ASSESSMENT OF THE LEGAL FRAMEWORK FOR COOPERATION BETWEEN THE CSOS AND THE GOVERNMENT IN TURKEY

Prepared by:
European Center for Not-for-Profit Law (ECNL)

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Third Sector Foundation of Turkey (TUSEV)

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European Center for Not-for-Profit Law (ECNL)
Apáczai Csere János u. 17
1052, Budapest, Hungary

Tel: +361-318-6923
Fax: +361-266-1479
Website: www.ecnl.org.hu

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This Report has been developed by the European Center for Not-for-Profit Law (ECNL)[1] with substantial input and support from the Third Sector Foundation of Turkey (TUSEV)[2].

I. Introduction

Turkey is rapidly emerging from a generally restrictive era characterized by tense civic/state relations and regressive legal frameworks for civil society organizations (CSOs). In the past four years, the Turkish Government has demonstrated a remarkable change in political will and support for civil society and its critical contribution in the democratization and development of Turkish society.

As this report presents, one of the key areas under discussion in the context of improving CSO/state relations is 'NGO-Public Sector Cooperation'.[3] The concept of cross-sectoral cooperation is by no means completely new for Turkey; indeed, local and central governments and other government agencies have been 'cooperating' with philanthropic agents/organizations for many years, and through many different forms of public service assistance, i.e. schools, hospitals, universities, etc. Despite this 'history' of cooperation, the law has established no comprehensive framework to guide these so-called 'partnerships' or 'cooperative engagements'.

Recent studies of the CSO sector indicate that 30% of foundations engage in partnerships with one or more types of local governments, municipalities, governorships, and provincial education offices of the Ministry of Education. The same study however reports significant legal framework challenges faced by foundations (67%), yet foundations eagerly state the desire for the state to play a more supportive role in promoting foundations (19%).[4]

Another survey on civil society (which targets mainly associations) in Turkey reports more positive trends with regards to the legal framework, yet much more dismal figures

[1] ECNL was established in 2003 with the aim of promoting an enabling legal environment for civil society in Europe. It is a private not-for-profit organization, established as a public benefit organization in Hungary, and working regionally in Europe and beyond.
[2] TUSEV was established in 1993 with the aim of strengthening the legal, fiscal and operational infrastructure of the third sector in Turkey. It is a private operating foundation established in Turkey with a network of over 100 Turkish foundations. www.tusev.org.tr
[3] This report will make reference to CSO/state, CSO/government and CSO/public sector cooperation, as well as NGO/government cooperation. All terms are intended to convey the same meaning, and as such, are interchangeable.
[4] Philanthropy in Turkey: Citizens, Foundations and the Pursuit of Social Justice, TUSEV, 2006

for CSO/state cooperation. 88% report no funding or support from government sources; 22% report no dialogue, while 62% report limited dialogue.[5] Yet qualitative discussions in focus groups and workshops reveal that there are positive expectations for increased cooperation and partnership in relation to recent trends.

The aim of the Report is to explore the legal incentives and impediments for cooperation between civil society organizations (CSOs)[6] and the Government in Turkey.

In order to achieve this aim, ECNL and TUSEV kept the following fundamental questions in mind when reviewing the legislative and other documents:

- Is there any regulation that prevents effective cooperation between NGOs and government?
- Are there any incentives that help cooperation between NGOs and government?
- What are the key issues in the current legal environment that need to be addressed in order to improve cooperation?
- How does Turkey compare to other European countries in addressing these issues?

I.1. Definitional Issues and Scope of Review

Due to time and resource constraints, the research team recognized the key importance of clearly defining the scope of the research and the range of laws to be assessed. With guidance from the British Council, ECNL and TUSEV determined the scope of the assessment as follows:

> ***Cooperation*** is understood as having two main components: service delivery and policy participation. The report covers both aspects, but the primary focus is on service delivery. The report also focuses on the examination of the funding aspects of both main components.
>
> ***Civil society organization (CSO)*** encompasses associations and foundations; i.e. the legal review does not extend to legislation pertaining to trade unions, chambers and other forms of organized civil society. Associations and foundations are clearly defined in the Turkish Civil Code and the examined laws usually refer to these organisational forms; however, recent regulations also use the term "NGO"[7], which does not have a clear legal definition.

[5] Civil Society Index study in Turkey, TUSEV, 2006

[6] CSOs are often also referred to as nongovernmental organizations (NGOs). According to the relevant literature, there is a theoretical distinction between CSOs and NGOs, i.e. CSOs are seen to encompass a wider pool of organized citizen activity. Nevertheless, in this Report we are using CSOs and NGOs interchangeably. The term NGO is used due to its frequent usage in international research and legal assessments. In addition, the terms "voluntary organization" and "voluntary sector" are used in relation to the United Kingdom.

[7] For example, the Regulation for Procedures and Guidelines in Preparing Legislation (Decision Number 2005/9986)

Government (public sector) includes the central government and all three forms of local government (municipalities, metropolitan municipalities and special provincial administrations). The purpose of the review is to examine cooperation on a sectoral, i.e. horizontal or crosscutting level. Therefore, individual ministries are not the subjects of this study.

Written law, rather than implementation practice, is the focus of the review. Due to time and resource constraints, it was not possible to conduct statistically relevant field research in terms of how laws are being implemented. Nonetheless, the study does make reference to implementation issues known to TUSEV and ECNL and/or raised by the interviewed experts.

I.2. Structure of the Review and Areas for Examination

The report proposes to examine the legal issues affecting CSO/government cooperation from four different angles. These represent four main components of the overall theme of cooperation from the legal point of view. They are of course interrelated but may be analysed separately in defining the key issues related to cooperation. The report will therefore examine the legal framework for each partner in the cooperation process and then move on to the general and specific aspects of cooperation.

Concretely, the report elaborates on the key issues in the following fields:

- Legal framework pertaining to **non-governmental partners;**
- Legal framework pertaining to **governmental partners;**
- **General principles** underlying the cooperation as expressed in policies or legislation;
- **Specific legal framework for cooperation** in service delivery and policy-making, including funding mechanisms and other aspects of the relationship;

I.3. Methodology

ECNL and TUSEV identified the body of relevant laws, regulations and policy documents applicable to CSO/government cooperation. ECNL's and TUSEV's lawyers and experts then conducted a thorough analysis of the laws, regulations and policy documents for the purposes of this report.[8] In addition to the documentary review, both ECNL and TUSEV conducted e-mail and telephone interviews with key experts from Turkey, as well as European Union countries (France, Germany, Hungary, Poland, and the United Kingdom). Finally, ECNL reviewed a number of relevant legislative and policy documents from the above-mentioned countries as well as other European countries to help inform this analysis. ECNL and TUSEV also built on prior research

[8] For a full list of reviewed documents please see the Appendix.

analysis, which had been prepared by ECNL's affiliate, the International Center for Not-for-Profit Law (ICNL[9]) and TUSEV; specifically, in 2004, ICNL and TUSEV published Legal Reform Reports on laws relating to CSOs, including the Law on Associations, laws relating to foundations, and the issue of public benefit status.[10] The ECNL/TUSEV expert team built on those reports and expanded the analysis to include legislation pertaining to governmental actors and cooperation activities as well.

II. Legal Framework for Non-Governmental Partners

For purposes of this report, the legal framework for non-governmental partners embraces the **laws and regulations governing associations and foundations**. Reform of these laws has been a critical focus in relation to the adoption of the Copenhagen Criteria. In the past, these laws presented significant obstacles to the existence and operation of autonomous civil society in Turkey. Reform of the legal framework for **associations** began in 2001, continued with the establishment of a civil department for the regulation of associations in 2003 (previously the responsibility of the police), and culminated with a new law in 2004. The benefits of these reforms have been extensive, bringing the legal framework generally in line with international standards relating to freedom of association. Concerns regarding implementation remain, however, and the full realization of these reforms will require fundamental paradigm shifts in approach and practice. As for **foundations**, a new draft law (re-written completely for the first time since 1935) is pending in Parliament as this report is being prepared. While the current law retains significant restrictions, the draft law, if enacted, would bring about an entirely new and more enabling regulatory approach.

Of course, legislative reform does not lead to a strong, vibrant civil society overnight. Still in its nascent stage, civil society and CSOs in Turkey face challenges relating to building a broader base of civic participation and defining their roles as service delivery agents and advocates of social change. By **protecting and enlarging the legal space for CSO activity, the newly emerging legal framework for civil society offers benefits and creates opportunities for CSOs** to engage more meaningfully and partner with other sectors, especially with the public sector.

The purpose of this section is to review legislation that serves as a basis for the establishment, registration, governance, operation, fiscal management and termination of CSOs in Turkey. To this end, ECNL and TUSEV have specifically reviewed Law #5253 on Associations (Law on Associations), Regulation of Associations Law (2005), Law on Foundations 2762, Statute on Foundations, the current draft law on foundations (pending approval in Parliament), provisions of the Civil Code pertaining to associations and

[9] The International Center for Not-for-Profit Law (ICNL) is an international NGO aiming to create an enabling environment for citizen participation worldwide. ECNL is the European affiliate of ICNL.
[10] See TUSEV and ICNL (2004). TUSEV and ECNL also conducted a series of workshops for NGO and government officials in Istanbul in July 2005, focusing on the regulatory treatment of public benefit organizations as well as NGO-state cooperation frameworks and the issue of state financing of NGOs. For the Legal Reform Reports and the workshop summaries please refer to www.tusev.org.tr and www.icnl.org.

foundations (#56-117), and the General Communiqué of Corporation Tax (#83), which details the criteria and conditions of obtaining the status of public benefit for foundations.

