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Comments to the draft Act on Transparency of Civil Society Organisations of the Netherlands[1]

Developed by the European Center for Not-for-Profit Law (ECNL) Stichting as of February 19, 2019

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Executive Summary

ECNL Stichting respectfully submits its comments to the draft Act on the Transparency of Civil Society Organisations. In the development of this analysis, ECNL consulted with Dutch law experts and CSOs, as well as with the Donors and Foundations Network in Europe (DAFNE)/the European Foundation Center (EFC) and Data Protection Support and Management (DPSM).

The draft Act, if passed, would require all civil society organisations (CSOs) operating in the Netherlands to publish so-called 'donor overviews' either directly on their web site or via the Commercial Register. These overviews would include, among others, private information (i.e. the names and places of residence) of all donors whose donations reached or exceeded 15,000 EUR per year. The failure to do so would be sanctioned under the Economic Offences Act.

Given the wide scope of the draft Act, its adoption will very likely impact a large number of donors, who would find themselves in the impossible situation of wanting to fund certain CSOs, but at the same time wishing to protect their private lives. This would have serious repercussions on individual donors' willingness to spend funds on CSOs and their activities, which would jeopardize the ability of CSOs to implement projects and activities, including those helping people in need.

From the Explanatory Memorandum, it is clear that the drafters of this new legislative proposal took international and European standards into consideration, and sought to ensure compliance with relevant international instruments, notably the European Convention on Human Rights (ECHR). We welcome this diligent approach. Nevertheless, based on our expertise, a few concerns still remain regarding the full compliance of the draft Act with European and international standards including European Union (EU) law and the ECHR, as well as the International Covenant on Civil and Political Rights (ICCPR) and Financial Action Task Force (FATF) recommendations.

While preparing this analysis, we have taken into consideration recent initiatives of other EU countries to enhance the transparency of funding of CSOs. In some of these cases, notably Hungary and Romania, European institutions[2] have provided guidance which unequivocally criticises regulations that are disproportionate to the intended aims and actual needs of the respective countries.

General concerns with respect to the draft Act include:

- The draft Act does not seem to follow a risk-based and proportionate approach – instead it proposes a measure that would target all CSOs. The Venice Commission, the FATF and European Union Directive 2015/849, on the other hand, all require that legislative measures that restrict human rights follow a risk-based approach, which starts by identifying a specific risk and involves proportionate observance and investigations of individual CSOs affected by the identified risk, rather than supervision of all organisations. Evidence from similar approaches in legislative proposals from other countries, notably Hungary and Romania, shows that this may not only be counter-productive or ineffective to the intended aims of such laws, but that it will also affect individual rights.

[2] These include the European Union, the Council of Europe's Expert Council on NGO Law and European Commission for Democracy through Law (Venice Commission), at times jointly with the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE).

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- Further, the draft Act appears to turn on its head the general rights-based approach that the Netherlands has subscribed to in its Constitution and ratified international instruments: instead of treating the right to privacy as the general rule and the disclosure of private details as the exception, the draft Act creates a situation where the disclosure of private information becomes the rule, and the right to privacy the exception, which is granted only upon request or by further discretionary regulatory measures of the Executive.

- Finally, instead of focusing on how funds received by CSOs are actually being spent, and whether the activities supported by such funds are compliant with the laws and Constitution of the Netherlands, the draft Act zeroes in on the amount of money received by the organisation, which, by itself, may not appear to be of much help in the fight against serious crimes.

Specific concerns include:

(1) The draft Act interferes unduly with the fundamental right of freedom of association including the right to access and disburse resources, as enshrined in the ECHR and the Charter of Fundamental Rights of the European Union (CFR), in particular the right to freedom of association. The new law could prevent CSOs from raising funds and would restrict their ability to carry out their activities.

- The draft Act does not seem to be in line with European standards concerning the legality and foreseeability of legislation. According to case law of the European Court of Human Rights (ECtHR), legislation must be clear and foreseeable, so that individuals wishing to apply the law will know how to do so and will know which behaviour leads to which consequences. Here, the draft Act foresees exemptions for certain CSOs to the new reporting and disclosure obligations, and to new reporting obligations for foundations, but does not include the criteria for such exemptions in the draft Act. Instead, the draft Act states that these criteria will be determined in future by-laws. Also, the draft Act states that if the disclosure of a donor's name and place of residence would endanger his/her safety, the Minister for Legal Protection may issue an exemption for this donor; the reasons and criteria for this exemption are also not mentioned in the draft Act. This is not in line with the above principles of legality and foreseeability of legislation.

- The aims and measures proposed in the draft Act will likely not be fully legitimate, nor are they necessary or proportionate according to the requirements set out in the ICCPR and ECHR. While the Explanatory Memorandum lists several aims, which are considered legitimate aims under the ICCPR and ECHR, preventing undesirable behaviour, i.e. the influence of certain donors over CSOs, does not fall under the legitimate aims listed in the ECHR, also due to the vague nature of this term. CSOs have the right to choose their own donors and donors/foundations also have the right to give funding to CSOs. This is part of their right to freedom of association.

  Further, the need to pass legislation that impacts civil society per se so strongly, is not enumerated clearly in the Explanatory Memorandum. It is unclear why the requirements set out in existing legislation are insufficient to combat serious crimes such as money laundering or terrorism financing, and how publishing personal information of certain donors will facilitate oversight over CSOs. Even if certain donors may be seen as "undesirable" in terms of their actions and views, this, and the mere fact that they are supporting a certain CSO

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would, by itself, not necessarily have a negative impact on the CSOs that they fund. The potential effect of restricting CSOs' access to resources ultimately may also infringe their right to association established by Article 12 of the CFR.

Moreover, given that many potential donors could reach or pass the threshold of 15,000 EUR (even those that donate smaller sums on a monthly basis), the proportionality of the measure, which impacts the entire civil society sphere, but is directed at only a few potentially suspicious or at-risk cases, remains in doubt. It is equally uncertain whether treating violations of the draft Act as economic offences (i.e. criminal offences) is per se proportionate.

