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Comparative Report on
Turkish Foundation Law Provisions

September 2004

Summary of the Comparative Report Project

This report was developed as part of TUSEV's Comparative Reports Project, an initiative of TUSEV's NGO Law Reform Programme. The project was implemented with the technical assistance of the International Center for Not-for-Profit Law (www.icnl.org). The objective of this project was to:

- Conduct extensive research to identify specific issues in legislation governing NGOs (including both associations and foundations) which merit reform;
- Examine each specific issue from a comparative law perspective and
- Propose specific and feasible resolutions.

The desired impact was to develop a succinct set of reports listing issues which merit reform, providing key decision makers with comparative perspectives and information on international "good practices".

There were three separate comparative reports developed under this initiative: Associations Law Comparative Report, Foundations Law Comparative Report and Public Benefit Law Comparative Report. The selection of the issues to be examined in each report was based on experiential inputs from NGOs (TÜSEV receives at least 10 calls weekly from NGOs facing several legal and fiscal problems), comments from other NGOs, and analysis of legislation/regulations. Some of the topics covered in the reports are:

- Cumbersome regulations and excessive interference of State in internal affairs of NGOs;
- Prior authorization requirements to engage with international organizations;
- Limitations on freedom of association;
- Weaknesses in public benefit definitions and application of this status.

The reports were developed in Turkish and English, and disseminated to the general public as well as key decision makers, and parliament commissions. TUSEV expresses its appreciation to the International Center for Not-for-Profit Law (ICNL)[1] and Bilgi University Law Faculty[2] for their research and invaluable inputs in the preparation of this report on foundations law.

Overview of Legal Framework and Regulatory Status of Foundations in Turkey

Foundations formed after the establishment of the Republic of Turkey are regulated by the General Directorate of Foundations (abbreviated as GDF) which is a division in the Prime Ministry, with a Director appointed by the Prime Minister. The GDF has approximately 300 personnel with district offices all over the country, and is responsible for the administration of over 40.000 'old' (Ottoman) foundations which no longer have descendents, approximately 300 old foundations which still have descendents, and for the regulation of approximately 4.500 'new' (Republic Era) foundations, 1.500 of which are State-formed (public foundations).

The first foundation law in the Republic of Turkey was developed in 1935, and revised in 1970. Since then, the legislation has been updated/modified with regulations (details on how the law is applied), decree law, statutes and several communiqués. A new law is now being drafted, which intends not only to address much needed reforms, but also to harmonize the law and collect it under one framework. The law is currently in the process of being drafted, and is expected to be presented to Parliament in late Fall 2004.

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Report Contents and Structure

As stated above, this report was developed by capturing current operational problems faced by foundations as well as analysis and research of foundation law, regulations and a multitude of circulars which have been issued over the past years. Indeed, the 'scattered' state of foundations law made this task quite challenging. This report addresses the following key issues which were considered to be critical segments which require reform:

- Endowment
- Founding Members
- Board Membership and Board Meetings
- Asset Management
- International Cooperation

Each section in the report provides an overview of the current situation and challenges, followed by comparative perspective and comments on international good practice on each respective topic.

A. Endowment

According to Turkish Civil Code, there is no minimum capital requirement for the endowment of a foundation. The only criteria requires that there be 'enough' capital/assets allocated to realize objectives as stated in the foundation by-laws. The actual amount is determined on a case-by-case basis by the courts during the registration process. However, two communiqués of General Foundations Directorate dated 21 September 1997 and 21 January 1998 introduced additional limitations to these criteria. According to the provisions, the establishment of a foundation requires a minimum (as of 2004) of 375 to 940 Billion TL (app. USD 250,000 to 627,000) which is determined specifically (by the courts) according the purpose of the foundation.

Comparative Perspective

In Europe, foundations are based on the Roman law concept of *universitas rerum,* requiring the designation of property for a particular purpose. The approach for determining what constitutes sufficient capitalization (sometimes styled as an "endowment")[3] varies throughout Europe. Three approaches, however, are most common:

(1) A fixed amount explicitly stated in law;
(2) A general requirement that capital be sufficient to accomplish the foundation's purposes;
(3) No initial property requirement.

