

PRINCIPLES FOR STATUTORY REGULATION AND SELF-REGULATION OF FUNDRAISING





European Center for
Not-for-Profit Law



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ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACNC	Australian Charities and Not-for-profits Commission
AI	Artificial intelligence
AML/CTF	Anti-money laundering and counter terrorism financing
CAF	Charities Aid Foundation
CBF	Centraal Bureau Fondsenwerving
CFRE	Certified Fund Raising Executive
CSO	Civil society organization
CSP	Charities and Societies Proclamation
DGR	Deductible Gift Recipient
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECNL	European Center for Not-for-Profit Law Stichting
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
FATF	Financial Action Task Force
GDPR	General Data Protection Regulation
GST	Goods and services tax
IACAD	Islamic Affairs and Charitable Activities Department
ICCPR	International Covenant on Civil and Political Rights
IRS	Internal Revenue Service
NBU	National Bank of Ukraine
NGO	Non-governmental organization
NPO	Non-profit organization
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights, United Nations
PFRA	Public Fundraising Regulatory Association
TGE	Transnational Giving Europe
UK	United Kingdom
VAT	Value added tax

I. INTRODUCTION

As the philanthropic sector and the use of digital technologies have grown, so have opportunities for civil society organizations (CSOs) to adopt new fundraising practices. Questions about how to appropriately regulate these new practices are also increasingly pertinent. The new technologies provide innovative and cost-effective means to raise funds for important social missions. Individuals can donate to a CSO through their Instagram or Facebook accounts¹, metro passes, and mobile phones. CSOs can use crowdfunding platforms to fundraise across borders. Artificial intelligence (AI) can also help fundraisers to become more efficient: among others, AI applications have been designed to automatically craft personalized, donor-centric emails for fundraisers at CSOs.² Algorithm-based systems can also be used to launch global fundraising campaigns that drive traffic to donors based on their previous research history. On the other hand, the digital revolution has also brought a range of new risks and challenges to fundamental rights.³

We are also witnessing the private sector playing an increasing role in fundraising and acting as the intermediary service provider between donors and charities, particularly in Asia. For example, in China the internet giant Tencent Holdings Ltd created Tencent Charity, a mobile and desktop donation site that adapted traditional philanthropic approaches for the smartphone era to become one of the world's most used giving platforms.⁴ In India, the Companies Act requires companies to spend at least 2 percent of their aggregate net profit over the preceding three years on CSR activities.⁵ Frequently, corporates and other third parties are soliciting donations and managing donor data. Therefore, the focus of fundraising regulation and self-regulation should be on the act of giving rather than on CSOs.

The societal environment for fundraising is also rapidly changing. CSOs need to adapt their strategies to match the unique needs of the millennial generation. With online social networks providing easy methods for those with shared interests or aims to connect with each other, and with millennials placing less value on traditional means of networking, association membership has been declining

1 Gee, N. 'How WWF are using Instagram donate to engage younger donors', Medium, 30 July 2019, available at: <https://medium.com/@NicolaGeeTweets/instagram-donate-3f679bf4ac74>; Facebook Social Good, 'How to Create a Nonprofit Fundraiser from a Facebook Page', 28 August 2018, available at: <https://socialgood.fb.com/2018/08/28/how-to-create-a-nonprofit-fundraiser-from-a-facebook-page/>.

2 Afshar, V. 'How Nonprofits Can Use Artificial Intelligence To Improve Fundraising', Huffpost, 28 September 2017, available at: https://www.huffpost.com/entry/how-nonprofits-can-use-artificial-intelligence-to-improve_b_59ccf9efe4b02ba6621ffac.

3 United Nations Office of the High Commissioner for Human Rights. 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/HRC/41/41, 17 May 2019, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/41.

4 Feifei, F. 'Tencent continues to build sophisticated charity platform', China Daily, 4 September 2019, available at: <http://www.chinadaily.com.cn/a/201909/04/WS5d6f703ba310cf3e35569b71.html>; Flannery, R. 'How China's Social Media Giant Tencent Is Shaking Up Traditional Philanthropy', Forbes, 22 May 2017, available at: <https://www.forbes.com/sites/russellflannery/2017/05/22/how-chinas-social-media-giant-tencent-is-shaking-up-traditional-philanthropy/#24449237e6c0>.

5 ICNL. 'Civic Freedom Monitor: India', 6 August 2019, available at: <https://www.icnl.org/resources/civic-freedom-monitor/india>

over recent decades.⁶ Furthermore, growing social movements, such as the global climate movement, require flexible tools and rapid responses across borders. Fundraising is becoming ever more professional as a result. At the same time, it is also becoming more personal, as increasing numbers of individuals raise money for family and friends' healthcare, for instance.

While giving is an important aspect of all cultures, the regulation of philanthropy and fundraising falls on a spectrum ranging from incentivizing giving to controlling fundraising. Around two-fifths of the 79 countries covered in the 2018 Global Philanthropy Environment Index have a restrictive philanthropic environment. Cross-border flow of donations has become more restricted and CSOs are subject to burdensome registration and licensing requirements in order to be able to raise funds from the public.⁷

Therefore, it is important to work with government and other stakeholder groups to make sure that fundraising is safeguarded by fundamental principles to ensure CSOs' access to resources and maintain the public trust. However, the ways to implement the principles varies from region to region, with no uniform understanding of the relative roles that regulation and self-regulation play in fundraising within the philanthropic sector. These *Fundraising Principles* attempt to address this knowledge gap by providing an overview of current trends in fundraising regulation and self-regulation globally and by offering some suggestions for consideration as all stakeholders work together to ensure the health and accountability of the philanthropic sector.

Purpose of the Fundraising Principles

The Fundraising Principles attempt to map the terrain of fundraising regulation and self-regulation globally in order to understand the common interests and intersections of the philanthropic sector, government, and other stakeholders in building and maintaining strong, well-resourced CSOs while maintaining appropriate safeguards for the public, donors, and other stakeholders. They formulate principles in 7 key areas of fundraising regulation and self-regulation, including fundamental freedoms, fundraising methods; data protection and right to privacy; cross-border fundraising; taxation; transparency, accountability and oversight; and registration, licensing and permission. They are based on international and regional standards that guarantee the fundamental rights of CSOs, their employees and fundraisers to access resources and protect their right to privacy.

The Fundraising Principles aim to support advocacy efforts to create an enabling environment for private giving within and across countries. We formulated the principles with the intention that they should be applicable globally, whilst also acknowledging regional peculiarities. We have included some good practice examples in text boxes for inspiration. We hope that they can serve as a reference

⁶ Lee Yohn, D. 'To Stay Relevant, Professional Associations Must Rebrand', Harvard Business Review, 5 January 2016, available at: <https://hbr.org/2016/01/to-stay-relevant-professional-associations-must-rebrand>.

⁷ Indiana University Lilly School of Philanthropy. 'The Global Philanthropy Environment Index 2018', available at: <http://hdlhandle.net/1805/15958>.

point to promote and facilitate further dialogue between CSOs and policy makers on key questions such as: *What is the relationship between statutory regulation and self-regulation?* What are the advantages and disadvantages of regulation and self-regulation as control mechanisms for fundraising? What purposes are these mechanisms supposed to achieve, and are they effective in providing appropriate safeguards? Are they cost-effective in providing the desired results?

- *When is regulation or self-regulation of fundraising most effective?* Should regulation and self-regulation aim at providing preventative measures that stop potential abuses before they occur? Or are regulation and self-regulation more appropriately correct measures that provide a remedy for abusive fundraising practices after the fact?
- *What entities should be the subject of regulation or self-regulation in fundraising?* Civil society organizations that receive donations? Fundraising professionals who secure donations? Trustees of CSOs, who provide governance oversight for these organizations? Or the third-party entities (such as for-profit companies who provide solicitation services to CSOs), whose business models are predicated on their ability to fundraise successfully on behalf of their client organizations?
- *What are the frameworks in which regulation and self-regulation of fundraising operate?* How are decisions made regarding what tasks to regulate or self-regulate, and what tasks remain intentionally unaddressed?
- *What are the principles of oversight, enforcement, and liability that are addressed by regulation and self-regulation of fundraising?* How are the legitimate interests of CSOs, fundraisers, trustees, donors, beneficiaries, and other stakeholders addressed through regulation or self-regulation?

Stakeholders / Target Group

The Fundraising Principles aim to serve as an inspiration for governments, CSOs, fundraising professionals, third party fundraisers, philanthropic networks, academia and other stakeholders engaged in fundraising and philanthropic efforts. We hope that the Principles will contribute to better regulation and more self-regulation, create more dialogue in countries about how best to deliver social good, and contribute to an enabling environment.

Methodology

The European Center for Not-for-Profit Law Stichting (ECNL), together with the International Center for Not-for-Profit Law (ICNL), gathered a group of core experts to guide the development of these Fundraising Principles. The core expert group included Eva E. Aldrich (CFRE International), Oonagh B. Breen (Sutherland School of Law, University College Dublin), Pia Tornikoski (Finnish Fundraising Association) and Usha Menon (Usha Menon Management Consultancy Asia). They represent various sectors and fundraising professionals, representatives of CSOs,

academia, and other stakeholder representatives. We are grateful for their expert input and guidance throughout the process.

The core expert group met to outline the parameters of the Fundraising Principles and acted as subject matter experts for its chapters, meeting in person and via teleconference from February 2018 through to October 2019. The Fundraising Principles were further informed by the research conducted by the following experts and organizations on the topics of self-regulation; licensing, permission, and notification procedures for fundraising purposes; regulation of digital fundraising; data protection relevant to fundraising regulation and self-regulation globally: Ian MacQuillin (Rogare- The Fundraising Think Tank), Dr Adrian Sargeant and Harriet Day (Institute for Sustainable Philanthropy), the Indiana University Lilly Family School of Philanthropy, the Ukrainian Center for Independent Political Research, Katarzyna Batko-Tołuc (Citizens Network Watchdog Poland), Andrea Caracciolo (ASSIF- Associazione Italiana Fundraiser) as well as Alissa Pelatan, Julien Steinberg and Carly Nyst. In addition, we shared the pre-final version of the Principles with more than 40 key experts through an online consultation to seek further input and validate the findings. The feedbacks confirmed the relevance of the principles and recommendations to advocate for a better environment for philanthropy and shape regulatory advocacy and engagements with governments across regions. We are particularly grateful for all feedbacks during the consultation.

The Fundraising Principles were made possible by the generous support of the Government of Sweden.

Key Terms

The Fundraising Principles use the following definitions for key terms:

- **Civil society organization (CSO):** The term “civil society organization” is used to refer to voluntary self-governing bodies or organizations established to pursue the non-profit-making objectives of their founders or members. CSOs encompass bodies or organizations established both by individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based. CSOs can be either informal bodies or organizations that have legal personality. They may include, for example, associations, foundations, nonprofit companies and other forms that meet the above criteria. They are also commonly known as non-governmental organizations (NGOs) or social development organizations (SDOs). There is admittedly much fluidity of terminology when referring to such entities. The Fundraising Principles have chosen to use the term “civil society organization” as it is most commonly used by the United Nations and governmental policy makers. We also feel the term “civil society organization” most accurately reflects the way in which organizations operating in the philanthropic sector act as pillars for a healthy civil society.
- **Fundraising:** “Fundraising” is defined here narrowly as an activity that generates voluntary donations of money and in-kind support to assist CSOs.

- **Fundraising professional:** This document defines “fundraising professional” as an individual employed to conduct, advice, counsel, or manage the solicitation of donations or contributions for or on behalf of a CSO.
- **Statutory Regulation:** “Statutory Regulation” is defined here as the activity by which government entities create laws or regulations that define how civil society organizations may conduct their fundraising.
- **Self-regulation:** This document defines “self-regulation” as the process by which CSOs and other entities within the philanthropic sector (for example, national fundraising associations) create codes of practice and ethical standards to provide guidance on how fundraising shall be performed. These codes of practice and ethical standards generally also outline grievance procedures on how entities that violate the codes and standards will be disciplined.
- **Co-regulation:** The term co-regulation is defined here as self-regulation combined with a statutory element and with the clear involvement of a public authority or public oversight.⁸
- **Service Providers:** A service provider is an outside resource – for example, a consultant or agency – that assists (a CSO) with fundraising, usually operating for a profit.
- **Certification:** A certification reflects attainment of established criteria for proficiency or competency in a profession or occupation, and is granted upon an assessment of an individual’s knowledge, skills, and abilities. Certification is valid for a specific time period. A certification program has ongoing requirements for maintaining proficiency or competency, and can be revoked if ongoing requirements are not met.⁹
- **Accreditation:** Accreditation denotes both a status and process. As a status it denotes conformity to a specific standard as set forth by an accrediting agency and as a process it shows a commitment to continuous improvement. Accreditation means that the certified body meets the requirements of a national or an international standard as assessed by an accrediting agency. The scope of the accreditation is determined by the standard to which the certification body is accredited. In general, the accreditation standard covers aspects of governance, disclosure, fairness to candidates, non-discrimination, and disclosure.¹⁰
- **Charitable:** Under the common law, to be charitable, an organization must have a charitable purpose; it must provide public benefit and it must be exclusively charitable. A charitable purpose traditionally relates to the relief of poverty, the advancement of education, the advancement of religion or other purposes beneficial to the community. In many common

8 MacQuillin, I., Sargeant, A. and Day, H. ‘Fundraising self-regulation: An Analysis and Review’, The Philanthropy Centre and ECNL, 2019. <http://ecnl.org/wp-content/uploads/2019/11/Fundraising-self-regulation-research.pdf>

9 American National Standards Institute. ‘Credentialing Programs’, available at: <https://www.ansi.org/Accreditation/credentialing/Default>.

10 American National Standards Institute. ‘Frequently Asked Questions’, available at: <https://www.ansi.org/accreditation/faqs#2>.

law countries, statutory definitions now elaborate on the contents of this fourth head of charity ('other purposes to the community') and it includes in many cases, advancement of health, advancement of culture, the arts and science, promotion of animal welfare and human rights and advancement of environmental protection.

- **Public benefit:** Public benefit associations or organizations in civil law countries are counterparts to the charitable organizations in common law countries. In common law countries, 'public benefit' has a specific legal meaning and is part of the charity test. At common law, to be of 'public benefit' a charitable gift must benefit the community or an appreciable section of the community. The gift must not have unnecessary private benefits to others attached and it must alleviate a need of the beneficiaries that makes them beneficiaries in the first place. Public benefit should not be confused with public interest (see below).
- **Public interest:** Public interest is a term denoting the common concern among citizens in the management and affairs of local, state, and national government. It does not mean mere curiosity but is a broad term that refers to the body politic and the public weal. It covers matters affecting the rights, health, or finances of the public at large. Public interest law refers to a way of working with the law for the benefit of marginalized and disadvantaged people. It means taking cases, proposing law reform and promoting legal education as tools of change – a union of legal and social justice work.

Assumptions and Limitations of the Report

The Fundraising Principles are intended to assist government decision-makers, CSOs, the public, and other stakeholders in understanding key issues in the regulation and self-regulation of fundraising. The document assumes that all parties desire a strong philanthropic sector, wish for CSOs to be well resourced so they can successfully fulfill their missions, and believe that a strong society needs a strong civil society in order to function. It also assumes that the government, CSOs, and other stakeholders share a common interest in making sure that fundraising for CSOs is transparent and accountable, and that access to resources is part of the right of association as a fundamental human right.

Because the issue of fundraising regulation and self-regulation is huge in scope, the Fundraising Principles are not meant to be an exhaustive documentation of fundraising regulation and self-regulation practices worldwide. It is, however, meant to provide a basic overview of the landscape for fundraising regulation and self-regulation so that decision-makers from all sectors and at all levels can make informed decisions regarding the appropriate use of fundraising statutory regulation and self-regulation in their localities.

II. RELATIONSHIP BETWEEN STATUTORY REGULATION AND SELF-REGULATION

An enabling regulatory environment for fundraising is a balanced system of statutory (state) regulation and self-regulation of the sector. Statutory regulation is “the creation of primary or secondary legislation by the state, ranging from statutes to statutory instruments, from executive orders or decrees to administrative rulings.”¹¹ Self-regulation, although taking many forms, by definition has some commonalities. It is (1) a set of standards and processes to ensure compliance with those standards that is (2) voluntary and (3) independent of the state.¹² Self-regulation is especially common in the area of fundraising and has often been the preferred option for civil society. Such regulation may include codes of conduct, ethics or practice, accreditation processes, certification processes, information services, working groups and others. There are two main approaches to self-regulation. “Low entry” schemes seek to engage all CSOs by setting relatively flexible minimum standards for transparency and accountability in fundraising, while more stringent “excellence” models set higher standards and sometimes seek to hold the best-funded or most visible CSOs to account. Self-regulation initiatives may include compliance mechanisms, such as self-assessments or peer assessments, or third-party assessments. The objective of both statutory and self-regulation should be to facilitate and enable CSOs’ fundraising activities and not to unduly constrain, restrain, or prohibit their activities in a way that is damaging to the sector and/or its beneficiaries.

Neither works fully on its own. Statutory regulations are established by legislative bodies to define and safeguard transparency and accountability in fundraising by the third sector. Although there may be input from the sector in its development, statutory regulation is a government-driven process.¹³ Self-regulation, on the other hand, occurs when CSOs determine standards for their own behavior. Some issues, such as tax benefits, can only be the domain of state regulations. Similarly, ethical standards should be regulated by the sector itself. The major benefit of self-regulation is that it sets certain benchmarks below which the standards of fundraising profession should not fall. It also provides an additional recourse for lodging a complaint against inappropriate communications and behaviors. Governments also benefit from this as they can focus their resources on more difficult and serious cases.

11 Breen, O. B., Dunn, A. and Sidel, M. ‘Riding the Regulatory Wave: Reflections on Recent Explorations of the Statutory and Nonstatutory Nonprofit Regulatory Cycles in 16 Jurisdictions’, *Nonprofit and Voluntary Sector Quarterly*, 2019, Vol. 48(4) 691–715, p. 694.

12 MacQuillin, I., Sargeant, A. and Day, H. ‘Fundraising self-regulation: An Analysis and Review’, *The Philanthropy Centre and ECNL*, 2019.

13 Breen, O. B., Dunn, A. and Sidel, M. ‘Riding the Regulatory Wave: Reflections on Recent Explorations of the Statutory and Nonstatutory Nonprofit Regulatory Cycles in 16 Jurisdictions’, *Nonprofit and Voluntary Sector Quarterly*, 2019, Vol. 48(4) 691–715, p. 694.

In 2006, representatives of approximately twenty-five national fundraising associations adopted the International Statement of Ethical Principles in Fundraising, which presents shared principles for ethical fundraising and standards of fundraising practice. Organizations voluntarily endorse and support this Statement as a demonstration of their commitment to agreed-upon values, beliefs, and principles.¹⁴ Nearly 7,000 Certified Fundraising Executives (CFREs) have committed to abide by these Principles.

Both have advantages and disadvantages. Both statutory regulations and self-regulation have their strengths and weaknesses. Statutory regulation may become problematic when the regulator comes to serve the regulated, rather than the public interest. The weakness of self-regulation typically lies in its voluntary nature and the lack of formal mechanisms for enforcement.

Having both creates a more robust system. There is a need for awareness of existing statutory regulations and self-regulation in fundraising, their relations, role and interplay. Such awareness allows stakeholders to have a holistic approach and create an environment that supports ethical and effective fundraising. The different functions of these two regulatory mechanisms can complement and strengthen each other. It is good practice to conduct a regular and systematic assessment of the implementation and effectiveness of both mechanisms and adjust this to arising needs to support the evolution of fundraising practices.

Increasing role of co-regulation and hybrid systems. Co-regulation is regarded as a new paradigm in fundraising regulation. Hybrid models that combine binding statutory regulation and self-regulation and bring both parties together for implementation and enforcement are becoming increasingly common.¹⁵ Co-regulation can take a variety of forms based on state involvement, including:

- *Co-operative:* Co-operation between regulator and regulated on the operation of statutory backed regulation.
- *Delegated:* Delegation of statutory powers by a public authority;
- *Devolved:* Devolution by government of statutory powers to a self-regulatory scheme;
- *Facilitated:* The explicit encouragement and support of self-regulatory schemes by a public authority.
- *Tacit:* No statutory backing and little explicit role for public authorities. This is closest to pure self-regulation.¹⁶

For example, in some countries state bodies have an instrumental role in facilitating the development of a self-regulation regime or are included in its management, as is the case in the United Kingdom (UK) and Germany. There are

¹⁴ Institute of Fundraising. 'International Statement of Ethical Principles in Fundraising July 2018', 2018. available at: <https://www.institute-of-fundraising.org.uk/library/international-statement-of-ethical-principles-in-fundraising/>.

¹⁵ Breen, O. B., Dunn, A. and Sidel, M. 'Riding the Regulatory Wave: Reflections on Recent Explorations of the Statutory and Nonstatutory Nonprofit Regulatory Cycles in 16 Jurisdictions', *Nonprofit and Voluntary Sector Quarterly*, 2019, Vol. 48(4) 691–715, p. 694.

¹⁶ See further details at MacQuillin, I., Sargeant, A. and Day, H. 'Fundraising self-regulation: An Analysis and Review', The Philanthropy Centre and ECNL, 2019.

cases where state funding bodies only make grants to organizations accredited by the national regulator.

Elements of effective self-regulation. Based on academic research, there are a variety of elements that may contribute to effective self-regulation. Elements may include the existence of adequate funding to maintain the mechanism; written standards that are clear and easily accessible; an independent complaints administrator; an enforcement mechanism with the possibility to appeal; public awareness of the schemes and mechanisms; an independent regulatory body accountable to those they are regulating; transparency regarding the process and the potential penalties for non-compliance; and the appropriate duty of care when handling complaints and membership take-up.¹⁷

¹⁷ MacQuillin, I., Sargeant, A. and Day, H. 'Fundraising self-regulation: An Analysis and Review', The Philanthropy Centre and ECNL, 2019.

III. PRINCIPLES FOR STATUTORY REGULATION AND SELF-REGULATION OF FUNDRAISING

III.1. FUNDAMENTAL GUARANTEES

Principles:

- 1. States guarantee CSOs' right to solicit, receive and use resources, which includes cash, in-kind and other forms of financial resources from individual and institutional donors.**
- 2. CSOs are allowed to fundraise for any legitimate nonprofit purposes.**
- 3. CSOs are informed and actively involved in the development, implementation and assessment of laws and policies affecting fundraising.**

INTRODUCTION

CSOs need resources to be able to function properly. Philanthropy has been a key traditional income source and plays an important role in diversifying CSO funding, as it derives from the basic human urge to help other people and support the common good.¹⁸ As an integral part of freedom of association CSOs should have the right to solicit, receive and use such resources without barriers.

