



## OVERVIEW OF THE DRAFT DUTCH TRANSPARENCY ACT (as published in November 2020)

### Background

The Dutch draft of the Transparency Act (“Wet Transparantie maatschappelijke organisaties”) is revised and back on the political agenda in [the Parliament](#) as of November 2020. It is a follow up of the draft law proposed to public consultation in 2018, when it required all civil society organisations (CSOs) to publish details on donations and donors that amount to or exceed 15,000 EUR a year. That proposal caused a strong reaction by many CSOs, including ECNL (see our [submission](#)), and resulted in [190 comments](#) in response to the consultation requiring the draft to be significantly changed to protect freedom of association and the right to access resources and engage in fundraising.

The current draft takes a different framing and approach by replacing this generic obligation for all CSOs with narrowing the focus of interest to CSOs that are considered a (potential) threat to ‘public order’, which falls under the responsibility of the Mayor, or ‘general interest’, which is under the responsibility of the Prosecutor. Such CSOs seem to be those that are receiving funding from abroad and will be required to disclose information either when there is an indication of risks of (potential) public threat and when a substantial amount of donations of a CSO comes from outside the European Union (EU) and European Economic Area (EEA). This concerns CSOs in the broadest sense, including foundations and associations (Article 1(1))<sup>1</sup>.

The current draft of the Transparency Act aims to prevent “undesirable foreign influence from occurring in these social organizations” as a result of received donations. According to the explanatory memorandum, a CSO can become vulnerable by accepting donations, “because it can no longer determine its own course relatively independently. This is undesirable, especially if this influence leads to the management of the social organization being tempted to (cooperate with) behaviour that is contrary to the norms of the Dutch constitutional state, for example because it is disruptive or in conflict with public order or national security”. An example is given for when authorities, for example the Mayor, may want to ask for information in the explanatory memorandum of the draft Act: “The aim of this could be, for example, that the municipality wants to protect vulnerable people, for example young people, against radical or extremist influences by guaranteeing social security and cohesion and allowing them to participate in local society “.

---

<sup>1</sup> The draft refers to social organizations (Article 1(1)) and defines them as: (i) foundations; (ii) associations; (iii) organization of which one or more denominations are part, as referred to in Article 6, paragraph 3, of the Trade Register Act 2007”; (iv) legal person or other legal entity established under a law other than Dutch law that is comparable to a foundation, association or organization as referred to under i, ii, and iii, and carries out activities in the Netherlands on a permanent basis.





The government places this legislation as one of the actions under [an overarching strategy](#) regarding ‘*undesirable foreign influence*’. It further notes that this is an attempt to address “*problematic behaviour*”, which does not always have to be “*punishable behaviour*”, but it is “*socially unacceptable because of its anti-democratic and anti-integration character*”. This overarching strategy also includes a legislation that makes it easier to ban “*anti-democratic organizations that seriously threaten our society or overthrow the rule of law*”, which was passed in the Parliament and has been sent to the Senate in October 2020. Furthermore, the government announced that the cabinet will come up with plans to stop certain flows of money that lead to “*undesirable behaviour, for example by freezing the financial resources of an organization that incites hatred, discrimination or anti-democratic thoughts that do not belong in the Netherlands.*”.

The draft Act provides Mayors (Article 3(1)), the Office of the Public Prosecution (Article 4)<sup>2</sup> and other government agencies (Article 8 jo. 3(7)) the mandate to inquire from CSOs details about received non-EU/EEA donations; and if these donations are deemed substantial to the CSO overall budget, to make further inquiries about the donors’ personal details.

According to the draft Act, the authorities can:

- Request information about the *geographical origin, purpose and size* of one or more donations from outside the EU/EEA;
- Process personal data that may reveal religious or philosophical beliefs, in so far necessary for the performance of their duties;
- Impose an order subject to a penalty to enforce this obligation.

In addition, at the request of the Mayor and other institutions as prescribed in the Act, the Court may impose an *administrative ban* to the director of the CSO if the director, despite a request by the authorities, has “*seriously failed to fulfil their information or cooperation obligations*” (Article 3(6)). “*Serious failure*” is defined as repeatedly and deliberately obstructing cooperation with the request.

Article 5 of the draft Act prescribe specific obligations also for to any intermediary person or obligation residing or established in the Netherlands which provides donations on behalf of a foreign donor to a Netherlands-based CSO. The intermediary person or organization is obliged to provide information to the CSO about the name, residence/seat and country of the donor.

---

<sup>2</sup> This concerns an extension of existing powers that the Office of the Public Prosecution has in relation to foundations. If this act passes, it will extend to all social organizations as defined by article 1 (1) of the draft, which includes associations.





### Key points of why this draft Act may not be in line with European and international standards:

Any framework of preventing foreign, undesirable influence through placing restrictions or additional requirements on legally allowed donations and money flows, needs to be closely in line with the European and international obligations regarding freedom of associations and fundamental rights, as well as the rule of law principle.

