



1126 16th Street, NW, Suite 400
Washington, DC 20036
(202) 452-8600
(202) 452-8555 (fax)
E-mail: nbourj@icnl.org
www.icnl.org

USAID's CIVIL SOCIETY PROJECT¹

Recommendations² on the Azerbaijani Presidential Decree Supporting NGOs and Government-NGO Cooperation

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In a Decree dated July 27, 2007,³ the President of the Republic of Azerbaijan expresses great appreciation for civil society and the contribution of non-governmental organizations (NGOs) to economic and social development in Azerbaijan, and to democracy in general. The Presidential Decree documents the State's support of the nonprofit sector and establishes the legal ground on which government-NGO cooperation may be developed. Specifically, this Decree authorizes the Cabinet of Ministers of the Republic of Azerbaijan to prepare and submit recommendations on the establishment of a State body to address the issues of NGOs and creation of a foundation dedicated to assistance to NGOs. ICNL is very pleased to have this opportunity to contribute to preparation of the Cabinet of Ministers' recommendations, and to express our sincere appreciation of the Presidential initiative.

¹ The Civil Society Project is a United States Agency for International Development initiative, implemented by Counterpart International in partnership with the Urban Institute and the International Center for Not-for-Profit Law. The goal of the Civil Society Project is to assist the citizens and government of Azerbaijan to develop a dialogue while working towards the creation of a more representative and better functioning democracy.

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³ The Order of the President of the Republic of Azerbaijan on confirmation of the state support conception for NGOs of the Republic of Azerbaijan dated July 27, 2007 was published at the official newspaper Azerbaijan on July 28, 2007 (#165).

The purpose of this paper is to provide those officials charged with implementing the Presidential Decree an overview of international best practices on NGO-government cooperation. We hope that this overview will help the officials to identify the most useful practices and mechanisms of NGO-government cooperation and adapt them to the unique needs of Azerbaijan.

Our recommendations focus on two particular areas of NGO-government cooperation: (1) special official entities in charge of implementing concrete tasks pertaining to Government-NGO cooperation; and (2) government-established financial institutions (typically foundations) providing material assistance to NGOs. We respectfully submit to the attention of the Azerbaijani government an overview of different models of entities charged with government-NGO cooperation as well as different models of government-established foundations in place in Western or Central and Eastern Europe. Of course, ICNL stands ready to provide further information on the models deemed of interest to parties implementing the Presidential initiative.

I - Special official entities in charge of implementing concrete tasks pertaining to Government-NGO cooperation

Among European countries, various structures, agencies and mechanisms are employed to implement concrete tasks pertaining to Government-NGO cooperation, such as the registration and oversight of NGOs, the engagement of NGOs into the decision-making process, the provision of financial support to NGOs, and the coordination and exchange of information between the government and NGOs.⁴

In this paper, we present examples of State bodies from various European countries⁵ which implement government policies applicable to all NGOs nationwide. We do not consider entities that operate only at the level of a line ministry, unless they benefit the whole NGO sector. Similarly, in this paper we do not consider governmental initiatives at the local level. Nonetheless, we would be pleased to provide examples of and guidance on those complementary approaches upon request.

1. Parliament

Special committees dealing with NGO-related issues are typical institutional forms of cooperation. In Hungary, for example, a Parliamentary Committee for the Support of Civil Organizations has existed since the early 1990s, with responsibility for granting budget subsidies to national associations. Now, this Parliamentary Committee is in charge of legislative policy concerning the sector, and the grant-making function has been transferred to a newly-created entity -- the National Civil Fund (see below). In addition, Hungary has a Civil Office of the Parliament that fulfills a related informational role. This Civil Office maintains a database of NGOs to which it delivers the

⁴ Nilda Bullain and Radost Toftisova, *A Comparative Analysis of European Policies and Practices of NGO– Government Cooperation*, European Center for Not-for-Profit Law (2004).

⁵ These examples are presented in Nilda Bullain and Radost Tofisoya’s comparative analysis, see *Supra* Fn 2.

Parliament's legislative agenda, sorted by area of interest (e.g., an NGO can sign up to receive only legislative plans on laws related to the environment); answers NGO inquiries; coordinates and arranges NGO participation in the various Committee meetings, etc.

In Germany, a subcommittee of the Committee for Family Affairs, Senior Citizens, Women and Youth (Subcommittee of Civil Engagement) was established in 2003. Its task is to help implement the recommendations of a major study concerning civil society in Germany,⁶ and to discuss related bills and initiatives.

2. Government

As for entities established within the Government, there may be a central department responsible to liaise with NGO independently of the line ministries. For example, in Hungary, in 1998, a Department for Civil Relations was established in the Prime Minister's Office that was responsible for development and coordination of policies affecting the non-profit sector as a whole. This Department developed the *Government Strategy towards the Civil Sector*, a comprehensive strategy for the support and development of the non-profit sector.

In Croatia, the Government Office for Cooperation with NGOs is also located at the governmental level. The Office was originally established in 1998 with the task of building confidence and developing cooperation with NGOs. It coordinated working groups on various legislative initiatives affecting CSOs, and provided grant support to NGOs in all areas of work. In the near future, the role of the Office will be modified to include assistance to the Council for Civil Society, a governmental advisory body (see below).