CSOs carry out a variety of activities. Among many others, they conduct research, provide services to vulnerable people, advocate for better policies, and bring together people that enjoy the same activities or interests. States should allow CSOs to fundraise for any such legitimate nonprofit purposes.

States should engage CSOs in developing laws and policies that affect their ability to fundraise. This derives from their basic right to participate in decision-making¹⁹ and guarantees that any such developments enable rather than disable CSOs, their donors and beneficiaries to access funding from individual and corporate donors.

18 United Nations Office of the High Commissioner for Human Rights (OHCHR). 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

19 OHCHR. 'Guidelines for States on the effective implementation of the right to participate in public affairs', 2018, para 19(e), available at: https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf.

PRINCIPLES

- 1. States guarantee CSOs' right to solicit, receive and use resources, which includes cash, in-kind, and other forms of financial resources, from individual and institutional donors.**

CSOs need resources to be able to function properly. It is important not only to the existence of CSOs, but also to the enjoyment of other human rights and freedoms for those benefiting from their work.

CSOs' right to access resources is an integral part of the right to freedom of association guaranteed by numerous international documents, including the International Covenant on Civil and Political Rights (ICCPR, Article 22), the UN Declaration on Human Rights Defenders, the European Convention on Human Rights (ECHR, Article 11), the American Convention on Human Rights (ACHR, Article 16) and the African Charter on Human and Peoples' Rights (ACHPR, Article 10). This implies any form of resources, be they monetary, material or human.²⁰ The term "resources" encompasses a broad concept that, among others, includes financial transfers (e.g., donations, grants, contracts, sponsorships, social investments, etc.); in-kind donations (e.g., contributions of goods, services, software and other forms of intellectual property, real property, etc.); material resources (e.g. office supplies, IT equipment, etc.) and others.²¹ The scope of resources expands with technology and the creation of non-traditional resources, such as cryptocurrencies and airline miles.

States have an obligation to guarantee "the right of [...] an association freely to carry out its statutory activities,"²² which includes soliciting, receiving and using financial donations."²³ Many countries provide such basic guarantees of access to resources in their legislation regulating CSOs. For example, in Kosovo the 2019 Law on the Freedom of Association in Non-Governmental Organizations dedicates a separate Article to the "Freedom to seek, receive and use resources". According to this Article, *"The NGO has the right to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the realization of its objectives and activities. The restriction or blocking of an NGO's access to resources on the basis of nationality or country of origin is prohibited, as well as the stigmatization of those who receive these resources. The freedom to seek, receive and use resources should not be contrary to the legislation into force."*²⁴

20 See the joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, Principle 7 on the freedom to seek, receive and use resources, para. 32 (available at <https://www.osce.org/odihr/132371>). See also the Council of Europe Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (10 October 2007), in particular Article 50, stating that NGOs shall be free to solicit and receive funding in the form of cash or in-kind donations (available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d).

21 OHCHR. 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association', para. 9, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

22 UN Human Rights Committee. Communication No. 1274/2004, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F88%2FD%2F1274%2F2004&Lang=en.

23 See ECtHR, *Ramazanov and Others v. Azerbaijan* (44363/02). See also Article 13 of the UN Declaration on Human Rights Defenders (available at: <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Translation.aspx>).

24 Kosovo, Law No. 06/L-043 on Freedom of Association in Non-governmental organizations, Article 10(1).

In addition, much CSO legislation provides a list of the types of income sources, including donations. According to the same Kosovar law, “*the incomes of an NGO may include: donations, income from insurance, securities, inheritance, membership, gifts, grants, movable and immovable property, incomes from invested funds, and income generated from any lawful activities undertaken by the NGO with its property and means.*”²⁵

Still, many countries limit CSOs’ fundraising efforts by introducing burdensome public collection permits, restrictions on foreign funding, reporting requirements, and others. States should refrain from any rules and practices that unduly interfere with CSOs’ right to solicit, receive and use resources.

2. CSOs are allowed to fundraise for any legitimate nonprofit purposes.

CSOs may be established for a variety of purposes. As a general rule, CSOs should be allowed to fundraise for any legitimate nonprofit purposes. This derives from their right to access resources and the general non-discrimination principle as set out in ICCPR (Article 2), ECHR (Article 14), ACHR (Articles 1 and 24), ACHPR (Article 2) and other international and regional documents.

In Finland, for example, donations may be collected for nonprofit and public benefit activities. In addition, donations may be sought to assist individuals or families who are, for instance, in financial distress and to promote the educational activities of a day-care group, school class, or established study or hobby group.

3. CSOs are informed and actively involved in the development, implementation, and assessment of laws and policies affecting fundraising.

CSOs should have the ability to engage in and influence laws and policies that affect their operation, access to resources and fundraising activities. Such a right of engagement is based on the right to participate in decision-making recognized and guaranteed by the ICCPR, the UN Human Rights Council resolutions on equal participation in the conduct of public life, the Civic Space Resolution, the Resolution on Protecting Human Rights Defenders²⁶ and many other international and regional documents. The protection is provided to individuals as well as organized gatherings of citizens.²⁷ According to the Council of Europe’s Recommendation on the legal status of NGOs, “*NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation*”.²⁸

25 Kosovo, Law No. 06/L-043 on Freedom of Association in Non-governmental organizations, Article 35(1).

26 UN Human Rights Council, ‘Equal political participation: resolution / adopted by the Human Rights Council’, 8 October 2013, A/HRC/RES/24/8; UN Human Rights Council, ‘Equal participation in political and public affairs: resolution / adopted by the Human Rights Council’, 2 October 2014, A/HRC/RES/27/24; UN Human Rights Council, ‘Equal participation in political and public affairs: resolution / adopted by the Human Rights Council’, 11 October 2015, A/HRC/RES/30/9; UN Human Rights Council, ‘Civil society space : creating and maintaining, in law and in practice, a safe and enabling environment : resolution / adopted by the Human Rights Council’, 9 October 2013, A/HRC/RES/24/21 (all available at: <https://documents.un.org/prod/ods.nsf/home.xsp>). UN HRC, 9 October 2013, A/HRC/RES/24/21.

27 UN Committee on Human Rights, General Comment 25, ‘The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service’, 12 July 1996, available at: <https://www.osce.org/odihr/elections/19154>.

28 Council of Europe. Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007, available at: https://search.coe.int/cm/Pages/result_details.

In order to participate, CSOs need to have access to information on the process and types of laws/regulations the government wishes to adopt. This is a basic and important right underlying the whole process of participation.²⁹

Laws should guarantee meaningful and inclusive participation in decision-making. CSOs shall enjoy equal opportunities to participate in the development of laws and policies on fundraising. The consultation mechanisms should be defined by law and notice of consultations should be disseminated widely to ensure broad public participation. The comments and suggestions provided should be duly discussed and taken into consideration by the relevant decision-making body.

In Finland, the development of the new Fundraising Act (entered into force on 1 March 2020) was one of the pilot projects on how to support law drafters on consultation, stakeholder cooperation and engagement. The Law Drafting Development Group appointed by the Ministry of Interior included the representatives of CSOs among various other authorities. During the development of the new legislation, the Ministry gained a far clearer insight into fundraising in Finland by offering CSOs and stakeholders the opportunity to participate in numerous workshops and consultation events both in-person and online. The preparation work leading to the reformed Act has been praised by Finnish charities, the parliament and legislators.³⁰

Recommendations:

- State legislation should guarantee CSOs' right to access resources and recognize donations as one of their income sources.
- States should not inhibit CSOs' fundraising activities with unduly burdensome requirements.
- Any limitation on fundraising purposes must be proportionate and serve a legitimate aim.
- States should actively engage CSOs and other affected stakeholders when developing primary and secondary legislation that affects fundraising activities and encourage ongoing dialogue.

[aspx?ObjectID=09000016805d534d](#)).

29 ECNL. 'Civil participation in decision-making. An Overview of Standards and Practices in Council of Europe Member States'. 2016, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168068690f>.

30 European Fundraising Association. 'Fundraising Act approved by Finnish parliament', 27 March 2019, available at: <https://efa-net.eu/news/new-fundraising-act-approved-by-finnish-parliament>.

III.2. FUNDRAISING METHODS

Principles:

1. States allow and encourage the use of the broadest possible range of fundraising methods.
2. Where regulations impacting fundraising methods exist, states ensure that they are clear, strictly necessary, and proportionate to the interests protected.
3. Legislation allows for the use of new technologies in fundraising.
4. States ensure that financial service providers and other service providers do not limit fundraising activities through their policies and practices.
5. CSOs and fundraising professionals consider self-regulatory and co-regulatory initiatives to guide the implementation of various fundraising methods.

INTRODUCTION

There are a variety of different fundraising methods available to CSOs. The availability and popularity of methods may vary by country, particularly since new technologies, such as social media and mobile technology (such as SMS), continue to create new, innovative fundraising methods that may complement more traditional forms of fundraising, such as face-to-face fundraising. Countries have also taken different approaches to regulating these various fundraising methods and different stages of the solicitation process. Despite these diverse methods and approaches, there are some common principles that apply across the globe. States should generally permit a broad range of fundraising methods, ensure that regulations comply with international standards, allow for the use of new technologies in fundraising, and rely on self-regulatory initiatives to guide the implementation of the various fundraising methods.

PRINCIPLES

1. States allow and encourage the use of the broadest possible range of fundraising methods.

CSOs may seek donations from potential donors through a variety of methods. Some of these methods may target the public and seek single or recurring donations, while other methods may target a few wealthy individuals or corporations. Some of the most common conventional methods used by CSOs include:

- **Collection boxes, street fundraising, and door-to-door collections**, which are some of the most traditional and widespread fundraising methods.
- **Direct marketing** to request single or periodic donations from potential donors. Marketers often use mail, telephone, electronic communications, mobile technology, social media, and television, to market the fundraising campaign.
- **Special events**, such as charity dinners, auctions, or sporting events, such as walk-a-thons, races, or tournaments.
- **Gaming and lottery programs** where donors buy tickets for the chance to win a prize and the charity or organization receives the revenue.
- **Payroll giving schemes** that enable workers to donate a portion of their salary to their designated charities. The designated amount is deducted from the worker's salary by their employer.
- Requests to individual donors to include them in their estate planning and leave a **bequest** or **legacy** at the time of their death.
- **Memorial or tribute gifts** in honor of a person. For example, the deceased's loved ones may ask people to provide a donation to a designated charity as a tribute to a person that has passed away, in lieu of flowers or other gifts.
- Online **crowdfunding** websites to raise small contributions from a large number of people for a specific purpose or project via the Internet.
- **Peer-to-peer fundraising** and **third-party fundraising**, a growing trend which involves an individual or entity fundraising on behalf of a cause or organization. Third party fundraising may take place face-to-face, online, etc. For example, an individual may share their Facebook page with their network, including friends, family or other community members and encourage the community to donate to the selected cause or organization.³¹
- Sale of **merchandise** or other products or services or the pursuit of other **economic activities that generate revenue that is** reinvested in the activities into the organization.
- **Major gifts** from individuals. Determining whether a donation qualifies as a 'major gift' will often depend on the size of the organization and other factors.
- **Corporate donations**, whether in the form of money, skills or expertise, or in-kind resources.
- **Commercial or Strategic Partnerships**, including **corporate sponsorships** or **cause-related marketing**. For example, a corporation may dedicate a portion of its sales revenue to a CSO's cause to improve the company's brand and increase its sales. A for-profit business may also ask whether paying customers would like to add a small donation to their bill to benefit the CSO.
- **Capital campaigns** to raise funds for tangibles, such as building repairs,

³¹ Chung, E. 'What is Peer-to-Peer Fundraising?', Classy, available at: <https://www.classy.org/blog/what-is-peer-to-peer-fundraising-2/>.

equipment purchase, or a new office for the organization or *endowment campaigns* to develop funds that can accrue interest and help fund programs and activities.³²

Fundraising constantly evolves and adds new methods. For example, CSOs are increasingly outsourcing some aspects of fundraising operations to external service providers, such as business process outsourcing companies and public-relations consultants. Fundraisers are also increasingly using AI to identify potential donors and personalize communications with prospects and donors and using chatbots and other forms of AI to process donations and provide information about their programs and services.

For-profit entities are also playing an increasingly larger role in fundraising. Corporations are partnering with CSOs as a way to support or fulfill their corporate social responsibility commitments or boost their reputation. Grocery stores, restaurants and other vendors are creating programs asking their customers if they wish to donate to a selected cause or charity. Online providers are also using their platforms to boost fundraising. For example, Chinese internet provider Tencent helped launch China's first "Internet Philanthropy Day," which encourages users of its WeChat platform to send digital funds to a variety of charitable causes.³³ It has also incorporated philanthropy into its payment systems and games. For example, one game challenges players to guide a child along a path from home to school in the dark by picking up torches en route to help light the way and encourages the user to donate money to support the installation of solar-powered lighting in a rural community.³⁴

Laws and regulations on CSOs' solicitation of or access to donations, including online donations, can have a significant impact on freedom of association, which includes the ability to "seek, receive, and use resources."³⁵³⁶ As such, states have an obligation to facilitate access to resources and must avoid restraining CSOs' ability to access resources. Nevertheless, as noted by UN Special Rapporteur, too often states put in place regulations to control, rather than enable access to funding.³⁷

Laws and regulations that limit permissible fundraising methods constitute an interference with freedom of association. Prohibiting the use of certain methods cannot be justified merely because they are linked with other legitimate government interests; restrictions must also be strictly necessary in a democratic society for the direct achievement of those legitimate interests. The "necessary"

32 Lewis, H. 'Endowment "Campaigns"', Free Management Library, 25 January 2011, available at: <https://managementhelp.org/blogs/fundraising-for-nonprofits/2011/01/25/endowment-%E2%80%9Ccampaigns%E2%80%9D/>.

33 Wang, C. 'Chinese Tech Companies Reinvent Online Philanthropy', Borgen Magazine, 19 May 2018, available at: <https://www.borgenmagazine.com/chinese-tech-companies-reinvent-online-philanthropy/>.

34 Newby, J. 'Tencent Launches New WeChat Game to Help Children in Rural China', *Radii*, 26 November 2018, available at: <https://radiichina.com/tencent-launches-new-wechat-game-to-help-children-in-rural-china/>.

35 OHCHR. 'Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, para. 8.

36 In accordance with Principle 7 of the joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association (see footnote 19 above).

37 OHCHR. 'Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, para. 18.

test implies that any measures must be proportionate to the legitimate aim pursued, and only imposed to the extent that is no more than absolutely necessary; there must be a pressing social need for the interference.³⁸ To determine whether government interference is necessary, it is important to consider whether or not there are less intrusive means available to accomplish the desired end.

2. Where regulations impacting fundraising methods exist, states ensure that they are clear, strictly necessary and proportionate to the interests protected.

Governments and CSOs often have legitimate interests in regulating CSOs' fundraising activities. Fundraising regulations may help assure donors that their donations will be used for specified purposes and that they will be informed about the results. In some instances, laws and regulations establish tax incentives for donors or provide other benefits to boost philanthropy and incentivize giving. Fundraising rules and regulations may help maintain public confidence by providing standards that CSOs must meet in conducting their fundraising activities. Fundraising regulations may also increase the transparency and accountability of fundraising activities and prevent the abuse and misuse of collected funds and protect against fraud, embezzlement, money-laundering, and terrorism financing.

States have adopted different approaches to regulating fundraising and regulate different stages of the fundraising process: before, during or after the solicitation. For example, some states require CSOs to take steps before soliciting single or periodic donations while other states regulate the collection of the payment or the contribution. Some choose to impose reporting requirements on the CSO recipient or require it to publicly report its use of donations.

Numerous states have laws or regulations regulating the public collection of donations. For example, in Hong Kong, face-to-face and street fundraisers must obtain a permit before collecting money in public places. The permit holder must apply the money received from the public, less any reasonable expenses incurred, to the purpose for which the permission was given and submit a copy of the audited accounts to the government within 90 days of the conclusion of the fund-raising activity.³⁹ Fundraisers are also required to publicize the audited report and retain the relevant documents for public inspection.⁴⁰ The government of Hong Kong has also developed a good practice guide which provides additional details about the rights of donors and provides a summary of good practices to guide fundraising

38 OHCHR. 'Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, para. 17. See also OSCE/Office for Democratic Institutions and Human Rights (ODIHR), Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, para. 5, UN Committee on Human Rights, General Comment 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11, and UN Committee on Human Rights, General Comment 27, 'The Freedom of Movement', 1 November 1999, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

39 Government of Hong Kong. 'Press Releases: LCQ19: Regulation of activities for soliciting donations from public', 13 April 2016, available at: <https://www.info.gov.hk/gia/general/201604/13/P201604130478.htm>.

40 Government of Hong Kong. 'Press Releases: LCQ19: Regulation of fundraising activities', 29 February 2012, available at: <https://www.info.gov.hk/gia/general/201202/29/P201202290290.htm>.

operations. For example, it specifies that “paid fund-raisers, whether staff or consultants, should be compensated by a salary, retainer or fee, and not be paid finders’ fees, commissions or other payments based on the number of donors secured, the amount (or number) of gifts received or the value of funds raised.”⁴¹ Some states’ laws and regulations allow for exemptions to the permit requirement. For example, while the UK requires CSOs to obtain a license before pursuing door-to-door fundraising, charities that apply for and receive a ‘National Exemption Order’ can fundraise without a license as long as they notify the relevant local authorities.

States also have specific laws regulating various fundraising methods, which may place additional restrictions on particular types of fundraising. For example, Singapore and over 20 states in the United States regulate cause-related marketing or “commercial co-ventures” which are commonly defined as arrangements between a commercial entity and a CSO “under which the commercial entity advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or a charitable purpose.”⁴² Some laws require the commercial entity to register prior to marketing the commercial co-venturer relationship, post a bond and file financial reports with the state. Other states do not require registration, but require specific recordkeeping and/or impose mandatory contractual terms between the organization and the commercial co-venturer. Other laws require disclosures for advertising the good or service and prohibit the commercial entity from making false or misleading statements in connection with the solicitation.⁴³

States often have laws that are not focused specifically on fundraising, but nonetheless apply to a particular fundraising method, such as a telemarketing campaign. For example, in Europe, direct marketing fundraising campaigns must comply with the General Data Protection Regulation (GDPR), a European Union (EU) law on data protection and privacy. The GDPR seeks to ensure that users know, understand, and consent to the data collected about them. In addition, the GDPR requires fundraisers to ensure that the processing of data aligns with both the interests of the organization and the interests of the individual. To comply with this law, a CSO would have to evaluate whether an individual consented to being included on their call list. In the United States, the Telemarketing Sales Rule requires CSOs and fundraisers to limit the hours when telemarketers may contact people, to promptly state the name of the CSO and the purpose of the call, to avoid misleading statements during the call, and to honor all requests to be placed on a “do not call” list.⁴⁴

States may have a regulation focused specifically on advertising, which may apply to public advertising of fundraising campaigns that use TV, radio, newspapers, magazines, or online tools. For online public advertising, data protection and

41 Government of Hong Kong. ‘Good Practice Guide on Charitable Fund-raising’, August 2018, available at: <https://www.gov.hk/en/theme/fundraising/guide/>, p. 18.

42 Pompan, J. L. ‘Avoiding Legal Pitfalls in Cause-Related Marketing’, 11 August 2011, available at: <https://www.venable.com/insights/publications/2011/08/avoiding-legal-pitfalls-in-causerelated-marketing>.

43 Ibid.

44 Fair, L. ‘Telemarketing Sales Rule requires clarity on charity’, Federal Trade Commission, 16 January 2018, available at: <https://www.ftc.gov/news-events/blogs/business-blog/2018/01/telemarketing-sales-rule-requires-clarity-charity>.

privacy laws may also regulate how fundraisers can use data and personal information when developing their advertising campaign.

Many states have laws regulating lotteries and gambling, which may impact fundraising for CSOs. Numerous countries, such as Chile and the Netherlands, have national laws allocating a portion of their national lottery proceeds to charitable and social initiatives.⁴⁵ Some states also require CSOs interested in organizing a lottery or some other type of game to comply with a state's gambling laws or regulations. For example, in Hong Kong, CSOs must obtain a lottery license under the Gambling Ordinance to hold a lottery.⁴⁶ In Sweden, Finland, and Ireland, there are special laws regulating charitable lotteries. In Sweden, a CSO pursuing public benefit activities can obtain a license to organize a lottery or bingo game to raise funds for its operations. The CSO must notify the public of the value of the prizes, which must be at least 35 percent and not more than 50 percent of the value of the stakes; indicate the ticket price on the ticket; and dedicate "a reasonable amount" of the proceeds to the organizer.⁴⁷ The law does not specify what constitutes a "reasonable" amount, but by common practice the minimum threshold is about 20 percent.⁴⁸

In order to hold a special event, such as a charity dinner, auction, or sporting event, CSOs may have to comply with laws or regulations that apply to mass events, which may mandate special arrangements to handle security, manage traffic, or mitigate the environmental impact of the event.

CSOs may have to obtain a temporary hawker license before selling commodities or comply with special rules when fundraising through the sale of goods or services. In some countries, CSOs may need to report and pay income and VAT taxes on their sales revenue. In Slovakia, all goods and tickets sold for philanthropic purposes must be clearly marked with the amount of the contribution.⁴⁹ In France, goods sold for philanthropic purposes must bear a distinct mark or brand, which is issued by the Ministry of Public Health for a period of three years and the actual market value of the goods sold for philanthropic purposes must be equal to at least 50 percent of the selling price.⁵⁰

States may also adopt laws or regulations to create a more enabling environment for fundraising or incentivize giving. For example, the UK's Taxes Act and the Charitable Deductions (Approved Schemes) Regulations regulates the UK's payroll giving scheme, which allows employees to make tax-efficient donations before their tax liability is calculated, reducing their overall tax liability.⁵¹

There may be laws that regulate giving in particular contexts. For example,

45 Regarding Chile, see (in Spanish): <https://www.nacionalloteria.com/chile/sorteos-polla.php> and regarding the Netherlands, see: <https://www.novamedia.nl/charity-lotteries>.

46 Government of Hong Kong. 'Press Releases: LCQ19: Regulation of activities for soliciting donations from public', 13 April 2016, available at: <https://www.info.gov.hk/gia/general/201604/13/P201604130478.htm>.

47 Sweden, Lotteries Act 1994 No. 1000, Art. 16, available (in Swedish) at: <https://www.notisum.se/rnp/sls/lag/19941000.htm>.