- The draft Act is not in line with the **rule of law principle**. This is because the Mayor is given powers with large margin of interpretation without Parliamentary scrutiny. The criteria based on which the Mayor will decide, are left to be decided by the Mayor instead of being debated and adopted by the Parliament. Furthermore, the draft Act does not provide for clear legal remedies that are available for CSOs in case an organisation is considered to be acting/inciting undemocratic behaviour. Such lack of control mechanisms and clear criteria leads to the regulatory situation contrary to the rule of law principles and enhances potential for arbitrary implementation.
- **A wide group of CSOs will be potentially affected**. The draft Act aims to narrow the target group to only those organisations that are potentially a threat to public order or general interest. However, the decision on which are those CSOs is left to the Mayor, the public prosecutor and other authorities. Even more, the draft Act does not provide for clear criteria that will guide the authorities to decide. This is especially the case for the Mayor and in relation to what constitutes a potential threat to 'public order'. This means that a large group of CSOs receiving foreign funding will potentially be subject to additional administrative requirements, supervision and potential restrictions to their activities.
- The draft Act **violates the right to privacy** as it requests all intermediaries to obtain private information in advance about the donors of CSOs outside of the EU (name, private residency/seat, country) regardless if there is justified reason for further scrutiny by the Mayor and other authorities. This puts burden on such organisation to obtain and verify information. At the same time this may deter individual donors to provide funding because they may not be willing to provide information on private address without clarity how it will be used. Legitimate foreign donors might be reluctant or not able (for legal reasons) to share their privacy protected information details and therefore decide not to donate Dutch CSOs, creating vacuum of income for many organizations.
- The draft Act **creates legal uncertainty** contrary to international standards. The lack of clear criteria on what may constitute an indication of risk or disruption of public order, in conjunction with a very vague narrative in the explanatory note about "behaviours that are not illegal, but undesirable for a democratic society" creates vagueness and uncertainty. This may lead to several effects:
  - Potential **discretionary application** of the Act which amplifies the threat for potential discriminatory treatment of certain organisations and individuals because it will be left on the whim of the Mayor to apply the Act based on each individual situation and own judgement.



- **Confusion and legal uncertainty about how to comply with the law** among CSOs, individuals and organisations which act as intermediaries. Such uncertainty may:
  - Create reluctance and discourage support to CSOs among funders from abroad and intermediary organisations in the country, that may not want to be potentially violating the law or be seen affiliated with CSOs subject to the law;
  - Lead to **self-censorship of CSOs** and limiting freedom of expression, association and of assembly. This is because groups may feel that they might be under additional scrutiny by municipal authorities for what they act or say<sup>3</sup>, and at the same time they may reduce fundraising effort from foreign sources so to avoid violation of the Act, or being subjected to additional administrative burdens.
- The draft Act **discriminates** against CSOs receiving foreign funding from abroad and may lead to **stigmatisation** because it will potentially send a message that such organisations are undesirable and threat to the society. The Draft Act appears to single out and impose more scrutiny particularly on those CSOs which have foreign support and in this way would likely discriminate them, violating international law on the prohibition of discrimination in the exercise of fundamental rights.<sup>4</sup> In addition, supporters/donors and intermediary organisations of such CSOs are also treated discriminatively.
- If this draft Act and the draft Act on “Expansion of options for banning legal entities” pass the Senate – they will make it **easier to dissolve and/or ban CSOs** considered to be a threat to public order – based on very vague criteria.

In conclusion, the points above make it evident that the draft Act has raised a number of important concerns and issues for further discussion and alignment with the international and European obligations on the freedom of association, expression and assembly, as well as with the key rule of law principles. We recommend that the government undertakes further dialogue and consultation with the public about the need for this Act in order to find the best

---

<sup>3</sup> It also makes some vulnerable. For example, the draft Act does not provide guarantee or protection of CSOs who, for example, act or comment critically towards policies and work of a municipal government and might be easily subjected to accusations of disrupting public order. These could be human rights or civic freedom defenders that are less favoured by the municipal government or a particular Mayor. As long as the Mayor can claim that a group is threatening public order (even when the behaviour is not illegal), it would be enough to use this law to put more scrutiny and pressure on CSOs.

<sup>4</sup> Article 7 of the UDHR; Article 26 of the ICCPR; Article 14 of the ECHR and OSCE/ODIHR- Venice Commission Guidelines on Freedom of Association : Principle 5: Equal treatment and non-discrimination “ *Legislation and policy concerning associations shall be uniformly applied and must not discriminate against any person or group of persons on any grounds, such as age, birth, colour, gender, gender identity, health condition, immigration or residency status, language, national, ethnic or social origin, physical or mental disability, political or other opinion, property, race, religion or belief, sexual orientation or other status. No person or group of persons wishing to form an association shall be unduly advantaged or disadvantaged over another person or group of persons. Membership or non-membership in an association shall not constitute grounds for the discriminatory treatment of persons.*”



solution proportionate to the legitimate aim and democratic society. This will ensure that the draft Act achieves greater legal certainty and preserves the democratic legal order in the Netherlands as well as sets good example for other countries.