In Slovenia, a National Coordinator for Cooperation with NGOs was appointed under the Government Office for European Affairs. This appointment was made as part of an effort to develop a more coordinated, systematic governmental approach to working with NGOs.

3. Ministries

Sometimes a particular ministry is actually responsible for implementing a task or program that affects the whole NGO sector. This is the case, for example in Slovakia, where all NGOs are registered at the Ministry of Interior, or in Poland, where the Ministry of Labor and Social Affairs is responsible for implementing the new Law on Public Benefit Organizations and Volunteerism (adopted in June 2003). In France, the Ministry of Youth, Sport and Associative Life has taken on in recent years a specific place in the coordination of government efforts towards the non-profit sector. For example, this Ministry organized the National Conference of Associative Life in January 2006, which featured debate on three major issues of government policy toward the

⁶ *Civic Activities: Towards a Civil Society with a Future*, Summary of the Bundestag Study Commission's Report, June 2002, available at http://www.bundestag.de/gremien/enga/02Zsf_en.pdf.

sector: the place of associations in the civil dialog, strengthening the contractual relationship between the State and the associations, and the development of volunteerism.

4. Councils and joint committees

Establishing a formal advisory body that comprises both governmental and NGO representatives is also a typical form of cooperation. Usually such councils or joint committees are formed at the ministry level, but there are examples of a governmental council as well. Such examples include Slovakia, as well as Croatia, from among CEE countries. France is a Western European example of a country with such a council.

In Slovakia, the Council of the Government of the Slovak Republic for Non-Governmental Non-Profit Organizations has existed since 1999.. This Council was set up as a result of collaboration between the government and civil society. The government issued in 1998 a Program Declaration which expressed support for cooperation between the third sector and the government including joint activities to develop civil society. *The government endorsed this position in its policy statement and pledged to initiate projects that would advance the collaboration. NGOs similarly expressed support of the government concept in the Declaration of the 6th Stupava NGO Conference. [Natasha – these sentences could be cut.]*Discussions regarding a liaison body ensued among representatives of the Union of Third Sector, the Donor's Forum and umbrella and service NGOs.⁷

This Council has functioned as an advisory and initiating body of the Government of the Slovak Republic to support the activities of non-governmental non-profit organizations. It may initiate and advise on policy and legislation affecting NGOs; it cooperates with entities of the public administration at all levels in devising their methods of financing of and cooperation with NGOs; and it works specifically to maintain an official, public database of Slovak NGOs. The Council comprises 40 members. NGO representatives slightly outnumber the state administrators, 22 to 18. The operations of the Council are supported by the Secretariat of the Council at the Government office for NGOs Human Rights and Minorities Section. The Council meets twice a year, but in order to ensure ongoing communication and continuous cooperation, the Council has established working groups which meet more frequently.

In Croatia, a Council for the Development of Civil Society was established as a governmental advisory body in 2002. The Council is composed of 10 representatives from Ministries and 14 representatives of civil society (elected by the civil society organizations (CSOs) themselves). The Council focuses its activities on implementation of a Program of Cooperation, creation of a Strategy for the Development of Civil Society, and harmonization of financial support from the State budget for financing CSO programs and projects.

⁷ Maria Gerasimova, *The Liason Office as a Tool for Successful NGO-Government Cooperation: An Overview of the Central and Eastern European and Baltic Countries' Experience*, ICNL's International Journal of Not-for-Profit Law, Volume 7, Issue 3, June 2005.

Croatia previously established a Government Office for Cooperation with Non-Governmental Organizations, first operating in 1998. This Government Office is responsible for fostering cooperation with the NGO sector through financing, consultation, education, and information sharing. The Office coordinates legislative initiatives on issues affecting civil society. In addition, it channels state funds to almost all fields of NGO activity through a transparent funding mechanism with the following characteristics: public announcements of calls for proposals and clearly stated criteria; the creation of independent groups to review and assess proposals; and a well-established monitoring and evaluation process. The Government Office also led the process of preparing a Program of Cooperation between the Government of the Republic of Croatia and the Non-governmental, Nonprofit Sector in Croatia, which was signed in 2001. In addition, the Office has published a periodic bulletin addressing issues of concern to Croatian NGOs which has been distributed to 16,000 recipients. Through these activities, the Government Office for has helped build trust and transparent cooperation between the government and NGOs.

The cooperation between the government and civil society has proved to be a vibrant process that has adjusted as needed to ensure the sustainability of civil society organizations and to define their role in spheres of collaboration. The Croatian Government pledged to propose a means of financing civil society organizations to the Croatian Parliament; in response, the Government Office developed plans for a decentralized organization. This model consists of two bodies: the Council for Development of Civil Society, established in 2002 as mentioned above, and the National Foundation for Civil Society Development, established in 2003 (see Section II below). The model also envisions creation of a Strategy for the Development of the Civil Society and harmonization of the state funding process.⁸

In France, the National Council on Associative Life (CNVA) is a consultative body created by the Prime Minister in 1983. The CNVA's missions are to serve as a think tank on issues regarding the non-profit sector, to advise on legislation and regulation, to propose measures useful for the sector and to prepare reports and recommendations on related issues. The CNVA comprises 66 tenured members and 66 substitute members from NGOs designated by the Prime Minister. Local authorities are represented on the CNVA and play a consultative role. A permanent body was created within the CNVA comprising its officers, representatives of the concerned ministries, and representatives of associations of local elected officials. This permanent body is in charge of maintaining an open dialog between the CNVA and the ministries on issues regarding NGOs. The CNVA produces a statement on associative life every three years.