48 Association of Charity Lotteries in Europe. 'Sweden', available at: <https://www.acleu.eu/charity-lotteries/sweden>.

49 Slovakia, Law on Public Collections, Articles 10(1) and 11(1).

50 France, Law on Publications, Printed Materials and Goods Sold for Philanthropic Purposes, Art. 2.

51 See the Fundraising Regulator website, available at: <https://www.fundraisingregulator.org.uk/code/specific-fundraising-methods/payroll-giving-and-post-tax-salary-donations>; Association of Payroll Giving Organisations. 'Payroll Giving Explained', available at: <https://www.apgo.org.uk/payroll-giving-explained/>.

bequests and legacies may be regulated by wills, trusts, and estates laws.

Regardless of whether the fundraising method is regulated by a specific fundraising law, or some other law, such as a law on public advertising or a gambling ordinance, the law must comply with the standards set forth in Article 22 of the ICCPR. As previously mentioned, Article 22 allows states to restrict the right to freedom of association only when justifiable restrictions are “prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”

To satisfy the “prescribed by law” standard contained in Article 22 of the ICCPR, the law must contain “sufficient precision to enable the persons concerned to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” The rationale behind this well-established legal doctrine is that ambiguous provisions fail to provide sufficient notice of how one might remain in compliance with the law and grant too much discretion to government officials to determine when it is violated. It is essential that fundraising regulations, and other laws impacting fundraising, be narrowly tailored.⁵² As previously discussed, the laws and regulations must also be strictly necessary in a democratic society. The “necessary” test implies that any measures must be proportionate to the legitimate aim pursued, and only imposed to the extent that is no more than absolutely necessary and there must be a pressing social need for the interference.

Some States have also launched initiatives to reduce unnecessary regulatory burdens and ensure that all regulations are appropriate, which can help provide additional guidance when evaluating whether a fundraising regulation is necessary, proportionate, and sufficiently clear. For example, the UK’s Better Regulation Task Force recommends that a proposed regulation should meet five principles and if it fails to meet these principles, it should not be adopted. Similarly, if an existing regulation is found not to meet the five principles, it should be amended.⁵³ The principles include:

1. **Proportionality** – Regulators should intervene only when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimized.
2. **Accountability** – Regulators should be able to justify decisions and be subject to public scrutiny.
3. **Consistency** – Government rules and standards must be joined up and implemented fairly.
4. **Transparency** – Regulators should be open and keep regulations simple and user-friendly.

52 Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). ‘Guidelines for Laws Affecting Civic Organizations’, 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>

53 Better Regulation Task Force, “Regulation - Less is More Reducing Burdens, Improving Outcomes,” pp 51-52 (2005) available online at https://www.regulation.org.uk/library/2005_less_is_more.pdf

5. Targeting – Regulation should be focused on the problem and minimize side effects.⁵⁴

When regulating fundraising, it may be appropriate to exempt small CSOs or small-scale fundraising initiatives or to create simpler procedures for them. For example, the State of Indiana in the United States typically requires organizations to obtain a charity gaming license before holding a charity gaming event. However, it recently amended the law to exempt events with prizes up to USD 7,500 annually (up from USD 3,000 annually) from licensure. However, these smaller exempted events must still provide a notification 14 days in advance.⁵⁵

3. Legislation allows for the use of new technologies in fundraising.

Online, mobile, and digital fundraising techniques have become much more important in recent years. Several countries, including Italy and Slovakia, now identify mobile phone or SMS fundraising as one of their top three fundraising methods.⁵⁶ New, innovative tools, such as different mobile applications that facilitate easy and quick donations, can also help boost philanthropy from new donors and broaden a CSO's donor base. In 2016 in China, 8.2 million users donated to the online fundraising platform Tencent during 'Giving Day'. 40 percent of these donors were high school students.⁵⁷ However, in some regions, such as the MENA region, these new technologies remain underused. In 2016, 0 percent of CSOs surveyed in Morocco and Lebanon and just 1 percent in Tunisia and Jordan reported using new crowdfunding technology as a primary source of fundraising.

In some countries, fundraisers have been able to incorporate these new technologies into their fundraising strategies without specific legislation and regulations. For example, in Ukraine, the law does not specifically regulate crowdfunding. Instead, crowdfunding platforms usually act as non-profit facilitators that help facilitate the transfer of funds without the need to obtain a license or special permission.

States are increasingly adopting legislation and regulations to encourage or enable the use of these new technologies. Some of these laws reduce the ambiguity about the legality of using these new technologies, while some of these laws have effectively blocked the use of these new technologies. Below are a few examples of the trends regulating the use of new technologies in fundraising.

SMS donations

States have taken different approaches to regulating SMS donations, which may be regulated by law or be based solely on an agreement between the facilitating organization and telephone providers. In Ireland, LikeCharity, an organization

54 Id.

55 Indiana Gaming Commission. 'Indiana Code 4-32.3', available at: <https://www.in.gov/igc/files/07-09-2019%20Web%201517%20393%20Indiana%20Code%204-32.3%20.pdf>.

56 European Fundraising Association. 'Fundraising in Europe 2015', November 2015, available at: <http://fundraising.cz/v1/wp-content/uploads/2015/11/EFA-Survey-Fundraising-in-Europe-2015.pdf>, p. 9.

57 "What nonprofits in China have to do with your overhead"

established to help charities raise money has, in partnership with six mobile phone providers, launched an SMS donation service to ensure that 100 percent of the money raised, including VAT, goes directly to the intended charity.⁵⁸ In other countries, regulations may require a phone service provider to inform the legal entity organizing a collection of the number of messages received and the sum of the contributions.⁵⁹ The law may also set reporting requirements or deadlines for SMS collections.⁶⁰

SMS donations and the phone numbers used in fundraising may be regulated by digital laws and regulations or media laws. For example, in France, the legal regulation of SMS donations was introduced with the adoption of the Digital Republic Law of October 2016. The law allows donors to send financial contributions to CSOs via SMS with a value of up to EUR 50 (approximately USD 55) for each single-payment transaction and a cumulative monthly value of up to EUR 300 (approximately USD 325) for payment transactions for the same CSO. The law also established an obligation for telephone providers to report annually to the *Autorité de Contrôle Prudentiel* (Prudential Control Authority), an independent administrative body attached to the Bank of France.⁶¹

In Ukraine, the Law 1665-VIII of 2016 on Amendments to the Tax Code of Ukraine ‘on creating favorable conditions for the introduction of charitable telecommunication messages’ and the 2017 Decree of the Cabinet of Ministers No. 703 allows donors to send charitable SMS free of charge.⁶²

Crowdfunding

Crowdfunding is gaining in popularity and some countries, including France, Finland, and Spain, have recently introduced new legal frameworks to regulate it. Such regulations may or may not be applicable to charitable donations. France’s 2014 decree on crowdfunding is not compulsory for charitable donations. The decree allows individuals to make donations and lend money to CSOs at no interest or at lower interest rates than banks generally offer.⁶³ The new regulation also provides for the creation of “crowdfunding intermediaries,” platforms that facilitate donations, loans, the investment of capital in startups, and other permissible methods of crowdfunding. Only legal entities are eligible to obtain this status, and once it is acquired, they are subject to explicit rules of conduct and must have professional liability insurance. All crowdfunding intermediaries are supervised by the French Prudential Control Authority.⁶⁴

58 Mobile Providers Launch 100% Text Giving in Ireland,” Fundraising Ireland (January 23, 2013), <http://www.fundraisingireland.ie/whats-new/current-news/mobile-providers-launch-100-text-giving-in-ireland/>. For more on LikeCharity see <http://www.likecharity.com/#overview>.

59 Czech Republic, Law on Public Collections, Art. 16.

60 Slovakia, Law on Public Collections, Art. 8.

61 France, Digital Republic Law No. 2016-1321, 8 October 2016, available (in French) at: <https://www.legifrance.gouv.fr/eli/loi/2016/10/7/ECF1524250L/jo>.

62 Ukraine, Law 1665 on Changes to the Tax Code on beneficial condition for charitable messages, 6 October 2016, available (in Ukrainian) at: <http://zakon0.rada.gov.ua/laws/show/1665-viii>; Ukraine, Decree of the Cabinet of Ministers No. 703, 20 September 2017, available (in Ukrainian) at: <http://zakon2.rada.gov.ua/laws/show/703-2017-%D0%BF>.

63 France, Decree on Crowdfunding No. 2014-1053 (2014), available (in French) at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029463569&categorieLien=id>.

64 For more on the new crowdfunding regulation in France, see ACPR Banque de France, ‘Le financement participatif’, available

In England and Wales, the Financial Conduct Authority, a regulatory body independent of the UK government, supervises crowdfunding practices to ensure that consumer protection rules are safeguarded.⁶⁵ In Singapore, four online platforms agreed to a Code of Conduct that requires fundraisers using the crowdfunding platforms to declare that they will comply with the Charities Act, which includes a duty to make accurate representations to donors, maintain proper records of donations, and to use donations according to the intended purpose.⁶⁶

Not all new legislation and regulation of these new technologies have facilitated the use of these new tools. In 2019, Denmark passed legislation to make Facebook responsible for ensuring that the charitable organizations that use Facebook to collect money from their supporters are registered with Denmark's Collection Committee. Facebook was unable to modify its collection tool to confirm that every organization that collects funds is registered with the Collection Committee. As a result, Facebook was forced to close down its collection function in Denmark.⁶⁷

Crowdfunding via the Internet must also comply with other existing laws, such as data protection laws. The provider of an online crowdfunding portal administering a donor database must strictly abide by national data protection legislation — in particular, by requesting each donor's approval to process his or her personal data.⁶⁸

Other tools

There are also other new tools that are growing in popularity, such as payment terminals. For example, Ukraine has over 50,000 payment terminals located throughout the country. These terminals allow individuals to make donations via cash, e-wallet or card transfer through banks' ATMs and transactional terminals (kiosks) and allow donors to easily and anonymously transfer money.

4. States ensure that financial service providers do not limit fundraising activities through their policies and practices.

There has been a worrisome trend of states labeling the CSO sector as high risk for terrorism financing and money laundering and requiring banks and financial institutions to develop in-house policies and procedures to prevent money laundering, terrorism financing, and corruption and to ensure the effective management of compliance risks. These new policies and procedures often restrict CSOs' ability to open bank accounts, restrict the transfer of donations, delay cash

(in French) at: <https://acpr.banque-france.fr/autoriser/financement-participatif>.

65 UK Financial Conduct Authority. "The FCA's Regulatory Approach to Crowdfunding over the Internet and the Promotion of Non-Readily Realisable Securities by Other Media," Policy Statement 14/4, March 2014, available at: www.fca.org.uk/static/documents/policy-statements/ps14-04.pdf.

66 Government of Singapore, Ministry of Culture, Community and Youth. 'The Code of Practice for Charitable Online Fund-Raising Appeals', available at: <https://www.charities.gov.sg/Fund-Raising/Online%20Fund-Raising%20and%20Code%20of%20Practice/Pages/Code-of-Practice.aspx>.

67 Dahl Løppenthin, R. 'Facebook lukker ned for indsamlinger til mennesker i nød', Altinget, 27 January 2019, available (in Danish) at: <https://www.altinget.dk/artikel/facebook-lukker-ned-for-indsamlinger-til-mennesker-i-noed>.

68 See, for example, the rules for using the Slovak donor online portal (in Slovak) at: <https://www.darujme.sk/sk/pravidla/>.

transfers, and increase the time burden on CSOs. They can also result in the closing of CSO accounts that are considered ‘high risk’.

Any assessments carried out by the state to assess the money laundering and terrorism financing risks associated with the CSO sector must use a robust evidence-based methodology that reflects the actual risk areas and diversity within the sector. These risk assessments should be conducted in consultation with diverse stakeholders within the CSO sector. States should avoid broad-brush assessments, which could prompt more sector regulation or cause banks and financial institutions to place additional limits and restrictions on philanthropy and CSOs’ access to financial services, whether intentionally or inadvertently.

For example, in Brazil, financial institutions have recently started refusing to take on some CSO clients, particularly smaller CSOs. This is also the case in Mexico, where several banks have put measures in place that require either additional information from or about CSOs or that unofficially close down services to CSOs altogether. This is particularly true for smaller CSOs in Mexico.⁶⁹ In a recent survey of 159 Mexican CSOs, aimed at identifying problems with financial services, 12.82 percent were denied service and, 41.03 percent reported that they were asked for excessive information or burdensome paperwork.⁷⁰

Citing increased costs of complying with new AML/CTF rules and policies, banks and financial institutions have also begun imposing minimum amounts for CSOs to open or maintain a bank account. For example, one bank in Mexico requires existing CSO account holders to maintain a minimum of USD 600 in their checking account at all times.

In some countries, banks and financial institutions have also begun restricting the methods for CSOs to receive donations or transfer money. In Brazil, banks and financial institutions have begun refusing to accept ‘boletos’, the preferred cash payment method for charitable giving. The *boleto* (printed or as an image) has a barcode, corresponding serial number, transaction amount, issuing bank code, customer information, description, and expiration date, with the transaction amount listed on the *boleto* able to be paid at any period before and up to the expiration date.⁷¹ In Ukraine, the National Bank of Ukraine (NBU) has limited CSOs’ access to digital fundraising sources, such as money transfer websites that are not licensed by the NBU. However, other laws regulating money collections explicitly permit the use of new methods for transferring funds. For example, the new Finnish Fundraising Act (entering into force 1 March 2020), which regulates money collections, acknowledges the possibility of raising virtual currency.

Over the past five years, CSOs have also reported a 35 percent to 100 percent increase in workload managing the relationship with the bank and complying with

69 Human Security Collective and ECNL. ‘At the Intersection of Security and Regulation: Understanding the Drivers and Impact of ‘Derisking’ on Civil Society Organizations’, 2018, available at: http://fatfplatform.org/wp-content/uploads/2018/05/Understanding-the-Drivers-of-De-Risking-and-the-Impact-on-Civil-Society-Organizations_1.pdf.

70 De la Vega, M. and Pellón, G. ‘Informe sobre medidas para mitigar el riesgo de financiamiento del terrorismo y de corrupción en el sector de OSFL en Argentina y México’, Expert Hub on AML/CTF (Buenos Aires/Mexico City).

71 Human Security Collective and ECNL. ‘At the Intersection of Security and Regulation: Understanding the Drivers and Impact of ‘Derisking’ on Civil Society Organizations’, 2018, available at: http://fatfplatform.org/wp-content/uploads/2018/05/Understanding-the-Drivers-of-De-Risking-and-the-Impact-on-Civil-Society-Organizations_1.pdf.

requests for additional information in order to open or maintain a bank account.⁷² For example, Ukrainian CSOs must open a bank account for the accumulation of donations and to perform digital fundraising activities. To open the account, the CSO must apply to the bank and provide the necessary documents, including:

- a certified copy of the articles of incorporation (charter or statute),
- a registration certificate,
- a certified copy of the minutes of the initial organizational meeting, indicating the CSO's appointed executive(s),
- originals of passports and tax identification codes of those appointed as the CSO's executive(s), and
- other documents at the bank's request.⁷³

Banks are also able to request “other documents,” which seemingly grants the bank discretion to request any additional documents it chooses. This becomes a burdensome and time-consuming process for CSOs, particularly when the CSO's executive must provide this information in person.

5. CSOs and fundraising professionals consider self-regulatory and co-regulatory initiatives to guide the implementation of various fundraising methods.

Self-regulation can help establish norms and standards for CSOs' own behavior, improve the experience of donors and supporters, and help build and maintain public trust in the civil sector. Self-regulation initiatives often complement the laws and regulations in a country, but it can also form a basis for the development of fundraising practice or regulation and help forestall additional state regulation.

Self-regulatory initiatives may address particular methods and provide greater guidance about how to comply with the statutory requirements. For example, in the UK, the Institute of Fundraising publishes rule books that include all of the relevant standards within the Code of Fundraising Practice that apply to Door to Door, Private Site, and Street fundraising.⁷⁴ In Singapore, four online platforms agreed to a Code of Conduct for Online Charitable Fundraising Appeals, which requires fundraisers using the participating crowdfunding platforms to declare that they will comply with the Charities Act, make accurate representations to donors, maintain proper records of donations, and to use donations according to the intended purpose.⁷⁵

⁷² Id.

⁷³ National Bank of Ukraine. 'Regulation of the National Bank of Ukraine on Current Account Opening, Use and Closing, no. 492 (12.11.2003)', available (in Ukrainian) at: <http://zakon5.rada.gov.ua/laws/show/z1172-03>.

⁷⁴ Institute of Fundraising. 'Standards', available at: <https://www.institute-of-fundraising.org.uk/guidance/fundraising-compliance/standards/>.

⁷⁵ Government of Singapore, Ministry of Culture, Community and Youth. 'The Code of Practice for Charitable Online Fund-Raising Appeals', available at: <https://www.charities.gov.sg/Fund-Raising/Online%20Fund-Raising%20and%20Code%20of%20Practice/Pages/Code-of-Practice.aspx>.

In Ireland, where the Charities Regulator created Guidelines for Charitable Organisations Fundraising from the Public, the Charities Institute of Ireland (CII) provides practical ‘low level’ steps that charities and nonprofits can take to comply with the Guidelines.⁷⁶ CII also provides implementation resources to charities and nonprofits, such as a Donor Charter Template, a Checklist for ensuring compliance with the Guidelines, Trustee Resolution, a Public Compliance Statement, and a Sample Feedback and Complaint Procedure.⁷⁷

Recommendations:

- States should permit CSOs to pursue the broadest range of fundraising methods. Any legitimate government interests or concerns about CSO fundraising should be addressed through the least intrusive means.
- States should ensure that all legislation and regulations impacting fundraising, including laws regulating telemarketing, lotteries, or public events, serve a legitimate aim and that all measures are proportionate to that aim.
- States should consider providing exceptions for small-scale fundraising operations.
- States and CSOs should explore self-regulation options.
- Where there are no impediments to or misuse of new fundraising methods, states and CSOs should consider whether additional statutory regulation or self-regulation is required.
- States and CSOs should consult with service providers when making regulations.
- Banks should involve CSOs when addressing the risks related to anti-money laundering and countering terrorism financing (AML/CTF) and respect the right of CSOs to access financial services and conduct fundraising.
- Banks should not discriminate against CSOs by restricting their access to financial services.
- States and CSOs should establish or use national and international multi-stakeholder dialogues to develop cross-sectoral understanding about the banking restrictions experienced by CSOs, to identify solutions, and to develop and raise awareness about standardized guidance and training opportunities for banks and regulators.
- States and CSOs should explore developing specialized financial channels for CSOs with limited financial access, such as CSOs operating in high-risk areas or during humanitarian crises.
- CSOs should formulate self-regulatory standards of practice, codes of conduct, and codes of ethics with clear and concise terminology and present these in an organized, user-friendly format, so that they can be adapted to CSOs’ different forms and sizes.

⁷⁶ Charities Institute Ireland. ‘Guidelines for Charitable Organisations Fundraising from the Public’, available at: <https://www.charitiesinstituteireland.ie/guidelines>.

⁷⁷ Charities Institute Ireland. ‘Implementation Resource Materials’, available at: <https://www.charitiesinstituteireland.ie/implementation-resource-materials>.

III.3. DATA PROTECTION AND RIGHT TO PRIVACY

Principles:

1. States recognize and protect the right to privacy of CSOs, their donors and beneficiaries.
2. Reporting and disclosure requirements and state oversight do not violate the right to privacy of CSOs, their donors and beneficiaries.
3. Collection and use of data for fundraising purposes is based on previous consent of existing and potential donors as well as beneficiaries or on any other legal basis available, such as the demonstrable existence of a legitimate interest.
4. The scope of personal data collected and the time it is stored is limited and proportionate to the specific fundraising purpose.
5. Donors and beneficiaries have the right to access information about their data held by CSOs and can ask for their removal at any time.

INTRODUCTION

CSOs' fundraising activities involve accessing and dealing with personal data. CSOs and intermediaries collect names and contact details of people or organizations to promote their activities, conduct research, issue appeals and keep track of existing and/or potential future donors. They may even wish to share information about their support base with trusted partner CSOs or donors in order to identify new areas of work and shape their fundraising efforts accordingly.

The right of CSOs to access resources should respect international and regional standards on data protection.⁷⁸ These standards ultimately reflect the protection of the fundamental right to privacy enshrined in a number of international human rights instruments.⁷⁹

Privacy is also an enabling right, providing the conditions for individuals to enjoy other human rights, such as the right to freedom of expression, association and peaceful assembly. Therefore, states should acknowledge that the rights to privacy and data protection are enjoyed by CSOs themselves, their staff, members, donors and beneficiaries and need to be adequately protected from illegitimate,

⁷⁸ See, for example, the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (updated in 2013); the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (Convention 108+); the Council of Europe Convention on Cybercrime; the Asia-Pacific Economic Cooperation (APEC) Privacy Framework; the Organisation of American (OAS) States Principles on Privacy and Personal Data Protection; the Economic Community of West African States (ECOWAS) Supplementary Act on Personal Data Protection; the African Union (AU) Convention on Cyber Security and Personal Data Protection; and the EU General Data Protection Regulation (GDPR).

⁷⁹ See, for example, the Universal Declaration on Human Rights, Art. 12; the International Covenant on Civil and Political Rights, Art. 17; the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8; the EU Charter of Fundamental Rights, Articles 7-8; the American Convention on Human Rights, Art. 11; and the Arab Charter of Human Rights, Article 21.

disproportionate and unnecessary interference.

The right to privacy and data protection is also increasingly acknowledged by several international codes of practices of fundraising associations worldwide: the 2018 International Statement of Ethical Principles on Fundraising, for example, commits its signatories to follow their donors' preferences on communications and privacy. The "Donations Charter" of the Italian Donation Institute also contains a section on the rights of beneficiaries that covers their rights to privacy and data protection.⁸⁰

PRINCIPLES

1. States recognize and protect the right to privacy of CSOs, their donors and beneficiaries.

The right to privacy is a fundamental human right, enshrined in several international human rights instruments and in more than 150 constitutions around the world.⁸¹ While more than 100 countries have comprehensive data protection laws (which cover all private and public sector entities), others have sectoral laws pertaining to specific issues or sectors (e.g., banking secrecy, children's privacy online, health records, etc.).⁸²

The right to privacy requires that all individuals should be free from arbitrary or unlawful interference with their privacy, home, correspondence and family, and from attacks upon their reputation. More specifically, the right to privacy protects:

- the confidentiality of letters, phone calls, emails, text messages and internet browsing;
- the sanctity of the home;
- the ability of individuals to make decisions about their lives, including their sexual and reproductive choices; and
- individuals' control of their personal data.⁸³

The right to privacy also applies to an association and its members.⁸⁴ CSOs themselves benefit from the right to privacy and data protection: in some circumstances, CSOs could rely on data protection laws to defend themselves against government requests for information on donors or beneficiaries, or to redact financial disclosure documents. The right to privacy protects CSOs from arbitrary and unlawful surveillance, both domestic and foreign, of their communications and online activities. Therefore, any legal requirements imposed on CSOs to disclose information usually covered by data protection rules could give

80 MacQuillin, I., Sargeant, A. and Day, H. 'Fundraising self-regulation: An Analysis and Review', The Philanthropy Centre and ECNL, 2019.

