

## **ASSOCIATIONS DRAFT LAW**

Short Name            1.    This Law is named, “The Associations Law”.

### **PART I**

#### **GENERAL REGULATIONS**

Definitions            2.    Unless otherwise stipulated in this Law;

“Ministry”, refers to the ministry concerned with Interior Affairs in the Turkish Republic of Northern Cyprus.

“Child Associations”, refers to associations whose members consist of youngsters between the ages of 12 and 18, and which were established with the aim of preserving and developing the psychological, ethical, physical and mental abilities of its members, as well as their right to sports, education and instruction, their social and cultural existence, family structures and private lives.

“Association”, refers to groups of people operating under names such as associations, unions and organizations which were VOLUNTARILLY formed by three or more persons with the aim of achieving a certain common goal not prohibited by the Constitution and law, by the continuous sharing information and studies apart from profit sharing.

“Address of the Association”, refers to the address of the Association as stipulated in the charter presented during its establishment; it also includes the new address provided in case of an address change.

“District Officer”, refers to the district officer of the district where the address of the Association’s headquarters is registered.

“Branch”, refers to the subunits of an association which were established in conjunction with an association with the purpose of supporting the association’s activities, and which comprise certain organs and are not legal entities.

“Representative Office”, refers to the subunits of an association which were established in conjunction with an association with the purpose of supporting the association’s activities, and which do not comprise certain organs and are not legal entities.

“Charter”, refers to the regulations regarding the administration, control and annulment of an association, which are required for the registration of an association, whose details are provided in the articles below

“Foreigners”, refers to persons WITHIN THE JURISDICTION OF TRNC, who are not TRNC citizens.

		<p>“Foreign Associations”, refers to associations registered in another country.</p>
Aim and Scope	3.	<p>The aim of this law is to regulate the activities, responsibilities, controls and other relevant issues pertaining to associations, their branches or representative offices, and foreign associations.</p>
The Right to Establish an Association	4.	<ol style="list-style-type: none"> <li>1. Real persons and legal entities WITHIN THE JURISDICTION OF the TRNC have the right to establish an association without requiring prior permission to do so.</li> <li>2. Associations established in accordance with this article can freely conduct their activities which are not prohibited by the Constitution and law. However, associations where the majority of members or board of directors consists of foreigners, and branches or representative offices of foreign associations can not conduct or participate in political activities. The term political activity is limited to directly supporting or defending any political party OR A CANDIDATE, OR FUNDRAISING FOR A POLITICAL PARTY OF A CANDIDATE. FURTHERMORE, AN ASSOCIATION MAY NOT BE ESTABLISHED TO FUNDRAISE FOR A POLITICAL PARTY OR A CANDIDATE.</li> <li>3. <ol style="list-style-type: none"> <li>a. Youngsters over 15 years of age can establish child associations with the written consent of their guardians.</li> <li>b. Persons over 18 years of age may not become members of child associations and their membership to such associations expires automatically.</li> <li>c. Youngsters over the age of 12 may become members of child associations with the written consent of their guardians; however, they can not participate on the management and supervisory boards.</li> <li>d. The guardians of youngsters elected to the management and supervisory board of child associations will be held responsible for their duties and authorities.</li> </ol> </li> </ol>
Application and Registration	5.	<ol style="list-style-type: none"> <li>1. An association is established by founders consisting of three or more persons that meet the qualifications required for membership.</li> <li>2. The registration of associations is not compulsory; the association has the option of registering or not. However, associations that register resume their activities as legal entities.</li> <li>3. An association that wishes to be registered becomes a legal entity starting from the day that the charter endorsed by its founders is submitted to the district office.</li> <li>4. If the district office discovers any missing OR INCOMPLETE information on the association charter, it requests that information in writing no later than fifteen days from the day of the submission of the charter. and the association within fifteen</li> </ol>

days from the delivery of the written request provides the missing and incomplete information to the district office. IF AN ASSOCIATION FAILS TO MEET THE FIFTEEN DAY DEADLINE, THE DISTRICT OFFICE WILL REJECT THE APPLICATION FOR REGISTRATION. AN ASSOCIATION MAY CONTEST A DECISION OF THE DISTRICT OFFICE WITH A COMPETENT COURT.