Among countries requiring a fixed amount of minimum capital at establishment, most countries require between 5,000 and 100,000 Euro. The following provides some prominent examples of countries requiring set minimum endowments by law[4]:

[3] For purposes of this section, we will use the terms "minimum capitalization" and "minimum endowment" interchangeably.
[4] See Foundations in Europe, Edited by Schluter, Then & Walkenhorst, Berterlsmann Foundation 2001. Please note that the amounts are in some cases only approximate.

- Austria: 72,670 EUR required for private foundations *(Privatstiftung)*;
- Belgium: 24,800 EUR required as an initial capital contribution, based on a Ministry of Justice requirement;
- Denmark: 34,000 EUR required as minimum initial capital;
- Finland: 25,050 EUR required as minimum initial capital;
- Liechtenstein: 30,000 CHF (approximately 19,500 EUR) required as minimum capital;
- Czech Republic: 500,000 CZK (approximately 15,560 EUR);
- Slovakia: 200,000 SK (approximately 4970 EUR).

Similar to the listed countries, France also requires a fixed initial capital to establish a foundation. But France requires significantly higher initial capitalization, and indeed the highest among EU Member States. So-called state-approved foundations must have minimum capital of 762,000 EUR. Even then, the Conseil d'Etat has the power to determine whether a foundation's endowment is sufficient to pursue its aim and can demand additional initial capital.[5]

In several other countries, the law sets no fixed minimum endowment amount, but instead requires that minimum assets at establishment be sufficient or appropriate to meet the foundation's purposes. In Austria, for example, the Federal Foundations and Funds Act specify no minimum value for the capital of a general interest foundation *(Stiftungen)*; capital must be sufficient to achieve the stipulated purpose. Similarly, in Germany, there is no minimum capital required by law, but regulatory authorities must determine whether or not foundation assets are sufficient to pursue the stated purpose; typically authorities require a minimum of 50,000 EUR for foundations. Also, in Italy, there is no minimum endowment required by law, but the state must assess whether its assets will be sufficient to fulfill its aims. Regulatory bodies (at the ministry or regional levels) may set different minimum amounts; the highest minimum amount generally required by ministries is about 100,000 EUR.

The trend among the recently acceding EU countries is not to require a fixed minimum endowment. Hungary and Poland, as well as Estonia, Latvia, Lithuania and Slovenia generally require that minimum assets be appropriate for the purposes of the foundation. Registration judges in Hungary typically require foundations to have initial assets amounting to between 100,000 – 200,000 HUF (390-780 EUR). Similarly, in Poland, the law does not establish a minimum or maximum value for the initial endowment; where a foundation plans to engage in economic activities, however, a minimum initial endowment of 1000 ZL (210 EUR) is required. Bulgaria requires no initial capital for the establishment of a foundation.

Interestingly, countries' decisions concerning minimum endowment requirements are often not closely correlated with their level of economic development. Indeed, similar to the approach in Bulgaria, several West European countries adopt an extremely liberal approach toward initial endowments, not requiring any initial property at all. For example, Dutch law requires no property at the time of establishment; instead, it is sufficient that assets are available when needed. Government supervision is only relevant where the foundation lacks any resources and has no prospect for acquiring any resources, which can trigger court-ordered dissolution. In England, no minimum endowment is required, although the lack of sufficient financial means could lead to a considerable delay in being registered with the Charity Commission.

[5] It is therefore most accurate to speak of French law as a hybrid system, since it both requires a fixed initial capital and invests the Conseil d'Etat with discretionary authority to review the initial capital and determine its sufficiency.

A common question is whether it is better: (1) to require a fixed, albeit nominal, capitalization requirement, or (2) to grant registration authorities the discretion to determine what constitutes a sufficient amount. The first approach offers clarity and an objective basis for decision-making. The second approach offers more flexibility. At the same time, without clear criteria as to what constitutes "sufficient" capital, registration officials are in an awkward position, effectively required to exercise discretion in the registration process. In the end, there is no "best practice" in this regard. Resolution of this issue is a country-specific decision, requiring an analysis of domestic legal requirements and whether the benefit of flexibility outweighs the risk that registration officials will exercise their discretion in an arbitrary and restrictive manner.