(2) The draft Act will likely restrict the free movement of capital as guaranteed under EU law – in other words, the flow of capital via donations from individual donors from EU Member States towards CSOs based in the Netherlands. This is because the draft Act affects the donors' right to privacy and as such is likely to have a chilling effect on donors and make it more difficult for Dutch CSOs to access funding from other EU Member States. Dissuaded donors are more likely to shift their donations to other CSOs based in EU countries with less discouraging legislation.

(3) The provisions of the draft Act also appear to be incompatible with the General EU Data Protection Regulation (GDPR), particularly with regard to:

- Article 9 (processing and publication of special categories of data), since it is inevitable that publishing the personal data of individuals who support a particular CSO will also publicly reveal details about some of these special categories of data, in contravention of their fundamental rights;
- The risk-based approach required by the GDPR (Recitals 75-78) – which obliges CSO to evaluate the risks involved for the rights and freedoms of their donors when they receive and process their personal data – and the transparency requirements (Article 12 and 13 GDPR), which oblige CSOs to describe those risks as objectively as possible to their donors when they are about to process their personal data. Since individual donors donating to a controversial or unpopular cause may well be at risk of reprisals, the obligation to publish their names and places of residence, with the risks that this may entail for their safety, would likely have a significant chilling effect on them and consequently on the CSOs' ability to raise and disburse funds.

(4) Individuals and CSOs' right to privacy may be compromised and in turn this will likely affect donations to CSOs. As stated above, the further reporting and disclosure requirements of the draft Act would affect the private lives of the affected donors and protection of personal data (protected under the ICCPR, ECHR and CFR). Also here, the right to private life may be limited by a law that follows a legitimate aim, if the law is necessary and proportionate. With respect to the legal basis and the legitimacy of the aims, the same considerations apply as above. At the same time, the need to expose the private information of a wide range of individuals in order to protect national security, prevent disorder or crime, or protect the rights and freedoms of others is not outlined clearly in the Explanatory Memorandum. Similarly, such a measure cannot be proportionate, bearing in mind that the names and places of residence of the affected individuals will remain public for a period of 7 years, as part of a fight against crime that is, after all, the main responsibility of the state, and not of individual citizens. This could well expose

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these persons and make them vulnerable to threats and harassment in a way that is not compliant with their rights to privacy.

In conclusion, while we welcome the openness of the Government of the Netherlands, and its willingness to consult widely on the proposed draft Act, numerous concerns remain regarding the requirements that the draft Act would impose on CSOs. In particular, we believe that the draft Act and the requirement to publish donor information of all persons whose cumulative donations in a given year reach, or exceed 15,000 EUR in the public domain is neither necessary nor proportionate to achieve the stated aims.

Rather than adopting such a blanket approach, similar goals could be achieved by, e.g., introducing carefully considered reporting requirements on the spending of the funds by CSOs in proportion to specific identified risks that would not, however, involve publishing personal details of individuals. We remain open to further engagement in this matter with the Government, civil society and other stakeholders, and are ready to provide further expertise as needed.

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I. Introduction

In the second half of 2018, the Dutch Ministry for Legal Protection opened a draft Act on Transparency of Civil Society Organisations for consultations. Comments can be submitted until 22 February 2019.

According to the Explanatory Memorandum, the aim of the draft Act is to enhance the transparency of funds flowing from both international and domestic donors to Dutch civil society organisations (CSOs),[3] as well as foreign CSOs operating in the Netherlands to avoid "undesirable influences" on such organisations. In this context, the Explanatory Memorandum refers in particular to funds flowing to "religious and ideological organisations" from certain undemocratic countries, which could increase outside influence in such organisations and lead to the abuse of rights and potentially criminal behaviour.[4] The Explanatory Memorandum also refers to other aims such as enhancing public security, the prevention of disorder and criminal offenses and the protection of the rights and freedoms of others and, more specifically, combatting crimes like tax or bankruptcy fraud, terrorist financing or money laundering, or incitement to hatred or discrimination.

To achieve these aims, Articles 2 and 3 of the draft Act introduce additional reporting requirements to those that Dutch organisations are already obliged by law to fulfil. Specifically, all CSOs need to provide annual overviews of received donations (monetary and in-kind) that reach or exceed a threshold of 15,000 EUR per year, complete with the names and places of residence/seats of the donors. The draft Act also requires CSOs to publish these overviews, either on their own websites, or via the Chamber of Commerce (see Article 2 par 5); the overviews are to be kept directly and permanently accessible for seven years (Article 2 pars 5 and 6). In case the overviews remain public after this time, then the personal data contained therein shall be removed (Article 2 par 5). The public prosecutor's office and any interested party may demand that a CSO fulfil the transparency and disclosure requirements. Any violations of the law will be seen as economic offences, which may lead to sanctions such as detention, community service or fines.[5]

The draft Act foresees two ways for CSOs to be exempted from these requirements: (1) CSOs affected by the new reporting and disclosure requirements may request the Minister for Legal Protection to exempt individual donors from the disclosure requirement if this is necessary in the interests of these donors' safety (Article 2 par 7) and (2) certain CSOs may be fully or partially exempted from the disclosure obligations altogether pursuant to administrative regulations based on criteria that remain to be determined after the adoption of the Act (Article 2 par 10).

Further, Article 3 of the draft Act proposes changes to the Civil Code for foundations that are not already required to draw up financial statements according to the Code. The latter category of foundations would be required to publish their balance sheets and statements of income and expenditure, by submitting said documents to the Commercial Register. These documents will then be publicly available for seven years (Article 3 par 4). The public prosecutor and interested parties can demand fulfilment of

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[3] According to Article 1 of the Explanatory Memorandum to the draft Act the term CSO includes associations, foundations and churches.

[4] See Explanatory Memorandum to the draft Act.

[5] Article 4 of the draft Act also seeks to add the draft Act and amended parts of the Civil Code (once adopted) to the list of laws that fall under the purview of the Economic Offences Act. This would mean that violations of the respective laws will be treated as 'economic offences', leading to sanctions as set out in the Economic Offences Act.