It is of key importance that these so-called "framework laws" be generally enabling and in line with European and international standards, as they **determine the extent of freedom of association and the extent to which CSOs are able to become effective and reliable partners to the government**. In order for the CSOs to effectively contribute to the improvement of society and perform at a high level to achieve their mission, they need an enabling legal environment that provides incentives for high performance and that imposes restrictions only to the extent justified by the public interest.

As noted above, the review of the existing laws revealed critical differences regarding the legal framework for associations and that of foundations. The **legal framework for associations is generally enabling.** The Law on Associations was completely revised in 2004, when most of the provisions violating international law and the freedom of association were removed. In fact, we can refer to a number of provisions that serve as an important enabling factor for more effective cooperation regarding associations. At the same time, however, the Law on Associations still contains some significant gaps and limitations impacting on effective cooperation. The current **legal framework for foundations is still extremely restrictive** and undermines the ability of foundations to be established and operate effectively. Although proposed draft legislation, if enacted, could bring many improvements, the draft legislation is still pending Parliamentary approval. Finally, the **inconsistent regulation of the public benefit status** of both associations and foundations is seen as a key stumbling block in developing a comprehensive and coherent framework for CSO/government cooperation in Turkey.

II.1. Associations

The new Law on Associations, adopted by Turkey in July 2004 marks an important milestone for the strengthening of the legal framework for NGOs and for the general advancement of civil society in Turkey. Largely compliant with European and international standards relating to freedom of association, the new law represents a great leap forward for Turkey in its road to European Union accession. In this report, we cite the provisions that may serve as an important launching pad for improving the cooperation between CSOs and the government. Nonetheless, we also must acknowledge that additional reform (especially with regards to procedural issues) is necessary to ensure a fully effective partnering relationship between the state and the NGO sector.

Membership (Article 3 of Law on Associations). Legal entities are permitted to found or become members of associations. Based on this provision, businesses, cooperatives, and NGOs are able to form umbrella groups and federations to represent their collective interests. The ability to do this can be critical to effective communication with the government and to cross-sectoral partnership.

Foundation of Liaison Offices (Article 24 of Law on Associations). Associations may open liaison offices at necessary locations. Once established, the association simply notifies the local administrative authority of the location. The ability to establish liaison offices will permit associations to expand their activities, without creating a wholly new organization. This could multiply the opportunities for association/government cooperation, especially at the local level.

Formation of Platforms (Article 25 of Law on Associations). Associations are expressly permitted to form temporary platforms among themselves or with other foundations, unions, and similar civil society organizations to serve a common purpose. Through platforms and coalitions, associations will be able to adopt more appropriate forms to represent their interests and to cooperate more effectively with government.

Permissible Purposes and Activities (Articles 2, 30 of Law on Associations).
Article 2 of the Law on Associations permits associations to pursue "a given and common objective not prohibited by the laws excluding … profit sharing purposes". Prohibited activities include (1) those not contained in the governing statute, (2) those expressly restricted by the Constitution and laws of Turkey, and (3) preparatory, educational or training activities for military service, national defence and security. (Article 30).

Beyond these restrictions, associations are free to define their collective purposes. Consequently, associations are permitted to engage in public policy and advocacy activities, which are critical if associations are to contribute meaningfully in the discussion of issues of public importance, and to be taken as serious partners for purposes of CSO/government cooperation. Associations are also permitted to engage in economic activities, which is critical to their financial sustainability.

Income of the Association (Article 99 of the Civil Code). Article 99 of the Civil Code states that **"**The membership fees, income gained from the activities of the association or from its assets, contributions and donations constitute the income of the association." European laws governing associations and other NGO forms often outline permissible sources of income. The list is typically left open-ended to allow for a greater flexibility of income generation, with the only limitation being that income must be derived from legal or legitimate sources (e.g., not derived from criminal activity). It is often important, however, to affirmatively state the permissible sources of income, especially where certain categories of income may not be firmly rooted in practice. In the case of Turkey, public funding, whether through subsidies, grants or contracts, are not expressly listed in Article 99. This gap in the income sources could restrict – or at least inhibit – public funding of associations. This is especially true since Article 99 includes no open-ended, catch-all clause for other legitimate sources of income.

International Cooperation. The legal framework remains unduly restrictive in several aspects regarding international cooperation. While the Law on Associations specifically permits associations to engage in international activities and establish cooperation abroad (a significant improvement over the prior legal framework), the Association Regulations

impose burdensome notification requirements on both associations and foundations, which could be confused with requiring actual governmental approval, and furthermore, still require foundations to receive permission to engage in international activities. Regulatory burdens on international cooperation potentially undermine the ability for domestic CSOs to have access to a full range of information and funding, which in turn, could undermine their ability to serve as effective partners with the public sector.

II.2. Foundations

The current legal framework for foundations is still in need of reform. The first Foundation Law of the Republic of Turkey was developed in 1935, and revised in 1970. Since then, the legislation has been modified with regulations, decree law, statutes and several communiqués by the General Directorate of Foundations (GDF), which is a division of the Prime Ministry supervising all foundations in Turkey. The provisions affecting foundations are largely restrictive and in some cases do not comply with European standards.

There are positive signs of reform, however. For example, a rule allowing government representatives to attend foundation meetings (a clear interference with the independence and privacy of non-governmental organizations) was abolished through a regulation issued in November 2004. More importantly, a new law has been drafted, which intends not only to address much needed reforms, but also to harmonize all aspects of the governing framework for foundations under one law. However, the draft law has been pending in Parliament for more than six months, thereby leaving foundations to operate under the current restrictive framework.

In this report, we cite key provisions that may present an obstacle to cooperation in the current law. There are further provisions in the laws affecting foundations that are problematic and run counter to European and international standards. Please refer to the Legal Reform Report on Foundations prepared for TUSEV by ICNL for further details.[11]

Minimum capital (GDF communiqués of 21 September 1997 and 21 January 1998). According to the Turkish Civil Code, there is no minimum capital requirement for the endowment of a foundation. However, two communiqués of the General Foundations Directorate actually prescribe a minimum capital equivalent of approximately USD 250,000 to 627,000, to be decided by the courts on a case-by-case basis.

With the exception of France, no European country requires such a high level of initial capitalization by foundations. In fact, where fixed initial amounts are required they range from 5000 – 75,000 Euros. In several countries, including most of the new EU member states, no fixed minimum amount is required to establish a foundation; and in a few countries no minimum is required at all. Interestingly, countries' decisions concerning minimum endowment requirements are often not closely correlated with their level of

[11] See TUSEV and ICNL (2004) 2 or www.tusev.org . The new draft law incorporates many of the recommendations put forth by the Report.

economic development. For example, Dutch law requires no property at the time of establishment; instead, it is sufficient that assets are available when needed.

The requirement of high capitalization in Turkey might have some detrimental effect on the cooperation between the sectors. Namely, the establishment of community foundations, where all local stakeholders make joint decisions about meeting local needs, is a common and well-established form of cross-sector partnership in several European countries (as well as in the United States). It has been introduced in the continental Europe over the last decade and has proved successful in forging partnerships to improve the lives of communities in developed West European countries, like Germany and in transition countries, such as Slovakia. If Turkey were to introduce a similar model for cooperation, this requirement may prove to be a significant barrier.

We should note that the new Draft Law on Foundations addresses this question by proposing that the Court shall determine the minimum value of assets and property specific to its objectives during the establishment of a foundation.

Limitations of asset management (Article 113 of the Civil Code, Article 27 and Annex Article 1 of the Statute of Foundations). According to Article 113 of the Turkish Civil Code, selling or altering the assets or rights requires notification to GDF and a court decision. In all cases the GDF has the discretionary authority to initiate procedures regarding the use, acquisition, and liquidation of assets of a private foundation. In addition, Article 27 of the Statute of Foundations (1970) requires the permission of the High Council of the GDF prior to the court decision. This gives the GDF extensive power over the decision-making process and constitutes a clear infringement on the freedom of foundations, as private, non-governmental entities, to dispose of their own assets.

The new Draft Law on Foundations proposes that if there are justified reasons, the court shall permit, upon the application by the foundation's management body or auditing body, and after obtaining the written opinion of the non-applicant party (e.g., where the foundation is the applicant, the GDF would be the non-applicant), to replace its initial assets (the real estate and rights allocated to the foundation at its establishment) with new assets or to completely dispose of them. Immovable and movable properties subsequently acquired by the foundation shall be disposed of freely, based on the decision of the foundation's management body. This proposed change would be a positive improvement.

Furthermore, the Statute of Foundations, in Annex Article 1, states that foundations are required to keep their cash assets in state banks or Vakif Bank (a quasi-governmental bank). The new Draft Law on Foundations proposes that foundations shall evaluate their assets by observing economic rules and risks, thereby abolishing the requirement to keep their cash assets in state banks.