Finally, it is significant to note that countries insisting on high capitalization requirement often consider the creation of a third not-for-profit organizational form: a non-membership, non-property form. These organizations are primarily grant-seeking or income-generating NGOs. Often these NGOs are service-providing organizations, such as think tanks, social service organizations, not-for-profit universities, and training centers. This form has a variety of appellations, including the so-called "public benefit companies" common in the Czech Republic (and Hungary).

B. Founding Members

According to the Turkish Constitution Article 33, all real and legal persons have the right to establish a foundation. This right can only be restricted in the interest of national security and public order, preventing crime, protection of public health or good morals, and protecting the rights of others only with the law.

In addition to these provisions, the Civil Code also requires founders to have "the capacity to act" (which is described in detail in the Code).

However, two communiqués issued by the General Directorate of Foundations in 1997 and 1998 created limitations on the original provision as stated in the Civil Code. According to these regulations, real persons convicted of a crime (including political and ideological convictions) and/or sentenced to imprisonment for over six months indefinitely revokes their eligibility to be a founder.

Comparative Perspective

A restriction precluding convicted criminals from founding a foundation would seem inconsistent with international law and regional good practices. This section will examine the application of the European Convention on Human Rights and Fundamental Freedoms to this issue, which will serve as a springboard for subsequent international law analyses.

As a general rule, any natural or legal person may establish a foundation in European countries. In Poland, for example, foundations may be founded by "individuals regardless of their citizenship and domicile, or by legal entities with offices in Poland or abroad." In Hungary, a private individual, legal entity or unincorporated economic association may form a foundation; there are no citizenship or residency requirements. In Germany, private individuals, business corporations, associations and public bodies may establish a foundation; only the foundation itself is precluded from doing so. No restrictions apply to founders in the Netherlands.

It seems virtually unprecedented to preclude convicted criminals from establishing foundations.[6] Indeed, Vaclav Havel, as a former political prisoner, would be precluded from establishing a foundation. Consider also the example of Nelson Mandela in South Africa.

Barring convicted criminals from founding foundations would also seem problematic under international law, and specifically the European Convention of Human Rights and Fundamental Freedoms (ECHR). This is true even if the government retained the power to waive this prohibition for particular individuals. The Convention extends a whole series of rights to individuals – and in some cases, to legal entities[7] – including the freedom of association, freedom of speech, the right to privacy and the right to property. Restrictions are only allowed under specific conditions and on specific grounds:

1) A restriction must be prescribed by law;
2) Restrictions are only allowed in the interest of national security, territorial integrity and public safety, to prevent disorder and penal acts, the protection of public health or good morals, the good name or rights of others, to prevent the disclosure of information received in confidence or to guarantee the authority and impartiality of courts;
3) Restrictions are only acceptable when necessary in a democratic society, which incorporates the principle of proportionality.
4) Restrictions must not violate Article 14 of the Convention, which forbids discrimination.

Of primary concern is Article 11[8] – embodying the freedom of association – which recognizes the right of individuals to organize themselves on a voluntary basis for the realization of a specific purpose. Article 11 is closely connected with Article 10[9] (freedom of speech), for it is

[6] In the U.K., anyone who has been convicted of an offence involving deception or dishonesty, unless the conviction is spent, can act as a charity trustee. This restriction is limited, however, to managing charitable trusts, which is distinct from establishing a foundation.

[7] The Convention allows "any person, non-governmental organization or group of individuals claiming to be a victim of a violation" to submit an application after meeting the admissibility criteria (Article 25, ECHR). It can be inferred, therefore, that NGOs are protected by certain fundamental rights; the right to complaint would be meaningless with no substantive rights to protect. Thus, it can be assumed that references in the Convention to "everyone" may in principle refer to natural *and* legal persons, including NGOs. Indeed, many decisions by the European Court confirm the standing of NGOs under the Convention.

[8] Article 11 establishes that:

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interest.
>
> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

[9] Article 10 establishes that:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

through voluntary organizations that individuals can exercise their freedom of expression most effectively. The European Court of Human Rights, in considering the scope of Article 11, has expressly held that Article 11 applies to individuals and their right to form political parties and associations; presumably the protection of the freedom of association also extends to other organizational forms based on membership or an associational structure.