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these obligations (Article 3 par 5), and under a future by-law, following conditions that still remain to be determined, foundations may be partially or fully exempted from the above requirements (Article 3 par 6).

ECNL hereby submits the following analysis of how the draft Act complies with international and European standards regarding freedom of association and privacy. In the development of the analysis, ECNL consulted with Dutch law experts and CSOs, as well as with the Donors and Foundations Network in Europe (DAFNE)/the European Foundation Center (EFC) and Data Protection Support and Management (DPSM).

II. Possible Negative Effects of the Draft Act

After reviewing the draft Act, ECNL is concerned that it may have a negative impact on CSOs, individual donors and the general public:

(1) the obligation to publish the names and places of residence of certain donors on an annual basis is likely to have a chilling effect on donors and could lead to a severe drop in donations for many CSOs. Currently, it appears that CSO in the Netherlands are not obliged to publicly disclose the amounts received, or the names and places of residence/seats of their donors. The draft Act would change this, and it would expose personal details of organisations' donors to the public for a period of at least seven years. This may lead to a considerable reduction of such funding if donating individuals not wishing to see their names and places of residence published online reduce their donations or discontinue them altogether. For example, donors often donate to causes linked to their passions or concerns and may not wish the public to know that they are associating themselves with a particular issue. Or they may not wish the public to know how many resources they have to donate. The law will affect not only big donors but also individual donors, who give on a monthly basis and whose combined contributions may at the end of the year exceed the established threshold.

(2) As a result, some donors may face a higher risk of harassment and attacks on their reputation or even their physical well-being as a result of the forced disclosure of information on their donations.

(3) Also, people in need may not be able to obtain vital services that certain CSOs provide because of reduced philanthropic funding to support such services.

III. Analysis

From a human rights law point of view, the two main concerns with respect to the new draft Act relate to its impact on the rights of the affected CSOs (primarily the right to freedom of association) and the rights of the donors whose names and places of residence would be published (the right to private life). Both rights are set out in key international human rights instruments signed and ratified by the Netherlands, namely in Articles 22 and 17 of the International Covenant on Civil and Political Rights (ICCPR), and in Articles 11 and 8 of the European Convention on Human Rights (ECHR).

In addition, the draft Act was also reviewed from the perspective of its compliance with European Union (EU) law, specifically the EU's General Data Protection Regulation (GDPR) (see attached analysis) and the Charter of Fundamental Rights of the EU (CFR) – whose Articles 7, 8 and 12 include the right to privacy, the protection of personal data and the freedom of association – as well as with the fundamental freedoms (capital, goods, services and people) established in the EU Treaties. Article 52 of the CFR also reiterates that any restrictions on the rights and freedoms acknowledged therein must be subject to the principle of proportionality and necessity for the pursuit of a legitimate interest; the meaning and scope of such rights are the same as those laid down by the ECHR.

Finally, the Explanatory Memorandum specifies that one of the aims of the draft Act is to protect organisations against money-laundering and counter-terrorism abuse. It therefore merits analysis from the perspective of international standards in this area.

The draft law will hence be analysed from the following angles:

- Fundamental rights as protected under the ICCPR and ECHR; including the international money laundering/countering terrorism financing standards, with a specific focus on the Recommendation 8 of the Financial Action Task Force and the EU Anti-Money Laundering Directive;
- EU law and the CFR.

In addition, experts from Data Protection Support and Management (DPSM) prepared a separate opinion on privacy and data protection issues arising from the draft Act (see attached opinion).[6]

1. The Right to Freedom of Association

The draft Act raises some key concerns with respect to the right to freedom of association and particularly the right to access resources, as set out below.

The right to freedom of association, as set out in international and European documents, involves the right of associations to exist and conduct activities and the right of their members to participate in associations and their activities. For the purposes of the ICCPR and the ECHR, the term "associations" is to be interpreted widely. The above right thus applies to a wide array of entities, including civil society organisations and foundations. This right to freedom of association also includes the right to access and to distribute resources, as these are necessary prerequisites for the functioning of associations.[7]

In order to establish whether the new reporting and publication requirements set out in the draft Act are permissible under international law, it is important to first assess whether (i) they are set out in law, (ii) whether they follow a legitimate aim, and (iii) whether the proposed measures are necessary and proportionate to achieve this aim (see Article 22 par 2 of the ICCPR and Article 11 par 2 of the ECHR). In addition, this analysis reviews whether the draft Act follows a risk-based approach.

[6] https://dpsm.co.uk/
[7] 2015 OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association (Guidelines), pars 102-103.

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Legality, Proportionality, Necessity

i. **The draft Act constitutes a law, but may not satisfy the principle of legality and foreseeability of legislation.**

First of all, under Article 2, the draft Act indicates that in the future and based on criteria that still need to be determined, certain CSOs may be exempted from the reporting and disclosure requirements via implementing (secondary) regulation passed by the Executive. Such vague wording is problematic because: (1) it does not allow CSOs to foresee what will be expected of them under the draft Act and (2) it provides the Executive with wide discretion to determine the criteria and process that would lead to exemptions from the law, and to decide which organisations would then be exempt in practice, and which would not. Such extensive, unfettered discretion may not be in line with the principle of legality as set out in the case law of the European Court of Human Rights (ECtHR). [8]

Second, Article 2 par 7 of the draft Act provides that CSOs may request that information on individual donors not be disclosed; the Minister for Legal Protection can then decide to grant such specific exemptions if this is in the interest of safety of the respective donor. It seems that the draft Act leaves room for wide discretion of the Minister – for example, it is not clear from the draft Act in which circumstances the Minister will decide to grant such exemption or how long such a process will last or if the exemption will be applicable for all future donations of that donor. This could also raise concerns with respect to the principle of legality.

Third, Article 3 par 6 of the draft Act also provides that foundations obliged to publish their balance sheets and statements of income and expenditure may receive exemptions from these requirements, but again under conditions that will remain to be determined in an implementing regulation. The lack of criteria and prescribed process around such exemptions raises the same concerns from the perspective of legality and foreseeability of the draft Act.

