association, a Foundation is also obligated to inform the court about any changes to the above information and changes in its governing statutes and these are also entered in the Register. Thus with respect to Foundations, the Register is also generally accurate and up to date. Organizations that are denied Foundation status are not entered in the Register. Defunct Foundations are purged from the Register.

The Association and Foundation Register is open for viewing to any interested third party.

General Powers

Generally, Associations and Foundations have all the powers of legal persons. However, in the case of a Foundation, its ability to conduct economic activities is severely limited. While it may seem counterintuitive, a Foundation is only allowed to conduct economic activities that do not coincide with its statutory purposes. Thus, for example, a Foundation that is formed for the purpose of working for cleaner environment would be prohibited from selling books or taking fees for seminars on the topic, or even contracting with the government to undertake clean-up efforts. The same foundation, however, would be permitted to operate a gas station to help fund its work. This is perhaps one of the most far reaching flaws of the present Polish NGO law.

Membership Organizations

The Law on Associations sets out the rules for membership organizations. There is no prohibition on Associations that may want to limit membership or remove members. Rules with respect to membership may be initially adopted by the Association's organizing members and later by the membership. Rules on membership do specify that young people ages 16-18 may freely join Associations, while those under the age of 16 may only join as nonvoting members and must have the permission of a parent or guardian in order to do so. As already stated above, The law also asserts that no one can be forced to join or prevented from freely withdrawing from an Association. There is also a prohibition on forming Associations that require unqualified obedience of the members to the Association leaders.

Governance

The Laws on Associations and Foundations each separately prescribe governance requirements for these organizations.

An Association, if it does not specify otherwise in its statute, is governed by decisions undertaken at a general membership meeting. However, the statute does not prescribe quorum requirements, nor does it address the issue of what portion of the membership vote is required for passage of a resolution. The law allows that the Association statute prescribe that governance may be delegated to a meeting of elected delegates. But again all the details of such a solution are left to the discretion of the Association. The Association is, however, required to have a management and an organ of internal control. The election and functioning of these organs should be prescribed in the statute. Finally, an Association may form subsidiary organizations. The governance of these must also be set out in the statute, or if these are to have their own legal person status, this also must be set out in the statute.

A Foundation is required to have a management that directs its activities and represents it at large. A Foundation may also have other organs. The law, however, does not prescribe any specific competencies for any of these organs. Typically foundations, in addition to the management have a board of directors that sets organizational priorities and appoints the management. But again, all of these decisions are left to the discretion of the organizational statute.

Neither the Law on Associations nor the Law on Foundations provides many necessary anti-abuse provisions dealing with such important issues as conflicts of interest and self-dealing.

Dissolution, Winding Up, and Liquidation of Assets

An Association may dissolve on the basis of its own resolution or it may be dissolved by the court. In the first case, the members of the organization act as liquidators, unless the statute or a resolution of the governing organ dictate otherwise. In the second case, the court appoints a liquidator. The cost of the liquidation is born by the Association and the remaining assets are distributed for the purposes named in the statute or by a liquidation resolution. In the absence of a directive on distribution of assets, the court appropriates the assets to a public benefit purpose.

A Foundation is dissolved if its purposes have been achieved or if its financial assets have been exhausted. The Foundation's statute should prescribe the procedure for the dissolution. If there is no such prescription in the statute, or if the statute is not being followed, the appropriate minister or wojewoda (regional public official) petitions the court for the dissolution. If the statute does not specify how assets are to be distributed upon dissolution, the court decides on the distribution of these assets, taking into account the purposes served by the Foundation.

Regulation

The oversight of Associations is entrusted to the appropriate wojewoda (regional public official). However the government's power is limited to demanding copies of resolutions adopted by an Association and demanding any necessary clarifications. No reporting of any kind is required. The real oversight power then is vested in the court, which, on the motion of the wojewoda or the prosecutor can fine the Association up to 5,000 zł (\$1,250) for not complying with the demands of the wojewoda and invalidate resolutions adopted by the Association that do not comply with the law or with the Association's statute. The court may also dissolve the Association, for gross or persistent noncompliance with the law or the Association's statute when there is not a possibility of restoring compliance.

Unlike an Association, a Foundation is required to file detailed annual activity and financial report. The format of the report is strictly prescribed by government regulations. The report is filed with the appropriate minister but the Foundation must also make it available to the public. Interestingly, the appropriate wojewoda (regional public official) can view the report only on the basis of this public access. As with Associations, real oversight power over Foundations is vested in the court. On the motion of appropriate minister or wojewoda the court may invalidate resolutions adopted by the Foundation that do not comply with the law or with the Foundation's statute or are inconsistent with its purposes. The court may also suspend the management and appoint a caretaker manager, if the noncompliance is not addressed in a time prescribed by the appropriate minister or wojewoda, for the purpose of bringing the Foundation into compliance, or ultimately, for the purpose of appointing a new management. The decisions of the court may be appealed according to the provisions of the Civil Code.