81 See the Constitute Project: <https://www.constituteproject.org/search?lang=en&key=privacy>.

82 Banisar, D. 'National Comprehensive Data Protection/Privacy Laws and Bills 2019', available at: <https://ssrn.com/abstract=1951416> (Last revised: 1 August 2019).

83 ECNL (Nyst, C.). 'Privacy and Data Protection Standards for Civil Society Organisations', 2019, available at: <http://ecnl.org/data-protection-fundraising/>

84 Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association (see footnote 19 above), paras 164, 211, 228, 231 and 265.

rise to an unjustified interference with the right to freedom of association and the right to respect for a private life if they do not have a clear legal basis, do not pursue legitimate aims and are not proportionate to the pursuit of such aims (i.e., the so-called “three-part test”).⁸⁵

CSOs, their founders and members should also have the right to seek redress for any undue interference with and violation of their right to freedom of association or privacy, or of other related rights, as a result of state surveillance, even where the said surveillance is being conducted based on legislation that aims to protect national security or fight crime.⁸⁶

2. Reporting and disclosure requirements and state oversight do not violate the right to privacy of CSOs, their donors and beneficiaries.

A number of international instruments, worldwide state practices and regulations usually invoke combating fraud, embezzlement, money laundering and other crimes in the interest of national security, public safety or public order as legitimate justifications to impose disclosure of private data on CSOs.⁸⁷ In recent years, CSOs have come under increasing pressure to ensure that charity fundraising does not become a vehicle for money laundering or terrorist financing.⁸⁸ This pressure has translated into legal obligations to document donations, retain information and report suspicious information, all of which raise potential conflicts with data protection standards.⁸⁹

Generally speaking, potential areas in which conflicts may arise include:

- CSOs might be required to retain personal data on donors for longer than would be necessary for the purposes for which they were being processed;
- CSOs might be required to report suspicious behavior to national authorities and disclose donors’ personal information;
- CSOs might be required to refrain from informing donors about reports raised

85 ECHR, Articles 8 and 11; ICCPR, Articles 17 and 22.

86 Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, para. 272; and EU GDPR, Articles 60, 77-80 and Recitals (141), (143) and (145). For example, the UK Regulation of Investigatory Powers Act 2000 (RIPA) provides a framework for the authorization and review of surveillance activities by the Office of Surveillance Commissioners (OSC) and the Intelligence Services Commissioner, but a parliamentary inquiry in 2009 concluded that the law lacked clear and effective measures of redress in cases when surveillance powers had been exceeded (see House of Lords, Constitution Committee 2009 Report, ‘Surveillance: Citizens and the State’, available at: <https://publications.parliament.uk/pa/ld200809/ldselect/ldconst/18/1802.htm>).

87 E.g.: UN Security Council Resolution 137 and the Convention for the Suppression of the Financing of Terrorism, which impose obligations on states to prevent and suppress the financing of terrorist acts and to criminalize terrorism-related activities; the 2000 UN Convention Against Transnational Organized Crime (UNTOC) and the 2003 UN Convention against Corruption (UNCAC), which, inter alia, recommends the adoption of national legislation requiring customer identification, record-keeping and reporting of suspicious transactions for all organizations considered susceptible to money laundering; and the Financial Action Task Force on Money-Laundering (FATF) Recommendations, a set of 40 recommendations and 9 special recommendations designed to provide a comprehensive set of measures for a legal and institutional regime against money laundering and the financing of terrorism. States have implemented their obligations under the above-named instruments into domestic law in varied and often piecemeal ways. The EU has adopted a series of successive money-laundering Directives; the Fourth Money Laundering Directive came into effect in June 2017.

88 FATF Recommendation 8 noted the vulnerability of non-profit organizations to being used for terrorist financing purposes, and strongly encouraged states to introduce government registration processes for CSOs and introduce financial reporting and exchange data with law enforcement organizations.

89 In the UK, for instance, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 create a mandatory requirement upon any person or organization who has obtained relevant data (such as identification details, records of transfers, associates, etc.) to keep a record of that data.

about them or investigation into them, even when presented with a request by a data subject for access to their personal data.⁹⁰

At a regional level, the jurisprudence of the European Court of Human Rights (ECtHR) has established that there may be specific circumstances in which individual members of a CSO could be required to disclose their membership where this could conflict with their responsibilities as employees or public office holders.⁹¹ However, the UN Special Rapporteur on the Right of Freedom of Association has also clarified that although such justifications may be legitimate, “it is not sufficient to simply pursue a legitimate interest” and all related limitations should still be “the least intrusive means to achieve the desired objective”.⁹²

3. Collection and use of data for fundraising purposes is based on previous consent of existing and potential donors as well as beneficiaries or on any other legal basis available, such as the demonstrable existence of a legitimate interest.

CSOs’ fundraising activities rely on the “processing of personal data, that is, the collection, collation, storage, analysis and transmission of information from which an individual (the ‘data subject’) is identified or identifiable.”⁹³ With the development of new technologies, it is now possible to generate, collect, retain and analyze vast amounts of personal data in ways previously unimagined. These personal data may relate to donors and supporters on whom the organization relies, employees, volunteers as well as beneficiaries, who may represent vulnerable or marginalized people in society and therefore be particularly sensitive.

The internet and the use of digital communications in particular have dramatically expanded the opportunities for personal data to be shared and accessed, including by unauthorized actors. The data processed and held by CSOs, regardless of their size, may be of interest to any number of malevolent actors, including non-state actors, governments and companies with commercial interests.

In terms of developing international standards for data protection and privacy, the first significant instrument adopted, the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data includes among its basic principles that “onward use of data collected requires either the consent of the subject or legal authority”.⁹⁴ The principle of prior consent of data subjects has been consistently incorporated by subsequent international and regional level normative

90 E.g., For example, under the UK Terrorism Act 2000 and the Proceeds of Crime Act 2000, UK-based charities are under various obligations to report “suspicious activity” related to potential money laundering or terrorist activities to the relevant authorities and it is an offense to notify a person that a “suspicious activity report” has been made to the authorities about them, if that disclosure might prejudice any investigation.

91 ECtHR, *Grande Oriente d’Italia di Palazzo Giustiniani v. Italy* (35972/97), 31 May 2007.

92 OHCHR. ‘Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association’, A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, para. 35.

93 EU General Data Protection Regulation: ‘Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC’ (GDPR), Article 4, para. 1, available at: <https://gdpr-info.eu/>.

94 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, para. 10.

instruments.⁹⁵

The EU appears to be at the forefront of the protection of privacy and data protection, with the recent adoption of the GDPR and the forthcoming “ePrivacy” Regulation.⁹⁶ On the whole, the GDPR applies to all entities – including CSOs that are based outside of the EU and European Economic Area (EEA) – that process personal data of data subjects as defined by the GDPR. The cornerstones of its provisions include the need for the express consent in general of the data subject to the types of use (“data processing”) that CSOs intend to carry out,⁹⁷ unless an alternative legal basis applies.⁹⁸ In particular, CSOs can avoid requesting prior express consent when they can demonstrate that they have an existing “legitimate interest” (e.g., when dealing with routine and text communications to existing donors and supporters; when sending administrative communications about a past donation, for example, that don’t contain any promotional materials; when they obtain personal data about existing donors and supporters from third parties – e.g., via telematching or teleappending – as long as they inform the donors and supporters as soon as they contact them and indicate their right to withdraw their consent to being contacted; or when sharing data of existing donors and supporters, as long as they inform them of whom they have shared their data with).⁹⁹ The concept of “express consent” is intended as explicit, positive, consent, rather than the traditional practice of pre-ticked forms, default website settings, and opt-out communication preferences.¹⁰⁰ The forthcoming EU ePrivacy Regulation is expected to further strengthen obligations on all entities, including CSOs, on direct marketing, requiring that consent adheres to the same standards as the GDPR and extending it to apply to a broader range of technologies, like instant messaging services, in-app notifications and website tracking cookies.

These EU reforms are already having an impact on privacy/data protection legislation in other countries and regions. Because data transfer requirements in the GDPR affect entities based outside Europe as long as they process personal data of EU/EEA residents and citizens, countries outside of Europe have already started adopting similar or equivalent provisions in their countries, to facilitate and simplify cross-border compliance.¹⁰¹

95 See, e.g., Council of Europe Convention 108+, Art. 5, para. 2; APEC Privacy Framework, Principle 24; OAS Principles on Privacy and Personal Data Protection, Second Principle; ECOWAS Supplementary Act on Personal Data Protection, Article 23; and the AU Convention on Cyber Security and Personal Data Protection, Article 13, Principle 1.

96 Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017PC0010&from=EN>.

97 GDPR, Article 7.

98 GDPR, Article 6(1)(f), for example, also allows CSOs to rely on their “legitimate interests” to process data, as long as they are not overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. CSOs may also disclose data to a third party where they are under a legal obligation to do so (for example on the presentation of a warrant by a government agency).

99 Nyst, C, Data Protection Standards For Civil Society Organisations, (2018), ECNL, pp. 14-15.

100 GDPR, Recital 32.

101 E.g., Thailand Personal Data Protection Act (2019); Philippines Personal Data Protection Act and Implementing Rules and Regulations (2016); Brazil’s General Data Privacy Law (2018) and Japan’s Act on the Protection of Personal Information (2017).

4. The scope of personal data collected and the time it is stored is limited and proportionate to the specific fundraising purpose.

The international and regional standards on privacy and data protection converge on the need that data collection should be limited for specific, clearly defined and legitimate purposes and that the time that it is stored should also be limited and strictly necessary to the achievement of such purposes.¹⁰²

International and national fundraising associations can also play a fundamental role in promoting these standards and educating CSOs at regional and local levels about data retention policies. In the US, for example, the National Council of Nonprofits' website includes a detailed policy for data retention.

It is also important to highlight that the highest standards for the protection of privacy established by the GDPR for data processing of EU/EEA residents and citizens even outside EU/EEA countries include “the right not to be subject to a purely automated decision” that affect them significantly (e.g., an algorithm-based system automatically selecting and/or sharing their personal data with third parties) without their previous consent and right to request a human-based review.

5. Donors and beneficiaries have the right to access information about their data held by CSOs and can ask for their removal at any time.

The right of individuals to access, rectify or amend their personal data held by CSOs is incorporated on different levels in all the relevant international and regional standards on privacy and data protection.¹⁰³

In the EU, the GDPR has also explicitly formalized the right of individuals to request the erasure of their personal data without undue delay where those data are no longer necessary in relation to the purposes for which they were collected, where they withdraw consent, or where they object to the processing of that data, among other grounds.¹⁰⁴

Recommendations:

- **States' provisions regulating fundraising should be established clearly by law, strictly necessary and proportionate to the achievement of legitimate purposes, accompanied by specific safeguards and overseen by independent authorities.**¹⁰⁵

102 See. e.g., OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, paras 7, 9; Council of Europe Convention 108+, paras 47-48, 53; APEC Privacy Framework, Principles 24-25; OAS on Privacy and Personal Data Protection, First and Third Principles; ECOWAS Supplementary Act on Personal Data Protection, Article 25; AU Convention on Cyber Security and Personal Data Protection, Art. 13, Principles 3(a) and (c); EU Charter of Fundamental Rights, Art. and GDPR, Art. 5(1) (a-d).

103 See. e.g., OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, para. 13; Council of Europe Convention 108+, Art. 9, para. 76; OAS on Privacy and Personal Data Protection, Eighth Principle; ECOWAS Supplementary Act on Personal Data Protection, Articles 38-41; AU Convention on Cyber Security and Personal Data Protection, Articles 16-18; and GDPR, Articles 15, 16.

104 GDPR, Article 17.

105 UN Human Rights Committee. 'Concluding Observations on the Fourth Periodic Report of the United States of America', CCPR/USA/ICO/4, 23 April 2014, available at: <https://undocs.org/CCPR/C/USA/CO/4>, p. 22. []

- All regulations and practices on oversight and supervision of CSOs should take as a starting point the principle of minimum state interference in the operations of a CSO and should not be more exacting than those applicable to private businesses.¹⁰⁶
- CSOs may lawfully rely exclusively on their “legitimate interests”¹⁰⁷ when processing personal data for fundraising and promotional activities but in this case, the collection, storage, retention and other use of the data must be strictly necessary and proportionate for that interest and must not be overridden by the data subject’s other interests, rights or freedoms.¹⁰⁸
- Whenever it is not possible to clearly demonstrate an existing legitimate interest in processing an individual’s data without their prior explicit permission, CSOs and service providers should ask for an individual’s consent to use their personal data (such as name, age and address), to share that data with third parties and to send the individual fundraising or promotional communications. The data subject should have the right to easily withdraw their consent at any time.
- CSOs can rely on consent or legitimate interests, as well as lawful obligations (e.g., a judicial warrant), to share data on donors and supporters with other CSOs, third party companies or governments. However, they will need to inform individuals of the entities that their personal data has been shared with.¹⁰⁹
- If CSOs decide to use third-parties to process personal data of staff members, donors, beneficiaries or supporters (e.g. for research, employee payroll, external communications, etc.), the third parties have to provide sufficient guarantees that they will provide equivalent standards of data protection and privacy (e.g., via contract provisions or certified membership to a code of conduct).¹¹⁰
- CSOs should regularly invite individuals to review, update and correct their personal data stored in the CSOs’ databases.
- CSOs should set up adequate processes to ensure they can respond to individuals’ requests for their personal data without charging for providing such data.

106 Para. 228 of the joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association (see footnote 19 above).

107 Examples of “legitimate interests” may include routine email and text communications to existing donors and supporters (administrative communications about a past donation, for example, that do not contain any promotional materials), direct marketing purposes, preventing fraud, internal administrative purposes, data processing for ensuring information security, reporting potentially criminal acts to a competent authority, etc., and cannot be overridden by the interests or fundamental rights of the individual. See ECNL (Nyst, C.) ‘Privacy and Data Protection Standards for Civil Society Organisations’, 2019, available at: <http://ecnl.org/data-protection-fundraising/>.

108 E.g., for routine email and text communications to existing donors and supporters (administrative communications about a past donation, for example, that do not contain any promotional materials), the CSO can rely on its legitimate interests.” See ECNL (Nyst, C.) ‘Privacy and Data Protection Standards for Civil Society Organisations’, 2019, available at: <http://ecnl.org/data-protection-fundraising/>.

109 ECNL (Nyst, C.) ‘Privacy and Data Protection Standards for Civil Society Organisations’, 2019, available at: <http://ecnl.org/data-protection-fundraising/>.

110 ECNL (Nyst, C.) ‘Privacy and Data Protection Standards for Civil Society Organisations’, 2019, available at: <http://ecnl.org/data-protection-fundraising/>.

III.4. CROSS-BORDER FUNDRAISING

Principles:

1. States do not impose restrictions or intrusive procedures on CSOs to receive and use international funding and on the outflow of domestic funding to CSOs abroad.
2. States guarantee equitable tax treatment for cross-border and domestic donations.
3. Intermediary organizations can help to facilitate cross-border fundraising.
4. CSOs receiving international funding are not stigmatized, labeled as foreign agents, or attacked in public media, by the government, or by third parties.
5. Banks recognize the CSOs' right to open bank accounts and use banking services.

INTRODUCTION¹¹¹

As CSOs need resources to be able to function properly, the right to freedom of association also involves the freedom to seek, secure and utilize resources.¹¹² Funding may be received from a variety of sources, including natural and legal persons that are located in another country.

While the majority of states globally do not restrict the type of funds that CSOs may receive, there has been an increasing trend in several states to impose additional obligations on CSOs wishing to receive funding from abroad (in the following we use the term 'international funding' to refer to funding by both foreign governments, legal persons and individuals, and funding by international organizations).¹¹³ In many countries, foreign donations are subject to discriminatory tax treatment compared to domestic resources. Besides, CSOs face stigmatization and labelling by the government and state-owned media that threaten their credibility and public trust towards the sector.

Negative rhetoric and restrictive laws aiming to limit international funding impact

111 This chapter is based on the ECNL research *Enabling the flow of donations: International standards that safeguard cross-border giving to CSOs*, 2019, available at: <http://ecnl.org/publications/enabling-the-flow-of-donations/>

112 See Guidelines, para. 102, ECtHR, *Ramazanova and Others v. Azerbaijan* (44363/02), paras 59-60; OHCHR, 'Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, para. 8; Council of Europe 'Recommendation CM/Rec(2007)145 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe', available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d, para. 50; UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, available at: <https://undocs.org/en/A/RES/53/144> Art. 13; African Commission on Human and Peoples' Rights: Guidelines on Freedom of Association and Assembly in Africa, available at: <https://www.achpr.org/presspublic/publication?id=22>, paras 37-38.

113 ECNL. *Enabling the flow of donations: International standards that safeguard cross-border giving to CSOs*, 2019, available at: <http://ecnl.org/publications/enabling-the-flow-of-donations/>

not only CSOs but also their beneficiaries and hence undermine civil, cultural, economic, political and social rights as a whole.¹¹⁴ They also have a negative impact on philanthropic investments to support development in countries across borders. Therefore, states should eliminate administrative barriers and facilitate tax-effective cross-border philanthropy.¹¹⁵ Banks should also provide CSOs with access to their financial services and work closely with the sector to address any bank de-risking practices that hinder CSOs' work and fundraising efforts.

PRINCIPLES

1. States do not impose restrictions or intrusive procedures on CSOs to receive and use international funding and on the outflow of domestic funding to CSOs abroad.

States impose various obligations that may affect CSOs wishing to receive international funding and/or foreign states, entities and individuals wishing to fund CSOs in certain countries.

Restrictions on CSOs include: bans on international funding (Bahrain,¹¹⁶ Saudi Arabia);¹¹⁷ limitations on international funding for certain activities (e.g. Ireland,¹¹⁸ Sudan, Indonesia, Bolivia);¹¹⁹ prohibitions on receiving international funds from specific donors (e.g. in Russia,¹²⁰ Eritrea, Tunisia);¹²¹ requirements to inform the relevant state bodies about the receipt of international funds (e.g. Turkey, Tunisia, India)¹²² requirements to be declared eligible to receive international funds via a special procedure (e.g. India, Bangladesh, Kuwait), the requirement to receive international funds via special bank accounts (e.g. Bangladesh or India) or channel them via a centralized government fund, bank or state body (as in Burundi,¹²³ Nepal).¹²⁴ In others, CSOs funded by international sources need to register in a special state registry that places them in a special category of CSOs (e.g. Russia, Hungary). Additionally, some state laws subject CSOs receiving funds from abroad

114 OHCHR. 'Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, para. 9.

115 European Foundation Centre and Donors and Foundations Networks in Europe. 'European Philanthropy Manifesto: Private Resources for Public Good', 2019. available at: https://www.philanthropyadvocacy.eu/wp-content/uploads/2019/03/20190321-Philanthropy-Manifesto_420x210_WEB.pdf.

116 Bahrain, Law of Associations, Social and Cultural Clubs, Special Committees Working in the Field of Youth and Sports and Private Institutions of Bahrain of 18 December 1989, Art. 20.

117 According to Art. 21(12) of the Saudi Arabian Associations and Foundations Regulation, an organization may not receive subsidies from outside of the country unless approved by the Ministry of Social Affairs pursuant to a bylaw. The bylaws implementing the new regulation do not address the process for gaining such an approval hence formally donations from non-Saudi citizens are not allowed.

118 Ireland, Electoral Act 1997, Sections 23A and 48A.

119 Bolivia, Supreme Decree No. 29308, Art. 9.

120 Russia, 2012 Federal Law of the Russian Federation No. 272-FZ of 2012-12-28 'On Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation', Art. 3.

121 Tunisia, Decree No. 88 of 2011 pertaining to the registration of associations, Art. 35.

122 Turkey, Law on Associations of 4 November 2004, Art. 21 and Foundations Law of Turkey of 20 February 2008, Art. 25, para. 2; Tunisia, Decree No. 88 of 2011, Art. 41; India, Foreign Contribution (Regulation) Act of 27 September 2010, Art. 18.

123 Burundi, Law No. 1/02 of Burundi of 2017 Establishing an Organic Network of Non-Profit Organizations, Art. 74.

124 Nepal, 2014 Development Cooperation Policy, Section 3.9.10.

to greater supervision and control by the state, including inspections carried out without prior warning.¹²⁵ CSOs receiving international funding are also at times subjected to more frequent, more detailed, or otherwise more burdensome reporting and disclosure obligations than other CSOs (e.g. India, Russia, Hungary and Tunisia¹²⁶) or special audits or inspections (e.g. in Russia).¹²⁷

Furthermore, a number of states prohibit CSOs from accepting donations from particular donors or impose extensive obligations on the donor states or organizations. For example, Tunisia prohibits Tunisian CSOs from accepting donations from countries that do not have diplomatic relations with Tunisia or organizations that defend the interests and policies of those countries.¹²⁸ Azerbaijan obliges foreign NGOs to register and/or open a representation or branch office in the country, to sign an agreement with the Ministry of Justice and to obtain the Ministry of Finance's opinion on the financial-economic expediency of grants.¹²⁹

Some states also impose restrictions on the outflow of domestic funding to CSOs abroad. This is achieved by imposing obligations on citizens wishing to donate to foreign organizations as, for example, in South Africa, where an individual must obtain prior approval before sending donations to a foreign CSO.¹³⁰ In Singapore, the so-called "80:20 fundraising rule" requires a person or organization wishing to conduct fundraising appeals for "foreign charitable, benevolent and philanthropic purposes" from the general public (but not from private sources) to obtain a permit from the Commissioner of Charities. The granting of the permit is conditional upon the applicant undertaking to apply 80 percent of the funds raised through the fundraising appeal on charitable objects in Singapore.¹³¹ In Palestine, transfers of money outside of Palestine to non-Palestinian Banks and between the West Bank to banks in Gaza and Jerusalem, regardless of the amount, require prior clearance by the Ministry of Interior. The clearance must be obtained every six months. Many CSOs headquartered in the West Bank and operating in Gaza have reported that they ceased their operations in Gaza because they were unable to easily transfer funds and pay their Gaza-based staff members.¹³²

States have been using various justifications to introduce additional obligations and restrictive measures on international funding, including transparency in CSO funding, to limit international influence, to prevent corruption and money laundering, terrorism or and to ensure effective coordination of development aid. Restrictions have been often justified by citing the requirements of the Financial Action Task Force (the FATF) regime and, most importantly its Recommendation 8

125 Russia, Law on Non-Commercial Organisations, Art. 32 paras 4.2 and 4.3.

126 Tunisia, Decree No. 88 of 2011 pertaining to the registration of associations, Art. 41, which states that associations shall publish information about the foreign assistance, donations and grants they receive and record its source, value and purpose in one written media outlet and on the website of the association (if it has one).