5. If the district office determines that the aims of the association are prohibited by the Constitution and law submits the matter to the authorized court within thirty days from the submission of the corrected version of the charter. The district office completes the registration process in the case that the authorized court approves.
  6. Foreign associations MAY OPERATE IN TRNC FOLLOWING THE SUCESSFUL COMPLETION OF THE REGISTRATION PROCESS OF ITS BRANCH OFFICE. A FOREIGN ASSOCIATION that wish to register in the TRNC must submit to the ministry an application document which includes the following;
    1. A document proving that the association is of legal entity status in another country;
    2. A document describing the activities that the association will conduct in the TRNC;
    3. The address and telephone number of the headquarters of the association AND A PERSON AUTHORISED TO SUBMIT APPLICATION FOR REGISTRATION OF A BRANCH OFFICE IN the TRNC;
    4. The name, surname, address and identification card number or travel document number of the person authorized as legal representative in the TRNC by the association and who is resident in the TRNC.
    5. RULES AND PROCEDURES ON REGISTRATION AND DISSOLUTION OF AN ASSOCIATION PROVIDED IN THIS LAW SHALL APPLY ACORDINGLY TO ISSUES RELATING TO REGISTRATION AND DISSOLUTION OF A BRANCH OFFICE OF A FOREIGN ASSOCIATION, WHICH ARE NOT SPELLED OUT IN THIS ARTICLE.
  7. Each association has its own charter. An association's charter must comprise;
    1. The name and address of the association,
    2. The aims of the association and the work subjects to be covered and types of activities that the association will conduct with the purpose of achieving its aim,
    3. The names, surnames, addresses and identification card numbers with signatures of the founding members of the Association,
    4. The conditions and approach for membership and removal from
- The Registration of Foreign Associations
- Associations' Charter

membership,

5. How branches, IF ANY, will be established, administered and represented and their level of authority,
6. A description of the organs of the association and their duty, authority and responsibilities, the manner in which organs will be selected, and the number of real and substitute members,
7. The membership fee to be paid by members, or how it will be determined
8. The internal control of the association,
9. The manner in which the association charter may be amended,
10. How the association will be annulled and in case of annulment how the assets will be liquidated, IN ACCORDANCE WITH ARTICLE 18 OF THE LAW

The Organs of the Association

8. 1. There are certain organs all associations must have as stated below;
  - a. All associations must have a General Council formed by its members. The General Council is the highest organ of the association. THE GENERAL COUNCIL OF AN ASSOCIATION MEETS AT LEAST ONCE A YEAR, UNLESS THE CHARTER PROVIDES FOR A SHORTER PERIOD. It may be called for an extraordinary meeting with the request of 1/4 of the members of the General Council, UNLESS THE CHARTER PROVIDES FOR ANOTHER MINORITY THRESHOLOD.
  - b. There must be an assigned person who represents the association in relations with the private and public sector. This individual may be addressed as the chairperson or any other title the association determines.
2. Apart from obligatory organs associations may elect a board of directors, a supervisory board, a disciplinary board and similar other organs as stipulated in their charter.

Records to be kept by the Association

9. Associations are required to keep the registers stated below. However, an association may keep the information that must be recorded in these registers in electronic format under a legal framework. The registers that must be maintained are;
  1. A register showing the members,
  2. A register recording the General Council decisions,
  - 3 Recordings of decisions of organs of the association (if applicable)
  4. An Income and Expense register.

The Income of an Association

10. 1. The incomes of an association consist of membership fees, donations, incomes obtained as a result of the activities of the

association, incomes obtained from the assets of the association, aid received from public institutions and organizations under a project framework and other legal sources.

2. The incomes and assets of an association may only be used with the purpose of improving its legal aims.

THE FOREGOING PROVISION DOES NOT PERTAIN TO SALARIES OF PROFESIONAL STAFF AND APPROPRIATE RENUMERATIONS.

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| Acquisition of Immovable Properties            | 11. | Associations may acquire immovable properties or sell immovable properties under their ownership.  |
| Opening of Branches and Representative Offices | 12. | Associations may open representative offices or branches within the country or abroad where they deem necessary in order to carry out their activities.  |
| Engaging in International Activities           | 13. | Associations may engage in international activities and collaboration, as well as participate in foreign associations or organizations in order to achieve the aims stipulated in their charters.  |
| Representation in Court                        | 14. | <ol style="list-style-type: none"><li>1. Associations may be sued and file suit themselves.</li><li>2. The person who was elected to represent the association in relations with the private and public sector and addressed as chairperson or any other title the association determined also represents the association in court proceedings.</li></ol>  |
| Voting of Legal Entities                       | 15. | <ol style="list-style-type: none"><li>1. In the case where a legal entity becomes a member of an association, a representative assigned by the legal entity exercises the vote.</li><li>2. After the representative duty of this person terminates, a new person is assigned to vote on behalf of the legal entity.</li></ol>  |
| Declarations                                   | 16. | <ol style="list-style-type: none"><li>1. Associations must declare to the district office the resolutions of the General Council meetings within 30 days after such meetings and the name of the person who was elected to represent the association in relations with the private and public sector and addressed as chairperson or any other title the associations determined.</li><li>2. Associations reserve the right to keep the information regarding their members confidential. This information may only be requested through valid law and court order.</li><li>3. A RESPONSIBLE PERSON OF AN ASSOCIATION SHALL SUBMIT TO THE DISTRICT OFFICE ANY CHANGES IN THE CONTENT OF THE STATUTE WITHIN 15 DAYS FOLLOWING THE OCCURANCE OF THOSE CHANGES.</li></ol> |

