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FP Final

## **Fundamental Principles on the Status of Non-governmental Organisations in Europe and explanatory memorandum**

### **Fundamental Principles on the Status of Non-governmental Organisations in Europe**

The participants at the multilateral meetings held in Strasbourg from 19 to 20 November 2001, 20 to 22 March 2002 and 5 July 2002,

Having regard to Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides that “everyone has the right to freedom of peaceful assembly and to freedom of association with others”;

Having regard to the European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations (ETS No. 124) and to the desirability of enlarging the number of its contracting parties;

Considering that non-governmental organisations (hereinafter NGOs) make an essential contribution to the development, realisation and continued survival of democratic societies, in particular through the promotion of public awareness and the participatory involvement of citizens in the *res publica*, and that they make an equally important contribution to the cultural life and social well-being of such societies;

Considering that NGOs make an invaluable contribution to the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe;

Considering that their contributions are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of change in law and public policy, the provision of assistance to those in need, the elaboration of technical and professional standards, the monitoring of compliance with existing obligations under national and international law, and on to the provision of a means of personal fulfilment and of pursuing, promoting and defending interests shared with others;

Considering that the existence of many NGOs is a manifestation of the right of their members to freedom of association and of their host country's adherence to principles of democratic pluralism;

Recognising that the operation of NGOs entails responsibilities as well as rights,

Have adopted the present Fundamental Principles on the Status of Non-governmental Organisations in Europe.

### **Scope**

1. NGOs are essentially voluntary self-governing bodies and are not therefore subject to direction by public authorities. The terms used to describe them in national law may vary, but they include associations, charities, foundations, funds, non-profit corporations, societies and trusts. They do not include bodies which act as political parties.
2. NGOs encompass bodies established by individual persons (natural and legal) and groups of such persons. They may be national or international in their composition and sphere of operation.
3. NGOs are usually organisations which have a membership but this is not necessarily the case;
4. NGOs do not have the primary aim of making a profit. They do not distribute profits arising from their activities to their members or founders, but use them for the pursuit of their objectives.
5. NGOs can be either informal bodies or organisations which have legal personality. They may enjoy different statuses under national law in order to reflect differences in the financial or other benefits which they are accorded in addition to legal personality.

### **Basic principles**

6. NGOs come into being through the initiative of individuals or groups of persons. The national legal and fiscal framework applicable to them should therefore permit and encourage this initiative.
7. All NGOs enjoy the right to freedom of expression.
8. NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and be subject to the same administrative, civil and criminal law obligations and sanctions generally applicable to them.
9. 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**

10. 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.

11. An NGO may also be established to pursue, as an objective, a change in the law.
12. An NGO which supports a particular candidate or party in an election should be transparent in declaring its motivation. Any such support should also be subject to legislation on the funding of political parties. Involvement in political activities may be a relevant consideration in any decision to grant it financial or other benefits in addition to legal personality.
13. An NGO with legal personality may engage in any lawful economic, business or commercial activities in order to support its non-profit-making activities without there being any need for special authorisation, but always subject to any licensing or regulatory requirements applicable to the activities concerned.
14. NGOs may pursue their objectives through membership of federations and confederations of NGOs.

### **Establishment**

15. Any person, be it legal or natural, national or foreign national, or group of such persons, should be free to establish an NGO.
16. 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 the establishment of an NGO.
17. Any person should be able to establish an NGO by way of a gift or bequest, the normal outcome of which is the creation of a foundation, fund or trust.

### **Content of statutes**

18. Every NGO with legal personality should have statutes. The “statutes” of the NGO shall mean the constitutive instrument or instrument of incorporation and, where they are the subject of a separate document, the statutes of the NGO. These statutes generally specify:
  - 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 statutes and dissolving the organisation or merging it with another NGO.
19. In the case of a membership-based NGO, the highest governing body is constituted by the members. The agreement of this body, in accordance with

the procedure laid down by law and the statutes, should be required for any change in the statutes. For other NGOs the highest governing body is the one specified in the statutes.

### **Membership**

20. Membership of an NGO, where this is possible, must be voluntary and no person should therefore be required to join any NGO other than in the case of bodies established by law to regulate a profession in states which treat them as NGOs.
21. 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 statutes, and should not be influenced by any unjustified discrimination.
22. Members of an NGO should be protected from expulsion contrary to its statutes.
23. Persons belonging to an NGO should not be subject to any sanction because of their membership. However, membership of an NGO may be incompatible with a person's position or employment.

### **Legal personality**

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

### **Acquisition of legal personality**

26. 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.
27. National laws may disqualify persons from forming an NGO with legal personality for reasons such as a criminal conviction or bankruptcy.
28. 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 statutes 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.