The issue of asset management is a critical one for Turkish foundations. The supervisory and control role of the GDF does not facilitate and support the ability of foundations to

manage assets effectively so as to accomplish the foundation purposes, which is a key precondition for cooperation. Indeed, the level of restrictions and opportunity for intervention into the financial management of foundations may affect their sustainability and morale to the extent that it establishes an obstacle to fruitful partnership between the state and foundations. From the point of view of CSO/state cooperation, therefore, it is of critical importance to adopt the proposals of the Draft Law.

International Cooperation. The Decree Law of GDF (1984) describes under which conditions foundations can engage in international relations. This decree 'allows' Turkish foundations to engage in international cooperation, open branches or representative offices and become members of foreign foundations only upon obtaining prior authorization from the Ministry of Interior and Ministry of Foreign Affairs. These regulations also apply to foreign foundations operating in Turkey. Furthermore, the Ministry of Interior issued a circular in 9 January 2004 regarding the international relations of foundations, which requires these requests to be processed through the Department of Associations, but uses such vague language as to create additional confusion. Regulatory burdens on international cooperation potentially undermine the ability for domestic CSOs to have access to a full range of information and funding, which in turn, could undermine their ability to serve as effective partners with the public sector.

II.3. Public Benefit Status

Article 27 of the Law on Associations creates a special category of associations: "Public Benefit Associations" and defers to separate regulations to detail relevant aspects and procedures of public benefit status (Articles 48-52 of Association Regulations). The Law No. 4972 ("The Amendments in Some Laws and Recognizing Tax Exemptions to Foundations") separately defines public benefit foundations. The definition, criteria and application procedures vary according to each organizational form. **The regulatory framework for public benefit issues therefore lacks a clear, consistent and comprehensive policy.**

The regulatory framework for public benefit status has a distinct impact on CSO/government cooperation, insofar as public benefit status is often a fundamental criterion underpinning various aspects of CSO/government partnership. The overall policy regarding public benefit status reflects the level of government recognition of the contributions by NGOs to democratic development. Public benefit organizations routinely receive tax exemptions, and may also be extended preferential treatment through direct government funding and joint projects with the government.

In conceptualising a more coherent framework, it is necessary to consider a wide range of critical issues. Issues of public benefit status are many and complex, and necessitate thorough consideration. Some of the key issues that necessitate further consideration include (1) the definition of "public benefit", (2) the decision-maker responsible for determining whether an association qualifies for public benefit status, and the application procedures, (3) the criteria for attaining public benefit status, (4) the accountability

requirements, (5) sanctions, and (6) the benefits of public benefit status. Indeed, given the complexity of the issue, and the importance of a coherent regulatory approach, law drafters may want to consider addressing public benefit status issues through a separate law or separate regulation.

1) Definition of public benefit: Article 27 of the Law on Associations defines "public benefit" as those purposes and activities that are measurably for the benefit of the public. Article 49(c) of the Associations Regulation defines "public benefit" as those purposes and activities that "contribute to social development and bring solutions to social problems". Potential issues could arise concerning on the one hand, whether the definition is broad enough to embrace all public benefit purposes which the state may want to support (arts and culture, protection of the environment, health, etc.), and on the other hand, whether the decision-making authority will have sufficient guidance in its decisions regarding which association purposes qualify for public benefit status.

General Communiqué of Corporation Tax #83 defines "public benefit" for foundations more concretely, to include health, social assistance, education, research and development, culture, environmental protection and forestation purposes. Interestingly, however, the Law also requires that the public benefit activity lessen the burden of the state. Depending on interpretation and implementation, this limitation could be narrowly construed and limit public benefit status to a small category of foundations actually carrying out 'public tasks'. The Code also excludes activities focused solely on a certain region or target group; thus foundations dedicated to minority rights issues or to earthquake victims of a particular region would not qualify for public benefit status. This limitation is potentially problematic, and runs counter to the approach adopted in most European countries, which recognizes a public benefit from activities targeting certain vulnerable and disadvantaged segments of the population, as well as activities benefiting society as a whole. Moreover, it is certainly worth asking, as with the Law on Associations, whether the definition is broad enough to support all purposes the state has reason to support. And perhaps most importantly, the differences of definition underscore the importance of a coherent approach to public benefit status, and a single definition that would apply to both associations and foundations.

2) Decision-making authority and process: Article 27 of the Law on Associations and Article 48 of the Association Regulation vest decision-making authority in the Council of Ministers and involve the Ministry of Interior, Ministry of Finance and other relevant ministries as well. Similarly, the Law on Foundations authorizes the Council of Ministers to decide on public benefit status, but does not define the related procedures (e.g., length of time to respond, etc.), which makes this process rather non-transparent.

Article 51 of the Associations Regulation spells out the application procedures for attaining public benefit status. The process described, which necessitates (a) the opinion of the Governorship, (b) the opinions of the "relevant ministries", (c) the opinion of the Ministry of Finance, (d) the proposal of the Ministry, and (d) the decision of the Council of Ministers is likely to be time-consuming and burden both association applicants and governmental agencies. Far more efficient would be a one-stop process, as is common in

EU Member States that recognize a distinct public benefit or charitable status (the U.K., Poland and Hungary, for example).

Key to a fair determination is ensuring that the decision-maker is sufficiently independent of political concerns and is able to exercise an appropriate level of objectivity, professionalism, and expertise relating to civil society. These characteristics do not normally attach to the Council of Ministers, which is generally subject to political influences. Moreover, we wonder if this is a productive use of the Council of Ministers' time.

Other options for decision-making, as detailed in the TUSEV Public Benefit Report 2004 (prepared by ICNL), include the tax authorities, a designated Ministry such as the Ministry of Justice, the courts, or an independent "commission" along the lines of the Charity Commission of England & Wales. Of course, the most suitable decision-maker will vary from country to country and must fit smoothly within the overall legal framework. For the sake of consistent decision-making, the designated authority should be tasked with deciding on public benefit status for all categories of NGOs.

3) Public benefit criteria: Article 49 of the Associations Regulation lists criteria for achieving public benefit status; among them are the requirements that an association be operational for at least one year, and that the association meet turnover requirements. The Law on Foundations defines even more burdensome criteria for public benefit foundations. In addition to the requirements of one year of existence and lightening the burden of the state, foundations must have assets in the value of 300,000 YTL (approximately €187,500) minimum, annual income of 30,000 YTL (€18,750) and must have spent at least 2/3 of their income on specified approved areas, and must be audited.

Such requirements are likely to burden new organizations seeking to meet pressing needs, such as disaster relief. To address this possibility, many countries require no minimum period of existence, while others, like the United States, have adopted a "provisional status", which Turkey might also wish to consider. In addition, few European countries have separate income or turnover requirements for public benefit status. Minimum assets may be required for initial registration as a foundation, but rarely to qualify separately as a public benefit organization. Instead, additional criteria is typically linked with accountability and transparency, such as requirements to create an additional governing body, to file a public benefit report, and to be subjected to an annual audit. Turnover requirements are guarantees of the size of operations, not of enhanced accountability. Details on criteria for public benefit status in European countries are contained in the TUSEV – ICNL Public Benefit Report 2004.

4) Accountability requirements: Article 27 of the Associations Law subjects public benefit associations to regular inspections at least once every two years and provides for heavy fines and imprisonment for violations by members of public benefit associations. These supervisory mechanisms may not provide sufficient assurance that the public benefit association is actually engaged in public benefit activity. Typically, public benefit laws subject public benefit organizations to both stricter internal governance

requirements (e.g., conflict of interest provisions) and heightened reporting requirements (e.g., financial and activity reporting, independent audit). An overview of European approaches to accountability of public benefit organizations is contained in the TUSEV Public Benefit Report 2004.

5) Sanctions: Associations whose public benefit applications are rejected cannot re-apply for public benefit status for another three years. Yet there are no clear objective criteria which the association should abide by in order to retain this status. Nor is there any mention regarding a waiting period to re-apply for this status if it has been taken away for some reason. As for foundations, there is no restriction to reapply when initially rejected and the requirements to retain the status are spelled out clearly. However, a foundation cannot reapply for this status for five years if it loses the status. As such, the issue regarding sanctions is not consistent for associations and foundations.

The limitation on re-applying is inconsistent with European standards; similar restrictions are rare in European countries. Nor is the state interest behind this restriction clear. Such a restriction may be especially problematic where the decision-making process is open to political influence, as is the case in Turkey.

6) Benefits: Tax exemptions and donor incentives are in place for both public benefit associations and public benefit foundations. While the tax law makes available to donors the same 5% tax deduction for donors to public benefit associations and foundations, the organizational tax exemptions vary dramatically according to organizational form. The link to fiscal benefits is fundamental to public benefit status and in the European context, the same fiscal benefits are typically available to all public benefit status organizations, regardless of the underlying organizational form. Where preferences relating to direct government funding and/or joint projects with government are also extended to public benefit organizations, the significance of public benefit status grows.

II.4. Recommendations on Legal Framework for Non-Governmental Partners

Regarding Legal Framework for Associations

- Income of Association: Revise Article 99 of the Civil Code to (1) expressly include "public funding" or some similar category referencing state financial support through subsidies, grants and contracts, among the permissible categories of income for associations; and (2) include an open-ended, catch-all phrase permitting associations to secure income from "other sources of income".