Generally, it is permissible to limit the freedom of association if such limitation is set out in law, but according to the ECtHR, the relevant legislation also needs to be drafted in a clear and foreseeable manner.[9] The laws must be sufficiently understandable and detailed in their terms to give individuals an adequate indication as to the circumstances and conditions in which public authorities are empowered to interfere with their human rights.[10] Considering that the criteria for exempting certain CSOs from the requirement to provide donor overviews are not listed in the draft Act itself, this means that there is no clarity in the law as to which circumstances will lead to such exemptions. Furthermore, since the criteria are to be determined in secondary legislation, which is not subject to parliamentary review, this means that the establishment of such criteria will lie within the sole discretion of the Executive.

[8] See, *mutatis mutandis*, ECtHR, Maestri v. Italy, 39748/98, judgment of 17 February 2004, pars 30-42.
[9] ECtHR Koretskyy v. Ukraine, no. 40269/02, judgment of 3 April 2008, par 47; and The Sunday Times v. the United Kingdom (No. 1), no. 6538/74, judgment of 26 April 1979, par 49.
[10] This was clarified in by the ECtHR in numerous cases, including some relating to wire-taps, see Doerga v. The Netherlands, no. 50210/99, judgment of 27 April 2004, pars 50-52 and Copland v. the United Kingdom, no. 62617/00, judgment of 3 April 2007, pars 45-46 and 48.

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ii. The draft Act may not fully satisfy the requirement that restrictions of rights need to be based on a legitimate aim

Most of the aims debated in the Explanatory Memorandum (notably combatting money laundering and terrorism financing or inciting to hate crimes or discrimination) could be said to follow the legitimate aims of protecting national security and public order, preventing disorder or crime, and/or protecting the rights and freedoms of others[11], if they are adequately justified (NB: whether or not the draft Act proposes necessary and proportionate means to achieve these aims will be reviewed under point iii below).

The Explanatory Memorandum, however, also mentions the fight against 'undesirable behaviour' and 'undesirable influences' and the need for transparency of monetary flows to CSOs in the Netherlands as aims to realize via the draft Act. It is welcome that the drafters of the Explanatory Memorandum recognize that transparency is not a legitimate aim under international human rights law in itself.

However, the manner in which "undesirable behaviour" or "influences" is discussed is more ambiguous. The Explanatory Memorandum implies that these terms relate to undue influences of donors in the activities and personnel decisions of CSOs, which may, in the end, lead to unconstitutional, disruptive, non-democratic, intolerant behaviour that may also affect the human rights of others. While the latter would be covered by the legitimate aims mentioned in the previous paragraph, it is difficult to justify from a human rights law perspective how preventing the influence of certain donors over CSOs would be an equally legitimate aim. CSOs have the right to choose their own donors and donors/foundations also have the right to give funding to CSOs. Generally, CSOs and donors have the right to determine their relationships - this is part of their right to freedom of association. Moreover, it is not clear from the Memorandum what 'undesirable behaviour' and 'undesirable influences' mean (it is not clear what would be undesirable and what would not). In light of this, and due to the vagueness of the terms, the prevention of undesirable behaviours and influences will likely not be seen as a legitimate aim within the meaning of the ICCPR and the ECHR.

iii. The draft Act does not appear to satisfy the requirements of necessity and proportionality

With respect to the question of necessity, it is important to note that according to the ECtHR, even if limitations of the right to freedom of association aim to protect a country's national interest and fight corruption, this is still only permissible to counter a concrete threat for the public and/or constitutional order, or if there is a concrete indication of individual illegal activity;[12] hypothetical dangers will not be sufficient in this respect. [13] The Explanatory Memorandum discusses the need to prevent undesirable behaviour and influences, and notes that influencing can lead to possibly unconstitutional behaviour, or behaviour that may at some point turn criminal, but does not provide any information on clear and imminent threats for the constitutional or public order, the rule of law or the rights and freedoms of others.

Moreover, the Explanatory Memorandum to the draft Act provides little information as to why and how exactly the actual publication of the donations on a CSO web site, rather than, for example, its prompt

[11] These are the legitimate aims that are set out in Article 22 of the ICCPR and Article 11 of the ECHR.
[12] See ECtHR, Sindicatul "Păstorul cel Bun" v. Romania, application no. 2330/09, judgment of 31 January 2012, par 69.
[13] See the U.N. Human Rights Committee, Mr. Jeong-Eun Lee v. Republic of Korea, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002(2005), par 7.2.

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communication to the relevant authorities upon request in case of investigations, would be necessary in order to fight serious crimes such as fraud, money laundering and terrorism financing, or incitement or calls for hate crimes. The draft Act states that the proposed measure will facilitate and accelerate investigations into such cases, but it is doubtful whether oversight would really hinge on the publicity of the information – rather, law enforcement officials would have access to such information equally if it existed in CSO internal databases, without it needing to be open to the public. Other examples set out in the Explanatory Memorandum also do not clearly justify the need for publicizing the personal data of donors. In particular, the Explanatory Memorandum does not address why the current laws or legal measures are not sufficient to address any identified needs and risks.

Additionally, it is unclear whether divulging the sources of funds of CSOs is indeed of assistance in the fight against crimes such as fraud, money laundering or terrorism financing. Here, it should be borne in mind that even if certain donors may be seen as "undesirable" in terms of their actions and views, this would, by itself, not necessarily have a negative impact on the CSOs that they fund. It would be more important to look at the ways in which such funds are spent, and in particular, whether funding is used in a way that could result in threats to the constitutional order, the rule of law, or the rights and freedoms of others. Merely reporting on and publishing the amount received would not appear to constitute appropriate measures to achieve the intended aims.

For the reasons set out above, it is thus doubtful whether the proposed additional reporting and disclosure measures are necessary in a democratic society to enhance and protect the above-mentioned legitimate aims of protecting national security and public order, preventing disorder or crime, and/or protecting the rights and freedoms of others.