29. A membership-based NGO should only seek legal personality after a resolution approving this step has been passed by a meeting which all its members have been invited to attend, and it may be required to produce evidence of this.
30. Any fees that may be charged for an application for legal personality should not be set at a level that discourages applications.
31. Legal personality should only be refused where there has been a failure to submit all the clearly prescribed documents required, if 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 if there is an objective in the statutes which is clearly incompatible with the law.
32. 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.
33. 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.
34. 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.
35. 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.
36. 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.
37. Without prejudice to the applicability of the articles laid down in the European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations for those states that have ratified that convention, 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. This would not preclude a requirement that a new and separate entity be formed where an NGO transfers its seat from one state to another.
38. The activities of NGOs at the international level should be facilitated by ratification of the European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations.
39. 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.
40. An NGO whose statutes allow it to establish or accredit branches should not require any other authorisation for this purpose.

41. An NGO should not be required to renew its legal personality on a periodic basis.
42. A change in the statutes of an NGO with legal personality should require approval by a public authority only where its name or its objectives are affected. The granting 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.

## **Management**

43. In a membership-based NGO, the persons responsible for its management should be elected or designated by the members or by an organ statutorily delegated this task.
44. The management of a non-membership-based NGO should be determined in accordance with its statutes.
45. The bodies for management and decision-making of NGOs should be in accordance with their statutes and the law, but NGOs are otherwise sovereign in determining the arrangements for pursuing their objectives. In particular, the appointment, election or replacement of officers, and the admission or exclusion of members are a matter for the NGO concerned.
46. The structures for management and decision-making should be sensitive to the different interests of members, users, beneficiaries, boards, supervisory authorities, staff and founders. Public bodies providing NGOs with financial and other benefits also have a legitimate interest in their performance.
47. Changes in an NGO's internal structure or rules should not require authorisation by a public authority. No external intervention in the running of NGOs should take place until and unless a breach of the administrative, civil or criminal law, insurance obligations, fiscal or similar regulations occurs or is thought imminent. This does not preclude the law requiring particular supervision of foundations and other institutions.
48. An NGO should observe all applicable employment standards and insurance obligations in the treatment of its staff.
49. NGOs should not be subject to any specific limitation on foreign nationals being on their board or staff.

## **Property and fund-raising**

50. NGOs may solicit and receive funding – cash or in-kind donations – from another country, multilateral agencies or an institutional or individual donor, subject to generally applicable foreign exchange and customs laws.
51. NGOs with legal personality should have access to banking facilities.
52. NGOs with legal personality should be able to sue for redress of harm caused to their property.

53. In order to ensure the proper management of their assets, NGOs should preferably act on independent advice when selling or acquiring any land, premises or other major assets.
54. Property acquired by an NGO on a tax-exempt basis should not be used for a non-exempt purpose.
55. An NGO may designate a successor to receive its assets, in the event of its termination, but only after its liabilities have been cleared and any rights of donors to repayment have been honoured. Such a successor should normally be an NGO with compatible objectives, but the state should be the successor where either the objectives, or the activities and means used by the NGO to achieve those objectives, are found to be unlawful. In the former case, and in the event of no successor being designated, the property should be transferred to another NGO or legal person that conforms most with its objectives or should be applied towards them by the state.
56. The funds of an NGO can be used to pay its staff. All staff and volunteers acting on behalf of an NGO can also be reimbursed for reasonable expenses which they have thereby incurred.

### **Public support**

57. There should be clear, objective standards for any eligibility of NGOs for any form of public support, such as cash and exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits.
58. In granting such support, relevant considerations may be the nature of activity that the NGO undertakes and whether or not it exists for the benefit of its membership or for the benefit of the public (or a section of this). Such support may also be contingent on an NGO having a particular status and be linked to specific requirements for financial reporting and disclosure.
59. A material change in the statutes or activities of an NGO may lead to the alteration or termination of public support.

### **Transparency and accountability**

60. NGOs should submit an annual report to their members or directors on their accounts and activities. These reports can also be required to be submitted to a designated supervising body where any taxation privileges or other public support has been granted to the NGOs concerned.
61. NGOs should make a sufficiently detailed report to any donors who so request, on use made of donations to demonstrate the fulfilment of any condition which was attached to them.
62. Relevant books, records and activities of NGOs may, where specified by law or by contract, be subject to inspection by a supervising agency. NGOs can also be required to make known the percentage of their funds used for fundraising purposes.

63. All reporting and inspection shall be subject to a duty to respect the legitimate privacy of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality.
64. NGOs should generally have their accounts audited by an institution or person independent of their management.
65. Foreign NGOs should be subject to these reporting and inspection requirements only in respect of their activities in the host country.