5. Quangos

Quasi NGO or quango is a term often used to describe nonprofit organizations set up or funded by the government. A distinct feature of these organizations is that despite their government "ownership," they are autonomously governed and, at least in principle, professionally independent from the political establishment. The forms and roles they take vary widely, from fundraising and grantmaking foundations (e.g. public foundations

⁸ This background information is taken from Maria Gerasimova's study, see *supra* Fn 5.

in Hungary or France), to advocacy and service providing organizations (e.g. associations of municipalities), to project implementing nonprofit companies (e.g. public benefit companies in Hungary).

Quangos represent the overlapping functions and institutional forms between the state and organized civil society. A key determinant of their ability to promote social development and to further the cooperation between the two sectors is the extent to which they are really independent from political influence.

An example of a quango in Denmark is the Volunteer Centre, established in 1992. The Centre was established as a self-governing, independent unit with its own supervisory board under the Ministry of Social Affairs. The Volunteer Centre provides services to voluntary social organizations and associations in the form of, for example, advisory and counseling services, courses, consultancy and method development. Besides rendering services to organizations, the Centre is under an obligation to disseminate knowledge and experience to the Ministry of Social Affairs and to other public authorities and co-operation partners. Finally, the Centre serves as secretariat to the Committee on Volunteer Effort.

Examples from CEE include the so-called public foundations, which are usually foundations set up by law or government order (see Section II below).

6. Specific bodies

In addition to institutional forms of cooperation that may fit into a particular category, there are institutional forms that are distinct in their functions and do not lend themselves to easy categorization. Such a specific type of body is, for example, the Charity Commission in the UK. The Charity Commission is established by law as the regulator and registrar for charities in England and Wales.

Charities are an essential part of societal life in the UK but need to be regulated in order to ensure that they meet the legal requirements for being a charity, and are equipped to operate properly and within the law; to ensure that charities are run for public benefit, and not for private advantage; to ensure that charities are independent and that their trustees make their decisions free of control or undue influence from outside; and to detect and remedy serious mismanagement or deliberate abuse by or within charities.

The Charity Commission performs this function by securing compliance with charity law, by enabling charities to work better within an effective legal, accounting and governance framework, keeping pace with developments in society, the economy and the law, and by promoting sound governance and accountability. The Charity Commission provides information and advice on law and good practice and dealing with abuse and poor practice, assists charities in registration, investigates evidence for non-compliance with the law, cooperates with other regulators (prosecution, police), and may intervene to protect charities' assets. The Charity Commission is accountable and reports annually to parliament and the Home Secretary and publishes annual reports. However, it remains an independent body acting in the public interest.

Another “hybrid” category is a fund in Hungary called the National Civil Fund Program. It is not really a quango, as it is not registered as a public foundation. Nevertheless, the law assigns to the Fund an autonomous governing body that consists of 17 members, the majority of whom (12) are named by nonprofit organizations.

To finance the Fund, the Hungarian government will provide matching funds based on the amount of actual taxpayer designations under the 1% tax designation law each year. The 1% Law permits every Hungarian taxpayer to designate 1% of his or her tax liability to a qualified NGO of their choice each year. Under the Civil Fund Law, the government will match the amount of actual tax designations each year, and will in no case contribute less than the 0.5% of personal income taxes collected. Thus, the more money that taxpayers designate, the more money will be contributed by the government to the Fund.

At least sixty (60) percent of the Fund’s resources each year will have to be dedicated to providing institutional support (core costs) to NGOs in Hungary. This is an important development as most of the available government funds for NGOs have been dedicated to project financing only. Besides covering the costs of the Fund’s administration, the remaining funds may be directed towards the support of various programs related to the development of the NGO sector, including, for example, sector-wide events, festivals, international representation, research, education or publications.

Lastly, another initiative of interest is the use in France of a genuine legal form of corporate entity designed to associate NGOs and the main ministries monitoring the nonprofit sector (Interior, Culture, Social Affairs Youth and Sport, etc.). Such entities called Public Interest Groups (GIPs) are used in several areas of government action, as defined by regulation, where the partnership with private entities is necessary or useful. The advantage of the GIP resides in the fact that each private or public partner holds shares and related votes in proportion to its financial contribution to the group’s capital. Therefore, the GIP offers a more transparent form of cooperation and division of power than the previously mentioned quangos. Under the French regulation, GIPs are created for a limited period of time, which can be renewed. An example of such groups in the nonprofit sector was the GIP RIG (Information & Management Network) which provided a nationwide network of associations offering technical support to local NGOs (information on the legislation and regulation, training of volunteers, officers and directors, etc.).

Recommendations:

Whatever the structure chosen by the Government of Azerbaijan to initiate and develop government-NGO cooperation, the following recommendations should be kept in mind in the establishment process.