With respect to the question of whether the publication requirements are proportionate measures to achieve the intended aims, it is important to look at the potential effects of these measures. First of all, the requirement to publish overviews of larger donors applies to the cc. 350,000 legal entities operating in the Netherlands (at least for the moment, as it is as yet unclear which organisations would be exempt in the implementing regulations and based on which criteria).

Second, the organisations would be obliged to publish the names and places of residence/seats of those donors having donated a total sum of at least 15,000 EUR per year. This may seem like a large sum, but also includes smaller donations made by the same donors, if the total amount of these smaller donations amounts to at least 15,000 EUR in a year. That means that if an individual were to donate around 1500 EUR per month to a CSO, he/she would already fall into the category of donors whose private details would be published.

Thus, individuals wishing to support a worthy cause on a monthly basis would also end up having their personal details published online for a period of seven years, which is quite a long time. The threat of being exposed to the public eye in this way, and for this stretch of time, could lead to a drastic reduction of funding across the entire civil society sector, which may have serious effects on the activities of all organisations. In this way, the financial security of the civil society sector in the Netherlands as a whole would be placed in great jeopardy, in order to facilitate investigations into a small percentage of potentially or actually criminal organisations.

Generally, as stated in the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Association, blanket bans or requirements, that have negative effects on large parts of society but are actually aimed

at preventing improper or criminal actions of individuals, are usually not in line with the principle of proportionality. [14]

Risk based Approach – FATF and EU Directive 2015/849

Rather than adopting such a blanket approach, international standards thus require a risk-based approach, which would identify a specific risk and involve heightened observance and investigations of those organisations identified as being at risk, rather than enhanced supervision of all organisations. The fact that the drafters of the draft Act included the possibility of exempting CSOs from the reporting and disclosure requirement in Article 2 par 7 likely indicates that also the drafters of the Act do not consider it necessary or proportionate for all CSOs to fall under these new obligations.

With regard to the legitimate aims of fighting criminal abuse (money laundering and terrorism financing), relevant European and international policy[15] requires a targeted approach to potential threats, following risk-based assessments. For example, Articles 22-27 of the EU's Anti-Money Laundering Directive 2015/849[16]requires a risk-assessment, evidence-based decision-making, and a proportionate approach that considers the specific needs and the nature of the business of the entities that will be affected also requiring compliance with the Charter on Fundamental Rights.

Recommendation 8 of the Financial Action Task Force (FATF)[17] also requires a targeted and risk based approach and does not provide a basis for introducing reporting and transparency rules on all civil society organisations as such.

Rather, Recommendation 8 also requires states to first undertake an assessment of the sector in order to identify which organisations are at risk. Only after this, states may apply focused and proportionate measures, but only to those organisations identified as being at risk. The FATF regime also asks states to respect international human rights law and avoid over-regulation. Indeed, MONEYVAL, which is a FATF-style body responsible for monitoring the compliance with the FATF recommendations, concluded that the draft law in Hungary which aimed to increase transparency of donations was not based on a risk-based approach.[18]

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[14] Guidelines, pars 35 and 115.

[15] See the Joint Venice Commission-ODIHR Opinion on Draft Law No. 140/2017 of Romania on amending Governmental Ordinance No. 26/2006 on Associations and Foundations of 16 March 2018, adopted by the Venice Commission at its 114th session, par 66, where the Venice Commission and ODIHR note that where there are indications of money laundering activities on the side of individual NGOs, the correct response to this would be criminal investigations against these particular associations, and not blanket reporting requirements that affect numerous other organisations engaging in entirely legitimate activities.

[16] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

[17] The Financial Action Task Force (FATF) 'International standards on combating money laundering and the financing of terrorism and proliferation: The FATF Recommendations' (last updated 2016). See FATF Recommendation 1 on adopting a risk-based approach ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. See also Recommendation 8 relating to not-profit organisations, stating that "[c]ountries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse".

[18] See MONEYVAL Follow-up report on Hungary, March 2018, par 109: https://rm.coe.int/moneyval-2017-21-hungary-1st-enhanced-follow-up-report-technical-compl/1680792c61. See also Venice Commission, Opinion on Hungary's Draft Law on the Transparency or Organisations Receiving Support from Abroad, adopted on 20 June 2017, par 38, and in particular footnote 24, noting that while the Explanatory Memorandum to the Hungarian draft law spoke of "challenges posed by financial flows of non-transparent origin associated with money laundering and the financing of terrorism", statistical data

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Furthermore, the FATF itself has stressed that there is no "one size fits all" approach to mitigating terrorist financing risks of CSOs and has noted that while protecting CSOs from terrorist abuse is important, measures taken to achieve this should not disrupt or discourage legitimate charitable activities, nor unduly or advertently restrict CSOs' access to resources, including financial resources. The FATF also stated that "*as a matter of principle, complying with the FATF Recommendations should not contravene a country's obligations under the Charter of the United Nations and international human rights law to promote universal respect for, and observance of, fundamental human rights and freedoms, such as freedom of expression, religion or belief, and freedom of peaceful assembly and of association.*" The FATF also noted that "*additional reporting requirements (…), may not be appropriate for CFT purposes for those NPOs facing little to no TF risk. Any of these or other TF risk mitigation measures should be proportionate to the TF risk they face*".[19]

Hence the draft law and the requirement to publish donor information for all donations that amount to or exceed 15,000 EUR in the public domain appear neither necessary nor proportionate to achieve the stated aims. Rather than adopting such a blanket approach, similar goals could be achieved by introducing carefully considered reporting requirements on the spending of funds by CSOs in proportion to the identified risks.

The relevant provisions of the draft Act may thus raise concerns with respect to the affected CSOs' right to freedom of association. The potential effect of restricting CSOs' access to resources ultimately also may infringe their right to association established by Article 12 of the CFR.

Sanctions

iv. Sanctions for breaches of the draft Act seem disproportionate

Article 4 of the draft Act states that the draft Act, once adopted, will fall under the scope of the Economic Offences Act. This means that if the donations are not published as required by law, then such breaches of law will lead to sanctions as set out in the Economic Offences Act, which include fines, community service, or even detention of up to six months.