### **Supervision**

66. NGOs may be regulated in order to secure the rights of others, including members and other NGOs, but they should enjoy the benefit of the presumption that any activity is lawful in the absence of contrary evidence.
67. NGOs should not be subject to any power to search their premises and seize documents and other material there without objective grounds for taking such measures and prior judicial authorisation.
68. Administrative, civil and/or criminal proceedings may be an appropriate response where there are reasonable grounds to believe that an NGO with legal personality has not observed the requirements concerning acquisition of such personality.
69. NGOs should generally be able to request suspension of administrative action requiring that they stop particular activities. A refusal of the request of suspension should be subject to prompt judicial challenge.
70. In most instances the appropriate sanction against an NGO will merely be the requirement to rectify its affairs and/or the imposition of an administrative, civil or criminal penalty on it and/or any individuals directly responsible. Penalties shall be based on the law in force and observe the principle of proportionality.
71. In exceptional circumstances and only with compelling evidence, the conduct of an NGO may warrant its dissolution.

### **Liability**

72. The officers, directors and staff of an NGO with legal personality should not in principle be personally liable for its debts, liabilities and obligations.
73. The officers, directors and staff of an NGO with legal personality may be liable to it and third parties for misconduct or neglect of duties.

### **Relations with governmental bodies**

74. NGOs should be encouraged to participate in governmental and quasi-governmental mechanisms for dialogue, consultation and exchange, with the objective of searching for solutions to society's needs.
75. Such participation should not guarantee nor preclude government subsidies, contracts or donations to individual NGOs or groups thereof.



76. Consultation should not be seen by governments as a vehicle to co-opt NGOs into accepting their priorities nor by NGOs as an inducement to abandon or compromise their goals and principles.
77. Governmental bodies can work with NGOs to achieve public policy objectives, but should not attempt to take them over or make them work under their control.
78. NGOs should also be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation.

# **Explanatory memorandum to the Fundamental Principles on the Status of Non-governmental Organisations in Europe**

## **Introduction**

1. Freedom of association, as declared in Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, is a right recognised by all member states of the Council of Europe.
2. In the majority of member states this freedom is reflected in a flourishing voluntary sector; the number of associations registered in the countries concerned is estimated at 2 to 3 million,<sup>1</sup> and this figure does not take account of unofficial, unregistered associations, of which there are many in certain countries. The number of non-governmental organisations (hereinafter NGOs) is therefore increasing, and this trend is inextricably linked to the ideal of freedom and democracy which guides the Council of Europe and its member states.
3. However, freedom of association is effective only where it goes hand-in-hand with legislative measures facilitating its exercise and respecting the value of NGOs' contribution to society. Although they can be fostered by passing favourable legislation, awareness of and respect for NGOs' contribution develop only where NGOs themselves undertake to behave in a responsible, efficient and ethical manner.
4. It is for these reasons that the Fundamental Principles on the Status of Non-governmental Organisations in Europe have been drawn up. The aim is not to offer model legislation concerning NGOs but to recommend the implementation of a number of principles which should shape relevant legislation and practice in a democratic society founded on the rule of law.
5. The European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations<sup>2</sup> (ETS No. 124) deals with existing NGOs which already have legal personality in the state where they are headquartered and wish to have this legal personality recognised by other states in which they intend to carry out some of their activities. On the other hand, the fundamental principles seek to promote national legislation which assists the setting up of NGOs and which, among other things, lays down arrangements for the acquisition of legal personality in the NGO's state of origin, regardless of whether the NGO's work is to be purely national or international as well. National law should provide NGOs with a flexible legal framework, enabling them to meet the recommendations contained in the fundamental principles. All legislation on NGOs should be devised in consultation with representatives of the NGO sector.

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1. According to the *Guide de la liberté associative dans le monde*, edited by Michel Doucin, Paris, 2000.

2. As of 5 July 2002, state parties to the European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations (ETS No. 124) are: Austria, Belgium, France, Greece, Portugal, Slovenia, Switzerland, "the former Yugoslav Republic of Macedonia" and the United Kingdom.

## **Background**

6. The Fundamental Principles on the Status of Non-governmental Organisations in Europe are the result of discussions initiated as early as 1996. They began with a series of multilateral meetings and regional conferences held from 1996 to 1998,<sup>3</sup> which resulted in the adoption of “Guidelines to promote the development and strengthening of NGOs in Europe”, constituting the conclusions of a multilateral meeting on the legal status of NGOs and their role in a pluralist democracy. It was these guidelines that laid the foundations for the fundamental principles.
7. An expert, Professor Jeremy McBride, was commissioned to prepare a preliminary draft of the Fundamental Principles on the Status of Non-governmental Organisations in Europe. This draft text was discussed at three open meetings held in Strasbourg on 19 and 20 November 2001, from 20 to 22 March 2002 and on 5 July 2002.