- The annulment of the Association
17. Associations may be annulled in the situations stated below;
1. Upon the request of the members with the decision of the General Council upon request.
  2. Non-voluntary annulment may occur in the situation where;
    - a. The court rules that the association engaged in activities that are explicitly prohibited by the Constitution and law,
    - b. IF AN APPLICATION FOR REGISTRATION was not found appropriate IN DUE PROCESS.
    - b. The ordinary General Council meeting is not convened for more than twice the duty term stipulated in the LAW AND association's charter. In this case the association may be annulled upon the application to the authorized court with the initiative of any of its members.
    - c. Upon the bankruptcy of the association
  3. In the case of annulment, the assets of the association may be transferred to another association or trust in the TRNC that pursues the same or similar objectives, under the framework of its charter with a decision by general council decision. In the case where article is not able to be implemented or where the general council cannot draw a decision on this issue the authority rests with the district office.
- Crime and Penalties
- 18
1. Any association AND A RESPONSIBLE PERSON THEREOF that acts contrary to ARTICLE 7, PARAGRAPH 2, ARTICLE 9, 10 and 16 of THE LAW. may be fined up to one minimum wage with the informed petition of the district office if approved by the authorized court.
- Executive Authority
19. The Ministry has the authority to execute this law.
- Temporary Article
1. Associations are required to make the necessary amendments to their charters within 1 year after the day that this law comes into effect.)
- Abolishment ( 6/1961)
20. After the date that this law is published in the Official Gazette, the Turkish Communal Assembly Unions and Associations Law will be abolished and associations, unions or other organizations registered under this law shall be regarded as registered under the Association's Law.
- Day of Effect
21. This law comes into effect starting from the date it is published in the Official Gazette.

## EXPLANATORY NOTE TO THE DRAFT LAW ON ASSOCIATIONS

### 1. The underlying reasons for a new draft Law on Associations

The primary reasons behind the initiative to prepare a new draft Law on Associations was to bring the somewhat obsolete regulation governing freedom of association in TRNC in line with international standards and best practices, and thus allow the full exercise of this freedom. Freedom of association has been recognized a universal human right and protected by a number of international instruments, including the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (1953) and the United Nations (UN) Covenant on Civil and Political Rights (1976). Article 11 of the European Convention, which is closely patterned to the Universal Declaration of Human Rights (1948), provides that:

“Everyone has the right to freedom of peaceful assembly and freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

Similarly, Article 22 of the UN Covenant provides that:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention”.

Further undrscoring the need to observe human rigths, including the freedom of association, IN 1999, the UN adopted the General Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Defenders Declaration). In 2003 the Council of Europe (CE) drafted the Fundamental Principles on the Status of Non-Governmental Organizations in Europe, which was endorsed in the form of recommendations by the CE Committee of Ministers in 2007. This text, which has a non-binding character, aims at recommending a number of principles which should govern NGO legislation and practice (i.e., legislation and practice governing associations, foundations and other institutional forms

established to pursue non-commercial activities) in a state governed by the *rule of law*. Among others, it states that NGOs come into being through the initiative of individuals or groups of persons, and that the national legal and fiscal framework for them should therefore permit and encourage this initiative.

## 2. The European Convention and freedom of association

Of all the international instruments governing freedom of association, the European Convention is particularly important. First, it is the first comprehensive international instrument in the field of human rights, whose ratification is a condition for a country to become a member of the CE. Second, there is a distinct judiciary body (i.e. the European Court of Human Rights - ECHR), which hears cases of alleged violation of human rights that are protected by the Convention. Indeed, the ECHR case law is said to have played a leading role in setting up standards for the protection of human rights (including freedom of association) not only in the Council of Europe members, but also around the globe. Third, the catalogue of human rights guaranteed by the Constitution of the Republic of Cyprus (Part II) is closely patterned to the Convention and its additional protocols.