Recommendation CM/Rec (2007)14 of the Council of Europe's Committee of Ministers states that in most instances, the appropriate sanction against CSOs for breach of the legal requirements applicable to them should merely be the requirement to rectify their affairs and the imposition of administrative, civil or criminal penalties on them and/or any individuals who are directly responsible. Such penalties should be based on the law in force and observe the principle of *proportionality*.[20]

In this context, it must be stressed that economic offences are still (minor) criminal offences. It is questionable whether the failure to publish the donors' overview as set out in the draft Act, which would

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and information on criminal proceedings conducted in cases of acts of terrorism and money laundering provided by the Office of the Prosecutor-General of Hungary did not reveal that civil society organisations, in particular those receiving foreign funding, were involved in the commission of those crimes during the two previous years.

[19] par 8 and 22, FATF Best Practices Paper on Combatting the Abuse of Non-Profit Organizations (Recommendation 8), June 2015.

[20] See Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007, par 72.

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appear to be a minor breach, should really lead to criminal liability included in the economic offences act, and whether such criminal liability could, by definition, guarantee proportionate sanctions.

2. The Right to Private Life and Protection of Personal Data

This section highlights issues relating to the right to private life of the donors of CSOs, which includes the privacy of their homes. Article 17 of the ICCPR, Article 8 of the ECHR and Article 7 of the CFR protect every person's right to privacy, family, home and correspondence. Under Article 8 par 2 of the ECHR, this right may only be limited in accordance with the law and where this is necessary in a democratic society "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". For analysis on the compliance of the draft Act with the EU GDPR please see attached analysis of Data Protection Support and Management.

Publication of information and details about the names and residence of the donors are impacting the right to private life. The question is whether this is necessary and proportionate to reach the stated aims.

Generally, when regulating the reporting of CSOs, Governments should consider that all reporting and disclosure requirements should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality.[21] The Guidelines on Freedom of Association, state that "the right to privacy applies to an association" and that *"[l]egislation should contain safeguards to ensure the respect of the right to privacy of the clients, members and founders of the associations, as well as provide redress for any violation in this respect"*.[22]

i. <u>The obligation to publish names and places of residence of certain donors does not seem necessary</u>

Even if the obligations to publish the donor overviews with names and places of residence of the donors are set out in law (although, as stated in the previous section, concerns with respect to the principle of legality persist), and follow legitimate aims set out in the ICCPR and ECHR (see previous section), the additional requirements introduced by the draft Act would need to be necessary and proportionate to the intended aims.

With regard to the question of necessity, the arguments made with respect to the compliance of the draft Act with the right to freedom of association under the ECHR also apply here. Moreover, given the importance of the right to private life, it is highly questionable whether listing the names and places of residence of certain donors on an annual basis and keeping them as public information for a period of seven years is a necessary measure to strengthen national security, prevent disorder or crime and/or protect the rights and freedoms of others. To achieve certain legitimate aims such as protecting national security or preventing disorder or crime, <u>much less intrusive rules could be envisaged</u>, for example, by

[21] Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies

[22] Guidelines, pars 228 and 231.

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requiring CSOs to include only anonymous data in the required overview, or by asking for total figures.[23] Ideally, and as stated above, while reporting on funding received to relevant state organs is permissible, this should ideally happen without needing to publish such information as well.

ii. The obligation to publish the names and places of residence of donors is not proportionate

This interference with the rights to private life of the donors of CSOs would also need to be proportionate. While the Explanatory Memorandum rightly states that key personal data such as religious and philosophical convictions of donors will not be included in the overview, the listing of individuals' names and places of residence is equally problematic and concerning, as it may well even touch on peoples' assets and homes[24] (even addresses are not difficult to establish if the names and places of residence of individuals are known) and will reveal which organizations they consider worth supporting. Importantly, in cases where donors give funds to organisations engaged in matters that are the subject of controversial public debates, depriving such donors of their anonymity may also expose their views or affiliations. This could subject such donors to harassment and even threats, which, as the donors' places of residence are also listed, may, as stated above, even extend to their front door.

The Venice Commission also established, when reviewing Hungary's 2017 Law on the Transparency of Organisations Receiving Support from Abroad, that while it is legitimate for states to monitor in the general interest the main sponsors of CSOs, disclosing the identity of also minor sponsors is excessive and also unnecessary, in particular with regard to the requirements of the right to privacy as enshrined under Article 8 ECHR.[25] As noted above, since the threshold of 15,000 EUR also applies where several donations amount to 15,000 EUR, small continuous donations over a period of one year can also reach this threshold.

The draft Act does include exceptions for cases involving potential threats to donors' safety. However, the suggested exceptions do not lead to a different analysis/judgement with regard to the proportionality of the measures set out in the draft Act. Further, this type of opt-out system appears to turn the general rights-based approach that the Netherlands has subscribed to, also in its Constitution, on its head. The right (in this case the right to privacy) is the rule, and the disclosure of private details of an individual the exception. The draft Act, however, will create a situation where the disclosure of private information is the rule, and will allow the exception (privacy) only upon request, and only if the Minister for Legal Protection confirms that disclosure may create problems for an individual donor's safety.

Also, the respective provision does not take into account cases where both the organisation, and the individual donor are initially not aware of any possible threats or harassment, and thus do not apply for

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[23] See Joint Venice Commission-OSCE/ODIHR Opinion on Draft Law No. 6674 on Introducing some Legislative to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of international Technical Assistance and on Draft Law No. 6675 on Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance, of 16 March 2018, adopted by the Venice Commission at its 114th session, par 47.

[24] According to ECtHR case law, Article 8 includes the right to live privately, away from unwanted attention. See Smirnova v. Russia, application nos. 46133/99 and 48183/99, judgment of 24 July 2003, par 95, and also Alkaya v. Turky, application no. 42811/06, judgment of 9 October 2012.

[25] Venice Commission, Opinion on Hungary's Draft Law on the Transparency or Organisations Receiving Support from Abroad, adopted on 20 June 2017, pars 52-53

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an exemption from the disclosure requirement – once the name and place of residence of the donor have been published, it will be difficult to reverse possible chains of events, even if such personal details are later deleted from the overview.