There remains a question, however, whether the freedom of association protects the right to form non-membership legal forms, like foundations. The better argument would seem to be that foundations are deserving of protection under Article 11 – and the burden is on the government to justify restrictions against individuals wishing to form foundations. Both membership and non-membership forms are well established in the leading legal systems around the world – and in all European countries. Through either form, individuals can pursue collective interests and exercise their rights under Articles 10 and 11. The organizational form chosen usually depends on internal governance or activity considerations, rather than on any attribute fundamental to the freedom of association itself.[10]

If Articles 10 and 11 indeed embrace foundations within their protection, then the government must demonstrate why restrictions on individual founders are 'necessary in a democratic society' to achieve enumerated state interests. Quite simply, it is unlikely that this standard would be met. Moreover, under some legal systems it would be inappropriate for the NGO law to impose "punishments" not specified in the criminal law, and it might be interesting to examine this topic under Turkish law.

C. Board Membership and Board Meetings

The Executive Board and Supervisory Board are two mandatory organs of a foundation, required by law. The structural and administrative structure of the board is formulated in the Civil Code Article 106, and is required to be described in further detail in the by-laws of the foundation. The Civil Code does not state a minimum or maximum number of members of these organs, although the GDF communiqué of 1997 requires a minimum of 3, and maximum of 13 members in the board (to be determined specifically according to the purpose of the foundation). Comparatively, Turkish Corporate Law, requires at least three board members in a corporation, with no maximum limit.

Aside from the issue of requiring a minimum and maximum limit for board members, which has been an ongoing debate, there are two critical issues concerning board membership in Turkish foundations:

(1) Restrictions precluding foreigners from serving as board members of foundations,

(2) *Permanent* disqualification of a person from serving on the board of any foundation if they are removed from the board of any particular foundation, and

(3) Participation of Government official from the GDF at annual foundation general assembly (trustee) meetings.

These three issues are described in detail below, with comparative perspectives following each issue respectively.

[10] See "Freedom of Association: Recent Developments Regarding the 'Neglected Right'", Leon E. Irish and Karla W. Simon, International Center for Not-for-Profit Law 2000.

1. Requirement of Turkish citizenship

As per the Turkish Constitution Article 33, all real and legal persons have the right to establish a foundation. This implies no discrimination between Turkish citizens and non-Turkish citizens (foreigners) - both of which would have to abide by the same laws and regulations regarding foundations.

However, according to the Statute of the Foundations dated 1970, a foreigner can be founder, appoint board members, but is not eligible to be a board member herself.[11] These provisions create serious problems in implementation.

According to Turkish Corporate Law, there are no limitations for foreigners as board members. However, they cannot constitute the majority on the supervisory board.

Comparative Perspective

Foreigners are permitted to serve as both founders and board members of foundations in virtually all EU countries. Some countries, including Italy, Finland, Estonia and Denmark, require that all or a majority or at least some board members be residents in the country where the foundation sits, but they do not require that board members be citizens. But in many other countries, such as Hungary and Poland, there is neither a citizenship nor domicile requirement for board service.

Interestingly, in 1999, Belgium was condemned by the European Court of Justice for the nationality requirements contained in two separate laws governing non-profit associations. (Kingdom of Belgium v. Commission, Case C-172/98, June 29, 1999)[12]. Belgium's 1921 law on non-profit associations (NPA law) required that the membership of a non-profit association should consist of at least 75% Belgian nationals; associations failing this requirement were deprived of legal personality. Similarly, the 1919 law on international associations (IA law) required at least one Belgian national in the management of the association.

The European Commission alerted the Belgian government to the problem in 1996. The argument was that the nationality and residency requirements of the Belgian laws violated the rights of citizens of other EU Member States by discriminating on the basis of nationality. When Belgium failed to amend its legislation, an action was brought before the European Court of Justice, which held:

> [B]y requiring the presence of a Belgian member in the administration of an association or a minimum, and majority, presence of members of Belgian nationality in order for the legal personality of an association to be recognised, the Kingdom of Belgium has failed to fulfill its obligations under Article 6 of the EC Treaty (now, after amendment, Article 12 EC).

(Kingdom of Belgium v. Commission, Case C-172/98, (June 29, 1999)).