127 Russia, 1996 Law on Non-Commercial Organisations, Art. 4.

128 Tunisia, Decree No. 88 of 2011, Art. 35.

129 Azerbaijan, Law on Associations, Articles 12.3 and 24-1; Resolution No. 339 of the Cabinet of Ministers of the Republic of Azerbaijan of 4 December 2015.

130 <https://www.icnl.org/post/report/south-africa-philanthropy-law>

131 Government of Singapore, Ministry of Culture, Community and Youth, 'Fund-raising for Foreign Charitable Purposes', available at: <https://www.charities.gov.sg/Fund-Raising/Pages/Fund-Raising%20for%20Foreign%20Charitable%20Purposes.aspx>.

132 ICNL. (Far, D.), 'ICNL Assessment Report - Palestine', 22 June 2019.

that created space for misinterpretation and misuse by national regulators.¹³³

Any control exercised by the state over CSOs receiving international funding should not be ‘unreasonable, overly intrusive or disruptive’ to the CSOs’ lawful activities.¹³⁴ The obligation to route funding through state channels, to report on all funds received from foreign sources and how these are allocated or used and to obtain authorization from the authorities to receive or use funds all constitute human rights violations. At most, the state may require CSOs to notify it about the receipt of such funds.¹³⁵ However, such a procedure should be simple, clear and straightforward with an inherent approval mechanism that does not provide any administrative authority with the ultimate decision-making power as to whether or not CSOs may receive such funds.¹³⁶ Similar considerations apply with respect to systems where funds need to be channeled through government funds or bodies; where CSOs receiving international funds are subjected to excessively burdensome reporting requirements; where CSOs are held to disclose the names, and at times even the places of residence of donors; where CSOs may not engage in human rights, advocacy or other activities; where such organizations’ work is stigmatized or delegitimized due to their being labelled in a negative way (e.g. as ‘foreign agents’); where they are harassed by special audit or inspection campaigns; or where criminal sanctions are imposed on CSOs that fail to comply with the above.¹³⁷

According to the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, states should demonstrate a change in mentality by highlighting that funding CSOs contributes to the development of a flourishing, diversified and independent civil society that is characteristic of a dynamic democracy.¹³⁸

2. States guarantee equitable tax treatment for cross-border and domestic donations.

The issue of taxation may arise in various ways when it comes to cross-border philanthropy. It may affect both the tax obligation of the recipient CSOs (income tax, VAT, inheritance tax, etc.) as well as their donors’ access to tax incentives after the donation from abroad. For example, certain states, such as Kazakhstan, require CSOs receiving funding from abroad to pay special additional taxes on the funds received and report on them separately to the respective tax authorities.¹³⁹

133 See more on FATF at: <http://fatfplatform.org/>.

134 OSCE-ODIHR/Venice Commission Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic of 16 October 2013, para. 69, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)030-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)030-e).

135 OHCHR. ‘Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association’, A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, paras 36-37. See also African Commission on Human and Peoples’ Rights: Guidelines on Freedom of Association and Assembly in Africa, available at: <https://www.achpr.org/presspublic/publication?id=22>, paras 37-38.

136 Venice Commission Interim Opinion on the draft Law on Civic Work Organisations of Egypt, 18 June 2013, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(2013\)032-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL(2013)032-e), para. 43.

137 Guidelines, para. 222.

138 OHCHR. ‘Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association’, A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, para. 34.

139 Kazakhstan, Tax Code, Art.14.

In Belarus, grants are tax-free only if they are registered with the Department on Humanitarian Activity within the Presidential Administration and if they are used exclusively according to the designated purposes, as defined in the law and by the President's special approvals/decisions. The Department can register a foreign grant with tax exemption or without exemption at its discretion, or in other cases exempt only a small part of the grant sum. Use of a foreign grant without registration is prohibited and is punishable by both the dissolution of CSOs and criminal liability for managers.¹⁴⁰

There is an emerging trend for foreign sources to be treated equally to domestic donations by tax legislation. Within the EU, the principle of non-discriminatory tax treatment of cross-border philanthropic giving has been reinforced by the European Court of Justice (ECJ) through several judgments, including *Persche*, *Missionswerk* and *EC v. Austria*.¹⁴¹ The *Persche* and *EC v. Austria* cases deal with the possibility of donors claiming tax benefits for cross-border donations. In *Missionswerk*, the ECJ resolved the issue of whether an organization with public benefit status in one EU country is required to pay a tax on a legacy received from a testator in another EU country.¹⁴² However, many EU countries have been slow in adapting their national legislation and practical barriers and legal uncertainties often remain even after the laws have changed. Tax authorities have seemingly used bureaucratic complexity, burdensome administrative hurdles and a lack of transparent process to limit the availability of tax incentives for donations within the EU. For example, in order to claim tax credits in France, the recipient organization must have either gained accreditation by French tax authorities or the donor must be able to prove its equivalency. The European Commission has therefore issued a series of infringement procedures against Member States related to the taxation of cross-border philanthropy.¹⁴³

As an example of good practice, in Portugal imported goods are subject to VAT but a wide range of exemptions are in place, including those pertaining to donations. Imported goods from outside the EU are, however, subject to customs duty. Additional costs such as banking fees and taxes exist but are similar to other types of financial flows. There is no approval process to receive charitable contributions from abroad, and there are no restrictions on receiving cross-border charitable donations.¹⁴⁴

In the United States private foundations interested in funding organizations and projects abroad can also enjoy tax benefits, provided that they conduct an

140 Law on Public Associations of 4 October 1994 (last amended in 2013); Decree of the President of the Republic of Belarus #5 on the Receipt and Use of Foreign Gratuitous Aid of 31 August 2015. See also the Belarus Tax Code.

141 ECJ, 27.1.2009 - C-318/07 (Hein Persche/Finanzamt Lüdenscheid); ECJ, 10.2.2011 - C-25/10 (Missionswerk Werner Heukelbach eV/Belgium); ECJ, 16.6.2011 - C-10/10 (Commission/Austria).

142 ECNL. 'The Regulatory Framework for Fundraising in Europe' ECNL, 2017, available at: http://ecnl.org/wp-content/uploads/2017/11/The-Regulatory-Framework-for-Fundraising-in-Europe_ECNL-research.pdf.

143 European Foundation Centre (EFC) and Transnational Giving Europe (TGE). 'Boosting Cross-Border Philanthropy in Europe: Towards a Tax-Effective Environment', May 2017, available at: <https://efc.issuelab.org/resource/boosting-cross-border-philanthropy-in-europe-towards-a-tax-effective-environment.html>.

144 Hudson Institute. 'The Index of Philanthropic Freedom: Selected country reports', 2016, available at: <https://wings.issuelab.org/resources/27065/27065.pdf>. See also the Global Philanthropy Indices by the Lilly School of Philanthropy, Indiana University, available at: <https://philanthropy.iupui.edu/research/globalindices.html>.

equivalency determination promulgated by the Internal Revenue Service (IRS) to help ensure that the foreign grantees are properly using those funds for charitable purposes. An equivalency determination generally refers to the review and evaluation by a private foundation of whether a potential grantee is the foreign equivalent to a U.S. public charity and meets the requirements described in Section 501(c)(3) of the Internal Revenue Code. Among others, the grantee shall be organized exclusively for a charitable, educational, or other 501(c)(3) exempt purpose; operated primarily for a qualified exempt purpose; shall not engage in any transactions that would result in private inurement or a prohibited private benefit; its assets, upon dissolution, shall be distributed to another nonprofit for a qualified exempt purpose or a government instrumentality; shall not engage in substantial lobbying or prohibited political campaign interventions.¹⁴⁵

Some organizations provide potential donors, CSOs, foundations, and government officials with easy access to laws, regulations, and other materials that may help them understand the implications of their cross-border giving. For example, the Council on Foundations, in partnership with ICNL, maintains a regularly updated library of resources and “country notes,” which provide key information on domestic nonprofit laws and regulations in 35 countries.¹⁴⁶ These country notes give U.S. and global foundations, CSOs, governments, academic institutions, and advisors access to materials, which may help them evaluate the potential tax benefits of their cross-border philanthropy.

3. Intermediary organizations can help to facilitate cross-border fundraising.

Cross-border giving can be facilitated by intermediary organizations such as Transnational Giving Europe (TGE). TGE is a partnership of leading European foundations and associations that enables donors, including both corporations and individuals resident in one of the participating countries, to financially support CSOs in other member countries, while benefiting directly from the tax advantages provided for in the legislation of their country of residence. TGE builds a bridge between CSOs and their prospective donors abroad and enables them to extend fundraising to foreign countries, without having to set up branches or sister organizations. Once approved as an eligible recipient of transnational gifts by TGE, a CSO benefits from fiscal incentives to charitable giving provided for by national regulations in the same way as domestic charities. Supporting such a CSO yields the same tax benefits for foreign donors as supporting non-profit organizations (NPOs) in their home country. TGE carries out all administrative tasks related to the tax deductibility of gifts. It charges operational costs in the amount of 5 percent of the donated amount for gifts up to EUR 100,000 and 1 percent of the amount in excess of EUR 100,000. The maximum operational cost is EUR 15,000. TGE currently covers 21 countries and is currently the only practical solution for tax-effective donations all across Europe.¹⁴⁷

145 Nonprofit Law Blog (NEO Law Group). ‘International Grantmaking: Equivalency Determinations’, 28 September 2017, available at: <http://www.nonprofitlawblog.com/international-grantmaking-equivalency-determinations/>.

146 ICNL and Council on Foundations. ‘Country Notes’, available at: <https://www.cof.org/country-notes>.

147 See more on TGE at: <https://www.transnationalgiving.eu/how-does-it-work>.

The Charities Aid Foundation (CAF) is another organization that helps donors, companies and charities to make a bigger impact. Headquartered in the UK, CAF's network of international offices enables donations overseas to charitable organizations. CAF validates the charity for the donor, to make sure the donation is going to a legitimate project, and arranges for the donation to be paid to them.¹⁴⁸ In a similar vein, the Ireland Funds is a global philanthropic network established in 1976 to promote and support peace, culture, education and community development throughout the island of Ireland, and Irish-related causes around the world. With chapters in twelve countries, The Ireland Funds has raised over USD 600 million for causes in Ireland and beyond, benefiting more than 3,200 different organizations.¹⁴⁹

The NGOsource, a project of the [Council on Foundations](#) and [TechSoup](#), helps American grantmakers streamline and save in their international giving. It aims to increase the efficiency of international grantmaking by enabling a thorough, accurate equivalency determination analysis in compliance with IRS regulations.¹⁵⁰

4. CSOs receiving international funding are not stigmatized, labeled as foreign agents, or attacked in public media, by the government, or by third parties.

CSOs receiving donations from abroad should not be subject to discriminatory measures or smear campaigns by state bodies, state-supported media or other third parties that stigmatize or delegitimize their work.

Nevertheless, CSOs receiving international funding have been stigmatized and labelled as 'foreign agents' or foreign funded organizations both by law and the media in many countries globally. As referenced earlier, CSOs funded by international sources in Russia and Hungary need to register in a special state registry, adopt a specific title (e.g. 'foreign agent' in the Russian Federation, or organizations receiving support from abroad' in Hungary) and indicate this on their materials and publications. In addition, CSOs have also been labelled based on the source of their funding in public media and discussions. This could affect the way foreign-funded CSOs are perceived in society and may have the effect of inhibiting cooperation with such organizations or deterring foreign funders from making financial contributions.¹⁵¹

This has a severe impact on the reputation of the respective organizations that may cause them to lose other funds, partners, and beneficiaries.¹⁵² Indirectly stigmatizing legislation has also led to decreased cooperation with state institutions, like in the case of Hungary.¹⁵³

148 See more on CAF at: <https://www.cafonline.org/my-personal-giving/plan-your-giving/donating-overseas>.

149 See more on The Ireland Funds at: <https://irelandfunds.org/>.

150 See more on NGOsource at: <https://www.ngosource.org/>.

151 Venice Commission Opinion on the Draft Law of Hungary on the Transparency of Organisations Receiving Support from Abroad, 20 June 2017, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)015-e_Art.41](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e_Art.41).

152 Council of Europe Commissioner for Human Rights, Third Party Intervention in the pending ECtHR case of *ECODEFENCE and Others v. Russia*, application no. 9988/13, 5 July 2017, available at: <https://www.coe.int/en/web/commissioner/third-party-interventions>, paras 33-34.

153 2017 USAID CSO Sustainability Index, available at: <https://www.fhi360.org/sites/default/files/media/documents/resource-civil-society-organization-2017-regional-report.PDF>, page 98.

The practice of stigmatizing CSOs based on their sources of funding has been condemned by several international institutions, including the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Venice Commission and others. Branding CSOs receiving international funding as a separate category (e.g. ‘foreign agents’) does not seem to be necessary to achieve legitimate aims under Article 22 ICCPR. Even where a state can reasonably argue that the intended aim is protected under international law, stigmatizing entire groups of CSOs and potentially ruining their reputations cannot be considered a necessary step towards combating serious crimes and enforcing the rule of law. States can and should address this by less intrusive means that do not stigmatize CSOs and have a less restrictive effect on the right to freedom of association of an organization. Such measures undoubtedly represent an interference with the exercise of the right to freedom of association and of freedom of expression without discrimination.¹⁵⁴ Moreover, simply assuming undue foreign influence because a CSO receives funding from an international source does not reveal a fact-based approach.¹⁵⁵

5. Banks recognize CSOs’ right to open bank accounts and to use banking services.

CSOs around the world are impacted by issues of financial access, including inordinate delays in cash transfers, onerous due diligence requirements, the inability to open bank accounts, arbitrary suspension or closure of bank accounts, etc. These are collectively classed as ‘de-risking’ activities by financial institutions.

¹⁵⁶

There are various reasons for bank de-risking among which international rules designed to combat money laundering and terrorist financing are the most significant. These AML/CTF rules require financial service providers to conduct extensive ‘due diligence’ on their customers and transactions to ensure that they do not facilitate such criminal activity. They must also ensure that they do not inadvertently breach any of the national and international sanctions regimes or financial ‘blacklists’ that now span the globe in their hundreds. AML/CTF compliance is subject to intense scrutiny by regulators and bank examiners, and is underscored by substantial criminal or civil penalties for failures or lapses, and the reputational damage this brings. The rising cost of compliance with these

¹⁵⁴ OSCE-ODIHR/Venice Commission Joint Interim Opinion on the Draft Law Amending the Law on Non-Commercial Organizations and Other Legislative Acts of the Kyrgyz Republic of 16 October 2013, para. 69, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)030-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)030-e).

¹⁵⁵ ECNL Enabling the flow of donations: International standards that safeguard cross-border giving to CSOs, 2019, available at: <http://ecnl.org/publications/enabling-the-flow-of-donations/>. Also see, in this context, Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, Opinion on the Hungarian Draft Act on the Transparency of Organisations Supported from Abroad, 24 April 2017, para. 27. See also Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), Anti-Money Laundering and Counter-Terrorist Financing Measures, Hungary, 1st Enhanced Follow-up Report & Technical Compliance Re-Rating, December 2017, paras 108-112, where it was noted that Hungary had conducted a risk assessment of the CSO sector, but that the Draft Act on the Transparency of Organisations Supported from Abroad had not been based on this risk assessment, or indeed on a risk-based approach.

¹⁵⁶ See more on bank de-risking: ECNL and HSC. ‘At the Intersection of Security and Regulation: Understanding the Drivers of ‘De-Risking’ and the Impact on Civil Society Organizations’, 2018, available at: http://ecnl.org/wp-content/uploads/2018/05/Understanding-the-Drivers-of-De-Risking-and-the-Impact-on-Civil-Society-Organizations_1.pdf.

requirements, which in practice requires financial institutions to profile all their customers and subject them to ongoing surveillance, coupled with the relatively small profits that may be gained from correspondent banking relationships, is widely seen as the key driver of de-risking.

Bank de-risking of CSOs undermines economic development and jeopardizes CSOs' ability to carry out their mission. It hinders their access to financial services that is essential to raise funds for their important work. Broadly, CSOs' financial abandonment has a negative impact on the implementation of the UN Sustainable Development Goals, the financial inclusion agenda and civic freedoms in general. They also create new terrorism-financing risks due to pushing money transactions underground.¹⁵⁷

Though not framed explicitly as a 'de-risking' issue, both the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association have stressed that financial exclusion falls squarely within their fundamental rights remit and have asserted that the denial of access to financial services to civil society affects a range of human rights, including the right to freedom of association.¹⁵⁸

There are several good examples for addressing bank de-risking. For example, in the Netherlands, the Ministry of Finance and Human Security Collective co-convened a multi-stakeholder dialogue process over the past few years on bank de-risking and its impact on CSOs. This dialogue process involves government (the Ministry of Finance and the Ministry of Foreign Affairs), banks and NPOs (large and small). The UK tripartite working group on financial access is another example of a national roundtable where relevant stakeholders identify joint solutions to navigate the complex AML/CTF and sanctions landscape with the aim of facilitating payments, in support of humanitarian aid in particular.

Recommendations:

- States should refrain from adopting or should remove any existing restrictions that may affect CSOs wishing to receive donations from foreign entities and individuals.
- States should refrain from adopting and eliminate administrative barriers to cross-border philanthropy.
- Any assessments carried out by the State on the money laundering and terrorism financing risks associated with the CSO sector must be conducted in consultation

157 Van Broekhoven, L., Vanja Skoric, V. and Hayes, B. 'De-risking and non-profits: how do you solve a problem that no-one wants to take responsibility for?', OpenDemocracy, 11 July 2017, available at: <https://www.opendemocracy.net/en/de-risking-and-non-profits-how-do-you-solve-problem-that-n/>.

158 OHCHR. 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', A/70/371, available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/371, paras 42–43 and p. 6; OHCHR. 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai - Addendum - Mission to the United Kingdom of Great Britain and Northern Ireland', A/HRC/23/39/Add.1, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/39/Add.1, paras 84-85. See more at: ECNL and HSC. 'At the Intersection of Security and Regulation: Understanding the Drivers of 'De-Risking' and the Impact on Civil Society Organizations', 2018, available at: http://ecnl.org/wp-content/uploads/2018/05/Understanding-the-Drivers-of-De-Risking-and-the-Impact-on-Civil-Society-Organizations_1.pdf.

with CSO stakeholders and must use a robust evidence-based methodology for assessing the sector that reflects the actual risk areas and diversity within the sector.

- States should facilitate tax-effective cross-border philanthropy.
- State authorities should provide appropriate and easily understandable information to donors and CSOs about the tax rules and procedures to obtain tax benefits.
- CSOs can help to facilitate cross-border fundraising through intermediary organizations.
- States, through their tax agencies, should develop transparent equivalency procedures for tax effective CSO cross-border transactions.
- States should refrain from introducing any law that requires CSOs to register in a special state registry, adopt a specific title and indicate this on their materials and publications based on the sources of their funding.
- The state authorities and state-owned media should refrain from stigmatizing and labeling CSOs based on their sources of funding.

III.5. TAXATION

Principles:

- 1. States provide preferential tax treatment and tax exemptions to a broad range of CSOs.**
- 2. Tax benefits are provided in an impartial and transparent manner, based on clear and objective criteria, and are not used to undermine the independence of civil society.**
- 3. States encourage philanthropy by providing meaningful tax benefits for donors.**
- 4. States create other incentives or initiatives, such as tax designations and payroll schemes.**
- 5. The procedure to obtain tax benefits and incentives is clear, simple, and quick.**

INTRODUCTION

Laws and policies regulating CSO taxation can influence CSOs' fundraising activities and the behavior of potential donors. Providing tax incentives and exemptions for CSOs can boost the impact of received donations and increase their sustainability. As a result, various international experts and regional bodies

have recognized the importance of adopting enabling tax laws and policies that create an enabling environment for fundraising and philanthropy. In a 2018 report, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association said that an enabling legal framework for civil society includes “the possibility of tax-benefits”.¹⁵⁹ According to the Council of Europe, CSOs “should be assisted in the pursuit of their objectives through other forms of support, such as exemption from income and other taxes or duties ...”¹⁶⁰ The African Commission on Human and Peoples’ Rights’ ‘Guidelines on Freedom of Association and Assembly in Africa also confirms that “States should provide tax benefits... to not-for-profit associations.”¹⁶¹ Most states currently provide some type of tax benefits to CSOs. For example, the *Rules to Give By* Global Philanthropy Legal Environment Index evaluated the legal frameworks of 177 countries and found that 95 percent of them provided some type of tax benefits for CSOs.¹⁶²

Laws that provide tax deductions or other incentives for donors can help encourage philanthropy and boost donations, bequests, and other forms of giving. States also benefit from these enabling tax laws and policies. CSOs can often provide more efficient services, including in the health, education, poverty reduction, human rights, anti-discrimination, and environmental protection fields. Boosting revenue for CSOs may reduce the demand for government-provided service delivery.

On the other hand, restrictive and discretionary tax laws can have a negative impact on fundraising and disincentivize giving.¹⁶³ When donors provide a donation or bequest, they often do it to benefit beneficiaries, promote a specific cause, or address a particular need. If CSOs are taxed on donations, gifts, and bequests, or taxed when they seek to purchase goods or services with these donations, only a portion of the original donation or bequest will be used for its intended purpose. Some donors may be less likely to contribute to a fundraising campaign if tax laws diminish the size and impact of the donation.

PRINCIPLES

1. States provide preferential tax treatment and tax exemptions to a broad range of CSOs.

States have an obligation to guarantee “the right of an association freely to carry out its statutory activities,”¹⁶⁴ which includes soliciting, receiving and using

159 OCHR. ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association’ A/73/279, 7 August 2018, available at: <http://undocs.org/A/73/279 para. 20>.

160 Council of Europe. Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d), Art. 57.

161 African Commission on Human and Peoples’ Rights: Guidelines on Freedom of Association and Assembly in Africa, available at: <https://www.achpr.org/presspublic/publication?id=22>, paras 41-42.

162 Nexus, McDermott Will & Emery LLP, and the Charities Aid Foundation. ‘Rules to Give By: Global Philanthropy Legal Environment Index (2018)’, available at: <https://www.issueLab.org/resources/19560/19560.pdf>.

163 OCHR. ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association’, A/73/279, 7 August 2018, available at: <http://undocs.org/A/73/279>, para. 9.