## **The Fundamental Principles on the Status of Non-governmental Organisations in Europe**

### **Preamble**

8. The preamble to the Fundamental Principles on the Status of Non-governmental Organisations in Europe stresses the importance and value of NGOs’ contribution to a democratic society, which is made in fields as varied as promotion of human rights, environmental protection, sport, public health and defence of the interests of various sectors of the community. The text lays particular emphasis on NGOs’ role in public awareness-raising and education for democracy, while pointing out that these aims, albeit essential in a society adhering to the values of democracy and the rule of law, are not the sole purposes fulfilled by NGOs. The nature of NGOs’ input in the different fields is equally varied.
9. The preamble emphasises that, through the many different activities they pursue and the ensuing benefits, NGOs contribute to the achievement of the aims and principles set out in the Statute of the Council of Europe and the Charter of the United Nations. As far as the Council of Europe is concerned, this contribution is made through a variety of means, such as education, training, dissemination of Council of Europe standards, participation in expert committees, and especially through the consultative status that some 370 NGOs have acquired with the Organisation.

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3. – Multilateral Meeting on Associations and Foundations, Strasbourg, 27-29 November 1996;  
– Multilateral Seminar on Application of Convention ETS No. 124, Strasbourg, 9-10 February 1998;  
– Meeting on the Legal Status of NGOs and their Role in a Pluralist Democracy, Strasbourg, 23-25 March 1998;  
– Regional conference on the legal status of NGOs, Kyiv, 9-10 September 1998, with the participation of Ukraine, Moldova and the Russian Federation;  
– Regional conference for the Caucasus countries on the legal status of NGOs, Strasbourg, 10-11 December 1998.

10. Member states of the Council of Europe undertake to promote the rule of law and protection of the fundamental freedoms which are the foundation of genuine democracy, in particular freedom of opinion, expression and association.
11. Laws enabling NGOs to acquire legal personality play a vital role in giving effect to freedom of association, guaranteed by the European Convention on Human Rights and safeguarded by international and constitutional law. Furthermore, freedom of expression, which is also guaranteed by the European Convention on Human Rights and safeguarded by international and constitutional law, is meaningful only where it is enforced through laws permitting the establishment of associations. This is why the preamble states that the vitality of civil society in a given country is a good indication of that country's adherence to principles of democratic pluralism, in particular freedom of association.
12. Lastly, the preamble points out that, under the text, NGOs have not only rights, but also certain duties and responsibilities.

### **Scope**

13. There is no general definition of an NGO in international law and the term covers an extremely varied range of bodies within the member states. Reference should be to the different practices followed in each state, notably concerning the form that an NGO should adopt in order to be granted legal personality or receive various kinds of advantageous treatments. Some types of NGOs, trusts, for example, exist only in certain states. NGOs' sphere of action also varies considerably, since they include both small local bodies with only a few members, for example a village chess club, and international associations known worldwide, for example certain organisations engaged in the defence and promotion of human rights.
14. Among these NGOs the text gives examples of certain forms, but the list is not exhaustive. This list does not include trade unions and religious congregations, but these certainly have a special place among NGOs. In some countries these bodies, or some of them, come within the ambit of legislation on associations, whereas in others they are covered by separate laws. Since Convention No. 124 did not expressly exclude these bodies from its scope, the participants decided to make no explicit mention of trade unions and religious congregations in the fundamental principles.
15. Political parties are expressly excluded from the ambit of the fundamental principles as, under most national laws, they are the subject of separate provisions from those applicable to NGOs in general.
16. Professional bodies, established by law, to which members of a profession are required to belong for regulatory purposes, are also not included in the fundamental principles' definition of NGOs. However, as is recognised in paragraph 20, national law may treat them as NGOs and some aspects of their activity can be essentially the same as those carried out by voluntary bodies, for example, the human rights committee of a bar association.
17. As indicated in paragraph 4 of the fundamental principles, the main character of NGOs is the fact that profit-making is not their primary aim. All NGOs have in common their self-governing, voluntary nature and the fact that they do not

distribute profits from their activities to their members but use these for the pursuit of their objectives.

18. Apart from these common features, the distinction most frequently drawn in the case of NGOs is that between associations and foundations. As stated in the explanatory report on Convention No. 124, an association means “a number of persons uniting together for some specific purpose”. According to the same source, a foundation is “an identified property devoted to a given purpose”.
19. Another distinction of some importance is that addressed in paragraph 5, the distinction between informal NGOs, that is those not wishing to acquire legal personality, and NGOs with legal personality. As is the case with most national laws, the text contains a number of provisions aimed solely at NGOs with legal personality. However, the text acknowledges the principle that an NGO may wish to pursue its activities without having legal personality to that end, and it is important that national law should do likewise. Furthermore, in some countries, the distinction between NGOs with legal personality and those without does not exist, as NGOs automatically acquire legal personality upon their establishment. Therefore, not all aspects of the fundamental principles are applicable to them.