- International Cooperation: Revise Article 21 of the Law on Associations and Articles 18-21 of the Regulation on Associations by deleting (or at least clarifying) notification requirements for receiving foreign cash and in-kind assistance.

Regarding Legal Framework for Foundations

- Minimum Capital Requirements: Abolish the minimum capital requirement of approximately USD 250,000 to 627,000, currently required for the registration of foundations. The proposed draft Law on Foundations, if enacted, would accomplish this, by allowing the minimum value of foundation assets to be determined by the Court.

- Asset Management: Revise Article 113 of the Civil Code, and Articles 27 and Annex Article 1 of the Statute of Foundations to give foundations greater freedom in disposing of assets, and to guard excessive government infringement into the internal governance of foundations. The GDF currently has extensive power over the selling or altering of foundation assets. We support the proposed draft Law on Foundations, which would allow the foundation to seek court permission to dispose of its initial assets, and give the foundation full freedom to dispose of assets subsequently acquired. In addition, we support the proposed revision, which would abolish the requirement for foundations to keep their cash assets in state banks and allow foundations to manage their assets by observing economic rules and risks. As these issues relate to sustainability and foundation/state trust, the changes will be critical to fostering more fruitful partnership between the state and foundations.

- International Cooperation: Abolish the requirements contained in the Decree Law of GDF and Ministry of Interior circular (as well as the restrictions relating to foundations contained in the Regulation on Associations), which prevent foundations from engaging in international cooperation without the prior authorization from the designated ministries.

Regarding Legal Framework for Public Benefit Status

Recognizing the fundamental importance of public benefit status to the not-for-profit sector and CSO-government cooperation, we recommend that the legal framework be revised to ensure a consistent approach to regulating public benefit status. Public benefit status should be equally available to both associations and foundations and prescribe the same benefits and accountability requirements to both. It may therefore be advisable to remove public benefit provisions from separate laws on associations and foundations, and instead prepare a separate law (or tax code provision) on public benefit status. The overarching legal framework should regulate the following issues[12]:

- Definition of public benefit: Define "public benefit" with sufficient breadth to embrace all public benefit purposes which the state may want to support and with sufficient specificity to provide guidance to the decision-making authority.

[12] For more information on European regulatory approaches to all the following issues, please see the TUSEV – ICNL Public Benefit Report 2004.

- Decision-making authority and process: Vest a single government organ with decision-making power and create more efficient, streamlined process for deciding on public benefit status. Ensure that the decision-maker is sufficiently independent of political concerns and is able to exercise an appropriate level of objectivity, professionalism, and expertise relating to civil society. For the sake of consistent decision-making, the designated authority should be tasked with deciding on public benefit status for both associations and foundations.

- Public benefit criteria: Simplify the criteria for achieving public benefit status for both associations and foundations. The appropriate criteria is typically linked with accountability and transparency, such as requirements to create an additional governing body, to file a public benefit report, and to be subjected to an annual audit.

- Accountability requirements: Include sufficient accountability requirements to ensure that public benefit organizations comply with stricter internal governance requirements (e.g., conflict of interest provisions) and heightened reporting requirements (e.g., financial and activity reporting, independent audit).

- Sanctions: Remove restrictions preventing the re-application for public benefit status by associations whose public benefit applications are rejected. The limitation on re-applying is inconsistent with European standards.

- Benefits: Ensure consistent benefits for all public benefit status organizations, whether associations or foundations.

III. Legal Framework for Governmental Partners

The legal framework for governmental partners lacks a comprehensive, consistent approach which would facilitate meaningful partnership with CSOs. Many governmental bodies have certainly engaged in partnership with civil society, but such cooperation depends on occasional, 'informal' practice rather than on consistent policy. As Turkey prepares for membership in the European Union, it is becoming increasingly critical to more clearly define the role of government in cooperation with civil society, and to ensure transparent and accountable cooperation mechanisms, which are accessible to CSOs.

The aim of this section, therefore, is to determine whether there is any legislation that specifically encourages or inhibits state actors to engage in cooperation (joint projects, service delivery) with CSOs. For this part of the review, we examined specifically the

laws on local governments[13], the Law #5072 on Regulating the Relations of Associations and Foundations with Public Institutions and Enterprises, State Financial Management Law #5018, as well as the Law #3294 governing the Social Solidarity and Assistance Foundations (SYDV), and the Law #2828 on the Social Services and Child Protection Agency (SSCPA).

As a general rule, there are few references to CSOs in Turkish laws and regulations concerning local governments, governmental bodies and implementing agencies. There is no overarching legal framework for cooperation. The various provisions in central and local laws regarding CSO/state cooperation are detailed in the section 'Specific Legal Framework for Cooperation".

III.1. Authorization to Engage in Cooperation

Of fundamental importance to the legal framework is the inclusion of an **explicit or implicit authorization for governmental actors to engage in the various forms of cooperation with CSOs**. In some European countries, the basic laws affecting governmental partners (such as laws on state finances or municipalities) are silent regarding the general permissibility of involving CSOs in the provision of governmental duties. However, in these states (e.g., the U.K.) the general principle "what is not prohibited, is allowed" prevails and in fact, several policies and specific laws address various concrete forms of cooperation.

In other countries, laws on state finances, municipalities or public services provision (i.e. generally "high level" legislation) provide explicit reference to the involvement of CSOs in the work of the government. This is typically the case in the new EU member states, where traditionally the understanding has been that all governmental duties shall be provided for by the central or local authorities, and CSOs were (and in many respects, still are) not seen as part of this provision. In these countries it also proved useful to emphasize the possibility of CSO participation because the culture in these countries is such that local authorities refrain from undertaking anything not explicitly authorized by law (i.e. "what is not allowed, is prohibited").[14]

In Turkey, there is a general understanding that cooperation is possible with CSOs and the word cooperation is used increasingly (e.g., in the laws on local governments). However, the concrete meaning, nature and forms of cooperation remain unclear, partly due to the lack of a coherent legal framework for such cooperation.

III.1.1. Central level

As for Turkey, the State Financial Management Law 5018 provides in Article 29 that state agencies/ministries/departments can provide 'assistance' to NGOs as long as that is

[13] Law No. 5302 of 2005 on Special Provincial Administrations, Law No. 5393 of 2005 on Municipalities and Law No. 5216 of 2004 on Metropolitan Municipalities

[14] Thus, in Hungary the State Finance Law, and in Poland the Law on Public Benefit Activities contains such references.

stated in their budgets. This provision is to be seen as a positive element in the legal framework affecting cooperation as it gives **explicit authorization to the government actors to include NGOs in their budgets**. However, this general authorization is not supported by concrete rules that would "operationalise" the relationship. In Hungary, for example, a similar provision in the State Finance Act also includes specific terms of how it can be actualised (e.g., that the responsible Minister shall report on the volume of tenders planned to be supplied to NGOs for the annual budget). It would be helpful, therefore, to define and elaborate more concrete terms of government "assistance" to NGOs at the budget planning level (though not necessarily in Law 5018).

III.1.2. Local level

The laws relating to the three main types of local government (municipality, metropolitan municipality and the special provincial administration) have recently undergone reform and for the first time include specific references to CSO cooperation. This is a critical and important step in CSO/state relations.

At the same time, however, there is a lack of **explicit authorization for the local governments to contract out services to CSOs**. In fact, the use of the general term 'cooperation' is vague and may lead to implementation difficulties. Authorization is provided often indirectly and to a rather limited extent.

- Article 15 of the Municipalities Law defines the powers and privileges of municipalities and asserts that the municipality may "engage in any activity and initiative to meet the local common needs of city residents" (Article 15(a)). This language is sufficiently broad to include government engagement through cooperation with CSOs.
- Further, the same Article 15 (points e-g) provides the possibility of assigning its duties regarding services related to the provision of water, transportation and waste management, to other actors, and subsequently elaborates a procedure for obtaining permission from the Ministry of Internal Affairs in order to do so.
- The Metropolitan Municipalities Law (MML) lists a number of services that may be provided by other actors, mainly pertaining to transportation, building and other works and investments (Article 7 f, g, i, l).
- In Article 7(m) the MML also specifically refers to the possible outsourcing of the construction and operation of social facilities, local parks, zoos, animal shelters, libraries, museums, recreational facilities and the provision of material support to non-professional sports clubs.

In addition, all three municipal laws contain specific provisions on implementing joint projects with CSOs, as well as the participation of CSOs in the local policy development process (see below for a more detailed discussion.).

On the one hand, the foregoing provisions constitute a very encouraging sign that the lawmakers may regard CSOs as potential partners to the local authorities. On the other hand, other than the fact that certain services may be contracted out, there is no explicit

recognition of a possible role for CSOs in providing these services; and the joint projects by themselves are an ambiguous concept (see below, p. 21). Procedures are also ambiguously defined, if at all, which may lead to non-transparent and inconsistent partnership practices and the failure to ensure opportunities for a broad range of CSOs.
In the Turkish environment, where the political/legal environment is similar to that of the new EU member states (i.e. a tradition of centralized, restrictive legal environment), it would be more enabling to include express reference to the possibility that CSOs may engage in the provision of state services at the various levels, and to include more detail regarding the various forms this may take. To include such provisions in the laws on municipalities would likely provide stronger support and incentive for local authorities to cooperate with CSOs at all levels of the administration.