In most of the examples presented above, the civil sector played a significant role in establishing the body in charge of cooperation between the government and the NGOs. The role of the NGOs was particularly prominent when the state chose to create a joint committee or specific body. Nonetheless, even in countries where the government created the “office liaison” on its own, it worked closely with NGOs to develop the objectives of the office.

In most of the examples presented above where a joint committee, specific body or quango is established, its functions are carried out by a “bureaucratic unit and a broadly representative advisory body.”⁹ The active participation of NGOs in the State body to be established is key to its efficiency and success. The Azerbaijani government must therefore set up objective criteria to determine which the NGOs will be invited to contribute to the establishment and operation of the government-NGO cooperative entity. Questions the State should consider include: How can the nonprofit sector as a whole feel fully represented in the decision-making process of establish and operating the government-NGO cooperation body? What type of NGO representation should be sought (registered associations, federations, informal groups, multiple NGOs acting in the same field, etc.? Should the participation of NGOs be based on an electoral process or on nomination by the government? Should there be compliance requirements for the NGOs to participate in the cooperation body (compliance with the regulation, existence of democratic structures, transparency and accountability, etc.)?

The previous recommendations are key to the success of the Azerbaijani State Support Concept for NGOs, as studies conducted in CEE countries, which have generally established a “liaison office” to develop government-NGO cooperation, show that the main challenges are:¹⁰

- to build trust and overcome misconceptions and false expectations;
- to determine who has authority to represent the NGO sector collectively in cooperative efforts; and
- the inexperience of both the Government and the NGOs in cross-sectoral communication.

In all the countries studied, the major activity of State-established bodies on NGO issues is drafting and consulting on legislation. This function does not appear expressly in the the Azerbaijani Support Concept for NGOs. The Government should consider including this important attribute in the goals defined for the future State established body on NGO issues in Azerbaijan.

II Government-established financial institutions (or foundations) providing material assistance to NGOs

Governmentally-supported foundations may be established at all levels of government, from municipal to regional and national, international and supra-national. As such, foundations established by state entities can likewise be founded and funded in a wide variety of methods, depending upon the goals of the founding entity, as well as the legal system of the particular country or body involved. Despite the varied nature of such bodies, there are some common factors. The first, as expected, is that it is a state or government entity which acts as the founder (or, in some cases, co-founder), and this body continues to exert some level of participation or control over the donated funds (through direct management of the foundation, participation on the board of directors and/or in monitoring expenditure of state-donated funds). Secondly, although the

⁹ See Maria Gerosimova, *supra* Fn 5.

¹⁰ See Maria Gerasimova, *supra* Fn 5.

original funding of the foundation comes directly from the government, the foundation, once established, is typically free to seek other sources of income. Beyond these basic commonalities, the procedures and forms for government-established foundations vary considerably. Hence, ICNL will seek to acquaint the Azerbaijani Government with this topic by describing how various countries have chosen to implement this approach.

This section provides an introduction to the various approaches taken by several countries to establish state-sponsored foundations. The countries presented are: Bulgaria, Croatia, the Czech Republic and the Slovak Republic.¹¹ For each country studied, we outline briefly how the foundations were established and how they are operated and managed.¹²

1. Bulgaria

There are multiple laws in Bulgaria establishing government-supported foundations. One example is the National Culture Fund, established through the Law of Bulgaria for Protection and Development of Culture.¹³ The National Culture Fund is largely operated by the Bulgarian Ministry of Culture. This Law has provided for a Fund that remains, in some sense, a government body, because by statute, the Chairman of the management council is the Minister of Culture. However, the Law also provides that the remaining 10 members of the management council shall be representatives of organizations with non profit objectives in the field of culture, creative professional organizations, culture activists, academic communities connected with culture, the municipalities and one representative of the Ministry of Culture and the Ministry of Finance.¹⁴ All members of the management council are appointed by order of the Minister of Culture. The members of the Management Council are paid in accordance with an order by the Minister of Culture.

In addition, the terms of the competition for the resources of the Fund are determined by the Minister of Culture, although the Law does require that the process be transparent and open to the public. The ultimate decision as to who shall be recipients of Fund resources must be made on a competitive basis, after holding a competition, and on the basis of the

¹¹ ICNL has intentionally chosen not to discuss Hungary and the National Civil Fund Program, or other so-called “percentage philanthropy” models for government support of the non-profit sector despite potential relevance to the topic, both because “percentage philanthropy” models are a substantial topic in and of themselves, and because ICNL was not aware that stakeholders in Azerbaijan have any interest in adopting such a model. If the readers are interested in “percentage philanthropy” laws, ICNL would be happy to provide such information. In addition, a substantial amount of information on this topic may be found (in English and Hungarian) at the following website: <http://www.onepercent.hu/index.html>.

¹² As presented in ICNL’s Overview of Government-established Foundations (2005).

¹³ A similarly constituted government-supported foundation can be found in the Republic of Macedonia, where the Fund for Environment Protection and Advancement was established under the Ministry of Environment, pursuant to the Law of Macedonia for Nature and Environment Protection and Advancement. This Fund (established under articles 30 and 31 of the Law), is supported from car registration fees. The Macedonia Fund for Environment Protection and Advancement, although similar in some respects to the Bulgarian Fund, it is even less independent from its supervisory Ministry. Currently, the Fund operates essentially as a special organ within the Ministry, with close Ministry involvement in all aspects of its operation. However, the intention of the Government is that the Fund will eventually grow into a fully independent institution.