The primary obligation of a State Party (i.e. party to the Convention) with respect to freedom of association is the *negative* one: duty not to interfere with freedom of association. This reflects the fact that freedom of association is a domain of private actions, which does not require state's interference. However, depending on circumstances, a State Party may also have positive obligations towards freedom of association – as long as the state action is deemed necessary to ensure unhindered realization of this freedom. For example, a State Party must afford legal protection to a member of an association who is unduly prevented from exercising his/her membership rights. Similarly, a State Party must afford protection to an association which is granted the legal entity status, throughout its life cycle.

Article 11, Paragraph 2, of the Convention sets out legitimate grounds for interference with freedom of association. The list provided in Paragraph 2 is exhaustive and hence no other ground for interference is deemed legitimate. The ECHR (Court) has developed a standard test when analyzing alleged Article 11 violations. This test is used virtually without exception, with occasional, slight variations. The Court asks itself the following questions.

1. Is Article 11 applicable in this case? (This step is skipped if the answer is clear.)
2. Has there been an interference with Article 11?
3. Is there a justification for the interference?
  - a. Was the interference prescribed by law?
  - b. Does the interference have a “legitimate aim”?
  - c. Is the interference “necessary in a democratic society”?
    - i. Did the interference meet a “pressing social need”?
    - ii. Is the interference proportionate to the legitimate aims pursued?

Although the Court dutifully goes through each of the above planks in its test of whether there has been an Article 11 violation, in most cases it has answered affirmatively to every plank until it gets to the last plank on *proportionality*. This is where the real analysis occurs and this is normally determinative of whether an Article 11 violation has occurred or not. Before discussing the last plank in the Court's test in some detail, it is useful to review certain guiding principles the Court repeats in its analysis of Article 11. These guiding principles

form the theoretical foundation upon which the Court analyzes the particular facts of each case in reaching its decision. As previously mentioned, these guiding principles come mostly into play in the final plank of the Court's analysis – Whether the interference is proportionate to the legitimate aims pursued.

The Court often emphasizes the interconnection between Article 10 (freedom of expression) and Article 11. The two must be seen as working together to protect and engender a pluralistic society, which is necessary for democracy. Pluralism means taking the perceived good with the perceived bad, the “favorable” with the “unfavorable”.

*“Article 11 must also be considered in light of Article 10... There can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.” (Refah Partisi, para. 45. See also, United Communist Party, paras. 42-43; Stankov, para. 86.)*

The Court is particularly vigilant in protecting freedom of expression and pluralism when the alleged Article 11 interference is on a political party, so important to a functioning democracy. This protection goes so far as to allow a political party to call into question the basic structures and organization of a state.

*“[T]he fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.” (Socialist Party, para. 47. See also, Freedom and Democracy Party, para. 41.)*

There are, of course, limitations on the extent of these protections.

*“The Court takes the view that a political party may campaign for a change in the law or the legal constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons.” (Socialist Party, para. 47.)*

Further, the Court cannot simply rely on the stated lawful intentions of a political party or other organization but must endeavor to discover its true intentions and judge it on those grounds.

*“[I]t cannot be ruled out that an organisation's programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the organisation's actions and the positions it defends (citation). An essential factor to be taken into consideration is the*

*question whether there has been a call for the use of violence, an uprising or any other form of rejection of democratic principles (citation).” (Stankov, para.90.)*

*Another general principle guiding the Court is one of deference to the state and its authorities. The Court allows the national authorities a certain “margin of appreciation” when determining whether and how to restrict and control the various organizations within that nation’s borders. “The Court’s task is not to take the place of the competent national authorities but rather to review under Article 11 the decisions they delivered pursuant to their power of appreciation.” (Socialist Party, para. 53.) This entails the Court determining whether an Article 11 restriction is “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify such restriction are “relevant and sufficient”. (Id. See also, Stankov, para. 87.)*

This margin of appreciation is, however, limited when a state is seeking to restrict one of the rights guaranteed in the Convention, particularly when a political party has been dissolved.

*“[H]aving regard to the essential role of political parties in the proper functioning of democracy (citation), the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties’ freedom of association... [T]he Contracting States has only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying to it...” (Socialist Party, para. 50. See also, Gorzelik, para. 58.)*

These general guiding principles are typically referred to by the Court throughout every Article 11 case.

As already mentioned, to determine whether Article 11 interference is “necessary in a democratic society”, the Court will ask itself two questions: (1) Did the restriction meet a “pressing social need”, and (2) Is the restriction proportionate to the legitimate aims pursued? (See, e.g., Freedom and Democracy Party (ÖZDEP) v. Turkey (Application No. 23885/94) 8 December 1999, para. 43; Refah Partisi (The Welfare Party), Erbakan, Kazan and Tekdal v. Turkey (Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98) 31 July 2001280, 299, para. 53.)