### **Basic principles**

20. The fundamental principles lay down four basic principles, which are then fleshed out in the subsequent sections:
21. *Voluntary establishment*: the starting point for any law on NGOs should be the right of any natural or legal person to establish an NGO with a lawful, non-profit-making objective. This should be an act of free will. It is important that national laws on NGOs, and also rules on their taxation, allow and encourage such initiatives.
22. *Right to freedom of expression*: this principle derives from Article 10 of the European Convention on Human Rights, which provides that “Everyone has the right to freedom of expression”, and is applicable to NGOs on an equal footing with other natural or legal persons.
23. *NGOs with legal personality should have the same general rights and obligations as other legal entities*: the purpose of this principle is to reaffirm that NGOs must be subject to ordinary domestic law, not special regulations, although separate legislation may grant them additional rights and measures may be taken to encourage their activities.
24. *Judicial protection*: in a state governed by the rule of law it is essential that NGOs should be entitled, in the same way as other legal entities, to challenge decisions affecting them in an independent court which has the capacity to review all aspects of their legality, to quash them where appropriate and to provide any consequential relief that might be required. The principle established in the previous paragraph holds good, that is any act or decision affecting an NGO must be subject to the same administrative and judicial supervision as is generally applicable in the case of other legal entities. There should be no need for special provisions to this effect in legislation on NGOs.

### **Objectives**

25. The range of objectives that may be pursued by NGOs is commensurate with their own diversity, and the objectives mentioned in the fundamental principles are merely examples. The only requirement here – other than that an NGO should be non-profit-making – is that set out in paragraph 10: lawfulness of the objectives pursued and the means employed. The fundamental principles illustrate a range of the means that might be employed, but these are not exhaustive.
26. Two objectives, namely seeking a change in the law and participating in political debate, are particularly mentioned because limitations on their pursuit have been the subject of successful challenges in the European Court of Human Rights.
27. Pursuit of economic activities is a special case, since it is in fact NGOs' non-profit-making nature that distinguishes them from commercial enterprises. In this connection, the text lays down the principle that an NGO is free to carry on any economic, business or commercial activity, on condition that any profits are used to finance the pursuit of the common- or public-interest objectives for which the NGO was set up. National legislation governing NGOs should therefore stipulate that none of their earnings or net profits is to be distributed, as such, to any person whatsoever. Such legislation might also prescribe particular modalities for carrying out economic or commercial activities, for example, the formation of a subsidiary company. Subject to this general restriction, no requirements should be imposed on NGOs other than the general rules governing the economic activities in question.
28. The fundamental principles also establish the principle that, in pursuit of their objectives, NGOs are free to join or not to join federations and confederations of NGOs. Such federations and confederations of NGOs have an important role, since they foster complementarity among NGOs and allow them to reach a wider audience, as well as share services and set common standards.

## **Establishment**

29. Paragraph 15 of the fundamental principles reiterates, and develops, the principle that any person or group of persons should be free to establish an NGO, already mentioned in the section on basic principles. Two kinds of restriction are encountered in practice in some states: firstly, on the establishment of NGOs by foreign nationals and, secondly, on establishment by legal entities. There are no grounds for these restrictions.
30. The question of the minimum number of people needed to establish an NGO was discussed at length during the preparatory work, since this number varies under national law. In some states one person is enough, whereas in others the law sets a higher threshold, which may be two, three or five people, or even more. In the end, the participants decided to draw a distinction between informal organisations and those wishing to acquire legal personality. In the first case, two people should suffice to establish a membership-based NGO, whereas a greater minimum number of members may be required before legal personality can be granted. In that event, the figure should not be so large as to discourage the actual establishment.
31. Paragraph 17 of the text deals with foundations, funds and trusts, which are the normal forms taken by NGOs established by means of a donation or bequest.

## **Content of statutes**

32. As regards their organisation and decision-making processes, NGOs, in particular those with legal personality, must heed the needs of various parties: members, users, beneficiaries, their highest governing body, their staff, donors and, in certain circumstances, national or local administrative authorities. They must therefore have clear statutes, setting out the conditions under which they operate and which should be available for consultation by the above-mentioned parties, with a view to ensuring legal certainty. Paragraph 18 of the text lists several examples. They illustrate the type of information of general usefulness which the statutes should contain.
33. Subject to generally applicable administrative, civil and criminal law, the conditions under which an NGO operates, as set out in their statutes, are entirely a matter for the NGO itself, in the persons of its members. A decision to amend the statutes accordingly lies with the NGO's highest governing body, consisting of its entire membership, so as to ensure that the proposed amendment commands sufficient support among members.