Moreover, the provisions of the European Convention are secured to "everyone within the jurisdiction" of the member-states. Thus, a foreigner may not be excluded from the fundamental rights protected under the Convention. Barring foreigners from serving as

[11] There is one exception to this; in the instance that the foundation has an operating institution affiliated with it (e.g. hospital, school , museum etc.), a non-Turkish citizen is eligible to be a board member. They cannot, however, constitute the majority and requires the permission of Council of Ministers.

[12] See also "Belgian Non-Profit Associations and Belgian International Associations Lose Belgian Nationality and Residency Requirements for Their Members and Directors, Bart Servaes, International Journal for Not-for-Profit Law, Vol. 3, Issue 2 (www.icnl.org.).

board members is a potential infringement against Article 11. In other words, due to this restriction, founders of foundations are prevented from associating as they choose.

Based on the ECHR's analytical framework (outlined above), the burden falls to the government to justify any restriction as necessary in a democratic society. Indeed, the Croatian Constitutional Court held that nationality requirements applicable to founders of association were unconstitutional and violated Article 11 of the Convention.[13] The 1997 Croatian Law on Associations provided that foreign citizens who permanently reside in Croatia, or who have legally resided in Croatia for more than one year, can be founders of a registered association, under the condition of reciprocity. The Court found that the reciprocity requirement violated Article 11 of the Convention, which guarantees freedom of association to "everyone", without further reference to the country of citizenship or other conditions. According to the Court, "there are no legitimate reasons which would justify restrictions imposed on foreign domestic and legal persons in exercising the freedom of association which are attached to the action of their respective states."

2. Termination of Board Members

According to the Statute of the Foundations Article 23, board members should administer the foundations according to their by-laws and should be responsible and prudent managers. If a board member does not comply with the laws and regulations, their board membership may be terminated by a court decision upon the application of GDF. Terminated board members are no longer eligible (for an indefinite period of time) to be board members in other foundations.

According to Turkish Corporate Law, board members can only be terminated with a general assembly decision.

Comparative Perspective

A provision which precludes a disqualified board member from ever serving on another foundation's board is unusual restriction in the European context. Certainly, we see in other countries the termination or disqualification of a board member available as a disciplinary sanction. Dismissal of a board member is a measure applied primarily to remove those found acting in serious breach of duty toward the foundation.

Permanent disqualification, however, is atypical. Moreover, to the extent it exists, it should be imposed only for the most serious violations of law, limited in time, and subject to strict procedural safeguards. Again, we are not sure that it makes sense in the Turkish context to impose this restriction at all, but if Turkish stakeholders decide that it makes sense, the Netherlands model is instructive. There, a dismissal disqualifies the board member involved from holding a directorship of a foundation for a period of five years following his or her dismissal by the court (Article 2:298 CC). It is imperative to emphasize that: (1) the removal is ordered by the court, rather than by a government agency, and (2) the disqualification is limited by a fixed term, rather than permanent. Moreover, this sort of remedy is generally imposed only for serious breaches of law.

3. Governmental Participation in Foundation Meetings

The Communiqué of GDF dated 1998 requires an official representative to attend foundation's general assembly meetings. This regulation also requires foundations to send

[13] Decision of the Croatian Constitutional Court of February 3, 2000, published in the Official Gazette No. 20 of February 16, 2000.

invitations to the general assembly participants by registered mail or to publish the date and the location of the assembly in a nation-wide newspaper.

Comparative Perspective

To allow government representatives to attend board meetings of private, voluntary organizations runs counter to European standards. Furthermore, such a rule is almost certainly a violation of the European Convention of Human Rights (namely the right to privacy as protected under Article 8).