164 UN Human Rights Committee. Communication No. 1274/2004, available at: https://tbinternet.ohchr.org/_layouts/15/

financial donations.¹⁶⁵” Generally, national legislation should avoid taxing received donations.¹⁶⁶ Taxing donations could constitute a restriction on the freedom of association, particularly if a state designs or uses tax law to discourage the exercise of the freedom of association.¹⁶⁷ Generally, this principle should apply to a broad range of CSOs. For example, in the Dominican Republic, all non-profit associations legally incorporated and authorized to operate in the Dominican Republic enjoy a general exemption from “all taxes, duties, fees, special contributions, whether national or municipal, existing or future,” including on donations and bequests, as long as they have followed the requirements to remain eligible for such tax exemptions.”¹⁶⁸ While some states may want to prioritize certain public interest activities over others, this can be done by providing additional incentives or benefits, such as deductions for private donations.

There are a variety of ways that states avoid taxing CSOs on the receipt of donations. Many states do not consider donations as “income” for tax purposes.¹⁶⁹ In Botswana, CSOs are exempted from paying tax on donations because the funds are considered support for non-profit activities.¹⁷⁰ In some countries where donations are rare, such as Mali, the law does not explicitly address the taxation of received donations, however, when donations occur, they are not, in practice, taxed as income.¹⁷¹ There are also some countries that recognize donations as income but confer tax-exempt status on civic organizations.¹⁷² There also remain a few countries, such as the Democratic Republic of the Congo and Belarus that require CSOs to pay taxes on received donations.¹⁷³

An enabling legal framework should also exempt some or all CSOs from paying other types of taxes, duties, and fees. These benefits commonly include preferential treatment under goods and services tax (GST), Value Added Tax (VAT), or sales tax systems; exemptions from paying customs duties; and more favorable tax treatment on bequests.¹⁷⁴

[treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F88%2FD%2F1274%2F2004&Lang=en](#).

165 ECtHR, *Ramazanova and Others v. Azerbaijan* (44363/02). See also Art. 13 of the UN Declaration on Human Rights Defenders.

166 Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). ‘Guidelines for Laws Affecting Civic Organizations’, 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>

167 Venice Commission and ODIHR. ‘Hungary - Joint Opinion on Section 253 on the special immigration tax of Act XLI of 20 July 2018 amending certain tax laws and other related laws and on the immigration tax, adopted by the Venice Commission at its 117th Plenary Session (Venice, 14 and 15 December 2018)’, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)035-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)035-e), para. 11.

168 Nexus, McDermott Will & Emery, CAV “Rules to Give By: A Global Legal Environment for Philanthropy Index”, p. 133 (2014)

169 Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). ‘Guidelines for Laws Affecting Civic Organizations’, 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>

170 USAID. ‘2016 CSO Sustainability Index for sub-Saharan Africa’, available at: <https://www.usaid.gov/africa-civil-society/2016>, p. 18.

171 USAID. ‘2016 CSO Sustainability Index for sub-Saharan Africa’, available at: <https://www.usaid.gov/africa-civil-society/2016>, p. 141.

172 Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). ‘Guidelines for Laws Affecting Civic Organizations’, 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>

173 USAID. ‘2016 CSO Sustainability Index for sub-Saharan Africa’, available at: <https://www.usaid.gov/africa-civil-society/2016>, p. 53.

174 OCHR. ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association’, A/73/279, 7 August 2018, available at: <http://undocs.org/A/73/279>, para. 20.. See also Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). ‘Guidelines for Laws Affecting Civic Organizations’, 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>, p. 78, which states “Generally, CSOs, whether organized for mutual benefit or for public benefit, and whether a membership or non-membership organization, as well as foundations, should be exempted

States have adopted different approaches for providing preferential treatment for CSOs under GST, VAT, and sales tax systems. In some countries, CSOs are excluded from these systems by not being defined as a “taxable person” or by being exempt.¹⁷⁵ This approach may present challenges in practice since the tax may be built into the price of goods and services. Other countries, such as Lebanon and Ireland, allow qualifying CSOs or charities to receive a rebate or partial compensation of VAT paid.¹⁷⁶ In many countries, including EU member states, eligible organizations receive a more favorable GST or VAT rate, but not a zero rate. The eligibility and qualification requirements to receive VAT or GST exemptions vary by country. Some countries limit these exemptions to public benefit organizations or certain public interest activities (typically education, healthcare, social services, etc.)¹⁷⁷ For example, in Ireland, the purchase of appliances for use by disabled persons, donated research equipment, and donated medical equipment are exempt from VAT.¹⁷⁸ Some countries also require that if the item is sold within a short period (e.g. two to three years) after its import, then it should be subject to customs duties and import VAT at the time of sale.

Some countries, such as Bulgaria, apply GST or VAT exemptions for both monetary and in-kind donations. For example, the Bulgarian VAT system provides for VAT-free supply of food donations to food banks, under certain conditions.¹⁷⁹

Many countries provide CSOs with exemptions or preferential treatment for taxes such as real estate or personal property taxes, and estate or inheritance taxes.¹⁸⁰ It is particularly common for states in Europe to exempt certain categories of charities and public benefit organizations from paying inheritance tax on bequests.¹⁸¹ For example, in Belgium, public benefit organizations can receive a reduced tax rate of 7 percent on donations provided through inheritances versus the standard tax rate of 80 percent.¹⁸²

from paying taxes on received donations. See also Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). ‘Guidelines for Laws Affecting Civic Organizations’, 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>, p. 83.

175 Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). ‘Guidelines for Laws Affecting Civic Organizations’, 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>, p. 83.

176 Ibid; USAID. ‘2016 CSO Sustainability Index for the Middle East and North Africa’, available at: <https://www.usaid.gov/middle-east-civil-society/2016>, p. 39. See also Ireland’s Office of the Revenue Commissioners, ‘VAT Compensation Scheme’, available at: <https://www.revenue.ie/en/companies-and-charities/charities-and-sports-bodies/vat-compensation-scheme/index.aspx>.

177 Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). ‘Guidelines for Laws Affecting Civic Organizations’, 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>, p. 83

178 Council on Foundations. ‘Nonprofit Law in Ireland’, available at: <https://www.cof.org/content/nonprofit-law-ireland>.

179 Varbanov, P. ‘Bulgaria exempts food donations from VAT; introduces conditions for exemption’, Eurofast, available at: <https://eurofast.eu/bulgaria-exempts-food-donations-from-vat-introduces-conditions-for-exemption/>.

180 Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). ‘Guidelines for Laws Affecting Civic Organizations’, 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>

181 von Hippel, T. ‘Taxation of Cross-Border Philanthropy in Europe after Persche and Stauffer: From Landlock to Free Movement?’, European Foundation Centre and TGE, available at: <http://efc.issuelab.org/resource/taxation-of-cross-border-philanthropy-in-europe-after-persche-and-stauffer-from-landlock-to-free-movement.html>.

182 ECJ, 10.2.2011 - C-25/10 (Missionswerk Werner Heukelbach eV/Belgium).

2. Tax benefits are provided in an impartial and transparent manner, based on clear and objective criteria, and are not used to undermine the independence of civil society.

Any form of public support, including tax benefits, must be governed by clear and objective criteria and distributed in an impartial, non-partisan, and transparent manner. The granting of benefits shall not be used as a means to undermine the independence of the civil society sphere.¹⁸³

In general, laws affecting freedom of association, including laws providing tax benefits or incentives for CSOs, must always be accessible (i.e., published) and *formulated with sufficient precision to enable the persons concerned to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct.*¹⁸⁴ To meet this standard, the underlying law must provide clear and objective criteria and avoid the use of broad and imprecise terms.

States apply the “clear and objective criteria” in different ways. Some states apply these benefits to all associations. For example, in Albania, exemptions from tax and customs obligations apply “regardless of the form of organization, the purpose they follow, and the activity they exercise.”¹⁸⁵ Some states limit the application of tax exemptions to those CSOs “that meet particular social needs.”¹⁸⁶ For example, Austria provides exemption to public welfare CSOs and Morocco provides exemptions for VAT, income tax, and various fees to public interest associations.¹⁸⁷

If a law fails to provide clear criteria, officials may use their discretion to determine which CSOs are eligible to receive tax benefits. This could result in benefits being applied in an opaque, inconsistent, unpredictable, unfair or discriminatory manner. Discretion can also be used to divert resources from the sector or undermine the independence of the sector. For example, in Cote d’Ivoire, it is possible for individuals to benefit from a tax deduction for donations to a CSO with a humanitarian mission. However, the individual must submit a request to the fiscal revenue service and the service is free to decide whether to honor the request. Frequently the request is denied with a request to make the donation through a state agency.¹⁸⁸

183 African Commission on Human and Peoples’ Rights: Guidelines on Freedom of Association and Assembly in Africa, available at: <https://www.achpr.org/presspublic/publication?id=22>, paras 41-42;; Council of Europe. ‘Recommendation CM/Rec(2007)145 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe’, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d), paras 59-60, available at: <https://www.osce.org/odihr/33742?download=true>.

184 See, for example, *N.F. v. Italy*, (37119/97), paras 26-29, ECtHR 2001-IX; and *Gorzelik and others v. Poland*, (44158/98), paras 64-65, ECtHR 2004-I. (The ECtHR has discussed what it means to be “prescribed by law” in greater detail. Although not all states are subject to the jurisdiction of the ECtHR, the ECtHR’s decisions interpreting Article 22, are generally considered to be among international best practices and can provide guidelines for legal principles desirable in a democratic society.)

185 Albania, Law No. 8788 on Non-Profit Organizations of the Republic of Albania (2001), Art. 39.

186 See the joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, available at: <https://www.osce.org/odihr/132371>, para. 124.

187 Arafi, H. ‘Improving the Legal Environment Related to the Financial and Tax Aspects of Associations and CSOs in Morocco’, p. 31 (2018).

188 USAID. ‘2016 CSO Sustainability Index for sub-Saharan Africa’, available at: <https://www.usaid.gov/africa-civil-society/2016>, p. 44.

3. States encourage philanthropy by providing meaningful tax benefits for donors.

Tax incentives can help stimulate donations from businesses and individuals and have a significant impact on charitable giving and the culture of philanthropy.¹⁸⁹ According to data from the World Giving Index, 33 percent of survey respondents living in countries which offer some form of tax incentive to individuals reported providing a donation in the past month, while only 22 percent of respondents living in countries that offer no incentives reported providing a donation in the past month.¹⁹⁰

Incentives may take the form of deductions (decreasing the amount of the tax base on which the corporate/income tax is imposed) or tax credits (that allow the donor to subtract part of the donated amount from the tax to be paid, thus reducing the amount of tax owed).¹⁹¹ Among the countries that impose personal income or corporation tax, 77 percent offer some form of tax incentive to corporate donors and 66 percent offer incentives to encourage individual giving.¹⁹² Many countries provide different incentives for corporations and individuals. While some countries, such as Nigeria, provide this incentive to all registered CSOs, it is common to limit these incentives to donations provided to a certain category of CSOs, such as welfare organizations (Namibia) or public benefit organizations.¹⁹³ There are still several countries, including Sweden, Slovakia, Gambia, the Democratic Republic of the Congo and Nepal that provide no tax deductions for individuals or organizations that donate to CSOs.¹⁹⁴

There is a range of practice regarding the percentage of the donation that is eligible for the tax deduction or exemption. In Singapore, individual donors can claim a 250 percent tax deduction for qualifying donations to an approved 'Institution of a Public Character'.¹⁹⁵ In Australia, individual donors can claim a deduction from their income tax equal to 100 percent of the donation to eligible CSOs. Individuals in France can claim an income tax reduction (tax credit) of 66 percent of the amount donated to an eligible CSO or a 75 percent reduction in wealth tax. Countries also often set different limits for individual and corporate donors. For example, French

189 European Fundraising Association. 'Tax Incentives for Charitable Giving in Europe', available at: <https://efa-net.eu/wp-content/uploads/2018/12/EFA-Tax-Survey-Report-Dec-2018.pdf>, p. 3.

190 Nexus, McDermott Will & Emery LLP and the Charities Aid Foundation. 'Rules to Give By: Global Philanthropy Legal Environment Index (2018)', available online at: <https://www.issuelab.org/resources/19560/19560.pdf>.

191 Council of Europe. 'Recommendation CM/Rec(2007)145 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe', available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d, para. 57. See also Open Society Institute and ICNL (Irish, L. E., Kushen, R. and Simon, K. W.). 'Guidelines for Laws Affecting Civic Organizations', 2004, available at: <https://www.icnl.org/post/tools/guidelines-for-laws-affecting-civic-organizations>, p. 82.

192 Nexus, McDermott Will & Emery LLP and the Charities Aid Foundation. 'Rules to Give By: Global Philanthropy Legal Environment Index (2018)', available online at: <https://www.issuelab.org/resources/19560/19560.pdf>.

193 ICNL, Nigeria Philanthropy Law Report (available online at <https://www.icnl.org/post/report/nigeria-philanthropy-law>); USAID. '2016 CSO Sustainability Index for sub-Saharan Africa', available at: <https://www.usaid.gov/africa-civil-society/2016>, p. 159.

194 USAID. '2016 CSO Sustainability Index for sub-Saharan Africa', available at: <https://www.usaid.gov/africa-civil-society/2016>, pp. 53 and 77 and USAID. '2016 CSO Sustainability Index for Asia', available at: <https://www.usaid.gov/asia-civil-society/2016>, p. 30.

195 Inland Revenue Authority of Singapore, 'Donations and Tax Deductions' available at: <https://www.iras.gov.sg/irashome/Other-Taxes/Charities/Donations-and-Tax-Deductions/>.

companies can deduct 60 percent of the value of their gift from corporation tax.¹⁹⁶

There is also a range of practices regarding annual limits on donor relief. In the UK, there is no annual limit on donor relief for individuals who donate to qualifying CSOs. In Canada, donations to qualifying CSOs may be deducted up to 75 percent of income. In the United States, donations to eligible CSOs may be deducted up to 50 percent of an individual's adjusted gross income.¹⁹⁷ In France the tax relief is capped at 20 percent of the annual taxable income of individual donors and up to a maximum of 0.5 percent of the annual turnover of corporate donors. In the Czech Republic and Belgium, individual donors are entitled to tax reduction of up to 10 percent of their annual taxable income.¹⁹⁸ In Ireland, a donor's eligible donations in a single year are capped at EUR 1 million for tax relief purposes except in cases where there is a connection between the donor and the recipient charity in which case the relief is restricted to 10 percent of the donor's total income for that year.

Some states have minimums for deductible donations. In Belgium, donations are deductible if they total at least EUR 30 per eligible beneficiary. In the Czech Republic, donations to eligible CSOs are deductible if they total at least 1 percent of net income or CSK 2,000 (approximately EUR 81). In Ireland, donations to eligible charities above EUR 250 are deductible.¹⁹⁹

Any limits set by the state on how much can be deducted from the taxable income or the amount of donations needs to be reasonable and fair in order to stimulate regular giving.

States should also make data, statistics and research available annually regarding the tax treatment of fundraising and philanthropy, which may include the effectiveness and the impact of tax benefits. For example, after Ireland implemented significant tax changes on the treatment of charitable donations, Philanthropy Ireland prepared a report, which included insights and data on Ireland's landscape of giving.²⁰⁰

4. States create other incentives or initiatives, such as tax designations and payroll schemes.

States could also consider additional means to support CSOs' fundraising, such as tax designations and payroll schemes. Tax designation initiatives allow private individuals (and in Slovakia also corporations) to assign a percentage of their tax liability to their preferred CSO or public benefit organization.²⁰¹ Poland,

196 European Fundraising Association. 'Tax Incentives for Charitable Giving in Europe', available at: <https://efa-net.eu/wp-content/uploads/2018/12/EFA-Tax-Survey-Report-Dec-2018.pdf>, p. 7.

197 "Donations" refer to donations to tax-exempt organizations and public charities. See IRS, 'Charitable Contribution Deductions', November 2018, available at: <https://www.irs.gov/charities-non-profits/charitable-organizations/charitable-contribution-deductions>.

198 European Fundraising Association. 'Tax Incentives for Charitable Giving in Europe', available at: <https://efa-net.eu/wp-content/uploads/2018/12/EFA-Tax-Survey-Report-Dec-2018.pdf>, p. 7.

199 Centre for Tax Policy and Administration (OECD). 'Report on Abuse of Charities for Money Laundering and Tax Evasion', available at: <https://www.oecd.org/ctp/crime/releaseofreportonabuseofcharitiesformoney-launderingandtaxevasion.htm>, p. 7.

200 BDO and Philanthropy Ireland. 'The Impact of the 2013 Change in the Tax Treatment of Charitable Donations', December 2018, available at: <https://drive.google.com/file/d/1ClzyhQSVoj-FelXjUS7F5X7eCockwtEr/view?usp=sharing>.

201 Council of Europe. 'Recommendation CM/Rec(2007)145 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe', available at: https://search.coe.int/cm/Pages/result_details.

Hungary, and Romania allow public benefit organizations to collect a 1 percent tax designation from personal income tax. Lithuania and Moldova allow organizations to collect a 2 percent tax designation. In Slovakia, individual taxpayers may designate 2 percent of their personal income tax or 3 percent in case they volunteer at least 40 hours per year. In the case of corporations, it is 1.5 percent of corporate income tax (or 2 percent in case of additional gift of at least 0.5 percent).²⁰²

The amount raised from these tax designations is not a donation but a form of budgetary support but it does show similar elements and can have a big impact on funding for CSOs. For example, in 2013 in Poland, 44 percent of entitled taxpayers allocated 1 percent of their tax burden to qualified organizations, which resulted in PLN 480 million for public benefit organizations.²⁰³

Payroll schemes also help encourage philanthropy and support fundraising for CSOs. For example, legislation in the UK allows for payroll giving. An individual may donate money to charity directly from his or her wages or pension without paying tax on it.²⁰⁴ Another model to consider is the UK's Gift Aid scheme, which enables charities to reclaim the tax on a UK taxpayer's donation, thereby increasing the value of the donation by 25 percent at no extra cost to the donor.²⁰⁵

5. The procedure to obtain tax benefits and incentives is clear, simple, and quick.

CSOs should be free to accept tax-deductible donations without additional burdens, and individuals and businesses making such donations should be able to easily claim a deduction. Some states, however, require CSOs to register or obtain a special endorsement before receiving tax benefits. When such procedures are required, they should be clear, simple, and quick.

Several states require CSOs to be included on a registry before receiving particular tax benefits. Argentina requires charities to be recorded in a register for the Federal Tax Administration.²⁰⁶ In Austria, charities must register in the Austrian charities register, which is administered by authorities under the Ministry of Interior's supervision.²⁰⁷

Some states require CSOs to receive a special endorsement or follow a pre-registration procedure to provide receipts to donors for gifts or donations received. For example, Belgium requires an organization to meet a series of conditions and undergo a pre-registration procedure. In South Africa, CSOs must

[aspx?ObjectID=09000016805d534d](#)), Art. 206.

202 Svidroňová, M. and Kuvíková, H. 'Sustainability and Operation of NGOs Influenced by Tax System: The Case of Slovakia' *International Journal of Not-for-Profit Law*, 16, 1, September 2014, available at: https://www.researchgate.net/publication/269407792_Sustainability_and_operation_of_NGOs_influenced_by_tax_system_the_case_of_Slovakia, pp. 8-22.

203 Piechota, G. 'Legislation on Financing Public Benefit Activities from Tax Designation in Poland', *International Journal of Not-for-Profit Law*, 17, 1, March 2015, available at: <https://www.icnl.org/resources/research/ijnl/volume-17-issue-1>, pp. 86-91.

204 UK Government. 'Payroll Giving', November 2018, available at: <https://www.gov.uk/payroll-giving>.

205 UK Government. 'Tax Relief when you donate to a Charity', November 2018, available at: <https://www.gov.uk/donating-to-charity/gift-aid>.

206 Centre for Tax Policy and Administration (OECD). 'Report on Abuse of Charities for Money Laundering and Tax Evasion', available at: <https://www.oecd.org/ctp/crime/releaseofreportonabuseofcharitiesformoney-launderingandtaxevasion.htm>, p. 25.

207 Centre for Tax Policy and Administration (OECD). 'Report on Abuse of Charities for Money Laundering and Tax Evasion', available at: <https://www.oecd.org/ctp/crime/releaseofreportonabuseofcharitiesformoney-launderingandtaxevasion.htm>, p. 26.

register as a public benefit organization and then apply for approval to receive tax-deductible donations.²⁰⁸ In the Philippines, CSOs must be certified as donee institutions for donations to be exempt from the donor's tax.²⁰⁹ To be certified as a donee institution, a CSO must first be certified by the Philippine Council for NGO Certification, a self-regulation body recognized by the government, and the Bureau of Internal Revenue.²¹⁰ In Australia, a not-for-profit organization must apply for a Deductible Gift Recipient (DGR) endorsement in order to provide tax deductible gift receipts for gifts received.²¹¹ If a CSO does not have a DGR endorsement, it may receive its donations through a not-for-profit with such an endorsement, who can provide the donor with the necessary receipt.

Even where the law provides tax exemptions for donations, there can be other barriers that hinder their use. For example, Indonesia provides limited income tax deductions for persons or entities that provide contributions to national disaster relief, research, development, educational facilities, sports facilities, and social infrastructure development. However, the procedures to receive these incentives are complicated and subject donors to risk of inspection by tax officers.²¹² Similarly, in Lebanon, many CSOs are exempt from taxes, but are confused by the tax law and lack knowledge about how to take advantage of tax benefits and claim the relevant exemptions.²¹³

Recommendations:

- States should consider providing preferential tax treatment or exempting some or all CSOs from paying taxes, duties, and fees, including income tax, real estate tax, personal property tax, GST/VAT/sales tax, estate or inheritance tax, customs duties, and stamp fees.
- States should ensure that their adopted approach works well in practice and CSOs are able to take advantage of relevant exemptions or preferential treatment programs.
- Tax benefits must be governed by clear and objective criteria and avoid the use of broad and imprecise terms so that stakeholders may foresee how to qualify for the tax benefits.
- All tax benefits for CSOs should be applied in an impartial, non-partisan, transparent, and consistent manner.
- States should ensure that officials do not use their discretion to deny benefits to

208 USAID. '2016 CSO Sustainability Index for sub-Saharan Africa', available at: <https://www.usaid.gov/africa-civil-society/2016>, p. 211; South Africa, Income Tax Act 58 of 1962, Section 10(1)(cN).

209 The donor's tax exemption is equivalent to 30 percent of the donation. USAID. '2016 CSO Sustainability Index for Asia', available at: <https://www.usaid.gov/asia-civil-society/2016>, p. 39.

210 USAID. '2016 CSO Sustainability Index for Asia', available at: <https://www.usaid.gov/asia-civil-society/2016>, p. 39.