III.2. Supervisory vs. Contracting Role of the State

It is important to distinguish the role of the state as a supervisory agency and its role as a contracting partner. The state usually acts as a regulator towards non-state actors when a licensing scheme is involved[15], in order to protect the public interest (e.g. to ensure minimum professional standards in a health or educational institution). In these cases the competent ministry or other government authority is entitled to act unilaterally – according to legally prescribed procedures – to control and potentially sanction the service provider. However, the state cannot assume a role of unilateral control towards private providers (such as CSOs) acting under contract rather than under a licensing arrangement; instead, as a contracting party, the state's supervisory role is defined according to the contract, and therefore exercised on a case-by-case basis when entering a contractual relationship (with a CSO).

In the Turkish context, on some occasions, the laws provide a **strong supervisory role for the state agencies towards CSOs**. For example, the SSSPC[16] in provision 9(f) states that "the agency should provide oversight and input on NGOs involved in social services to make sure they are engaging in the appropriate activities and allocating their budget responsibly". While state supervision in the case of licensed activities is usually appropriate, this provision authorizes the state to exercise a controlling role toward all NGOs engaged in social services, whether or not acting under a licensing scheme. Without proper checks and balances, incorporated for example in implementing regulations, the SSCPA could lead to excessive and inappropriate state intervention in the NGO's activities.[17]

[15] The state of course has an ongoing regulatory and supervisory role with regard to CSOs in terms of their lawful operation, reporting requirements etc. Here we refer to the various roles it may assume in the actual cooperation with CSOs.
[16] Law # 2828 of 1983 on Social Services and Society for the Protection of Children
[17] Another unclear example related to licensing is Article 26 of the Associations Law, which restricts associations from opening dormitories and lodgings to carry out educational and training activities within their mission objective; as well as opening clubhouses for members and use of alcoholic drinks in these clubs. Of course, licensing requirements may be necessary where accommodation is provided or alcohol is served. However, in Europe, clubhouses are generally understood as meeting places for members - where alcohol may or may not be served - and are normally not under a license requirement. The impact of such

The rationale – the public interest involved - behind the above article are unclear. Nor do we find similar restrictions in the European context. Moreover, these kinds of restrictions seem to belie a fundamental suspicion and distrust of certain CSO activities, which could undermine the ability of CSOs to partner effectively with government.

III.3. The Social Assistance and Solidarity Foundations (SYDV)

The SYDV serves as a major implementing "arm" of the government "to assist the poor and the needy, promote social justice measures and normalize income inequalities".[18] It provides social assistance to citizens that are not receiving other social welfare support from other government agencies through small amounts e.g., for education or job training. It currently operates 931 local foundations across the country.

There are two aspects of the operation of the SYDVs that are especially interesting as regards cooperation. First, this construct is financed from the Social Assistance and Solidarity Incentive Fund that was established by the Prime Ministry. The Fund is resourced by an approved transfer from other funds (up to 10%) with the decision of the Council of Ministers; allocations from state budget; 50% of traffic fines; 15% of the advertisement income from the Radio and TV Authority; donations/assistance/grants; other income (such as 5% from the Handicapped Services division for projects relating to this area, etc.). This kind of **funding scheme whereby a certain percentage of targeted income is channelled for a social purpose** is not uncommon in European countries to fund NGOs. For example, in Hungary, a percentage of the so-called kitsch-tax (special tax to be paid by those supplying publications involving violence or explicit material) is channelled to the National Cultural Fund, which in turn supports cultural, artistic and educational NGOs. In Croatia, 14.5% of the income of the National Lottery is provided for the National Foundation for Civil Society, a grant-making organization to support NGOs. In sum, it might be worth noting that such financing example already exists in Turkey when reviewing the overall financing mechanisms available to ensure the resources for a program of cooperation.

The second interesting aspect of the SYDV is the **involvement of local stakeholders on the Boards of Trustees of the Foundations.** Each foundation is headed by the highest official in the province (governor) or sub-province (sub-governor); Trustees include the mayor, the municipal accountant, the provincial education manager, the health manager, the agriculture manager, the social services and child welfare manager, and a religious authority (government official). In addition, neighbourhood representatives, NGOs, other citizens and philanthropists select up to 2-3 representatives amongst them to be a trustee; and may be invited to the general assembly meetings of the foundation. While the SYDVs are clearly government established and controlled, the intention to include community stakeholders and to achieve broad representation on their Boards is

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procedural restrictions depends on implementation; the permission process should be based on clear and objective criteria.

[18] Law No. 3294 of 1986 on Encouragement of Social Solidarity

commendable and may serve as a good example for future cooperation efforts.

III.4. Law 5072, Regulating Relations of Associations and Foundations with Public Institutions and Enterprises

Law 5072 was enacted to regulate those foundations and associations established to raise additional support (through the receipt of private donations or through self-generated income) for state institutions, such as hospitals, schools, orphanages etc. The intent of the law was apparently to curb abuses and improper practices related to these state-established NGOs. Reportedly, these foundations and associations were using public funds without formal authorization, and raising funds from clients (i.e. parents, patients, other customers) for services rendered by a public institution (which were asked to make a "donation" in return for what is a public service, often regarded as "forced donations"). In addition these foundations set up offices in government buildings and used their resources (staff, vehicles, equipment, etc.) to achieve their objectives, creating unclear boundaries between these NGOs and the state. The Turkish government, through Law 5072, intended to counteract this corrupt practice by severely restricting financial flows between private and public actors (i.e. the citizens as clients *or* donors and the state established foundation).

The original intent of this law and the importance of fighting corruption and preventing conflicts of interest in public services are unquestionable. Regrettably, however, the **actual regulation severely curtails the income generation and partnership possibilities of almost *all* foundations and associations**[19], reaching beyond the presumed original intention of the lawmakers. The restrictions spelled out by the law include:

- *Public institutions can not allocate funds or provide assistance to these organizations from their budgets.* (Article 2.g.) While a legitimate restriction for a concrete organization, by extending the scope of the law to all CSOs, it becomes a severe impediment to cooperation.
- *These organizations are not allowed to make use of any public property (building, car, devices etc.) which belongs to the state*. (Article 2.a.) If applied to all CSOs, this cuts off an important opportunity for government support. Making public property available for the use of CSOs is a common form of in-kind support in Europe.

While this regulation affects CSOs, we chose to include it under the legal framework of the state actors, as it is our belief that the above restrictions should be applied exclusively to organizations established and operating under the public law.

[19] Exceptions include only the Social Solidarity and Assistance Foundation, the Turkish Armed Forces Foundation and foundations established in relation to chambers and trade associations.

It is not uncommon to find nonprofit organizations established by governmental institutions to support or complement their operations. Among examples from other European countries we can refer to the foundations established by laws or on decision of the Parliaments in Germany, or the so-called public foundations in Hungary. In both cases these have a specific legal status: Juristische Personen des oeffentlichen Rechts (legal persons of public law) in Germany; and Outstanding Public Benefit Organization in Hungary. Such foundations operate as independent organizations and are able to raise funds from private donors to support public aims; however they are subject to stricter accountability regulations than "normal" foundations. In Germany they belong under the public law and therefore their budgets are controlled by the state, whereas in Hungary they are regulated by special clauses of the Law on Public Benefit Status and supervised by the State Treasury. As a result, in both cases while their independence is maintained, they cannot circumvent budgetary regulations.

Since Law 5072 constitutes a serious obstacle in CSO/state cooperation, it is vital to revise the Law through a careful "regulatory impact analysis" with the extensive participation of all parties. The revisions will of course depend on the results of such analysis; however ECNL and TUSEV believe that it may be useful to consider the following to reduce the ramifications of this law: (a) to confer a special status on nonprofit organizations (whether associations or foundations) established by governmental institutions so as to differentiate them from private ones; and (b) to eliminate the restrictions posed by Law 5072 on all the foundations and associations currently registered in Turkey, leaving them in force only for those with the special status.

III.5. Recommendations: Legal Framework for Governmental Partners

Regarding Authorization to Engage in Cooperation

- At the Central Level: Support the explicit authorization that state agencies/ministries/departments can provide 'assistance' to NGOs, as contained in the State Financial Management Law 5018, with concrete rules that would "operationalise" the relationship.

- At the Local Level: In the laws governing the three levels of municipalities, include an explicit authorization for the local governments to contract out services to CSOs, define mechanisms and procedures more clearly and in greater detail.

Regarding Supervisory vs. Contracting Role of State

- Revise the SSCPA to limit the power of the state agency in its supervision over NGOs engaged in social services.

Regarding Law 5072

Revise Law 5072 to eliminate what is a serious obstacle in CSO/state cooperation; possibly by creating a special status for foundations and associations established by public entities.

IV. General Principles

In many European countries there is an underlying principle of "modus operandi" that has evolved over time and that determines the overall nature of the relationship between government and CSOs. Such principles define the roles and division of responsibilities of these two sectors vis-à-vis each other and towards the whole society. Importantly, they serve as a basis for the concrete mechanisms and platforms of cooperation that become explicit in the laws and regulations of the country. Two outstanding examples of countries with overarching principles that define the day-to-day relationship between the government and CSOs are Germany and the United Kingdom.