(1) In most of the cases the Court found the “pressing social need” plank to be satisfied, and therefore this should rarely be a determinative issue. (2) The Court engages in a balancing test between the seriousness of the restriction and the necessity and legitimacy of the aim pursued. In doing so, it brings into play the “General Guiding Principles” discussed above, applying them to the specific facts of the case at hand in order to determine if the interference in questions is the minimum level of interference necessary to respond to the pressing social needs. Significantly, the onus to prove the minimum level of interference is on a respondent State, not a plaintiff.

### 3. Major features of the draft Law

As already mentioned, the draft Law seeks to reflect the international standards and ECHR case law pertinent to freedom of association. What follows is the elaboration of major features of the draft Law against the background of those standards and case law.

Definition of an association (Article 2). An association differs from public assembly (which is also protected by Article 11 of the Convention) in that it is established to pursue more lasting goals (rather than ad hoc) and features a higher level of institutional organization (e.g. an association must have charter which details its goals and other information pertinent to its establishment and operation, see Article 7 of the draft Law).

An association is defined by the draft Law as a voluntary organization, which is established to pursue not-for-profit goal(s). The voluntary nature of an association implies the right to freely establish or join an association, as well as the right not to join an association (the so called negative freedom of association). Therefore, associations with mandatory membership (e.g. bar association, the chamber of doctors, etc) are not covered by the draft Law -- nor do they enjoy protection afforded by the European Convention.

The right to establish an association (Article 2, 4). An association may be established by natural or legal persons within the jurisdiction of TRNC. The Convention guarantees freedom of association to natural, but not to legal persons. However, as a matter of good practice, all EU countries allow legal entities to also be founders and members of an association. In addition, some EU countries (e.g. Germany) specifically extend the constitutional protection of freedom of association to legal persons.

Article 1 of the European Convention requires that a State Party secure to “everyone within its jurisdiction” rights and freedom guaranteed by the Convention – a requirement which is mirrored in Article 5 of the Treaty of the Establishment of the Republic of Cyprus, and which sets out to secure for everyone within its jurisdiction human rights and freedoms.

The significance of the Article 1 of the Convention is that it constitutes a nexus between Chapter I of the Convention, which proclaims rights guaranteed by the Convention (declaratory provision) and the specific responsibilities of a State Party in protecting those rights, including freedom of association. A State Party assumes dual positive responsibility according to Article 1 of the Convention. First, it must secure that its legislation complies with the Convention. This is also in accordance with Article 57 which prohibits general reservations. Second, the state must intervene in any alleged case of violation of human rights committed by public authorities at any level (police, court, etc). Accordingly, the State is responsible for any violation of the Convention which resulted from legislation incompatible with the Convention or acts (or omissions of acts) of public authorities at all level (whether the victims of violations are nationals or not of a Party State in question). Critical for the operation of Article 1 are the notions: "everyone" and "within jurisdiction". The notion of everyone reflects the universal characters of human rights that are protected by the Convention. Hence, the Convention affords and guarantees human rights not only to citizens,

but also to any other category of persons, such as foreigners, persons without citizenship, minors and handicapped persons. Accordingly, the underlying rationale of the notion ‘within jurisdiction’ is not to restrict categories of individuals that enjoy protection afforded by the Convention. Rather, its purpose is to establish the necessary legal nexus between everybody and a State Party. To that end, it is not necessary that this legal nexus is ongoing and firm, such as in the case of citizenship or residence, or temporary residence. Suffice it that a State Party may exercise some kind of authority over an individual. It is legitimate for the state to define its own jurisdiction, as provided by Article 56 of the Convention. However, it has to take into consideration the boundaries that are prescribed by the Convention and the case law in this regard. In the light of the foregoing observations, it is incumbent on the government to secure that any person within its jurisdiction is afforded the rights guaranteed by the Convention, including the freedom of association.

In addition to natural and legal persons, the draft Law also allows individuals that do not have full legal capacity (i.e. those between age 12 and 18) to be founders of the so called “child associations”. This approach is consistent with the UN Convention on the Rights of the Child (1990) which guarantees to those individuals the right to establish an association to further their (child) purposes and interests.

Legitimate goals of an association. An association may pursue any not-for-profit goal which is not expressly prohibited by the Constitution and law (Article 2, 5 of the draft Law), and may engage in international activities and collaboration, as well as participate in foreign associations or organizations in order to achieve its goals (Article 13). These provisions are consistent with the ECHR case law, which sets out that an association may be established to pursue any activities which an individual is allowed to pursue. In addition, it reflects a strong bond between the freedom of speech and freedom of association, which was described above.