## **Membership**

34. Membership is a particularly important issue, as it is related to the concepts of liability and legal capacity. The section of the fundamental principles dealing with this subject first reiterates the fundamental requirement that membership of an NGO must generally be voluntary. This negative aspect of freedom of association is, however, something that can be relaxed in the case of professional organisations to which members of a given profession – such as doctors or lawyers – must belong under the regulations in force, for those countries which treat them as NGOs.
35. Apart from its voluntary nature, membership is governed by two important principles: firstly, anyone should be able to join an NGO without being subject to unjustifiable restrictions imposed by law; secondly, questions relating to membership are a matter for the NGO's statutes.
36. Thus, the statutes may provide for restrictions, such as confining membership of a club for senior citizens to persons belonging to that age group. Furthermore, in some cases membership of an NGO may be incompatible with a person's office or employment, particularly where these are public. In addition, there may be a need to adopt restrictions to protect vulnerable persons, but any restriction on the ability of children to join an NGO should take into account the freedom of association guaranteed to them both by Article 11 of the European Convention on Human Rights and Article 15 of the Convention on the Rights of the Child. However, subject to these provisos, it should be lawful within a state's jurisdiction for any person, whether natural or legal, national or foreign national, to join an NGO.
37. In the same way as an NGO's statutes determine a person's capacity to become a member, it is for the statutes to deal with the question of expulsion of members and to determine the procedure to be followed in that case.

## **Legal personality**

38. The provisions relating to the legal personality of NGOs are one of the cornerstones of their status, since they permit NGOs to have an existence in their own right, separate from those of their members or founders. This enables them to enjoy elementary civic rights, such as the initiation of legal proceedings, but also to engage in practical dealings essential for their operation, for example rental of premises or opening of a bank account. It is important to note that paragraphs 24 and 25 of the fundamental principles are to be read together with paragraphs 72 and 73 on liability.
39. Some of the provisions contained in the fundamental principles specifically concern NGOs with legal personality. However, it must not be overlooked that some NGOs may well wish to pursue their objectives without acquiring legal personality to that end, and national law should allow them this possibility without being based on the assumption that legal personality is mandatory for all NGOs.

### **Acquisition of legal personality**

40. The moment at which an NGO acquires legal personality varies depending on the state concerned: in some states NGOs automatically have legal personality from their establishment, and this section therefore does not apply. In the majority of states, acquisition of legal personality is governed by rules and a procedure. The text stipulates that these should have an objective basis and that their application should not result in arbitrary treatment of NGOs.
41. Although the moment of acquisition of legal personality varies from one state to another, the same does not apply to its termination, since the rule is that an NGO's legal personality ends with its dissolution – voluntary or involuntary – in case of bankruptcy, prolonged inactivity – which might arise from insufficient membership – or as an exceptional sanction. It also comes to an end with the merger of two or more NGOs; the resulting new entity assumes the rights and obligations of the NGOs that have merged.
42. The section of the fundamental principles concerned with acquisition of legal personality establishes certain basic principles that should govern this procedure – referred to in some states as the registration procedure – where this personality is not automatically acquired through the establishment of the NGO concerned. The underlying logic is that the procedure must be as simple and undemanding as possible and must not entail the exercise of discretion.
43. For that reason the applicable rules must be clear and easily accessible by NGOs, which is not always the case among states. One means of guaranteeing such accessibility is publication of an explanatory guide to the process by the relevant authority. This may not be possible in all states for budgetary reasons, but in any event the registration authority should provide NGOs with all the information and assistance they may need.
44. It is entirely legitimate for states to make the acquisition of legal personality by an NGO subject to the supply of certain information and documents. In an effort to ensure legal certainty, this information should above all make it possible to answer enquiries from third parties about the NGO's identity, address and management structures. Any individual having a business relationship with an NGO, for instance in the event of sale of property or recruitment of staff, must be able to ascertain whether the organisation in



question is recognised as a legal person. Similarly, for their own protection, private individuals should be able to check that a body presenting itself as an NGO and seeking their support is in fact what it claims to be.