Based on the above considerations, it may be concluded that the requirement for organisations to publish the names and places of residence of certain donors would not be a proportionate measure to fight crimes such as fraud, money laundering, terrorism financing or incitement to hatred, let alone undesirable behaviour or influence. Given the large scope of the draft Act, these measures could affect many citizens and other persons living in the Netherlands, who would thus, through no fault of their own, become targets in the state's fight against money laundering and terrorism financing. It is important to remember in this context that fighting and also preventing crime is the sole responsibility of the State. It is not the responsibility of individual persons, whose rights should therefore not be placed in jeopardy in this way.

The respective provisions of the draft Act are thus not in line with the affected donors' rights to private life under the ICCPR and the ECHR. By imposing a disproportionate and unnecessary requirement on CSOs, the draft Act also seems to violate Article 7 and Article 8 of the CFR (respect for private life and protection of personal data).

Moreover, as also stated by the Venice Commission,[26] adequate safeguards should be in place to ensure that any personal data that are collected, processed and stored are protected against misuse and abuse in line with international standards, particularly the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[27] Similarly, all data processing should be in line with the EU GDPR (see attached opinion).

3. Restriction of the Free Movement of Capital within the EU

The European Commission has acknowledged that CSOs are not-for-profit economic actors and that as such, the money that they receive, either in donations or in payments, falls within the scope of the EU Treaties' provisions on free movement of capital.[28] The Dutch draft Act does not discriminate between foreign and national funding when it requires the publication of donations that amount to or exceed 15,000 EUR along with donors' personal details. However, the adoption of the respective provision may still potentially restrict the flow of capital via donations from abroad, particularly as the declared purpose of the draft Act is "to prevent undesirable influence being bought abroad from money flows".[29]

Further, as noted above, the publication of donors' residence details infringes their right to respect for their private life. The fact that such information will be publicly available may have a chilling effect on

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[26] Joint Venice Commission-OSCE/ODIHR Opinion on Draft Law No. 6674 on Introducing some Legislative to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of international Technical Assistance and on Draft Law No. 6675 on Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance, of 16 March 2018, adopted by the Venice Commission at its 114th session, par 46.
[27] See Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108), Strasbourg, 28 January 1981
[28] See European Commission press release, 7 December 2017, IP/17/5003, regarding the referral of the Hungarian NGO Law to the Court of Justice of the EU.a
[29] Dutch Draft Act, Explanatory Memorandum – Introduction, page 1.

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them and other potential donors, let alone the fact that other personal information about their affiliation, political opinion or belief may be deduced from the fact that they are donating to certain CSOs and not to others. Hence, there will presumably be donors from EU countries who will likely feel uncomfortable to donate to Dutch CSOs under the proposed legal rule.

As a result, the relevant provision can infringe the fundamental freedom of movement of capital within the EU established by Article 63 of the Treaty on the Functioning of the European Union and Directive 88/361 concerning free movement of capital. According to the jurisprudence of the Court of Justice of the EU, it is sufficient to prove that the national provisions are "capable of hindering, directly or indirectly, actually or potentially" the exercise of a fundamental freedom for them to amount to EU law restrictions.[30] In this case, this restriction is not justified as it imposes unnecessary and disproportionate requirements on CSOs for the pursuit of a legitimate purpose (for the reasons explained above) and does not set out any criteria for the regulation of exemptions.

[30] See ECJ, Berlington Hungary and Others v. Hungary, Case 98/14

Note to European Center for Not-for-Profit Law on privacy and data protection issues arising from Dutch government proposals on non-profit funding disclosure

15 February 2019

1. Right to privacy (Article 7 EU Charter, Article 8 ECHR)

The right to private and family life is enshrined in European human rights instruments and plainly extends to individual donors to charities and non-profit organisations. While the Dutch government asserts that it may legitimately restrict this right by demanding the publication of donations over 15,000 Euros in the public interest in knowing who funds a particular organisation, this must be demonstrably necessary and proportionate. It is clear that, contrary to the claims made by the Dutch government in its explanatory memorandum, a mandatory requirement affecting all non-profit organisations regardless of their size, activities or mandate and absent any meaningful safeguards for the affected individuals meets either of these tests.

While the draft legislation makes provision for organisations to request that the personal data of certain donors be suppressed from publication in the interests of protecting those individual donors, this will be at the discretion of the Minister for Legal Protection.[1] Similarly, despite a reference to future provisions allowing for the exemption of certain types of organisations from the requirement to publish donor data altogether,[2] it remains quite unclear how and to which types of organisations these exceptions may be granted. As such the proposed legislation itself does not contain adequate safeguards and it is difficult to foresee how these discretionary exemptions could offer meaningful guarantees in practice.

It should also be noted that the European Court of Human Rights has been asked to rule on the privacy implications of precisely these kinds of statutory provisions (the "Foreign Funding Law") in Hungary in a case bought by the Hungarian Civil Liberties Union, the Hungarian Helsinki Committee and other NGOs.[3] The European Commission has also initiated infringement proceedings against Hungary at the EU Court of Justice on the grounds that its Foreign Funding Law violates, *inter alia*, the rights to the protection of private life, the protection of personal data and freedom of association.[4]

[1] Draft Act, Article 2(7).
[2] Draft Act, Article 2(10) and Article 3(6).
[3] ***Társaság a Szabadságjogokért and Others v Hungary***, no. 83749/17, ECHR; see also"**14 Hungarian NGOs Bring ECHR Case Against New Anti-Civil Society Bill**", 31 January 2018: https://www.liberties.eu/en/news/fourteen-hungarian-ngos-have-brought-an-action-before-the-ecthr/14186.
[4] See "**European Commission steps up infringement against Hungary on NGO Law**", 4 October 2017: http://europa.eu/rapid/press-release_IP-17-3663_en.htm.