Foreign Organizations

The Law on Associations and the Law on Foundations do not regulate foreign organizations. Polish Associations and Foundations, however, are in no way prohibited from receiving foreign grants. Foreign Foundations and Associations may register representatives in Poland; representatives of foreign Foundations are subject to reporting requirements.

Miscellaneous

Under Polish law, there are no explicit rules for mergers and split-ups of NGOs. Neither are there special rules for investing the property or an endowment of an NGO. However, with respect to Foundations, the location of assets in anything other than a bank account may carry with it unpredictable tax implications. The Highest Administrative Court has ruled that income invested in anything other than a bank account will be considered as income that is not being applied to the statutory purposes of the Foundation and thus considered taxable income.

The Law on Associations specifically states that an Association has a right to express its views with respect to public affairs. There is no such clause in the Law on Foundations and of course, both Associations and Foundations need to be mindful of the consistency of its advocacy activities with its own statute. This, however, seems to be the only real limitation on these kinds of activities.

Income Tax

Tax law does not provide for any list of types of organisations that are tax exempt. Instead of that, it is stipulated that tax exemption is available for taxpayers whose activities (as shown in their statutes or articles of incorporations) include the following items:

- science and technical scientific research;
- education;
- culture;
- sport and physical exercises;
- environmental care;
- support for infrastructure development in rural areas (roads, telecommunication and networks for providing of water);
- charity,
- health care and social care;
- occupational and social rehabilitation of the disabled;
- religion.

The tax exemption is applicable if an organisation declares that an income is designated for the purposes listed above. This tax exemption is valid as long as an organisation does not use exempt income for purposes different than these initially declared. The exception to this rule concerns membership dues (an organisation may use it for any purposes, except for business operations). Also note however, that the tax authorities understand “use of income for purposes other than these set forth by the tax law” very extensively. In particular, the Highest Administrative Court has ruled that income is “used for other purposes” even if it is spent for typical passive investment, e.g. purchase of treasury bills.

All types of income is eligible for income tax exemption, except for income derived from activities explicitly defined by the tax law, which are:

- production of alcoholic beverages, tobacco, fuels, electronic devices, precious metals (and goods made of precious metals),
- trade of precious metals (and goods made of precious metals).

Generally, there are no advance tax rulings available under the Polish tax law. However, a ruling from tax authorities may be asked for if a taxpayer is in doubt relating to his tax position (e.g. if an organisation is not sure as to whether its activity falls within the scope of exemption).

An organisation taking advantage of exemption may engage in business, political or any other activity. Also, the presence of business activity does not effect possible non-taxability of other income.

Currently there are no minimum distribution rules (such rules existed in the past, but were repealed). This means that tax exempt income may be accumulated without any restrictions.

Charitable donations and donations for all other purposes enumerated as exempt are deducted from taxable basis in both personal and corporate tax. The deduction from taxable basis, however, is subject to the following limitations:

- donations for charity (and other purposes such as religion, public security, national defence, environmental care, fire protection, housing investment carried by local governments) are deducted from taxable basis insofar as they do not exceed 10% of the taxable basis;
- donations for certain other purposes (science, education, culture, sport and physical exercise, rehabilitation of the disabled, health care and social care, support for infrastructure investment in rural areas) are deducted from taxable basis insofar as they do not exceed 15% of the taxable basis.

Total amount of all deductible donations may not be higher than 15% of the taxable basis.

There are no strict limitations regarding type of organisation to which donations are transferred; the only restriction is that donation, in order to qualify for tax exemption, may not be made for the benefit of:

- natural persons;
- entities engaged in production of alcoholic beverages, fuels, tobacco, electronic devices, precious metals,
- entities engaged in trade of precious metals.

No carryforward of unused deductions is allowed.

Customs Duties

The customs exemption is stipulated directly by Customs Code. There are no schedules (etc.) which have binding power in this regard.

Import of medical equipment and materials (medicines, blood etc.) that constitute humanitarian relief and are imported by entities whose activity includes humanitarian aid are exempt from customs duties, but only if the goods imported are (i) received free of charge or (ii) purchased using funds derived from street charity collections.

Customs duties exemption is claimed during the customs clearance (although there are no formal exemption certificates or specific procedure), i.e. SAD import document must be filled in appropriately and documents concerning identity of importer must be presented.

There are no specific anti-abuse provisions with respect to Customs duties exemptions.