¹⁴ See Chapter V., Article 26(3) of the Law of Bulgaria for Protection and Development of Culture, Prom. SG 50 1999; Amend. SG 1 2000; Corr. SG 34 2001; Amend., SG 75 2002.

recommendations of expert commissions formed from prominent members of the relevant cultural field.

The initial resources provided to the National Culture Fund by the Law of Bulgaria for Protection and Development of Culture were not given in the form of a lump sum endowment, but rather the Law allocates to the Fund percentages of income collected by the government under this Law and under various other statutes. For example, the Fund receives 50% of the fines imposed for violation of copyright and related rights. In addition, the Fund receives an annual subsidy determined in the Law for the state budget of the Republic of Bulgaria, and it has the right to receive money from grants, donations and interest from accounts of the Fund.

The Bulgarian Law does not contain provisions guarding against conflict-of-interest on the part of management of the Fund, nor does it provide for or demand a policy of recusal in the event of a vote in which a member of the management council possesses a personal or pecuniary interest in a transaction.¹⁵ Similarly contrary to international best practices, the Law does not limit the distribution of resources from the Fund to non-profit organizations. Cultural organizations, nonprofit organizations and individual cultural activists may apply for Fund resources.

Another example of a government-established foundation in Bulgaria is the Social Investment Fund (“SIF”), which was established by the Bulgarian Government in 2001 and operations in 2003.¹⁶ This Fund is even less independent from the state, and closer aligned with its relevant Ministry (the Ministry of Labor and Social Policy), than is the National Culture Fund. The Social Investment Fund is a secondary administrator of the budget of the Ministry of Labor and Social Policy.

As with the National Culture Fund, there was no initial large independent endowment given in the creation of the SIF. The resources of the SIF are drawn from state budget subsidies, state guaranteed credit arrangements as well as donations and other types of non-state support.

The board of management for the SIF consists of 12 members. An equal number of representatives should be drawn from each of the Council of Ministers and the representative organizations of employers, workers and employees, as determined in Chapter Three of the Labor Code. The representatives of the Council of Ministers shall be appointed by order of the Prime Minister.¹⁷ According to the law establishing the SIF, the management board has “complete control” over determining the structure of the Fund, the expenditure of the resources, the determining of the annual program priorities, and many other responsibilities.

There are no specific provisions in the law enabling recovery of state resources transferred to the Fund. However, due to its close alignment with state institutions, such

¹⁵ The absence of such provisions is not in compliance with international best practices.

¹⁶ See Law of Bulgaria on the Social Investment Fund, Prom. SG 32 2001.

¹⁷ See Chapter III, Art. 10 of the Law of Bulgaria on the Social Investment Fund, Prom. SG 32 2001.

provisions were likely considered unnecessary. The resources allocated to the Fund would remain within reach of the government.

Although there are unfortunately no provisions preventing conflict of interest or self-dealing in the Law, it does ensure some measure of transparency by requiring that the public be informed of the Fund's activities through required publication of the investment program of the Fund in the "central daily newspapers."¹⁸

2. Croatia

In an effort to strengthen civil society in Croatia, in October of 2003, the Croatian Parliament passed a law establishing the "National Foundation for Civil Society Development," and endowing the foundation with two million Kunas, derived from proceeds from the state lottery and games of chance in 2003. In addition to the initial donation, the Foundation will continue to be financed from a separate line in the state budget.¹⁹ The Foundation is also specifically permitted to seek donations and all other lawful forms of income permitted to foundations under the Law of the Republic of Croatia on Foundations and Funds.

This Law specifies all manner of procedures affecting the Foundation, as well as stating that, with regard to issues not regulated in the Law, the Foundation will be governed by the Croatian Law on Foundations and Funds. The Law provides that the Foundation shall acquire legal personality by being entered into the Registry of Foundations, in the same manner as a non-governmentally established foundation. The purpose of this Foundation is the "promotion and development of civil society in the Republic of Croatia."²⁰ The Law provides for the initial composition of the Foundation management body, the Management Board, with the manner of future nomination of Management Board members to be set forth in detail in the Foundation's statute. With regard to the initial composition of the Board, "[t]he Government of the Republic of Croatia shall appoint three members of the first Management Board from the representatives of the state administration bodies, five members from the representatives of civil society organizations and one member as a representative of local and regional self-government, following a nomination from the Government Office for Cooperation with NGOs."²¹ The members of the Management Board are prohibited from receiving compensation for their services.

Consistent with international best practices, the Law contains provisions aimed at preventing the abuse of the funds allocated to the Foundation by self-interested individuals. This is accomplished through two provisions: a prohibition on self-dealing by members of the Management Board, and a provision permitting the Government of the Republic of Croatia to dismiss a member of the Management Board from office if he fails

¹⁸ See Chapter III, Art. 12(11) of the Law of Bulgaria on the Social Investment Fund, Prom. SG 32 2001.

¹⁹ See Article 3, Paragraph 8 of the Decree of the Republic of Croatia on Criteria for Distribution and Determining Beneficiaries of a Portion of Lottery Proceeds.

²⁰ See Section II, Article 3 of the Law of Croatia on the "National Foundation for Civil Society Development."