IV.1. Germany: Subsidiarity Principle

The most typical principle of civil society/government relationship, the so-called principle of subsidiarity, originates from Germany and has become widespread in Europe.

According to this principle, **a need that emerges in a community must be addressed by those closest to the need.** As a basis for social policy, this principle has determined the system of financing social welfare services in Germany for the last century. The principle originates with the efforts of the Catholic Church to retain its autonomy and control over the care for its communities under the all-encompassing universal social protection system introduced by Bismarck in the 1870s.[20] According to this system, a need should be addressed by the (informal) community of those affected (e.g., family, neighbours); if they are unable or unqualified to do so, then by the formal organizations of the same community (church, CSOs). The local government may set up a service to address a need only if no organized community effort is already addressing it. For those needs not addressed at the local level, a regional and ultimately a federal system has to be established. In this case, the government usually chooses to finance all of the service provision, with budgets negotiated on an annual basis.

[20] The principle, as understood in the social policy context, originates in the Encyclicals of Pope Leo XIII (1891) and Pope Pius XI (1931), who first explained and elaborated upon the division of tasks between state and church, as well as communities, in improving social conditions.
http://www.ucc.ie/academic/appsoc/hdsp/Pius%20XI,%20Quadragesimo%20Anno%20(15-05-1931).htm

The principle means in practice that when a CSO engages in an activity that is considered to meet a community need (e.g. is included among the lawful obligations of the local government, such as social service provision or education), then **the CSO is entitled** – provided it meets other conditions, such as professional standards or transparency criteria - **to receive proportionate funding for its services**. Such funding is usually determined based on the scope of operations of the CSO, e.g. a per capita support for the clients of the CSO.

IV.2. United Kingdom: The Compact

Another approach can be seen in the example of the United Kingdom, where the government and the voluntary sector concluded an agreement called the Compact, on the national as well as local levels. The Compact is a **framework for partnership** working between Government and the voluntary and community sector. It recognises the contribution the voluntary and community sector makes to the society.

The Compact grew out of two documents: the Deakin Commission Report "The Future of the Voluntary Sector" (July 1996), calling for a formal agreement between the government and the voluntary sector; and the Labour Party document "Building a Future Together – Labour's Policies for Partnership between Government and the Voluntary Sector" (February 1997). In July 1997, a conference of the biggest NGO umbrella organizations confirmed the need for such an agreement. In October and November 1998, after several months' consultations, four National Compacts were signed with the governments of England, Wales, Scotland, and Northern Ireland – the first such documents ever signed. The National Compacts were followed by local agreements signed between the voluntary sector at the local level and local councils or other public bodies.

The underlying principle in the case of the Compact is the partnership between the two sectors in achieving improved conditions in the communities and society at large. In the British so-called "mixed welfare" model, it is the joint responsibility of government and the private (for-profit as well as not-for-profit) sector to improve the quality of life among citizens. Therefore, there is no "entitlement" of CSOs for government support in case they engage in community services, although it is an important element of the Compact that the government "recognises the cost of doing business when funding public service delivery".[21] Instead, **government will tender and contract the service to the CSO that offers service provision at "best value".** In addition, CSOs are often on level competition with private for-profit providers. As a result, financing mechanisms for voluntary organizations in service provision are most often based on open competition and service contract procedures.

[21] Summary of The Compact, www.thecompact.org.uk

IV.3. European Union: Good Governance

Recognizing the increasing importance and influence of civil society, the European Union (EU) has also embarked on a number of initiatives to promote cooperation.

Although understood not in the social service but in the political decision-making arena, the subsidiarity principle is also a generally adopted principle of the European Union, intended to ensure that **decisions are made as closely as possible to the affected citizens**. This means that the Union does not take action (except in the areas that fall within its exclusive competence) unless its action will be more effective than action taken at national, regional, or local level.[22]

Also in regard to policy formulation and decision-making, the EU has developed its **key principles on good governance, which focus on citizen participation and the role of civil society as the key intermediary** (interface) **between political decision-makers and the citizens.** The EU Commission's White Paper on European Governance, adopted on July 25, 2001, focuses on "the way in which the Union uses the powers given by its citizens."[23] In order to promote stronger interaction between civil society and both central and local governments, the White Paper sets forth five underlying principles (openness, participation, accountability, effectiveness, and coherence) as well as general intentions based on those principles (including dialogue, consultations, and partnerships).[24] Significantly, the Commission also commits itself to undertake concrete measures: improving and clarifying European legislation, publishing guidelines, developing standards and criteria, organizing public debates, and developing a code of conduct on dialogue and consultations.[25]

These measures translate into concrete legislative requirements for the member states in the processes of national programming and implementation of the EU policies (e.g. elaboration of the National Development Plans, use and monitoring of the Structural Funds etc.). While not a requirement, most member states have been adopting similar participatory measures for non-EU related national legislation as well so as to demonstrate their commitment to the principles of good governance.

IV.4. Turkey: Current Situation

Based on the legislative review, we have not been able to identify an overarching principle that governs the day-to-day practice of CSO/government cooperation in Turkey.

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[22] http://europa.eu.int/scadplus/glossary/subsidiarity_en.htm.
[23] *EU Commission's White Paper on European Governance*, Brussels, 2001, http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf
[24] *EU Commission's White Paper on European Governance*, Brussels, 2001, p. 10, http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf
[25] *EU Commission's White Paper on European Governance*, Brussels, 2001, p. 19, http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf.

In that respect, the situation in Turkey is similar to the new EU member states, where the overall approach has been that of a centralized state protection system, seeing civil society as either peripheral (to be ignored), rival (to be controlled) or inferior (to be patronized). It has taken a long time, over 10-15 years in many of these countries, to even start to change the basic approach of the state administration towards civil society organizations and help them recognise the potentials of a partnership-based, mutually beneficial relationship. Without doubt, such change in attitude is also needed from the side of civil society, which traditionally views the government with distrust in these countries.

IV.5. Recommendation: General Principles

We recommend that the Turkish Government work with Turkish CSOs to define and establish an underlying principle of "modus operandi" that will determine the overall nature of the relationship between government and CSOs. Developing legal principles in a participatory manner is a time-consuming process even when there is a trusting relationship among the parties. Nevertheless there are several advantages to undertaking this process at a time when the country is undergoing fundamental reform in all aspects of its governance. The major advantage would be that such a process could create a basis for fruitful and mutually beneficial collaboration among government and civil society at large. From a policy and legislative point of view, in addition, determining these principles would provide **a coherent policy framework for a transparent and effective system of financing CSOs as well as for their effective involvement in service delivery and decision-making.**

V. Specific Legal Framework for Cooperation

Although the legal framework for governmental partners remains in need of comprehensive reform, we are encouraged by the recent introduction of specific laws and regulations relating to cooperation between the public sector and civil society. These provisions have been introduced primarily at the local level (municipalities, governorships, etc.), which is critical to support decentralization of service provision in Turkey. In addition, the recent adoption of regulations and guidelines for the preparation of legislation has for the first time referenced NGOs as a consultative stakeholder. Although these provisions require additional detail and guidance on implementation (to ensure that 'principles' take root in 'practice'), the Government of Turkey should be commended for its efforts to include participatory practice as part of its culture of public administration and management.

This section therefore aims to review the concrete "mechanics" of cooperation, including the forms of such cooperation and potential or existing mechanisms for funding the cooperation activities. We also address here the issues of CSO participation in the policy making process.

As a general finding it may be said that the main mechanism that can be identified in the written law of Turkey is a so-called "joint service/project". Beyond this kind of partnership, there is no distinction between the potential role of CSOs as service contractors or grant recipients; neither is there a clear funding mechanism or procedure to channel governmental support to CSO partners. As for participation in the policy and legislative process, there is an encouraging trend of including CSOs among stakeholders to be consulted both at the national and local level. Despite that positive trend, the legal framework lacks implementation procedures that may serve as a guarantee for effectiveness of participation.

V.1. Joint Projects in the Association Law

Article 10 of the Law on Associations allows associations to carry out joint projects with public institutions and corporations. State institutions, however, are restricted to cash or in-kind contributions that do not exceed 50% of the cost of the project.

According to Article 91 of the Regulations on Associations, each joint project should be carried out in the framework of a signed protocol and under the authority of a project management team, with an equal number of representatives from the state and association. The association should supply both the project team coordinator and the accountant. The team shall submit a copy of the protocol to the governorship within one month of the protocol date. Again, the Regulations emphasize that state funding for the joint project is limited to 50% of the project costs.

To accomplish some projects, the approach defined in Article 91 may be perfectly appropriate. It is **unlikely, however, to facilitate effectively the wide range of potential partnerships that the state is likely to pursue with associations.** While it is generally laudable to insist on a project management team with equal representation from both parties, there may be cases where this is not feasible. It may not always be practicable for the association to provide the project team accountant. There may be occasions when the state would want to provide more funding to accomplish a public purpose in partnership with an association. Thus, the existing Regulation may well constrain partnerships with associations.