45. The registration procedure should not constitute an opportunity for states to request information to which they have no entitlement. The latter would generally include the identity of donors or an NGO's financial circumstances, but there may be a need to require disclosure of those circumstances where a body such as a foundation is established. The procedure should also not provide states with an excuse for discriminating between NGOs as to whether their objectives or members are deemed "acceptable", in so far as the objectives and the means employed are lawful.
46. A state may charge a fee to cover the cost of processing applications, but this should not be set at a dissuasive amount.
47. The text establishes the principle that the authority deciding an application for legal personality should be separate from that awarding any form of public support. As a general rule, legal personality will be granted by an administrative authority, but in some countries it may be appropriate for the courts to fulfil this function.
48. So as to limit the scope for the exercise of discretion by the authorities deciding an application for legal personality, the fundamental principles list the grounds on which an NGO's application may be refused. However, the list set out in paragraph 31 of the fundamental principles is not exhaustive. States may lay down additional grounds for refusal in their legislation, though such grounds should be based on clear and objective considerations. In accordance with the principles governing decision-making by administrative authorities, it also specifies that there should be a prescribed time-limit for deciding an application. The decision must be final, and it is not acceptable that legal personality granted to an NGO should be subject to periodic review. However, this does not prevent states from re-examining the question of legal personality where a substantial change is made to the the statutes or activities of the NGO. The grounds for the decision must be indicated in writing, particularly where it is a refusal, so as to allow the NGO to challenge it in the relevant administrative authority and in court. Failure to decide within the prescribed time limit should be treated as either a refusal of, or the granting of, legal personality.
49. In the states which have ratified Convention No. 124, the legal personality and capacity acquired by an NGO in one contracting party where it has its registered headquarters should be recognised, as of right, by the other contracting parties, subject to compliance with certain conditions. In other states, foreign NGOs may be required to obtain approval to operate in the host country.
50. Information supplied by NGOs when applying for legal personality should be kept on record in a centralised national register, which, as stated in the text, should be accessible to the public. However, this rule on centralisation of information cannot be made generally applicable, as account should be taken of the particularities of federal states, where registration may be carried out at the level of the entities of the federation.

51. The rule laid down in paragraph 42 of the fundamental principles is intended to ensure that the statutes of an NGO can be amended under a simple, expedited procedure. Approval should only be needed in the case of significant matters, such as the name or objectives of an NGO. The procedure should not normally entail an obligation to re-establish the organisation as a whole, thus allowing the NGO to evolve, while maintaining some continuity.

## **Management**

52. As regards their organisation and decision-making processes, NGOs must heed the needs of various parties, both internal and external, as pointed out in paragraph 46. It is therefore in the interests of all concerned that NGOs should have clear statutes, as it is this document which defines the organisation's structure and operating rules.
53. The statutes should comply with the legislation in force, and it is also desirable that it be compatible with any commitments entered into by the NGO vis-à-vis donors or a network of NGOs to which it belongs.
54. The NGO's organisation and decision-making processes and determination of levels of responsibility and accountability must be consistent with its statutes, but should not be subject to the supervision of any outside authority, except for the requirement of compliance with the law, as mentioned above.
55. This means that an NGO is sovereign in determining the internal organisation it wishes to adopt in pursuit of its objectives, as defined in the statutes. As long as it does not break the law, external legal bodies should have no say in the conduct of its internal affairs. An exception is made here for those provisions governing certain types of NGOs which require special supervision. All NGOs must, however, observe all relevant applicable employment and social security law and they enjoy no exemption from any requirements as regards the membership of their component bodies or with respect to immigration law. In particular, foreign nationals on the board or staff of NGOs are subject to the laws of the host country with respect to their entry, sojourn and departure.

## **Property and fund-raising**

56. The possibility for NGOs to solicit donations in cash or in kind is a fundamental principle, a national consequence of their non-profit-making nature. Such contributions, along with the proceeds of any economic activity, are NGO's vital means of financing the pursuit of its objectives. However, this possibility for NGOs to collect funding is not absolute and may be subject to regulation, with a view to the protection of the targeted audience.
57. Donors may be natural or legal persons – companies or institutions – and may be national or foreign. In general, foreign and national funding should be subject to the same rules, in particular as regards the possible uses of the funds and reporting requirements.
58. The provisions of paragraphs 51, 52, 53 and 55 are designed to safeguard the assets of NGOs and ensure that they are properly managed.

59. The principle set out in paragraph 51 does not imply that banks are under an obligation to provide banking facilities to every NGO requesting it. Subject to the principle of non-discrimination, individual banks are free to choose their clients.
60. The law should permit an NGO to designate, in its statutes or by resolution, another compatible body to receive its assets, after clearing of its liabilities, in the event of its dissolution. This is a principle of good practice, which should be encouraged. In some cases contractual clauses, in particular concerning major donors, may require the return of funds to a donor in the event of the NGO's dissolution. The successor may also be the state, particularly where no compatible body exists or where the NGO's objectives or activities have been found to be unlawful. However, this should not give rise to a financial windfall for the state.
61. Paragraph 56 sets out the principle according to which it is perfectly appropriate for an NGO to use its funds for paying its staff and reimbursing staff and volunteers for the costs incurred while acting on its behalf, even if the funds used were obtained by means of public support.