²¹ See Section III, Article 5(3) of the Law of Croatia on the "National Foundation for Civil Society Development."

to act in compliance with the Law and the general acts of the Foundation, or if he has a conflict of interest, or fails to meet any of the requirements set forth in Article 231, Paragraph 1 of the Law on Foundations and Funds. The prohibition on self-dealing provides that, “[a] member of the Management Board or some other body of the Foundation may not vote on issues in which he, his spouse, adopter or adoptee, relative by blood, either lineal or collateral, to the fourth degree, or relative by affinity to the second degree has a pecuniary interest, or on issues which concern a legal person of which he is a member, in whose management he takes part or in which he has a pecuniary interest.”

While the Law specifies the basic management scheme as well as the funding sources for the Foundation, it does not provide any special provisions for recovery of state funds, nor does it provide any special limitations on the use of the transferred property. To the contrary, the Law states that “[t]he Foundation shall be liable for obligations arising from its dealings with its entire property,” and “[t]he Foundation’s losses shall be covered from its property.”²² Accordingly, unlike the models from Bulgaria, for example, the Government of the Republic of Croatia fully transfers ownership and responsibility for the use of the donated funds to the Foundation, without reserving any right of recovery. Consistent with this, the Law itself makes no determination as to the dispensation of the funds allocated to the Foundation in the event of dissolution, liquidation or bankruptcy, leaving this matter to be addressed in the Foundation’s statute.²³ In this sense, the Croatian regime governing its government foundation is much less rigid than that which can be seen in some other CEE countries, such as the Czech Republic or Slovakia.

As discussed earlier, the Law states that any issue not specifically regulated therein is subject to the provisions of the general Law on Foundations and Funds. Accordingly, the Foundation must comply with the Law on Foundations and Funds with regard to matters of investment practices, expenditure requirements, and even reporting requirements.²⁴ The Law requires the Foundation to prepare only those reports required by the general Law on Foundations and Funds, although it must submit its reports to the Croatian Parliament, as well as to the state bodies required by Article 31, Paragraph 3 of the Law on Foundations and Funds.

3. Czech Republic

Several models of government-supported foundations have been utilized in the Czech Republic. These recommendations will address succinctly three primary examples: (1) the Czech Foundation Investment Fund; (2) the Czech Foundation for Holocaust Victims; and (3) the Public Benefit Corporations Act.

Czech Foundation Investment Fund

²² See Article 17(1) and (2) of the Law of Croatia on the “National Foundation for Civil Society Development.”

²³ However, the Government retains the right to approve the Foundation’s proposed statute, which must be submitted by the Manager of the Foundation (appointed by the Government).

²⁴ For more detailed information on legislation affecting foundations, see ICNL’s Memo on Foundation Law.

In 1992, recognizing the need for stronger domestic foundations, the Czech National Council enacted an amendment to the Privatization Act awarding 1% of the returns on sales of state enterprises to a newly created fund, known as the Foundation Investment Fund (“FIF”). This entity was not established as a foundation, but rather as a joint stock company, although it was intended to operate, in principle, like a foundation.²⁵ One of the significant problems facing the Czech government in determining how to distribute the privatization funds dedicated to the FIF fund was the lack of an effective Law on Foundations. With the adoption of the Act of September 3, 1997 on Foundations and Endowment, the Czech law on foundations and endowment funds established a comprehensive scheme for regulating foundations and endowment funds.²⁶ At that time as well, the Council on Foundations created as the advisory board and decision-making body for the distribution of the funds gathered in the FIF was also restructured and renamed as “The Council for Non-governmental Not-for-profit Organizations” (“CNNO”). This Council consists of 15 representatives from NGOs, appointed upon the recommendation of the government, and another eight members who were appointed from individual ministries of the Czech Government. The CNNO acts as a regular advisory body to the Government on the distribution of funds from the FIF. The CNNO chose to limit the potential recipients of the privatization contribution to only registered foundations²⁷ with registered endowments. In 1999, the Czech Parliament adopted a resolution awarding 484 million CZK to 38 foundations.²⁸ In 2001, the Czech Government approved Decision No. 12/2001, which set forth the new procedure by which remaining assets in the FIF were to be distributed in the second round of awards. In 2002, the Czech Parliament awarded 849 million CZK to 64 foundations. The 2002 amendments to the Law allowed for more efficient investment of endowment assets and provided greater leniency in the use of FIF property.²⁹ The FIF continues to operate and to provide funding to Czech foundations using the interest from the funds originally allocated to the Fund.

²⁵ Prior to 1997, Czech foundations were largely unregulated, governed by minimal provisions in the Corporations Act and the Civil Code. According to the Czech Ministry of Economics, “the Foundation Investment Fund was intended to have the form of a portfolio investment fund with shares worth a total nominal value of 2,803 million Czech crowns transferred into it from 480 companies by October 15, 1996, in particular from companies selected for the second wave of the coupon privatization project. In the years 1995 and 1996, with regard to the rapid change of hands and, consequently, property rights to the above mentioned companies, the danger of depreciation arose for the Foundations Investment Fund portfolio shares. For that reason, in 1995, the Minister for Privatization decided to have the shares of the Foundations Investment Fund sold and the financial means thus acquired gradually deposited in a special account with the Investment and Postal Bank joint-stock company.” See <http://wtd.vlada.cz/scripts/detail.php?id=3952>.