211 Australian Taxation Office. 'Apply for DGR endorsement', available at: <https://www.ato.gov.au/non-profit/getting-started/getting-endorsed/is-my-organisation-eligible-for-dgr-endorsement-/apply-for-dgr-endorsement/>.

212 Indonesia, Government Regulation No. 93/2010 (GR-93); USAID. '2016 CSO Sustainability Index for Asia', available at: <https://www.usaid.gov/asia-civil-society/2016>, p. 20.

213 USAID. '2016 CSO Sustainability Index for the Middle East and North Africa', available at: <https://www.usaid.gov/middle-east-civil-society/2016and CSOSI for MENA>, p. 30.

groups that advocate for unpopular causes or to undermine the independence of the sector.

- States should consider creating meaningful mechanisms or incentives, such as tax deductions or tax credits, to encourage philanthropy.
- The law or regulation should clearly define qualifying CSOs, the percentage of the donation that is eligible for the incentive, any minimum amounts, and any other limits or caps.
- States should consider whether creating tax designations and payroll schemes could further support CSOs' fundraising and encourage philanthropy.
- States should review the procedures to obtain tax incentives and benefits and ensure that all procedures are clear, simple, and quick.
- States should take steps to ensure that donors are aware of their right to claim a deduction and understand the process for claiming a deduction.
- If states require CSOs to obtain a special endorsement before receiving tax benefits or providing receipts to donors, states should consider allowing CSOs without this endorsement to receive its donations through a CSO with such an endorsement.
- States should make data, statistics and research available annually regarding the tax treatment of fundraising and philanthropy.

III.6. TRANSPARENCY, ACCOUNTABILITY AND OVERSIGHT

Principles:

- 1. Any reporting and disclosure requirements are proportionate to the legitimate aim, follow a risk-based approach and are not used to stigmatize CSOs based on their donors.**
- 2. Any oversight is fair, objective and non-discriminatory and does not jeopardize the independence of CSOs.**
- 3. The bodies in charge of supervision, the scope of supervision, purpose and limits of mandates of supervisory bodies are clearly defined by law.**
- 4. Any fundraising-related sanctions are consistent with the principle of proportionality and are the least intrusive means to achieve the desired objective.**

INTRODUCTION

Public trust is an important driving element for the growth of philanthropy. Being accountable and transparent in fundraising is essential to maintain public trust in

the civil society sector.²¹⁴ When donors do not have faith that their donations will be used for the envisioned purpose, they are reluctant to give. While transparency is not in itself a right nor an obligation of CSOs under international law it is a means to achieving the said trustworthiness in the sector and ultimately the fulfillment of the right to associate through seeking and receiving funds.

One of the justifications provided by states to regulate fundraising is to increase public confidence in the third sector. State regulation is also one of the ways of achieving this aim. In order to do so, fundraising rules and regulations may provide standards that CSOs must meet. Fundraising regulations may also aim to increase the transparency and accountability of fundraising activities and avoid the abuse and misuse of collected funds, even though these would potentially also be captured under other regulations such as, anti-money laundering laws. For this purpose, regulation may include reporting obligations and some state supervision of CSOs' fundraising activities. Also, as fundraising becomes more commercialized, there is rising public concern about the cost-effectiveness of fundraising activities. Therefore, reporting and disclosure requirements may also promote the efficient use of funds.²¹⁵

For transparency to lead to a greater degree of accountability, it needs to be “intelligent”. Information that is requested through legislation should be:

- accessible, so people can find it easily;
- intelligible, so that people can understand it;
- useable, that is, able to address their concerns and;
- assessable, that is, it should by and in itself be able to show that it is working²¹⁶

Only when these criteria are met, we can begin to assess whether an additional piece of regulation or provision is indeed needed and proportional or whether it merely serves to hamper operations of CSOs, while providing effectively useless information to the public.

Therefore, any rules on reporting and oversight must respect freedom of association, the right to privacy (of the CSO and its donors, employees and other associated individuals) and the principle of non-discrimination. Any potential limitation on freedom of association and access to resources must be based in law, serve a legitimate aim and be necessary and proportionate.²¹⁷

Self-regulation can complement or even replace reporting, disclosure, and oversight requirements set by the state. In fact, building public trust and enhancing accountability and transparency are some of the key motives to establish self-regulatory schemes.²¹⁸

214 Renzenbrink, T. 'Why Philanthropy is More Successful in Some Countries Than in Others', *Advancing Philanthropy*, Fall 2016, available at: https://delawarenonprofit.org/wp-content/uploads/2017/08/afp_ap_2016fall.pdf.

215 ECNL. 'The Regulatory Framework for Fundraising in Europe', 2017, available at: http://ecnl.org/wp-content/uploads/2017/11/The-Regulatory-Framework-for-Fundraising-in-Europe_ECNL-research.pdf.

216 D Spiegelhalter, "Should We Trust Algorithms", Jan 20120 *Harvard Data Science Review*, explains that O'Neill has developed the idea of "intelligent transparency" (Royal Society 2012)

217 ICCPR, Art. 22.

218 MacQuillin, I., Sargeant, A. and Day, H. 'Fundraising self-regulation: An Analysis and Review', The Philanthropy Centre and

PRINCIPLES

- 1. Any reporting and disclosure requirements are proportionate to the legitimate aim, follow a risk-based approach and are not used to stigmatize CSOs based on their donors.**

Since CSOs benefit from the generosity of people through fundraising, it is important that organizations uphold a sufficient level of transparency. Transparent operations enable CSOs to establish their credibility and earn the public's confidence and support. CSOs are accountable to their donors and beneficiaries as well as to state authorities and the public.

Therefore, states may introduce special requirements for reporting income from fundraising activities. Examples of countries that have introduced such requirements include, among others, the Czech Republic, England and Wales (UK), Finland, France, Italy, Poland, and Slovakia. The rules governing transparency and accountability usually oblige a fundraiser to share information on the results of the fundraising effort, the utilization of funds raised and other costs covered by funds raised. This may be part of general reporting requirements (e.g. an annual financial report) or a separate report to the authority supervising the fundraising or money collection activity.

Reporting requirements, where these exist, should not be burdensome, should be appropriate to the size of the CSO and the scope of its operations and should be facilitated to the extent possible through information technology tools. For example, in England and Wales, the annual report submitted by certain categories of CSO to The Charity Commission (the requirements of which vary according to the organization's level of income) can be completed and filed via the UK Government's online portal.²¹⁹ CSOs should not be required to submit more reports and information than other legal entities, such as businesses. All reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality.²²⁰ For instance, in Dubai (United Arab Emirates), CSOs engaging in fundraising are required to obtain approval from, and periodically submit detailed reports to, the Islamic Affairs and Charitable Activities Department (IACAD). However, no such approval or reporting is required for organizations wishing to fundraise, advertise fundraising, or receive donations that are founded by the Emiri royal family, government departments or other entities determined by IACAD to meet the (undefined) requirements of the 'public interest'.²²¹

ECNL, 2019.

219 UK Government. 'Prepare a charity annual return', available at: <https://www.gov.uk/guidance/prepare-a-charity-annual-return>.

220 Council of Europe. 'Recommendation CM/Rec(2007)145 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe', available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d), Articles 64 and 225.

221 ICNL, 'The United Arab Emirates Philanthropy Law Report', February 2018, available at: <https://www.icnl.org/post/report/united-arab-emirates-philanthropy-law-report>, pp. 18 and 23.

Oversight bodies should avoid the duplication of reporting and data provision requirements. As a good example, in Australia the so-called Charity Passport contains all the Australian Charities and Not-for-profits Commission's (ACNC) publicly-available charity information, including financial information. The ACNC Charity Passport enables authorized government agencies to access ACNC charity data via a file transfer protocol process for reducing red tape for charities.²²²

Enhancing transparency of the CSO sector is not by itself a legitimate aim for restricting the freedom of association. Rather, it can be a means of achieving the legitimate aims of combating fraud, embezzlement, corruption, money laundering or terrorism financing and may, in principle, be justified as being in the interests of national security, public safety or public order within the meaning of Article 11(2) ECHR and Article 22(2) ICCPR.²²³ Extensive and overly-burdensome reporting requirements, enhanced inspections of CSOs, the obligation to disclose private donor information, stigmatization and harassment of CSOs and harsh sanctions such as suspension and dissolution of CSOs will never be proportionate to any legitimate aim, given their serious and disruptive effects on the activities of such organizations, and on individual human rights.²²⁴ It is also important to distinguish reporting obligations from disclosure obligations. Even if reporting obligations are considered necessary to achieve a legitimate legal aim, the mere fact of letting the general public know the sources of financing does not seem to add to the effectiveness of the action of the authorities (e.g. to combat terrorism).²²⁵

In spite of this, in several countries CSOs are subject to burdensome reporting and disclosure requirements on their funding and especially those from foreign sources. For example, in Qatar, before collecting donations or receiving transfers from abroad, not only must CSOs obtain prior approval from the regulatory authority, but, following fundraising, must also send the regulator copies of all related payment receipts (including the name and address of the donor) and maintain records of all donations for at least five years.²²⁶ In certain states, CSOs funded by international sources need to register in a special state registry and have a specific denomination, e.g. 'foreign agents' in the Russian Federation,²²⁷ or 'organizations receiving support from abroad' in Hungary.²²⁸ This is often paired with the requirement to clearly state this denomination in all of the CSO's publications and reports.²²⁹ Whether inscribed in a special registry or not, CSOs receiving

222 See more on the ACNC's Charity Passport at: <https://www.acnc.gov.au/about/red-tape-reduction/charity-passport>.

223 Venice Commission Report on Funding of Associations, March 2019, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)002-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)002-e).

224 ECNL, 'Enabling the Flow of Donations: International Standards that Safeguard Cross-Border Giving to CSOs, 2019., ECNL <http://ecnl.org/publications/enabling-the-flow-of-donations/>

225 Venice Commission, Report on Funding of Associations, 18 March 2019, par. 94, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)002-e)

226 ICNL, Qatar Philanthropy Law Report, December 2017, available at: <https://www.icnl.org/post/report/qatar-philanthropy-law>, p. 25.

227 Russia, 1996 Law on Non-Commercial Organisations, last amended in 2016, Art. 2, para. 6.

228 Hungary, Law of Hungary on the Transparency of Organisations Receiving Support from Abroad of 13 June 2017, Art. 1.

229 Russia, Law on Non-Commercial Organisations, last amended in 2016, Art. 24; Hungary, Law of Hungary on the Transparency of Organisations Receiving Support from Abroad of 13 June 2017, Art. 2, para. 5; Israel, Law Requiring Disclosure by NGOs Supported by Foreign Governmental Entities of 2016, Section 5a.

international funding are at times subjected to more frequent (e.g. monthly), more detailed, or otherwise more burdensome reporting and disclosure obligations than other CSOs. In some cases, e.g. in India, Russia and Hungary, these reports need to be published, including specific details on the respective donors.²³⁰

Self-regulatory mechanisms also play an important role in building public trust and confidence and oftentimes set requirements on transparency and accountability. For example, in Norway there is no legislation that directly regulates how to conduct fundraising. The Norwegian Control Committee for Fundraising assures the quality of fundraising activities. The Approval Registry is a voluntary registration scheme for organizations that raise funds for charitable causes.²³¹ The approved organizations need to present, among others, their annual report, accounts, the board's report, as well as key figures on fundraising that give a clear picture of the operation of the organization.

2. Any oversight is fair, objective and non-discriminatory and does not jeopardize the independence of CSOs.

All regulations and practices on oversight and supervision of CSOs should take as a starting point the principle of minimum state interference in the operations of a CSO.²³² Oversight and supervision must have a clear legal basis and be proportionate to the legitimate aims they pursue. It should not interfere with CSOs' internal management and should not compel CSOs to co-ordinate their objective and activities with government policies and administration. Any control needs to be fair, objective, and non-discriminatory.²³³ The activities of CSOs should be presumed to be lawful in the absence of contrary evidence.²³⁴

The supervision of fundraising by state authorities may include oversight of fundraising activities as well as the utilization of collected funds. It typically focuses on the compliance with fundraising laws, compliance with the conditions indicated in the public collection permit, eligibility to fundraise, fundraising efficiency, and others.

In addition, some state laws subject CSOs receiving funds from abroad to greater

230 In India, under Article 18 of the Indian Foreign Contribution (Regulation) Act of 27 September 2010, CSOs that are registered or that are permitted to receive foreign funding need to inform Central Government (and any other authorities specified by Central Government) about the amount, source and manner of receipt of each foreign contribution, and the purpose and manner of its use. Under Article 32 of the 1996 Russian Law on Non-Commercial Organisations, last amended in 2016, organizations considered to be This foreign agents are obliged to submit and also publish online reports on their activities and on the personal composition of their governing bodies every six months and need to file quarterly reports on the purposes of spending foreign funds, as well as the actual spending and use. Such organizations are also obliged to file an audit statement on an annual basis. In Hungary, organizations receiving support from abroad shall indicate the total sum of foreign financial support received in one year and provide a list of concrete donors (with the name, country and city for natural persons and name and registered address for legal persons, together with the sum provided by the donor in both cases), which will also be made public (see Annex 1 to the Law of Hungary on the Transparency of Organisations Receiving Support from Abroad of 13 June 2017).

231 See more on the Norwegian Control Committee for Fundraising: <http://www.innsamlingskontrollen.no/en/about-us/>.

232 Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, available at <https://www.osce.org/odihr/132371>, para. 228.

233 OHCHR. 'Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, para. 38.

234 Council of Europe. Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d, Art. 67.

supervision and control by the state: inspections may take place without prior warning, based on indications that, e.g., an internationally-funded CSO has not registered in the respective state registry – like in the case of Russia.²³⁵ This is contrary to international standards and best practices. Conversely, some states impose controls on local entities and individuals that wish to donate to foreign CSOs. For instance, in South Africa, the transfer of funds from South African donors to foreign sources is subject to exchange controls and requires prior approval. However, there are no specific laws governing fundraising from local sources or funding from outside of South Africa. A local CSO receiving foreign funding does not require prior approval and there are no associated reporting requirements.²³⁶ This is in direct contrast to in Nigeria, where there are no restrictions on a CSO's ability to receive funding from outside of the country.²³⁷

Self- and co-regulations also have an important complementary role in monitoring compliance with fundraising standards. Accreditation and certification schemes often include an oversight element. For example, in Hungary the Self-Regulation Body for Fundraising Organizations is responsible for supervising the enforcement of the Ethical Codex of Fundraising Organizations and can withdraw certification in cases of non-compliance.²³⁸

3. The bodies in charge of supervision, the scope of supervision, purpose and limits of mandates of supervisory bodies are clearly defined by law.

The bodies charged with the supervision of fundraising activities should be defined by law. Legislation should clearly indicate the scope, purpose and limits of the mandates of the supervisory body that is responsible for overseeing CSOs' fundraising activities. State authorities and their employees should be sufficiently accessible to CSOs in terms of communication, and should be adequately trained and competent. The legislation should define the procedure for appointing supervisory bodies, as well as the grounds for inspecting associations, the duration of inspections and the documents that need to be produced during inspection.²³⁹

Any regulation on inspection must be clear, should not be disproportionate, vaguely defined or provide public authorities with too much discretion. The legislation should specifically define in an exhaustive list the grounds for possible inspections. Inspections should not take place unless there is suspicion of a serious contravention of the legislation, and should only serve the purpose of confirming or discarding the suspicion.²⁴⁰

Supervision may be performed by the authority granting permits and certificates to

235 Russia, Law on Non-Commercial Organisations 1996 (last amended in 2016), Art. 32, paras 4.2 and 4.3.

236 ICNL 'South Africa Philanthropy Law Report', December 2017, available at: <https://www.icnl.org/post/report/south-africa-philanthropy-law>, pp. 19-20.

237 ICNL, 'Nigeria Philanthropy Law Report', December 2017, available at: <https://www.icnl.org/post/report/nigeria-philanthropy-law>, p. 14.

238 See more (in Hungarian): http://www.atlathatosag.eu/hu/mukodes/monitorozas_rendje.html.

239 Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, available at <https://www.osce.org/odihr/132371>, para. 229.

240 Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, available at <https://www.osce.org/odihr/132371>, para. 231.

fundraise or by another body. In Finland, the National Police Board and the police departments that grant permits are responsible for monitoring the implementation of money collections.

In addition to state authorities, donors and self-regulatory bodies may also take part in supervising fundraising activities. For example, in Sweden monitoring is conducted by the Swedish Fundraising Control, a self-regulatory body. Similarly, the Netherlands Fundraising Regulator (CBF) is an independent foundation which has been monitoring fundraising by charities since 1925. The CBF's task is to promote trustworthy fundraising and expenditure by reviewing fundraising organizations and giving information and advice to government institutions and the public.²⁴¹

4. Any fundraising-related sanctions are consistent with the principle of proportionality and are the least intrusive means to achieve the desired objective.

Fundraising rules may envision sanctions for cases when CSOs breach relevant legal provisions on fundraising. Depending on the country context, such cases may include non-compliance with the requirements of specific fundraising methods, reporting and others. In countries where there are rules on public collection (e.g. the Czech Republic), the law may also foresee sanctions for the failure to submit notification of a public collection and comply with the criteria of the public collection permit, for continuation of a collection after the expiration of the collection permit, and utilization of funds for purposes other than those indicated in the permit.

In principle, any sanction imposed on CSOs should be consistent with the principle of proportionality and therefore be the least intrusive means to achieve the desired objective. At all times sanctions should be enforceable and effective at ensuring the specific objectives for which they were enacted. When deciding whether to apply sanctions, authorities should apply measures that are the least disruptive and destructive to the right to freedom of association.²⁴²

The law should allow CSOs to correct minor deficiencies and oblige the authorities to provide notice in case a CSO fails to comply with the legal requirements on fundraising. In Finland, for example, a permit-issuing authority may require the permit holder to draw up a new report if the submitted report is deficient. The organization may also be requested to supplement or adjust the report if there appear to be errors in spelling or calculations or other minor deficiencies.²⁴³

The sanctions may include fines, prohibition on the collection or its continuation, and withdrawal of money collection permits. In addition, some countries introduce harsh sanctions, including criminal liability for violating rules on fundraising, and especially from abroad. For example, in Qatar, illegally collecting donations or

241 See more on the Swedish Fundraising Control: <http://www.insamlingskontroll.se/en>; see more on the Netherlands Fundraising Regulator: <https://www.cbf.nl/english>.

242 Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, available at <https://www.osce.org/odihr/132371>, para. 237.

243 Finland, Money Collection Act, Art. 21.

confiscating any collected amounts can be penalized by a maximum three years' imprisonment, a fine of QAR 100,000 (approximately \$27,000), or both.²⁴⁴ In India, if a CSO accepts and deposits a foreign contribution without being registered under Foreign Contribution Regulation Act (FCRA) or having obtained prior approval to do so, the CSO is barred from using the contribution and must pay 25,000 Rupees (approximately \$370) or 3 percent of the foreign contribution, whichever is higher.²⁴⁵

Recommendations:

- Reporting requirements should not be burdensome and should not stigmatize CSOs based on their sources of income.
- Reporting requirements should respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality.
- State legislation should not use transparency as a pretext to introduce burdensome reporting requirements on CSOs' fundraising activities.
- Reporting should be facilitated to the extent possible through information technology tools.
- States should consider the complementary role of self-regulation in monitoring CSO fundraising activities.
- Any state supervision must have a clear legal basis that is proportionate and does not interfere with CSOs' operation.
- Any oversight body should have a clear and limited mandate and sufficient capacity to carry out its mandate.
- Oversight bodies should avoid the duplication of reporting requirements.
- Any rules on inspection should be clear and include an exhaustive list of grounds for serious violations of the law.
- The law should allow CSOs to correct minor deficiencies and oblige the authorities to provide notice.
- Any sanctions need to be proportionate and should not disrupt CSOs' legitimate fundraising activities.
- States or regulators should provide an annual compliance report identifying the most common breaches and challenges and impact of regulation and oversight.

244 ICNL. 'Qatar Philanthropy Law Report', 2018, available at: <https://www.icnl.org/post/report/qatar-philanthropy-law>

245 ICNL. 'India Philanthropy Law Report', 2018, available at: <https://www.icnl.org/post/report/india-philanthropy-law>

III.7. REGISTRATION, LICENSING AND PERMISSION

Principles:

1. States ensure that any authorization, licensing, or notification requirements for fundraising activities are necessary and are the least intrusive means to achieve the desired objective.
2. States ensure that any authorization, licensing, or notification requirements for fundraising activities are proportionate.
3. Procedures are simple, quick, inexpensive, and easily performed by all CSOs wishing to organize a fundraising activity.
4. Legislation provides an explicit and limited number of justifiable grounds for rejecting requests for permits.
5. States and fundraisers, together with relevant stakeholders, assess whether self-regulatory mechanisms can complement or replace existing requirements.

INTRODUCTION

Any interference in the right to freedom of association, including any requirements that CSOs obtain a license, permit, or provide notification prior to fundraising, must meet the Article 22 standard. There are very limited circumstances that justify a restriction on freedom of association – that is, the restriction must be 1) “prescribed by law,” and 2) “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.”²⁴⁶

In some instances, the state may have a legitimate interest in regulating a fundraising activity. For example, states may want to prevent fraud and abuse by obtaining some basic information about the purpose of the fundraising campaign, how the funds will be used, and whether the collectors will obtain any commissions. They may also seek to prevent multiple collections from taking place at the same location on the same day and assess whether the activity will cause safety risks or impact traffic. Yet, the restriction must also be “necessary in a democratic society.” Case law interpreting “necessary in a democratic society” has established that “necessary” does *not* mean “indispensable,” “admissible,” “ordinary,” “reasonable, or “desirable.” Rather, it suggests a restriction directed at a “pressing social need.”²⁴⁷ Any interference with the right to associate must also be “proportionate to the legitimate aim pursued, and only imposed to the

²⁴⁶ ICCPR, Art. 22.