While in most European countries there will be some limitations on government funding of NGOs in the case of specific mechanisms (e.g., a certain grant scheme will not fund more than 60% of the total costs of the project), we have not identified any comparative example from an EU country where the limitation would be a general one, thus applicable to and potentially limiting all joint activities.

V.2. Joint Service Projects in the Municipal Laws

In all three laws governing the provincial and municipal administration, there are references to "joint services and other projects" carried out with other – domestic or international, private or public – organizations. These references all explicitly include associations and foundations as well.

A Summary Table and the analysis of these provisions are included here.

	Municipality Law (ML)	Metropolitan Municipality Law (MML)	Special Provincial Administration Law (SPA Law)
Allowable expenses.	**Article 60 (m)** Expenses of joint services and other projects executed in cooperation with domestic and international public, private sector and non-governmental organizations.	**Article 23 (n)** Expenditures on mutual services and other projects conducted jointly with domestic and foreign public and private institutions and non-governmental organizations.	**Article 43 (l)** Expenses of joint services and other projects executed in cooperation with domestic and international public, private sector and non-governmental organizations.
Relations with other institutions	**Article 75** (c) Execute joint service projects with public professional organizations, associations working for the interests of the public, foundations exempted from tax through a Council of Ministers decree and professional chambers covered by the Law No. 507 on Tradesmen and Small-Sized Artisans.	No specific provision regarding joint projects with NGOs. However, based on **Article 27** – in cases, for which this Law does not provide a resolution, the provisions of the Law of Municipalities and those of other laws regarding the municipalities will apply - Article 75 (c) of the municipality law may be applied.	**Article 64** (c) Execute joint service projects with public professional organizations, associations, foundations and professional chambers covered by the Law No. 507 on Tradesmen and Small-Sized Artisans.

V.2.1. Definition of joint service projects

We have not been able to determine a clear definition of "joint services and other projects". The municipal laws may be referring to the same concept of "joint projects" as described above in the Law on Associations and Regulations. However, applying that interpretation to foundations and other actors would imply a rather restricted practice of

cooperation at all levels of municipal administration. Therefore it is more likely that the term serves as an all-encompassing expression of cooperation among the local governments and a range of non-state actors.

Although lacking detail and distinction between the various forms of cooperation, such a broad definition may not be a problem in itself. However, the same challenge appears that this Report referred to in relation to the regulation of the overall framework: that is, the lack of implementation guidelines. An **overly broad approach may overlook the actual opportunities** for cooperation, especially in a country where such cooperation is a relatively new phenomenon.

It may therefore be found useful by both parties to elaborate in these laws or other laws on the concrete forms of cooperation. A simple listing of a "menu" may serve as a guide as to what are available options to both municipalities and CSOs. As an example, we are providing the relevant Article from the Polish Law on Public Benefit Activities:

Article 5

1. "Public administration organs perform activities in the field of public tasks that are mentioned in art. 4[26] in co-operation with non-governmental organizations and entities mentioned in art. 3 par. 3[27], which perform public benefit activities, taking into consideration the territorial division of public administration bodies. In particular, the co-operation may be conducted in the form of:

1) commissioning non-governmental organizations and entities mentioned in art. 3 par. 3 to perform public tasks according to the rules set by the Law;

2) mutually providing information about planned directions of activities and co-operation in order to harmonize these directions;

3) consulting with non-governmental organizations and entities mentioned in art. 3 par. 3, according to their scope of activities, regarding legislative projects in the fields related to the statutory activities of such organizations;

4) establishing mutual teams responsible for advising and initiative that consist of representatives of non-governmental organizations and entities mentioned in art. 3 par. 3 and representatives of relevant public administration bodies."

V.2.2. Distinction between public benefit and non-public benefit CSOs

The three municipal laws are inconsistent in applying public benefit status as a criterion for cooperation in the joint projects. Public benefit status is not mentioned among the

[26] This refers to a list of public benefit activities.
[27] This refers to church institutions and associations of local governments.

criteria for government spending (i.e. allowable expenses) as a basis for the transfer of funds. Public benefit status is, however, included as a criterion for cooperation in the ML, but in contrast, is omitted from among the cooperation criteria in the SPA law.

In European countries, the status of public benefit is usually not a condition to cooperate with government. Such status primarily serves as a condition to receive tax exemptions and other indirect state benefits; in addition it may lead to easier access to government funds (e.g. some central government grant schemes may only be available for public benefit organizations). At the local level, however, even such preferences are rarely found.

V.2.3. Lack of legislation relating to financing of CSOs by local governments

Although all three municipal laws list among the allowable expenses the costs of running joint projects with CSOs, there is no further mention of how such expenses might occur; i.e. in what form can the municipality channel funds to CSOs. Nor did we find reference to the existence of such mechanisms (legally prescribed) in other laws. This led to the conclusion that public financing of CSOs, and especially at the local level is under-regulated.

The two main, most basic forms of financing CSOs at the local level are grants and service contracts. From our review we had difficulty identifying any CSO-specific provisions related to either of these forms. Article 30 of the SPA Law provides that the governor may make "unconditional grants" to the needy (likely individuals rather than CSOs). As for contracting, we referred to the contracting possibilities described in Article 15 of the ML and Article 7 of the MML. Since local authorities come under the scope of the Law on Procurement, and no other contracting mechanism is described in the law it is assumed that they realize these contracts through regular procurement procedures. Practically speaking, however, many NGOs are not qualified to enter such tenders; they may lack the institutional capacity or the required turnover or collateral; and most typically, the tenders are issued for entrepreneurial activities rather than non-profit activities.

As a legislative example, the PBA Law in Poland defines these two main forms of financing in the same Article where it listed the forms of cooperation:

Article 5

> 4. "Commissioning public tasks, which are mentioned in par. 1 point 1 – as commissioned tasks described by art. 69 par. 4 point 1 letter d) and art. 71 par. 1 of the Law on Public Finances may be implemented in the following forms:

1) commissioning public tasks, which is accompanied by expenses to finance its implementation or

2) supporting such tasks, which is accompanied by expenses to participate in their financing."

The Law then elaborates on the concrete ways of implementing these two financing schemes, including rules for issuing open tenders, determining the criteria, decision-making, contracting and monitoring performance in both cases.

It is worth noting that the Law also **provides to NGOs the opportunity to make an offer to perform public tasks on their own initiative**, i.e. without a tender; including those tasks that until then have been performed usually by public administration bodies. The local government is then obliged to review and evaluate the offer and in two months deliver a justified decision on whether it will accept it or not. Such decision may be appealed by the NGO. This legal provision increases the potential for actual cooperation as it encourages CSOs to initiate the cooperation process.

ECNL and TUSEV recommend that **legal provisions be drafted to identify the key forms of financing CSOs as well as to elaborate the concrete rules for implementing contracts and grant schemes.** These procedural rules are indispensable for the transparent and accountable expenditure of public funds.

V.3. Participation of CSOs in Government Decision-making

Participation in decision-making is both an important form of cross-sectoral cooperation and a pre-condition to effective partnership in service and project delivery. By having direct input and influence in policy development, CSOs will be better positioned to partner with the government in the implementation of those policies. In fact, there are several advantages for the governmental that stem from such participation: increased ownership by CSOs, and through them, target constituencies; this also results in less resistance in implementing the policies; access by the government to additional information and expertise in the given field; and overall a higher quality policy process.

However, there are obvious disadvantages as well, namely that consultation is time-consuming and creates additional burdens for the administration. For these reasons, it is often not sufficient to simply declare the opportunity for CSOs to participate in the decision-making. Unless there is an obligation and clear procedures, any state bureaucracy will naturally tend to reduce those opportunities -- even more so in countries where civil society is not strong enough to push for the realization of a potential presented by law.

Based on the very recent publication of a Regulation for Procedures and Guidelines in Preparing Legislation (Decision No. 2005/9986, 17 February 2006), Turkey now has in its legal framework an explicit mention of the involvement of NGOs in decision-making at both the central and the local levels. At the same time it continues to lack at both levels the concrete mechanisms that will make such involvement meaningful.

V.3.1. Central level

Regulation for Procedures and Guidelines in Preparing Legislation (Decision No. 2005/9986). Published as of 17 February 2006, the new Regulation defines procedures for preparing legislation, and in its 6th provision, includes 'permission' to consult NGOs, universities and local government offices on draft laws.

Although it is void of any binding requirements on procedural issues (for publishing drafts, obtaining feedback, etc.), it is the first time NGOs are formally recognized in a national level 'framework' regulation (and not only those of specific Ministries, local or central government agencies which in some cases refer to some type of participatory engagement of NGOs in policy development processes).

As such, this is an important first step in the right direction in terms of participatory processes in legislation and as expected, brought about by the extensive EU reform and acquis adoption process, which is to take place over the next 10-15 years.

Some of the foreseeable problems in implementation include: 1) No binding requirements for a concrete form of engagement – for example, no procedures prescribed to share draft laws[28]; 2) No guidance as to how NGOs should be consulted so potentially only a limited circle of select NGOs could be included in the process; and 3) Lack of an official definition of the term 'NGO' as used in this law which in other laws, as seen above, is usually referred to specifically as 'association and foundation', 'trade union' and 'chambers of commerce'.

V.3.2. Local level

The three municipal laws analysed above all have incorporated reference to NGOs along with other stakeholders (such as professional organizations, labour unions, universities etc.). These provisions ensure the participation of CSOs in local decision-making at basic level.