²⁶ The Law on Foundations and Endowment Funds was amended four years later in 2002, by Act No. 210/2002 Coll.

²⁷ Registered foundations would only be those that had successfully re-registered after the passage of the 1997 Act, therefore demonstrating that they met the requirements of that Act.

²⁸ One qualifying foundation declined to accept the funds.

²⁹ Some notable changes include: (1) the ability to change the composition of the endowment, unless explicitly prohibited by the founder or donor; (2) the possibility to invest in foreign banks, as long as they have a branch in the Czech Republic; (3) investment assets may be issued or registered in any country, provided that the country is a member of the Organization for Economic Cooperation and Development; and (4) exempting the profit made from selling securities placed in the endowment of a foundation exempt from special income tax.

Czech Foundation for Holocaust Victims

As with the Bulgarian examples, the Czech government has also chosen to establish issue-specific state-endowed foundations, although these foundations are structured quite differently. One example is the Czech Foundation for Holocaust Victims, which was established using funds from the FIF to create an independent government-established foundation. In 2000, based on Resolution No. 1002/1999 of the Chamber of Deputies of the Parliament of the Czech Republic, 300 million CZK were transferred from the FIF to the Foundation for Holocaust Victims. The statutes of this foundation³⁰ provide an example of how a state may choose to establish a foundation which is less governmentally-aligned than the Bulgarian examples. The statutes of the Foundation for Holocaust Victims provide for continued government involvement in the management of the foundation through its power to nominate members to the Board of Directors, but the state representatives do not form a majority. In this particular case, the Board of Directors consists of nine members, of which four will be continually appointed by members of the Czech government, one by the Vice-Premier of the government of the Czech Republic, one upon recommendation of the Minister of Foreign Affairs, one upon a recommendation of the Minister of Culture, and one from the Minister of Finances. The remaining five directors are nominated by the Federation of Jewish Communities in the Czech Republic. Endowment benefits are granted by a decision of the Board of Directors. In addition, the statutes provide for a Supervisory Board of three persons, of which one member shall be appointed based upon a recommendation by the National Property Fund of the Czech Republic (the source of FIF funds).

Public Benefit Corporations

The Czech Republic chose to include the state as an entity capable of establishing a Public Benefit Corporation (“PBC”).³¹ In fact, some commentators suggest that, “this new legal form was originally conceived as a tool of privatization of the state-subsidized quasi-NGOs surviving from the previous regime.”³² Under this law, the state acts as any other founder would, and is subject to the same reporting and governance requirements as non-state organizations established under the Law, except that there are certain provisions in the law which appear to apply particularly to PBCs established by the state.

In practice, PBCs are the type of legal entity which a state could use to delegate the performance of certain social, educational and health services, without providing for a

³⁰ The Statutes are available in Czech and English at <http://www.fondholocaust.cz>.

³¹ Act No. 248/1995 Coll. of 28th September 1995 on “Public Benefit Corporations and on the change and amendment of some laws.” In practice, a PBC is similar to what is known as an “operating foundation”, and may be understood as a foundation without endowment, or be compared to nonprofit corporations (without membership). Essentially, PBCs are “private entities established to provide publicly beneficial services, such as education and health care that represent their source of income. [SIC] To finance their activities, PBCs use deposits of founders, presents and bequests, funds of the PBC, and they can also ask for subsidies from the state and municipalities’ budget.” See “The Nonprofit Sector in the Czech Republic,” Petra Brhlikova, Discussion Paper No. 2004-128, May 2004.

³² See “Amendments to Legislation Affecting NGOs in the Czech Republic,” Petr Pajas, Volume 4, Issue 4, *International Journal of Not-for-Profit Law*, July 2002.

large endowment up-front.³³ In addition, because the Law on Foundations and Funds precluded operating foundations (those which do not give grants but rather implement public and social services) from registration (due to the fact that foundations and funds are prohibited from engaging in commercial activities), many operating foundations chose to re-register as PBCs after the new law on foundations was adopted.

In order to provide for the protection of government funds allocated to a PBC, Article 4 of the Law on Public Benefit Corporations provides that “the Deed of Establishment may determine that a specific number of members of the Board of Directors or the Supervisory Board shall be elected or appointed upon the motion of a specific circle of citizens or a specific legal entity, local self-government body or a body of the national government. Optionally, the Deed of Establishment may specify that specific property endowed upon establishment may not be alienated or mortgaged or that a specific type of the publicly beneficial services rendered may be modified under specific terms and conditions.”

4. Slovakia

In 2002, the Parliament of the Slovak Republic adopted a set of amendments affecting the regulation and funding of non-profit organizations. Relevant to this discussion is Act No. 13/2002 on Conditions of Transformation of Certain Budgetary Organizations and Subsidiary Organizations into Non-Profit Organizations providing Generally Beneficial Services (“PBCs”)³⁴ (“Transformation Law”) and on Amendment and Change of Act No. 92/1991 on Conditions of Transfer of State Property on Third Persons. This Transformation Law made it possible to transform existing governmental bodies into PBCs. PBCs typically operate in the areas of health care, social services, education, or cultural or sports activities.