²⁴⁷ ECtHR, *Handyside v. The United Kingdom* (5493/72).

extent which is no more than absolutely necessary.”²⁴⁸ Furthermore, the bases listed in Article 22, including “in the interests of public order,” and “the protection of public morals” are “to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association.”²⁴⁹

The UN Human Rights Committee has also confirmed that funding restrictions are inconsistent with the provisions of Article 22 ICCPR and encouraged State Parties to review their legislation and practices in order to enable associations and NGOs to discharge their functions without impediments.²⁵⁰

PRINCIPLES

- 1. States ensure that any authorization, licensing, or notification requirements for fundraising activities are necessary and are the least intrusive means to achieve the desired objective.**

There are numerous examples of countries, including Brazil, Moldova, North Macedonia, Hungary, Spain, and Ukraine, that do not require organizers to obtain authorization to fundraise.²⁵¹ Other countries, such as the Czech Republic and Poland, apply a notification requirement, whereby organizers notify the responsible authority of their intention to conduct a public collection.²⁵² For example, in Poland, CSOs simply post information about their fundraising events on a website administered by the Ministry of Public Administration. If the administrators verify that the information submitted by the organizers is accurate, the information about the collection is published on the electronic portal of public collections and the collection may be organized.²⁵³

Some countries, such as India, do not require an organization to register before conducting fundraising. However, they require unregistered groups, including *Ganpati mandals*, *Navratri mandals*, and other groups that collect charitable donations for programs and religious activities, to obtain advance permission. The permission certificates that allow unregistered organizations and individuals to fundraise are valid for six months.²⁵⁴

Some countries require CSOs to obtain a permit or license when publicly soliciting donations. Denmark, Sweden, Finland, the UK, France, and Ireland require CSOs to have a collection permit, usually issued by a central government agency before

248 Ibid., at 24-25.

249 ECtHR: *Sidiropoulos and Others v. Greece* (57/1997/841/1047); *United Communist Party and Others v. Turkey* (133/1996/752/951); *Socialist Party and Others v. Turkey* (20/1997/804/1007), para. 50. See also *Freedom and Democracy Party v. Turkey* (23885/94); *Refah Partisi (The Welfare Party), Erbakan, Kazan and Tekdal v. Turkey* (41340/98, 41342/98, 41343/98 and 41344/98).

250 UN Human Rights Committee. ‘Concluding Observations of the Human Rights Committee: Egypt’, CCPR/CO/76/EGY, 28 November 2002, available at: <https://www.refworld.org/docid/3ecb70f94.html>, para. 21.

251 Based on information collected from interviews conducted by: the Indiana University Lilly Family School of Philanthropy, October 2018 and BetterNow, n.d.; ECNL, 2017.

252 BetterNow, n.d.; ECNL, 2017.

253 Poland, Act on the Principles of Conducting Public Collections, no. 498, ch.2 (2014), available (in Polish) at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140000498>.

254 ICNL. ‘Civic Freedom Monitor: India’, 6 August 2019, available at: <https://www.icnl.org/resources/civic-freedom-monitor/india>.

publicly collecting charitable donations. In Ireland, for example, the 1962 Act on Street and House to House Collections regulates cash collections and requires individuals and organizations to apply for a collection permit from the Chief Superintendent of the locality in which the collection will be conducted. The permit allows organizations and individuals to collect cash donations “in a public place, usually on the street, outside a church gate, shopping center or door-to-door.”²⁵⁵ Some countries also require special permissions or authorizations for other types of fundraising methods. For example, in Turkey, associations cannot conduct a SMS donation campaign or a fundraising campaign on their websites or social media accounts without getting permission.²⁵⁶

In the United States, CSOs and fundraising are primarily regulated at the state level. In many states, CSOs and/or fundraisers must register before soliciting donations on behalf of a charity. A 2018 study on state regulation of charities in the United States revealed that the majority of states require charitable solicitation registration:

- 84 percent of jurisdictions require registration by commercial fundraisers;
- 82 percent of jurisdictions require registration of charitable organizations; and
- 53 percent of jurisdictions require registration by fundraising counsel.²⁵⁷

When laws or regulations impose registration, licensing, or permitting requirements on fundraising, authorities must ensure that these requirements comply with Article 22 of the ICCPR and must be “necessary in a democratic society.” To meet this standard, limitations must be proportionate and be the least intrusive means to achieve the desired objective. There is currently very little guidance about whether permitting and licensing requirements in the fundraising context are the least intrusive means available. However, in other contexts, such as when establishing a CSO, the Special Rapporteur has confirmed that laws that include a notification procedure rather than a prior authorization procedure provide a higher level of protection of the freedom of association and are considered best practice.²⁵⁸ In country contexts where regulation is needed to meet a legitimate state interest, replacing the licensing or permitting requirement with a notification requirement would provide a higher level of protection of the freedom of association.

In addition to specific laws regulating fundraising, other types of legislation, such as AML/CTF, taxation, and media, may require a CSO to obtain a license or provide notification before fundraising. Care should be taken to ensure that any provisions in these laws restricting CSO fundraising meet the standard set forth in Article 22 of

255 The Wheel. ‘Garda Permits for Fundraising’ available at: <https://www.wheel.ie/funding/guidance/fundraising-from-the-public/garda-permits-fundraising>. Breen, O.B and Smith, P.A., Law of Charities in Ireland (2020, Bloomsbury), p.163 et seq.

256 ICNL, Civic Freedom Monitor for Turkey, available online at <https://www.icnl.org/resources/civic-freedom-monitor/turkey>

257 Lott, C. M., Shelly M. L., Dietz, N. and Gaddy, M. 2018. Bifurcation of State Regulation of Charities: Divided Regulatory Authority Over Charities and its Impact on Charitable Solicitation Laws (Washington, DC: Urban Institute), available at: <https://www.urban.org/research/publication/bifurcation-state-regulation-charities>.

258 UN Human Rights Council. ‘First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’, A/HRC/20/27, 21 May 2012, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf, para. 18(e).

the ICCPR.

2. States ensure that any authorization, licensing, or notification requirements for fundraising activities are proportionate.

The requirements for obtaining a license or permit, or providing notification should not be burdensome and should be proportionate to the size of the CSO and the scope of its activities, taking into consideration the value of its assets and income.²⁵⁹ States should review their legislation and regulations and consider whether there are less burdensome ways to provide oversight, and whether there should be exceptions for small fundraising campaigns or smaller organizations. This is also highlighted in the Better Regulation Agenda.²⁶⁰

For example, Finland's new Fundraising Act exempts small-scale fundraising from obtaining a license, which makes it easier for smaller organizations to raise funds. According to the new law, fundraisers may organize two 3-month fundraising campaigns during the year and raise up to a maximum of EUR 10,000 per campaign without obtaining a license. The organizers must simply notify the Police Department beforehand. The law applies to a broad range of organizations, including organizations that do not have a charitable purpose, and unregistered organizations.²⁶¹ Fundraising activities exceeding these amounts require a license from the National Police Board.

In contrast, Turkey's restrictive and bureaucratic Law on Collection of Aid requires receipt of permission for each fundraising activity by a CSO through an application procedure in which the CSO is requested to provide a set of comprehensive information, including the amount of money to be raised, how it will be used, the timeframe of the activity, and where it will be conducted. The decision to evaluate the application and approval or disapproval lies with the local state authority.²⁶²

3. Procedures are simple, quick, inexpensive, and easily performed by all CSOs wishing to organize a fundraising activity.

States should review the procedures to ensure that obtaining the necessary registrations, permits, licenses, or providing the notifications for fundraising are simple, quick and inexpensive. While in the Americas and Europe, licensing and permission procedures are relatively easy and fast. Such procedures are often slower and more burdensome for CSOs in Africa and Asia.²⁶³ For example, the Charity Law in China allows charities that have been registered for at least two

259 Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, available at <https://www.osce.org/odihr/132371>, para. 104.

260 See more at MacQuillin, I., Sargeant, A. and Day, H. 'Fundraising self-regulation: An Analysis and Review', The Philanthropy Centre and ECNL, 2019. <http://ecnl.org/wp-content/uploads/2019/11/Fundraising-self-regulation-research.pdf>

261 European Fundraising Association. 'Fundraising Act approved by Finnish parliament', 27 March 2019, available at: <https://efa-net.eu/news/new-fundraising-act-approved-by-finnish-parliament>.

262 ICNL, Civic Freedom Monitor: Turkey, available online at: <https://www.icnl.org/resources/civic-freedom-monitor/turkey>

263 Indiana University Lilly Family School of Philanthropy. 'Global Licensing, Permission, and Notification Procedures for Fundraising Purposes', November 2018.

years to apply for a certificate to conduct public fundraising.²⁶⁴ However, charities are required to provide a significant amount of sensitive information, including a proposal that fully discloses their fundraising plan, including goals, personnel, bank details, beneficiaries, and excess fund management.

Even if a law or policy is not burdensome on its own, authorities should consider whether the combination of various laws and policies, including at the regional level, create a burdensome process. If so, authorities should consider streamlining the requirements. For example, in the United States, CSOs must register in all states in which they conduct fundraising activities that require registration. This can present a challenge for small organizations that solicit a few donors from outside the state in which they are located.²⁶⁵ A similar challenge exists in Australia where each state and territory has its own requirements for fundraising licenses. According to a 2019 report, the regulatory burdens associated with applying and retaining fundraising licenses or permits is estimated to cost the Australian charity sector AUD 15.1 million each year.²⁶⁶ It is particularly problematic for small organizations that may have limited budgets and resources and may have trouble obtaining ‘exhaustive legal advice on issues requiring extensive research to account for jurisdictional inconsistencies.’

Additionally, jurisdictional issues with regard to registration for charitable solicitation have arisen with online fundraising, since it may not be clear under which jurisdiction digital campaigns fall. Organizations may not even know that individuals are fundraising on their behalf through social media or crowdfunding platforms.

In the United States, states have been working to address this burden on CSOs and streamline the registration and reporting processes for CSOs and fundraisers through a Single Portal Initiative. The goal of the project is to create an online platform that facilitates CSOs’ ability to provide information required at the state level.²⁶⁷ The Multistate Registration and Filing Portal, Inc., represents an initial development group of 13 pilot states, with future expansion planned to all 39 states in which registration is currently required.²⁶⁸ If successful, it may reduce the burden on CSOs fundraising in multiple states. Several U.S. states have also created online systems to make it easier for organizations to file initial and renewal fundraising registrations.

264 Council on Foundations (NGOsource). ‘China Charity Law Guidebook – Chapter 5: Charitable Fund-raising & Chapter 6: Charitable Donations (Pt. 6)’, 27 August 2018, available at: <https://www.ngosource.org/blog/china-charity-law-guidebook-%E2%80%93-chapter-5-charitable-fund-raising-chapter-6-charitable-donations-pt-6>.

265 Based on information collected from interviews conducted by the Indiana University Lilly Family School of Philanthropy, October 2018.

266 Parliament of Australia (Select Committee on Charity Fundraising in the 21st Century). ‘Report: Charity Fundraising in the 21st Century’, 14 February 2019, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Charity_Fundraising/CharityFundraising/Report.

267 The Editors and Lott, C. M. ‘The Shifting Boundaries of Nonprofit Regulation and Enforcement: A Conversation with Cindy M. Lott’, *Nonprofit Quarterly*, 3 August 2016, available at: <https://nonprofitquarterly.org/shifting-boundaries-nonprofit-regulation-enforcement-conversation-cindy-m-lott/>.

268 For more information on the Multistate Registration and Filing Portal, see: <http://mrfpinc.org/>.

4. Legislation provides an explicit and limited number of justifiable grounds for rejecting requests for permits.

In general, CSOs' activities should be presumed to be lawful in the absence of contrary evidence. Any government interference in the activities of a CSO, including fundraising activities, must meet the ICCPR standard.²⁶⁹ Specifically, it must be prescribed by law and necessary in a democratic society. To meet this standard, the legislation should provide an explicit and limited number of justifiable grounds for rejecting a permit or license.²⁷⁰ For example, while CSOs in Morocco are required to apply for a fundraising license from the government, most of the CSOs that apply for a license successfully receive one.²⁷¹

In many countries, licensing or permit requirements are used to control CSO fundraising. For example, Egypt's 2019 Law 149 Regulating the Exercise of Civil Work requires registered Egyptian CSOs to obtain advanced approval from the Ministry of Social Solidarity before conducting any fundraising event or effort.²⁷² In Ethiopia, charities must receive written approval from the CSO Agency to collect funds and must notify the Agency within 15 days of conducting any economic activity.²⁷³ In Sudan, the Voluntary and Humanitarian Work Act of 2006 requires CSOs to have a "project document" approved by the government prior to seeking domestic or foreign funding for any of their programs.²⁷⁴ In Jordan, registered Jordanian CSOs soliciting charitable donations must be registered with the Ministry of Social Development and submit an application at least one month in advance of any fundraising campaign. Branches of foreign organizations are not permitted to collect donations in the country unless they obtain prior consent from the Council of Ministers.²⁷⁵

Authorities should be required to provide a detailed and written justification when rejecting a license and guarantee access to judicial review. Any decision rejecting a permit or license application must be reasoned and communicated in writing to the applicant. Furthermore, associations should have the ability to appeal an adverse decision to a judicial authority.²⁷⁶ Judicial review is vital in ensuring that refusal to issue a license is not used to limit freedom of association.²⁷⁷

269 Council of Europe. Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, 10 October 2007, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d534d.

270 UN General Assembly. 'Report of the Special Rapporteur on the situation of human rights defenders', A/64/226, 4 August 2009, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/441/98/PDF/N0944198.pdf?OpenElement>, para. 113.

271 Indiana University Lilly Family School of Philanthropy. 'Global Licensing, Permission, and Notification Procedures for Fundraising Purposes', November 2018.

272 Egypt, Law 149 of 2019 Regulating the Exercise of Civil Work, Articles 25-26.

273 Ethiopia, Organization of Civil Society Proclamation of 2019, Articles 49 and 64.

274 Sudan, Voluntary and Humanitarian Work Act of 2006, Article 7.

275 Jordan, Regulation for the Collection of Charitable Donations No. 1 of 1957 as amended.

276 OHCHR. 'Thematic Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association', A/HRC/23/39, 24 April 2013, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf, para. 61.

277 UN General Assembly. 'Report of the Special Rapporteur on the situation of human rights defenders', A/64/226, 4 August 2009, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/441/98/PDF/N0944198.pdf?OpenElement>, para. 113.

5. States and fundraisers, together with relevant stakeholders, assess whether self-regulatory mechanisms can complement or replace existing requirements.

Around the globe, numerous national, regional, and international self-regulatory initiatives promote “the development and administration of common norms and standards of behavior by and for fundraising CSOs that are not fully mandated by government regulation”.²⁷⁸ These self-regulatory initiatives often adopt codes of conduct, codes of ethics, or some other set of standards and principles to guide CSOs’ own behavior and practices. Signatories voluntarily commit to abide by the determined standards and principles and follow them throughout their everyday operation. Codes typically regulate diverse areas, including governance, transparency and accountability, fundraising practices, and others.

These types of self-regulatory initiatives are proliferating at the national and regional levels throughout the globe and some are specifically focused on fundraising or philanthropy. In Africa, for example, the East Africa Philanthropy Network promotes local resourcing and effective grantmaking across Kenya, Uganda, and Tanzania; the Africa Philanthropy Support Organizations initiative works to develop philanthropic resources for CSOs across the continent; and the Southern Africa Institute of Fundraising represents fundraisers throughout the country.²⁷⁹ Higher education institutions have also begun offering certificates and trainings in fundraising and sustainability.²⁸⁰ In the United States and Canada, voluntary associations such as the Association of Fundraising Professionals and Imagine Canada proliferate. In China, the China Association of Fundraising Professionals facilitates communication among fundraising professionals in China and the China Fundraising Professionals Forum also promotes fundraising ethics among Chinese fundraising professionals.²⁸¹ In India, self-regulatory associations such as the Center for Fundraising, Raise for Help, and India Fundraisers have been formed to develop fundraising strategies, connect fundraisers through online platforms, and bring professionalism to the practice. Australian CSOs have also formed several self-regulatory associations to advance the profession, including the Fundraising Institute Australia and the Public Fundraising Regulatory Association. In the UK, the Code of Fundraising Practice, developed by the Fundraising Regulator’s standards committee includes standards relating solely to fundraising practice such as, among others, working with vulnerable groups, performance of different fundraising methods, and the handling of donations.²⁸² In Ireland, the Charities Institute Ireland has developed a suite of fundraising codes to help individuals at a fundraising level to follow best practice and to give effect

278 One World Trust (Obrecht, A.). ‘Effective Accountability? The drivers, benefits and mechanisms of CSO self-regulation’, Briefing no. 130, July 2012, available at: <http://www.oneworldtrust.org/accountability.html>.

279 For more information on the East Africa Philanthropy Network, see: <http://www.eaphilanthropynetwork.org/>; for more information on the Africa Philanthropy Support Organizations initiative, see: <http://africagrantsmakers.org/apso-initiative/>; for more information on the Southern Africa Institute of Fundraising, see: <https://www.saifundraising.org.za/>.

280 Based on information collected from interviews conducted by the Indiana University Lilly Family School of Philanthropy, October 2018.

281 See more about the China Association of Fundraising Professionals: <https://www.cafpnet.cn/index.php?s=/Eng/index.html>

282 Fundraising Regulator. ‘Code of Fundraising Practice’, October 2019, available at: <https://www.fundraisingregulator.org.uk/code>. (England, Wales and Northern Ireland only. Scotland has a separate regulator).

to the Charities Regulatory Authority's Guidelines for Charitable Organisations on Fundraising from the Public.²⁸³

These voluntary self-regulation initiatives do not typically have regulatory authority over licensing, permission, and notification procedures or serve as the licensing bodies.²⁸⁴ However, they may work with authorities to resolve challenges with the permitting and notification process and play a complementary role in implementing the licensing or permitting process. For example, the Public Fundraising Regulatory Association (PFRA) in Australia produced a fact sheet for local authorities, which recognizes that the application process for permits for face to face fundraising can often be time-consuming and resource intensive for local authorities. The PFRA offers to manage a roster system for local authorities to fairly allocate permits to charities and “work with local authorities and business associations to ensure that face to face fundraising does not grow beyond an acceptable level for local communities. This includes careful rostering of permits and “resting” of fundraising locations”.²⁸⁵

Some states have adopted a co-regulation model in which the main regulator is an independent body which is backed up by a statutory regulator. In some instances, co-regulation includes a voluntary registration component. For example, the UK's Fundraising Regulator is an independent, non-statutory body that regulates fundraising carried out by charitable institutions and third-party fundraisers in England, Wales, and Northern Ireland.²⁸⁶ Among other functions, it investigates complaints from the public about fundraising and can refer cases to the Charity Commission. While it has remit over all charities, charities can also choose to register with the Regulator to show their commitment to the Code of Fundraising Practice. Registered organizations are listed in a publicly-available directory and are able to use the *Fundraising Badge* on their websites and fundraising materials, which may lead to increased giving from the public.²⁸⁷

Some bodies have begun providing independent monitoring and assessment or accreditation for CSOs engaged in fundraising. For example, the International Committee on Fundraising Organizations, which consists of 16 organizations from 15 countries, monitor more than 4,000 charities who manage 60 billion euros.²⁸⁸ These monitoring and accreditation schemes may help stem calls for greater regulation of CSO fundraising activities. Under these voluntary schemes, CSOs are assessed against a set of written standards and principles, which may cover many areas, including governance, policy, spending, fundraising, accounting, reporting, and programs. When approved, a CSO may receive a recommendation, “seal” or mark of compliance providing sound credibility to the certified CSO. For example, the Netherlands created a voluntary national philanthropy validation system, a

283 <https://www.charitiesinstituteireland.ie/the-cii-codes>

284 Indiana University Lilly Family School of Philanthropy. 'Global Licensing, Permission, and Notification Procedures for Fundraising Purposes', November 2018.

285 Public Fundraising Regulatory Association. 'Information for Local Authorities', available at: https://www.pfra.org.au/data/docs/PFRA2443_Council_Factsheet_LOWRES.pdf.

286 See more on the Fundraising Regulator: <https://www.fundraisingregulator.org.uk>

287 Fundraising Regulator. 'Registration', available at: <https://www.fundraisingregulator.org.uk/registration>.

288 See more on the International Committee on Fundraising Organizations: <https://www.icfo.org/wp-content/uploads/2018/06/ICFO-Flyer-1.pdf>.

self-regulatory system that assures the public and potential donors that a charity meets all quality requirements and manages its affairs properly. These quality standards were developed by an independent, sector-wide committee. The CBF in the Netherlands monitors participants' compliance and participants lose their Seal of Approval and Certificate if they fail to demonstrate ongoing compliance. While registering is not mandatory, both CSOs and the public recognize the CBF accreditation and the value it represents, and as of 2016, more than 400 CSOs had registered with the scheme.²⁸⁹ These types of certification and accreditation programs can preempt calls for increased control of fundraising and boost support for easing the restrictions on fundraisers.

Other organizations provide certification for fundraising professionals. CFRE International, an independent, not-for-profit certification body, administers the Certified Fund Raising Executive (CFRE) certification program for fundraisers employed by charitable organizations. To achieve this voluntary certification, fundraisers must document their experience, results, and education as fundraisers; pass an examination on best practices in ethical fundraising; and attest that they are knowledgeable of and abide by the *International Statement of Ethical Principles in Fundraising* as well as national, regional, and local regulations affecting fundraising. The CFRE certification program was begun in the United States in the 1980s as a means of self-regulation for the fundraising profession. Since that time, the CFRE certification program has become globally available, with over 6,650 fundraisers across 24 countries currently holding CFRE certification.

These self-regulatory bodies do not typically have regulatory authority over licensing, permission, and notification procedures and are often not included in decision making about legislation and policies impacting fundraising licenses, permits, and notifications. They also rarely serve as the licensing bodies. This may be a missed opportunity and there could be opportunities for professional associations to advocate that regulatory bodies adopt licensing, permission, and notification procedures that are more favorable to fundraisers and in line with the codes that have already been developed by the sector or that they play a more active role in the licensing or permitting process.

Self-regulatory bodies may also participate in developing fundraising regulations that are more favorable to fundraisers and in line with the codes that have already been developed by the sector.

289 European Fundraising Association. 'Support from Dutch government for philanthropy validation system', 8 December 2016, available at: <https://efa-net.eu/news/support-from-dutch-government-for-philanthropy-validation-system>.

Recommendations:

- In country contexts where regulation is needed to meet a legitimate state interest, states and CSOs should consider replacing the licensing or permit requirement with a notification requirement, which provides a higher level of protection for freedom of association.
- States should review their legislation and regulations and consider whether there are less burdensome ways to provide oversight.
- States should provide exemptions for small-scale fundraising operations.
- States should streamline the process for obtaining the necessary registration, permit, or license, or notifying relevant authorities about a fundraising activity so that it is simple, quick, inexpensive and accessible.
- States should consider creating single portals for multiple jurisdictions.
- Licensing or permitting requirements must not be used to restrict CSOs' ability to seek or receive resources or to control CSOs.
- Legislation regulating fundraising should provide an explicit and limited number of justifiable grounds for rejecting a permit or license.
- Authorities should be required to provide a detailed and written justification when rejecting a license and this must be communicated in writing to the applicant.
- CSOs should have the ability to appeal an adverse decision to a judicial authority.
- States and fundraisers, together with relevant stakeholders, should assess whether existing or new self-regulatory mechanisms can complement or replace existing licensing and registration requirements.

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