### **Public support**

62. NGOs are sometimes better placed than the state to answer certain needs of society, for instance in welfare and health matters. As a result, states often decide to grant them support, in the form of direct grants or preferential tax treatment.
63. The eligibility for public support should be based on clear, objective criteria. The public should also be able to ascertain which NGOs have received support and on what grounds. The authorities must also be able to verify that associations seeking support or preferential tax treatment do, indeed, serve a non-profit-making purpose, as in some countries tax advantages attract certain entities to apply for NGO status when it would have been more appropriate for them to have been established as commercial companies.
64. As a result, the majority of states make the granting of public support contingent on compliance with certain criteria and, above all, with the NGO's fulfilment of a public interest objective. In some states this may entail recognition of a special status or classification as an organisation in the public interest, which enables the NGO to receive donations and enjoy tax advantages, while at the same time ensuring the protection of third parties.
65. Since the granting of public support is to a large extent conditional on the objectives and activities of an NGO, it is normal that any major change in those activities or objectives may result in review, alteration and even termination, of public support.

### **Transparency and accountability**

66. As regards its activities and financial position, an NGO is accountable to a number of parties, first and foremost its members. It is thus good practice that it should submit an annual report on its accounts and activities to them. Secondly, an NGO which has benefited from public support or preferential tax treatment can be expected to account to the community concerning the use

made of public funds. Lastly, donors may stipulate by contract that an NGO is required to report on the use made of individual donations.

67. However, reporting requirements must be tempered by other obligations relating to the respect for privacy and confidentiality. In particular, a donor's desire to remain anonymous must be observed. The respect for privacy and confidentiality is, however, not unlimited. In exceptional cases, the general interest may justify authorities' having access to private or confidential information, for instance in order to combat black market money transfers. Any exception to business confidentiality or to the privacy and confidentiality of donors, beneficiaries and staff shall observe the principle of necessity and proportionality.
68. In order to guarantee objectivity, the fundamental principles lay down the principle that NGOs should have their accounts audited by a person independent of its management, although this person could still be a member of the NGO in question. As tends to happen with small commercial companies, small NGOs may be exempted from the obligation of having their accounts audited by an independent person.

## **Supervision**

69. Whereas the previous section concerned oversight of an NGO's accounts and performance, in relation to the objectives defined in its statutes, this section deals with supervision of compliance with the civil, criminal and administrative law in force.
70. The best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation in this sector at national and international levels. Responsible NGOs are increasingly conscious of the fact that the sector's success depends to a large extent on public opinion concerning their efficiency and ethics. Furthermore, in some countries codes of conduct are often drawn up to enable groups of NGOs in a given sector to ensure that the sector's needs and challenges are met and widely understood.
71. States nevertheless have a legitimate interest in regulating NGOs so as to guarantee respect for the rights of third parties, and this may include action to safeguard the reputation and economic interests of other NGOs in particular. State intervention may also be needed to protect members against abuse of an NGO's dominant position, particularly against exclusion in breach of the organisation's rules, imposition of certain unfavourable conditions, or even adoption of wholly unreasonable or arbitrary rules. However, in most instances, the appropriate form of protection would be the possibility for members to bring the matter before the courts; there should generally be no need for a public body to take action on the members' behalf.
72. In supervising the activities of NGOs, the administrative authorities should apply the same assumption as holds good for individuals, namely that, failing proof to the contrary, their activities are lawful. The powers of the administrative authorities and the police, notably as regards search and seizure, and the penalties that may be imposed, must be consistent with the principle of proportionality and be subject to judicial supervision.
73. The fundamental principles specify that dissolution of an NGO – the ultimate

penalty – should be used only a last resort. Such cases should be extremely rare, and it must be shown that there is a very sound basis for taking a measure of this kind. Although the measure may appear warranted, to be valid it must, in turn, also be subject to effective judicial review.

### **Liability**

74. The principles established under this head are themselves a consequence of an NGO's legal personality. The NGO has separate existence from its members and founders, and it alone is liable for debts and obligations entered into on its behalf, save in case of misconduct or neglect of duties by a member of staff or management. In the latter cases, the NGO or others affected should be able to take legal action against the person responsible in order to obtain compensation for the damage caused.

### **Relations with governmental bodies**

75. Competent and responsible NGO input to the process of public policy formulation enhances the applicability of legislation and the seriousness of governmental decision-making.
76. Although NGOs and state authorities sometimes have an ambiguous attitude towards dialogue, it is in the interest of them both to establish mechanisms for dialogue and consultation, as they pursue a common objective of finding solutions to society's problems and satisfying its members' needs. Their participation is distinct from, and does not replace, the role of political parties. Consultation may take place at a national, local or sectoral level and may be particularly useful in the drafting of legislation.