Interestingly, PBCs are the only legal form of non-profit organization in the Slovak Republic that is permitted to deliver health care services.³⁵ The reason for this is likely because the Transformation Act itself was “motivated by the state’s intention to decrease its ownership in health and social care provision.”³⁶

The Transformation Law sets forth a procedure by which members of the government can nominate a particular government body or entity to be transformed into a PBC. According to the Transformation Law, for example, the Ministry of Health Care can select certain facilities under its auspices, and transform them into a non-profit form. The procedure by which this occurs is that the Ministry first buys all of the debts of the institution, and then co-founds a PBC, often in cooperation with the relevant municipality

³³ Unlike foundations, which have a minimum endowment requirement of 500,000 CZK, PBCs are not subject to this strict requirement.

³⁴ This legal entity is much like the Public Benefit Corporation legal form adopted in the Czech Republic. They are, at essence, operating foundations – i.e., non-membership organizations which provide services of public benefit.

³⁵ See “The Evolution of the Third Sector in Slovakia,” Katarina Svitkova, January 16, 2004, Section 4.4, P. 24.

³⁶ *Id.*, p. 25.

and, in some cases, the institution's employees. The Ministry then transfers the property of the state facility to the newly established not-for-profit organization.

The 2002 amendments to the Law of the Slovak Republic on Non-profit Organizations Providing Generally Beneficial Services ("PBC Law") established the concept of so-called "Priority Property," i.e. that property that derives from the state via the Transformation Law. These amendments to the PBC Law, adopted in conjunction with the Transformation Law, place strict requirements as to the treatment of so-called Priority Property. These provisions serve to guarantee that such property will not be alienated, that it will remain with the PBC and be used for publicly beneficial purposes.

The PBC Law generally details the structure and function that these former government entities must adopt. Government-established PBCs take the same form as non-governmentally established organizations. However, as mentioned above, there are provisions in the PBC Law which impose special treatment on Priority Property. According to Section 31a(1) of the PBC Law, "the priority property is such a part of the state property, which the state as a founder or co-founder endows to the non-profit organization according to the special law [Transformation Law] and which is to be used exclusively for securing public benefit services."

Priority Property cannot be used as a security or to secure obligations of the non-profit organizations or a third person. In addition, it cannot be sold, donated, rented or lent, is not subject to liquidation, and any real estate that is part of the Priority Property must be entered into the Register of Real Estates. This provision is intended to prevent the Government property from being squandered or misappropriated. However, the law does not provide for the funds to be forfeited to the state in the event of cessation or liquidation. As with non-governmentally established organizations, such funds should be transferred to another non-profit organization or foundation.

In order to ensure the government's ability to continue to exert some control over the transformed entity, the PBC Law explicitly provides that the "Founder's Deed" may specify that a certain number of members of the Board of Directors and/or the Supervisory Board may be elected based on nomination by a specified physical person, on the proposal of a specific legal person, or of a body of the territorial self-government or the state administrative body.³⁷

The PBC Law also contains detailed requirements pertaining to the management and supervisory structure of a PBC. All PBCs must have a Board of Directors and an Executive Manager, and those with resources over 5,000,000 SKK or those which possess Priority Property must also have a Supervisory Board. The minimum number of members of the Board of Directors is three. The Executive Manager is entitled to participate in Board of Directors' meetings but is limited to an advisory vote. The Supervisory Board acts as a supervisory body of the PBC, and is required to have at least three members (who may not also be the Executive Director or a member of the Board of Directors). Membership on both the Board of Directors and the Supervisory Board must

³⁷ See Section 7(a) of the Law of the Slovak Republic on Non-profit Organizations Providing Generally Beneficial Services, No. 213/1997 Coll., Amend. No. 35/2002, adopted July 2, 1997.

be voluntary and unpaid, although members of either Board are eligible for reimbursement of certain direct expenses associated with their service.

The PBC Law also contains several provisions designed to limit potential abuses of property, including a requirement that both members the Boards and the Executive Director be persons of “irreproachable character,”³⁸ as well as a provision designed to prohibit conflict of interests. However, the conflict of interest provision present in the PBC Law is simply not sufficiently detailed to be a genuine obstacle to abuse. In addition, there is no provision on recusal in the event that a Board member or the Executive Director has a personal interest in the relevant transaction being voted upon.

Conclusion

ICNL would be pleased to provide additional information on any of the models described herein, as well as to answer questions regarding countries not addressed in this memo. As the reader should be able to ascertain, there are many models available for government establishment of foundations. ICNL does not recommend any particular model over another. However, we would caution that, although government-established foundations are quite common and acceptable, they are peculiarly subject to actual and perceived favoritism on the part of the government. Such organizations are frequently (both fairly and unfairly) vulnerable to public criticism that such entities are more likely to “receive an unfair competitive advantage or be used inappropriately to benefit state officials, directly or indirectly, either politically or monetarily.”³⁹ The solution to this potential problem is simply to provide that any law or regulation establishing such an organization contain provisions which will ensure sufficient transparency and oversight to minimize the potential for such abuses to occur.

³⁸ According to the Law, this means a person who has not been convicted of purposefully committing a crime.

³⁹ See “Guidelines on Laws Affecting Civil Society Organizations,” 2d edition, Open Society Institute, 2004, p. 93.