On the other hand, the draft Law prescribes legitimate restrictions for associations where the majority of members or board of directors consists of foreigners, and branches or representative offices of foreign associations. Those associations may not pursue political activities, which are narrowly defined (Article 4 of the draft Law).

Number of founders. The draft Law requires at least three natural or legal persons may establish an association (Article 2 of the draft Law). This provision is consistent with the practice in the vast majority of EU countries (the notable exceptions include Poland, Lithuania, and Greece), which require few persons to establish an association. For example, Austria, Belgium, the Netherlands, Italy, France, England and Wales, and Sweden require only two persons to establish an association. In Spain, three persons are required as founders, while in Germany the minimum threshold is seven persons. These statutory practices reflect general consensus among the academics that any number of founders between two and ten meets the interference test set out in Article 11, Paragraph 2, of the Convention. The three founder threshold not only reflects the best international practices, but also has a practical value: an odd mandatory number of founders (three) facilitate the process of rendering decisions (thus avoiding a deadlock in decision making that might occur if a minimum mandatory number of founders is even).

Voluntary nature of registration. The registration of an association is voluntarily: it is up to an association to choose whether it wishes to seek to obtain the legal entity status and the resulting benefits thereof (first and foremost the limited liability for obligations towards third

parties), or it prefers to operate without entering into the registry and obtaining the legal entity status (Article 5 of the draft Law). In the later case, the rule of civil partnership shall apply accordingly and therefore members of an association will be hold personally liable for any obligations an association has undertaken towards third parties.

The voluntary nature of registration reflects the fact that general requirement for registration violates Article 11 of the European Convention. Indeed, registration is voluntary in each and every EU member state. However, it does not mean that a state does not have the right to require registration (i.e. the legal entity status) for certain categories of associations. For example, it is legitimate for the state to require registration of associations that enjoy tax and other benefits (charities), in order to ensure their higher transparency and a greater protection of donations and grants that are given to those associations.

Registration procedures. The draft Law provides for a simple registration procedure (Article 5) and effective legal remedies in case the registration authority finds the application incomplete, or finds the goals of an association prohibited by the Constitution and the law. These provisions are consistent with the right to an effective legal remedy, which is also guaranteed by the Convention.

Foreign NGOs. The draft Law provides for a simple procedure for a foreign association to operate via its branch office (Article 6). These provisions are consistent with the CE Fundamental Principles which provide that: “foreign NGOs may be required to obtain approval to operate in the host country, but they should not have to establish a new and separate entity for this purpose” (recommendation 37).

Internal governance. Recognizing that it is primarily up to founders and members to decide on the internal governance of an association (including whether or not to open a branch office, Article 12), the draft Law provides only the basic guiding principles in this respect. First, it prescribes the mandatory content of the association’s charter, which includes minimum information necessary for an association to be established and to operate smoothly (Article 7). In addition, it sets out the minimum governing structure of an association, which includes the general assembly and a person designated to represent an association (Article 8). These provisions are consistent with the Convention, which requires that general assembly is the highest body of an association in which all members of an association participate on equal footing -- a requirement that reflects the democratic nature of an association as a membership organization. In order to ensure transparency and orderly operation of an association, the draft Law requires that a general assembly meets at least once a year, which is consistent with the recommendation No. 60 of the CE Fundamental Principles.

Income and property of an association. The draft Law provides that an association may generate income for various legitimate sources (Article 10). The list of legitimate income in the draft is illustrative, rather than exhaustive, and therefore an association may generate income from any other source which is not specifically prohibited by law. In addition, like any other legal person, an association may acquire real estate (Article 11). These provisions reflect the fact that freedom of association would be illusory and theoretical if an association were not able to generate income and acquire and dispose with property necessary to secure its sustained operations. As a not-for-profit entity, an association is bound by a non-

distribution constrain: with few notable exceptions, income and property of an association may not be distributed between founders, members and persons affiliated with them, but may only be used to further the association's goals (Article 10 of the draft Law)

Grounds for dissolution and penalties. The draft Law provides precise and narrowly defined grounds for a dissolution of an association, thus reducing the discretionary power of the state with regard to this important matter (Article 17). The same pertains to fines, which are prescribed only for egregious breach of the law (Article 18).

All NGOs enjoy the right to freedom of expression.

NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and be subject to the same civil and criminal law obligations and sanctions generally applicable to them.

Any act or omission by a governmental organ affecting an NGO should be subject to administrative review and be open to challenge in an independent and impartial court with full jurisdiction.