2. Processing and publication of data, including 'special categories' (Article 9 GDPR, Article 8 EU Charter)

Article 9 of the EU General Data Protection Regulation (GDPR) prohibits the processing of special categories of data, including "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership… data concerning health or data concerning a natural person's sex life or sexual orientation". Data protection is included in the EU Charter of Fundamental Rights (Article 8). Contrary to the argument made by the Dutch government in its Explanatory Memorandum to the proposal, it is inevitable that publishing the personal data of individuals who support a particular non-profit will also publicly reveal details about some of these special categories of data, in contravention of their fundamental rights. It would also appear self-evident from the alarming trend we have witnessed across Europe in recent years that such action could result in a high risk to individual data subjects who may be subject to attacks on their reputation or even their physical person as a result of the forced disclosure of their philanthropic activities.

While Article 9 of the GDPR contains an express derogation permitting the processing of special categories of data for reasons of substantial public interest, this must be demonstrably proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject. It is again clear that, contrary to the claims made by the Dutch government in its explanatory memorandum, mandatory requirements affecting all non-profit organisations regardless of their size, activities or mandate and absent any meaningful safeguards for the affected individuals meets none of these tests.

Moreover, the draft legislation requires that both the names *and* places of residence of donors are to be made public in the interests of transparency and accountability. Such processing is surely excessive and could clearly exacerbate the aforementioned risks to data subjects. It also contradicts one of the fundamental data protection principles on which the GDPR is based: that data processed must be adequate, relevant and limited to what is necessary to the purpose of the processing.[5] The significant risks associated with the publication of both names and places of residence pursuant to the draft legislation are also contrary to the risk-based approach that the GDPR requires.[6]

[5] GDPR, Article 5.

[6] GDPR, Recitals 75-78.

3. Transparency requirements (Articles 12 and 13 GDPR)

As noted above, the draft legislation would impose a legal obligation on non-profit organisations to process the personal data of certain donors by publishing their names and places of residence. Under the GDPR, complying with a legal obligation is one of the six legal bases that can be relied upon for data processing,[7] and as such it does not require the data subject's consent (which is a separate legal basis). However, regardless of the legal basis relied upon for processing, data controllers are obliged to render their data processing operations transparent at the point of data collection.[8] In practice this means that non-profit organisations will be required to inform donors that they are legally obliged to publish donor personal data, so that donors can make an informed decision as to whether or not they want to provide their data, which under the draft legislation becomes inextricable from a decision as to whether or not to actually donate. Furthermore, in accordance with the risk-based approach that underpins the GDPR,[9] data controllers are required to evaluate the risks involved for the rights and freedoms of the data subjects (see further below), and should in turn describe those risks as objectively as possible to the data subjects when notifying them about the processing. In specific cases – donating to a controversial or unpopular cause for example – this may well include the risk of reprisals. Complying with these obligations would therefore appear highly likely to have a significant 'chilling effect' on individual donors, and with it certain organisations' capacity to fundraise, particularly those organisation working on controversial or sensitive issues.

4. Data Protection Impact Assessment (Article 35 GDPR)

In its explanatory memorandum to the proposal the Dutch government states that it conducted a Data Protection Impact Assessment (DPIA) and ascertained on that basis that there will be no contravention of Article 9 GDPR. Since Article 35 GDPR requires a DPIA be conducted "Where a type of processing… taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons", this is a welcome step. What is far from clear, however, is whether the government's DPIA followed internationally recognised best practice, which requires, *inter alia*, (i) consultation of the affected data subjects and other relevant stakeholders during the DPIA process; and (ii) publication of at least a summary of the DPIA findings.[10] While neither of these things appears to have happened in practice, we have not conducted exhaustive checks. Given these and other potential omissions in respect

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[7] GDPR, Article 6.
[8] GDPR, Articles 12 and 13.
[9] GDPR, Recitals 75-78.
[10] See "**Data protection impact assessments**": https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/data-protection-impact-assessments/; "**Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679**", 4 October 2017: https://ec.europa.eu/newsroom/document.cfm?doc_id=47711; "**ISO 31000:2009: Risk management — Principles and guidelines**": https://www.iso.org/obp/ui/#iso:std:iso:31000:ed-1:v1:en; and "**ISO/IEC 29134:2017: Information technology — Security techniques — Guidelines for privacy impact assessment**": https://www.iso.org/obp/ui/#iso:std:iso-iec:29134:ed-1:v1:en.

to the DPIA and its surprising findings with respect to the safety of the envisaged processing, it is imperative that the government at least publish the DPIA in accordance with internationally recognised best practice.

5. Prior consultation for high-risk processing (Articles 36 and 58 GDPR, Article 8(3) EU Charter)

Article 36 of the GDPR requires Data Controllers to consult their national data protection supervisory authority prior to processing "where a data protection impact assessment under Article 35 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk". The processing may not begin until the supervisory authority has provided its opinion, which could include a prohibition on the processing or the exercise of other powers vested in supervisory authorities pursuant to Article 58 of the GDPR. Such consultation is not optional but mandatory under the GDPR, and the role of supervisory authorities is enshrined in the EU Charter (Article 8(3)). As noted above, it is self-evident from the alarming trend we have witnessed across Europe in recent years that the processing could result in a high risk to individual data subjects who may be subject to attacks on their reputation or even their physical person as a result of the forced disclosure of their philanthropic activities. The Dutch government appears to be cognisant of these risks insofar as it has suggested that some future exemptions may be necessary but by failing to explain exactly how these safeguards will work in practice it is conceivable that the government is in breach of Article 36(1) of the GDPR. However, this can only be properly assessed subject to disclosure of the DPIA.

6. Prior consultation for legislative proposals (Article 36(4))

Irrespective of the findings of the DPIA or the level of risk ascribed to the processing, Article 36(4) of the GDPR requires EU Member States to consult the supervisory authority "during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing". This provision is designed to "ensure compliance of the intended processing with this Regulation and in particular to mitigate the risk involved for the data subject" (see Recital 96, GDPR). At the moment of drafting this note, we received an indication that the supervisory authority is developing an advice on the proposal but to the best of our knowledge the supervisory authority and the government have not yet publicly shared the details of this arrangement with the concerned stakeholders.

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