There is a general recognition in EU countries that board meetings are the private, internal affairs of foundations and NGOs. Government officials have no more right to attend meetings of foundations than they have to attend the board meetings of commercial companies. Despite differences in supervisory approaches, none of the surveyed countries mandate or allow government attendance at foundation or NGO meetings.[14]

Indeed, this view is supported by European Court jurisprudence. The European Court of Human Rights has declared that the expansion of the words "private life" and "home", as mentioned in Article 8[15] of the European Convention, to professional or business activities or premises is "consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities."[16] Given that Article 8 of the European Convention applies to professional and business premises, it can be inferred that Article 8 applies with equal weight to voluntary, not-for-profit organizations, including foundations. Thus, Article 8 protection would seem to prevent the government from attending meetings of governing bodies (including boards) of NGOs (including foundations).[17]

Moreover, as we have seen, Article 11 prevents any infringement upon the freedom of association, unless such infringement is prescribed by law and necessary to achieve one of four legitimate state purposes. Does a provision allowing government representatives to attend the meetings of NGO governing boards constitute an infringement upon the freedom of association? Undeniably, yes. While perhaps intended to promote transparency, it also infringes deeply upon the freedom of association, which includes the freedom to decide who will be a member and who has the right to attend the organization's meetings. While clearly applicable to associations and membership organizations, the same principle can at least arguably be extended to other NGO organizational forms, such as foundations. One could also argue that this provision undermines the so-called "negative freedom of association" by requiring that board members invite government officials to participate in meetings with them.

D. Asset Management

[14] An interesting exception is Hungary, but this provision is rarely, if ever, applied in Hungary.

[15] Article 8 of the European Convention on Human Rights runs as follows: (1) Everyone has the right to respect for his private and family life, his home and his correspondence; (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[16] Niemetz v. Germany, Judgment of 16 December 1992, Series A, No. 251-B, 16 EHRR (1993), para. 31.

[17] Moreover, the state interest in transparency among organizations receiving significant tax benefits, government funding, or public donations is often accomplished through reporting requirements. This issue will be addressed in a subsequent white paper focusing on the benefits and obligations arising from "public benefit status."

The issue of asset management is a critical one for Turkish foundations. The Communiqué of the General Directorate of Foundations dated 1999 gives this department the privilege to intervene, to permit and to authorize issues related to the foundations' asset management.

Aside from the fact that the general principle of this law does not facilitate and support the ability of foundations to manage assets effectively so as to accomplish the foundation purposes, there are two key issues at hand:

(1) Altering/selling immovable foundation property, and

(2) Requirement of foundations to retain cash assets in State banks.

1. Altering or Selling Immovable Foundation Property

According to Article 113 of the Turkish Civil Code, selling or altering the assets or rights requires notification to GDF and a court decision. In all cases the GDF has the discretionary authority to initiate procedures regarding the use, acquisition, and liquidation of assets of a private foundation.

In contrary to the Civil Code, the Article 27 of the Statute of Foundations (1970) requires the permission of High Council of the General Foundations Directorate prior to the court decision. This gives the General Foundations Directorate supreme power over the decision making process and constitutes a clear violation of Civil Code.

2. Retaining Cash Assets of Foundations in State Banks

The Statute of Foundations (1970) additional Article 1 states that foundations are required to keep their cash assets in State Banks or Vakif Bank (a quasi governmental bank).

Comparative Perspective

In Europe, there are essentially two common regulatory approaches to the protection of foundation's endowment. First, in some countries, the law establishes a general obligation to maintain the foundation's endowment (note that many of these rules do not apply to property held by the foundation but not part of the foundation's "endowment") For example, in Germany, it is a fundamental principle that the foundation's endowment be preserved in its value. Preservation of this endowment means that the value of the sum of assets must be maintained, while the proceeds are spent for the fulfillment of the foundation's purpose. There is a legal restriction on retaining proceeds: only up to 33% of the annual proceeds may be accumulated into the endowment, independent of the annual rate of inflation. Provisions in the law regarding asset management are vague; the law mentions value-keeping, safe and interest-bearing investments, but provides no specific guidance as to the appropriate balance between yield and risk. Other countries requiring the preservation of the endowment include Austria (stiftungen), Italy, Slovakia, and the Czech Republic.

In those countries requiring the preservation of the endowment, the challenge for foundations is how to invest wisely to ensure that the value of the endowment will be maintained. Among EU countries, the most detailed legislative response to this challenge is found in the Czech Republic – and through the 2002 amendments to the Czech Law on Foundations. The Czech Law on Foundations provides that a foundation must have an endowment of at least 500,000 CZK (approximately 16,000 Euros), which must be preserved. The Law, however, used to prevent effective endowment management – by prohibiting the investment of assets from endowments, and by requiring that assets be kept in monetary form in a separate bank account, real estate, state bonds, patent or author rights, and works of art which generated a steady income. Once bonds or any other form of assets were sold, the money received could only be put on a bank account or invested in state bonds.