### Objectives

1. An NGO is free to pursue its objectives, provided that both the objectives and the means employed are lawful. These can, for instance, include research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with stated government policy.
2. An NGO may also be established to pursue, as an objective, a change in the law.
3. An NGO which supports a particular candidate or party in an election shall be transparent in declaring its motivation. Involvement in political activities may be a relevant consideration in any decision to grant it financial or other benefits in addition to legal personality.
4. An NGO with legal personality may engage in any lawful economic, business or commercial activities in order to support its not-for-profit activities without there being any need for special authorisation, but always subject to any licensing or regulatory requirements applicable to the activities concerned.
5. NGOs may pursue their objectives through membership of federations and confederations of NGOs.

### Establishment

6. Any person, be it legal or natural, citizen or non-citizen, or group of such persons, should be free to establish an NGO.
7. Two or more persons should be able to establish a membership-based NGO. A higher number may be required where legal personality is to be acquired, but this number should not be set at a level that discourages establishment.
8. Any person should be able to establish an NGO by way of gift or bequest, the normal outcome of which is the creation of a foundation, fund or trust.

### Content of statute

9. Every NGO with legal personality should have a statute. This statute generally specifies:

- its name
- its objectives,
- its powers,
- the highest governing body,
- the frequency of meetings of this body,
- the procedure by which such meetings are to be convened,
- the way in which this body is to approve financial and other reports,
- the freedom of this body to determine the administrative structure of the organisation
- the procedure for changing the statute and dissolving the organisation or merging it with another NGO.

10. In the case of a membership-based NGO, the highest governing body is the membership, whose agreement should be required for any change in the statute. For other NGOs the highest governing body is the one specified in the statute.

### Membership

11. Membership of an NGO, where this is possible, must be voluntary and no person should therefore be required to join any NGO other than a body established by law to regulate a profession.
12. National law should not unjustifiably restrict the ability of any person, natural or legal to join membership-based NGOs. The ability of someone to join a particular NGO should be determined primarily by its statute but should also not be influenced by any unjustified discrimination.
13. Members of an NGO should be protected from expulsion contrary to its statute and from the adoption of rules that could be construed as wholly unreasonable or arbitrary.
14. Persons belonging to an NGO should not be subject to any sanction because of their membership except where this is clearly incompatible with their position or employment.

### Legal personality

15. Where an NGO has legal personality this should be clearly distinct from that of its members or of its founders who should not therefore be liable for any debts, liabilities and obligations that it has incurred or undertaken.
16. The legal personality of an NGO shall only be terminated pursuant to the voluntary act of its members - or in the case of a non-membership NGO, its management – bankruptcy, prolonged inactivity or serious misconduct. An NGO created through the merger of two or more NGOs shall succeed to their rights and liabilities.

### Acquisition of legal personality

17. Where legal personality is not an automatic consequence of the establishment of an NGO, the rules governing the acquisition of such personality should be objectively framed and not subject to the exercise of discretion by the relevant authority.
18. The rules for acquiring legal personality should be published together with a guide to the process involved. This process should be easy to understand, inexpensive and expeditious. In particular an NGO should only be required to file its statute and to identify its founders, directors, officers and legal representative and the location of its headquarters. A foundation, fund or trust may be required to prove that it has the financial means to accomplish its objectives.
19. A membership-based NGO should only seek legal personality after a resolution approving this step has been passed by a meeting to which all its members had been invited to attend and it may be required to produce evidence of this.
20. Any fees that may be charged for an application for legal personality should not be set at a level that discourages applications.
21. Legal personality should only be refused where there has been a failure to submit all the clearly prescribed documents required, a name has been used that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person in the country concerned or there is an objective in the statute which is clearly incompatible with the law.
22. Any evaluation of the acceptability of the objectives of an NGO when it seeks legal personality should be well informed and respectful of the notion of political pluralism and must not be driven by prejudices.
23. The body responsible for granting legal personality need not be a court but it should preferably be independent of control by the executive branch of government. Consistency in decision-making should be ensured and all decisions should be subject to appeal.
24. The body concerned should have sufficient, appropriately qualified staff for the performance of its functions and it should ensure that appropriate guidance or assistance for an NGO seeking legal personality is available.
25. There should be a prescribed time limit for taking a decision to grant or refuse legal personality. All decisions should be communicated to the applicant and any refusal should include written reasons.
26. Decisions on qualification for financial or other benefits to be accorded to an NGO should be taken separately from those concerned with its acquisition of legal personality and preferably by a different body.
27. Foreign NGOs may be required to obtain approval to operate in the host country but they should not have to establish a new and separate entity for this purpose.
28. The activities of NGOs at the international level should be facilitated by ratification of European Convention No ETS 124 on the recognition of the legal personality of

international non-governmental organisations.