VAT Tax

There are no exemptions in VAT available for specific kinds of persons/organisations. If a person carries out a sale of goods or services, this person may elect to be in the VAT system even though he is not in this system by the virtue of law. On the other hand, a person not involved in any VATable activities may not enter into the VAT system. In case of import, each importer is a VAT payer automatically. The VAT rates are 0%, 7% and 22%.

A varied list of goods and services are zero-rated or exempt from VAT on the basis of the VAT Act. Moreover, the Minister of Finance's decree on VAT provides an additional list of VAT exempt goods and services.

Gift and Estate Taxes

Gift, estate and inheritance taxes do not apply to organisations at all. This tax is levied on natural persons only, while legal persons (inclusive of non profit bodies, such as associations or foundations) are subject to income tax in reference to gifts/inheritances received (in other words, gifts received create income for income tax purposes). Like other income, however, gifts/inheritances received may qualify for exemption from income tax in the same way as any other income, which effectively means that gifts used e.g. for charity purposes are tax exempt.

Taxes on Real Estate

Tax exemptions on real estate are available for the Associations conducting certain activities (propagation of education, sports, recreation and science) for the benefit of the youth and children. This exemption is not available for real estate used in business activity. Other types of organisations pay real estate tax according to the general rules. (Note that real estate tax charged on the plots and buildings, which are not used for business purposes, is very low and does not create an excessive burden on the owner.)

Compliance

No studies have been done on NGO compliance with the law. As the law is frequently unclear and inconsistent there is often difficulty in complying with every aspect of it. However, the compliance with the general framework and intent of the Law on Associations and the Law on Foundations seems to be very good.

Nevertheless, anecdotal evidence suggests that there is a popular perception that NGOs have been used to avoid paying taxes that ought to be paid on business or commercial profits and that they have also been used by politicians or government officials to benefit themselves politically or financially.

The law generally does not provide sanctions specifically for NGOs with the exception of the ones discussed under Governance above. In general the sanctions are weak and non-self-executing.

Government Funding

The government funding of NGOs is presently the hottest topic for Poland's NGO community. NGOs may compete for funds on the basis of the Law on Procurement, while local self-governments define their own funding protocols. Access to funds, however, is often impeded by the local self-governments' mistrust of NGOs. Local self-governments vary vastly from one to another, and while some are eager to cooperate extensively with NGOs, many are not. Thus, the relations between the NGOs and the local self-governments present a most varied landscape. Much of this will need to be

solved with political willpower, as experiences with the good work of the NGO sector multiply.

There is, however, a great impatience on the part of the sector to force the government and self-governments into cooperation, by invoking the subsidiarity principle from the preamble of the Constitution. While some creative solutions may soon be tested, the biggest hope for the future would seem to be providing for strong anti-abuse regiments in the NGO sector, that will turn self-government cooperation with the NGOs into undisputed good policy.

Privatization

No special legal forms or procedures have been created to facilitate the privatization into the NGO sector of state assets or programs. In practice, the most essential NGOs like the Polish Red Cross or volunteer fire fighting organizations have been created with special laws or administrative orders.

Conclusions

The most important legal issues with respect to Poland's NGO sector are the impermissibility of Foundations to engage in economic activities related to the purpose of the Foundation and their inability to prudently invest capital without the investments being characterized as "non statutory purpose expenditures," and thus subject to tax.

The latter issue is presently being addressed in the courts. Also, an amendment to the tax law has been introduced in the Parliament by a broad coalition of MPs that, if passed, will address this problem.

Thus, the first issue is perhaps the most serious one presently facing NGOs. As the premise seems to be bizarre, noncompliance is rampant. For the most part there is, however, no strict enforcement of this law, except when the issue arises with respect to registering a new Foundation. Amending the Law on Foundations to permit Foundations to engage in all kinds of economic activities should be a top priority. The Amendment should also free Foundations to be organized for any lawful purpose, rather than only for a public benefit purpose.

A draft law on Cooperation of Public Administration Authorities with Nongovernmental Organizations has been in preparation for a long time. However, many key issues with respect to this document remain unresolved. Most notably, a reasonable definition, and oversight and certification regiment of public benefit organizations has proven to be elusive. Also, there is difficulty in codifying the permissibility of economic activities by public benefit organizations and the appropriate taxing approaches with respect to these activities.

Perhaps most important from the perspective of Poland's NGOs is a lack of agreement on the role that NGOs should play in the making of public policy and the access of NGOs to public funds. From an international perspective, however, the most alarming fact about the present version of the draft law is its almost complete avoidance of necessary anti-abuse provisions, whose absence will continue to promote the general public perception of NGOs as corrupt organizations.