Recognizing the restrictive nature of these provisions, in 2002, the Law on Foundations was amended. Among other notable provisions, Czech foundations are no longer limited to bonds issued by the Czech state; rather, they may now hold any instrument guaranteed by the state *or any instrument with the same investment grade as government-backed instruments.*

Second, most countries provide for no specific legal restrictions relating to property management for foundations.[18] Instead, the matter of investment policy is dealt with through general rules (separate from the foundation law). The governing documents should allow implicitly or explicitly for the organization to make certain investments. Investments are commonly allowed, unless this is in conflict with the purpose of the foundation. The Netherlands serves as a good example of this approach; foundation property is protected by the general duty of the board members to act in the best interests of the organization. In Hungary also, foundations are permitted to manage their funds independently, without legal restrictions, as long as funds are used for the purpose of implementing the objectives set out in the founding documents. Indeed, Hungary requires the board of public benefit foundations to set its own investment regulations (although the content and form of these regulations are not prescribed in detail in the law).

A minority of European countries defines specific restrictions relating to investments and even requires state approval before a foundation performs a specific transaction. Greece offers one such example. First, the law in Greece allows only a narrow range of investment opportunities for foundation revenue. In addition, any investments made by the foundation are subject to prior approval, allowed only at an interest rate of 5% and guaranteed by sufficient securities. The supervisory authority (minister of finance) also determines the terms of the loan agreement and the guarantees provided. Government approval of investment decisions is also required in some *Lander* in Germany and in Austria. A major sale of assets in Austria, for instance, is subject to approval and will be granted where the sale does not jeopardize the realization of the purpose of the foundation.

The wisdom of placing such decision-making authority in a state official seems highly questionable. Assume a foundation is seeking approval on the sale of real property. The foundation sends the expert's evaluation report, deed, and decision of the foundation board to the government to approve the sale. How will a government official or judge be able to determine – more effectively than the foundation board – whether the sale is proper? Such requirements of government review and approval would seem to do little to accomplish a legitimate state interest, and rather simply create a time-consuming process, which burdens both the foundation and the government. For public foundations (that is, state-founded organizations) entrusted with state "treasures", state approval before alienation is sensible. For private foundations, state involvement seems unwarranted.

E. International Cooperation

The Decree Law of GDF (1984) describes under which conditions foundations can engage in international relations. This decree 'allows' Turkish foundations to engage in international cooperation, open branches or representative offices and become members of foreign foundations only upon obtaining prior authorization from the Ministry of Interior and Ministry of Foreign Affairs. These regulations also apply to foreign foundations operating in Turkey.

The Ministry of Interior issued a circular in 9 January 2004 regarding the international relations of foundations, which requires these requests to be processed through the

[18] See "Supervision of Foundations in Europe: Post-incorporation Restrictions and Requirements", Foundations in Europe, Edited by Schluter, Then & Walkenhorst, Berterlsmann Foundation 2001.

Department of Associations (a new unit formed to regulate associations in mid 2003, within the Ministry of Interior).

Aside from the burden and cost this process creates for foundations, the 'vague' descriptions of the regulation and subsequent circular creates confusion for the 'applicant' foundation. For example, they both only refer to as 'cooperation' and 'membership' as conditions which require prior approval, but the word 'grant', 'funding', or any other term implying cash support does not exist. However in practice, foundations are told that obtaining a grant or cash support from a foreign foundation/organization constitutes 'cooperation' and thus requires permission. To add more confusion, informal advice guides foundations to apply to the Department of Associations when money is not involved and to the General Directorate of Foundations when it is.

In short, the prior authorization itself is a burden - but the conditions under which authorization is required, as well as the process by which this is obtained and from which authority is vague and difficult to navigate.

Comparative Perspective

Restricting the ability of foundations to cooperate (whether in terms of information sharing or funding) with foreign organizations is virtually unheard of in Europe. Requiring government approval – and in some cases, actually denying approval – for cooperation with foreign organizations is almost certainly a violation of the European Convention of Human Rights (namely, Article 10). Thus, only in repressive regimes like Belarus, which are not aspiring to join the European Union, can comparable restrictions be found.