	Municipality Law (ML)	Metropolitan Municipality Law (MML)	Special Provincial Administration Law (SPA Law)
Participation in assembly and its expert committees	**Article 24-** NGOs "relevant to the subjects on the agenda" may join expert commissions along other non-state stakeholders, without	**Article 11-** NGOs may join assembly and/or special commission meetings to express opinions but have no voting rights.	**Article 16-** Establishment of some commissions (social services, health, plan/budget, etc.) is mandatory.

[28] Whereas NGOs are required to give feedback within 30 days, there is no mention of an advance notice period required by government agencies to give NGOs enough time to prepare comments.

	voting rights. **Article 76 City Councils.** City Councils are advisory and may be established upon the initiative of the stakeholders (professional organizations, labor unions, universities, NGOs and others). Municipality shall "provide assistance" to them and is obliged to put on its agenda issues raised at the City Council.	**Article 14:** Committee reports will be open to public and communicated to public through various ways, and will be delivered to whoever orders them for a price to be set by metropolitan municipal assembly. The City council provision applies also to MML but the draft regulation of the city council only includes NGOs with public benefit status	NGOs may attend along with other non-state stakeholders and express their views in the meetings of expert commissions in which their respective matters are discussed, without any voting right.
<u>Involvement in strategic plans and development plans</u>	**Article 41**- Mayor required to prepare/submit strategic plans to municipal council and by law asked to consult other stakeholders that include NGOs. "The strategic plan shall be prepared upon receiving the views of universities, professional organizations and relevant non-governmental organizations and shall take effect after being approved by the municipal council."	No specific mention of strategic plans but **Article 41** of Municipality Law may apply to Metropolitan Municipalities as well, as per **Article 27.**	**Article 31-** Governor shall prepare and submit to the provincial council development plans and programs and a strategic plan in conformity with the regional plan, if any, as well as annual performance plan. "The strategic plan shall be prepared upon receiving the views of universities, professional organizations and relevant non-governmental organizations and shall take effect after being approved by the provincial council."

V.3.3. Expert commissions

There is no mandatory requirement to invite NGOs to the expert commissions although all three laws envision their participation. In these cases, however, there are also limitations voiced, e.g. only those NGOs may join that are relevant to the subject on the agenda, or they may join the commission in which their matters are discussed. This seems somewhat discriminatory in the light of the fact that the same limitations do not apply to other stakeholders. The more challenging issue is, however, how the municipalities will determine which NGOs may be invited. Based on the experiences of the new EU member states it is helpful to provide additional guidance to the local councils in this regard; at least to assert that **the principles of openness and transparency should be observed in this process.** Otherwise, as we have seen on several occasions in transition countries, some NGOs may monopolise access to the local council and the inclusive intent results in de facto exclusion of the rest of CSOs.

V.3.4. Strategic plans

The concept of municipal planning in terms of strategic and long-term development plans is a relatively new one in Turkey. It is therefore expected that it will take time to internalise the process and develop best practices not only with regard to CSO participation but also in the overall planning process. As the municipal laws contain the requirement of including CSOs and other important stakeholders in the process, this will also become an integral part of the planning process. Again, the "devil is in the details" – the effectiveness of such inclusion will depend on how the process is managed among all parties involved. However, it may be feasible to **include as an explicit part of the development plans a component relating to cooperation among the local authorities and local CSOs.** In the U.K., the locally negotiated Compacts and Codes of Good Conduct are in essence strategic frameworks that serve as the basis for cooperation in the development of the local communities. In Poland, the cited PBA Law includes an obligation for local governments to elaborate a "Program of Cooperation" among those performing public benefit tasks in the municipality, including NGOs. If the cooperation proves successful in the development of such strategic approach, it is likely that this success will "trickle down" to the day-to-day communication and participation issues, such as attendance of committee meetings.

V.3.5. Budget planning

A key element of local cooperation and participation is in fact the ability of citizens and CSOs to understand and provide input to the budget planning process. It is stated in the respective municipal laws that the strategic plan and related plans shall constitute a basis in the preparation of the budget and shall be adopted after being debated prior to the budget by the provincial council.[29] It is commendable good practice to take the strategic plan as the basis for the annual plans and the budget. However, the budgeting process is a separate, equally important process that determines the daily lives of local

[29] ML Article 62, MML Article 45

communities. Therefore it is equally important to conduct that in an inclusive and participatory way, which is currently not envisioned in the municipal laws.

V.3.6. Development Agencies[30]

As Turkey has been included in the pre-accession phase of the European Union, it has started to adopt the key institutional infrastructure that will enable it to become an integral part of the EU level planning and implementation processes. Among such infrastructure, the Regional Development Agencies (RDA) play a pivotal role as they determine in the first instance the needs and priorities that will be channeled up to the national and then EU level for financial support. In recent legislation adopted on the RDA, NGOs are included as members of the Councils along with other stakeholders. However, their status is still in question as to whether they will have voting rights, and as to how their participation will be determined. CSO participation in RDA is a routine practice in all EU member states although the effectiveness of their participation varies. Experience has shown that it is particularly important to clearly define selection procedures, participation criteria and rights and responsibilities of CSO members of the RDA in the new EU member states that are only now learning the workings of this mechanism.

V.4. Recommendations: Specific Legal Framework for CSO/State Cooperation

Regarding Joint Projects in the Association Law

Revise Article 10 of the Law on Associations and Article 91 of the Regulations on Associations to remove the 50% public funding limit for associations and to allow for greater flexibility of program management. The current restrictions are unlikely to facilitate effectively the wide range of potential partnerships that the state is likely to pursue with associations.

Regarding Joint Service Projects in the Municipal Laws

- Definition of Joint Services. Revise the relevant provisions in the municipal laws to more clearly define the meaning of "joint services and other projects". The breadth and vagueness of the definition may lead to missed opportunities. We therefore recommend that the laws be revised – or implementing regulations be issued – to detail more concrete forms of cooperation.
- Use of Public Benefit Status as Criterion for Funding / Joint Projects. Revise the three municipal laws to ensure a consistent approach toward public benefit status as a criterion for cooperation in the joint projects. Indeed, according to

[30] Law No. 5449 of 2006 on the Establishment, Coordination and Duties of the Development Agencies

international practice, public benefit status is typically not used as a criterion for CSO/state cooperation. We therefore recommend removing reference to public benefit status in connection with funding and joint projects.

- Local Government Financing of CSOs. We recommend that legal provisions be drafted to identify the key forms of financing CSOs as well as to elaborate the concrete rules for implementing contracts and grant schemes. These procedural rules are indispensable for the transparent and accountable expenditure of public funds.

Regarding the Participation of CSOs in Government Decision-making

- At the Central Level: Revise the recently issued *Regulation for Procedures and Guidelines in Preparing Legislation* (Decision Number 2005/9986) to include (1) binding requirements for a concrete form of engagement – for example, procedures prescribed to share draft laws; (2) guidance as to how NGOs should be consulted to ensure an inclusive, participatory process; and (3) an official definition of the term 'NGO' as used in this regulation which in other laws, as seen above, is usually referred to specifically as 'association and foundation', 'trade union' and 'chambers of commerce'.

- Expert Commissions. Revise municipal laws to remove limitations on which NGOs may join the expert commissions, as similar limitations do not apply to other stakeholders. Provide additional guidance to the local councils regarding how to determine which NGOs to invite; at a minimum ensure that the principles of openness and transparency are observed in the process. Consider whether or not to include a mandatory requirement to invite NGOs to the expert commissions.

- Budget Planning. Revise the municipal laws to allow for CSO participation in the budget planning process, with sufficient guidance to the local governments to ensure an inclusive and participatory process. A key element of local cooperation and participation is in fact the ability of citizens and CSOs to understand and provide input to the budget planning process.

- Regional Development Agencies (RDAs). Recognizing the pivotal role played by RDAs, we recommend that the law clearly define selection procedures, participation criteria and rights and responsibilities of CSO members of the RDAs.

Annex
List of laws and documents reviewed, bibliography and references

Key related legislation

Law No. 2762 of 1935 on Foundations

Law No. 2828 of 1983 on Social Services and Society for the Protection of Children

Law No. 3294 of 1986 on Encouragement of Social Solidarity

Law No. 4721 of 2001 on Turkish Civil Code

Law No. 4734 of 2002 on Public Procurement

Law No. 5018 of 2003 on Public Financial Management and Control

Law No. 5072 of 2004 on Regulating Relations of Associations and Foundations with Public Institutions and Enterprises

Law No. 5253 of 2004 on Associations

Law No. 5216 of 2004 on Metropolitan Municipalities

Law No. 5302 of 2005 on Special Provincial Administrations

Law No. 5393 of 2005 on Municipalities

Law No. 5449 of 2006 on Development Agencies

Decree Law No. 227 of 1984 on the Establishment of General Directorate of Foundations

Statute of Foundations of 1970

Regulation Draft for City Councils, 2005

Regulation for Procedures and Guidelines in Preparing Legislation (2005 decision Number 9986)

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TUSEV and ICNL (2004) 2: *Comparative Report on Turkish Foundation Law Provisions,* TUSEV, Istanbul, September 2004.

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