29. Where the acquisition of legal personality is not an automatic consequence of the establishment of an NGO, it is desirable for the public to have access to a single, national registry of all NGOs with such personality.
30. An NGO whose statute allows it to establish or accredit branches should not require any other authorisation for this purpose.
31. An NGO should not be required to renew its legal personality on a periodic basis.
32. A change in the statute of an NGO with legal personality should only require approval where its name or its objectives are affected. The grant of such approval should be governed by the same process as that for the initial acquisition of such personality. However, such a change should not entail an NGO being required to establish itself as a new entity.

Council of Europe

Responsibility of the State

### **THE TEST: TYPICAL COURT ANALYSIS OF AN ALLEGED ARTICLE 11 VIOLATION**

The Court has developed a standard test when analyzing alleged Article 11 violations. This test is used virtually without exception, with occasional, slight variations. The Court asks itself the following questions.

1. Is Article 11 applicable in this case? (This step is skipped if the answer is clear.)
2. Has there been an interference with Article 11?
3. Is there a justification for the interference?
  - a. Was the interference prescribed by law?
  - b. Does the interference have a “legitimate aim”?
  - c. Is the interference “necessary in a democratic society”?
    - i. Did the interference meet a “pressing social need”?
    - ii. Is the interference proportionate to the legitimate aims pursued?

Although the Court dutifully goes through each of the above planks in its test of whether there has been an Article 11 violation, in every case in this survey but one, it has answered affirmatively to every plank until it gets to the last plank on proportionality. This is where the real analysis occurs and this is normally determinative of whether an Article 11 violation has occurred or not. All of the above planks are discussed in more detail below, with particular emphasis on the last plank and the Court’s approach to proportionality.

### **GENERAL GUIDING PRINCIPLES**

Before discussing each plank in the Court’s test in detail, it is useful to review certain guiding principles the Court repeats again and again in its analysis of Article 11. These guiding principles form the theoretical foundation upon which the Court analyzes the particular facts of each case in reaching its decision. As previously mentioned, these guiding principles come mostly into play in the final plank of the Court’s analysis – Whether the interference is proportionate to the legitimate aims pursued.

The Court often emphasizes the interconnection between Article 10 (freedom of expression) and Article 11. The two must be seen as working together to protect and engender a pluralistic society, which is necessary for democracy. Pluralism means taking the perceived good with the perceived bad, the “favorable” with the “unfavorable”.

*“Article 11 must also be considered in light of Article 10... There can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.” (Refah Partisi, para. 45. See also, United Communist Party, paras. 42-43; Stankov, para. 86.)*

The Court is particularly vigilant in protecting freedom of expression and pluralism when the alleged Article 11 interference is on a political party, so important to a functioning democracy. This protection goes so far as to allow a political party to call into question the basic structures and organization of a state.

*“[T]he fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.” (Socialist Party, para. 47. See also, Freedom and Democracy Party, para. 41.)*

There are, of course, limitations on the extent of these protections.

*“The Court takes the view that a political party may campaign for a change in the law or the legal constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons.” (Socialist Party, para. 47.)*

Further, the Court cannot simply rely on the stated lawful intentions of a political party or other organization but must endeavor to discover its true intentions and judge it on those grounds.

*“[I]t cannot be ruled out that an organisation’s programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the organisation’s actions and the positions it defends (citation). An essential factor to be taken into consideration is the question whether there has been a call for the use of violence, an uprising or any other form of rejection of democratic principles (citation).” (Stankov, para.90.)*

Another general principle guiding the Court is one of deference to the state and its authorities. The Court allows the national authorities a certain “margin of appreciation” when determining whether and how to restrict and control the various organizations within that nation’s borders. “The Court’s task is not to take the place of the competent national authorities but rather to review under Article 11 the decisions they delivered pursuant to their power of appreciation.” (Socialist Party, para. 53.) This entails the Court determining whether an Article 11 restriction is “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify such restriction are “relevant and sufficient”. (Id. See also, Stankov, para. 87.)

This margin of appreciation is, however, limited when a state is seeking to restrict one of the rights guaranteed in the Convention, particularly when a political party has been dissolved.

*“[H]aving regard to the essential role of political parties in the proper functioning of democracy (citation), the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties’ freedom of association... [T]he Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying to it... ”*  
*(Socialist Party, para. 50. See also, Gorzelik, para. 58.)*

These general guiding principles are typically referred to by the Court throughout every Article 11 case.