Article 10 states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[19]

Prior authorization burdens the ability of people and organizations to "receive and impart information and ideas … regardless of frontiers." Any restriction on this freedom must be measured against the strict analytical framework set forth by the European Court to determine if it is 'necessary in a democratic society'. As emphasized by the Court, "[T]he Court must examine the question of 'necessity' in the light of the principles developed in its case-law. It must determine whether there exists a pressing social need for the measures in question and, in particular, whether the restriction complained of was 'proportionate to the legitimate aim pursued.'" (Open Door and Dublin Well Woman v. Ireland (Application Nos. 14234/88 and 14235/88) 29 October 1992, para. 70) (citations omitted). Therefore, exceptions to freedom of expression must be interpreted narrowly and can only be justified by "imperative necessity". (Vereinigung Demokratischer Soldaten Oesterreichs and Gubi v. Austria (Application No. 15153/89) 19 December 1994, para. 37).[20]

[19] Article 10 protection extends to foundations, for the provisions of the Convention are secured to "everyone within the jurisdiction" of the member-states. Thus, a legal entity, including a foundation or a foreign not-for-profit organization, cannot be excluded from the fundamental rights of the Convention. A foundation has the right to freedom of expression; it is not permissible for the state to stifle foundations on grounds other than those allowed under the Convention.

[20] In Open Door and Dublin Well Woman v. Ireland (Application Nos. 14234/88 and 14235/88) 29 October 1992, the Court found an Article 10 violation when the Supreme Court enjoined the applicant not-for-profit organizations from provided counseling to pregnant women, including discussing abortion generally and the right of women to travel outside of Ireland to obtain one. In Vereinigung Demokratischer Soldaten Oesterreichs and Gubi v. Austria (Application No. 15153/89) 19 December 1994, the Court found an Article 10 violation when the Federal Minister of Defense denied the applicant association's request that its published magazine (der Ingel) be distributed to

The "imperative necessity" of restricting cooperation with foreign organizations seems untenable. We know of no EU country with a comparable restriction. Indeed, in the European context, it is only comparable to the situation in Belarus. On March 15, 2001, Decree No. 8 of the President of the Republic of Belarus of March 12, 2001 "On Certain Measures to Improve the Order of Receiving and Using Foreign Aid" was published. The strategic intent of this document is apparently to impose an unprecedented level of government control over the activities of NGOs and their financial support from foreign and international organizations. This approach remains the subject of severe criticism by the EU and other members of the international community.[21]

One could also argue that this sort of prior authorization requirement impinges on Article 11 of the European Convention. In other words, it restricts the freedom of foundations – and those involved with foundations – to associate with others, as protected by Article 11 of the European Convention.

Summary

Given the rapid development of the non profit or 'third' sector in Turkey, the role of foundations and their contribution to social and economic development has become even more pronounced. This trend is not limited only to Turkey; in Europe, foundations have been debating the composition of a common legal framework for public benefit foundations, to promote cross-border activity and enable their activities[22].

However, the foundation sector in Turkey is currently facing severe difficulties as a result of the issues outlined in this report. Without more enabling laws and regulations for foundations, this very valuable tradition and the essence of devoting 'private wealth for public good' stands to be significantly diminished. It is therefore essential that revised legal frameworks enable foundations to operate within reasonable and operationally realistic regulations, so that their contribution to society and public benefit can be maximized.

soldiers in the Austrian army in the same way as the only other two military magazines published by private associations.

[21] If the goal of the authorities in restricting international cooperation is more narrowly focused on curbing ties to illicit organizations and the influence of international criminal activity, there are more effective ways to approach this issue than through foundation regulation. Money laundering laws and criminal laws, for example, are generally applicable to legal entities and targeted on specific problems. Restrictive requirements for foundations will do little to solve the perceived problem (especially where companies are not similarly restricted). Moreover, it is likely that these sorts of provisions will almost exclusively burden law-abiding organizations, recognizing that few entities seeking to break money laundering legislation or criminal laws would likely disclose this fact to the government.

[22] See www.efc.be for more on the Draft Framework for Public Benefit Foundations