

## EFC comments on the Study

### “Recent public and self-regulatory initiatives improving transparency and accountability of non-profit organisations in the European Union”

Commissioned by the European Commission and  
drafted by the European Center for Not-for-Profit Law (ECNL)

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#### I- Background

The European Commission (EC) is seeking stakeholders' views on the recommendations of the study on “recent public and self-regulatory initiatives improving transparency and accountability of non-profit organisations in the European Union”. The study, commissioned to the European Center for Not-for-Profit Law (ECNL), was presented to participants to the meeting on non-profit sector transparency on 12 February 2009 in Brussels. The European Foundation Centre (EFC), the representative body of public benefit foundations at EU-level, gave initial input to the ECNL study in April 2008 and is now submitting its contribution on the findings of the study.

#### II - EFC Comments - executive summary

The EFC provided comments on the recommendations of the first EC-commissioned study to assess the extent of abuse of non-profit organisations for financial criminal purpose at EU level<sup>1</sup> in September 2008. The EFC welcomes this consultation on the ECNL study on NPO Transparency and Accountability. The EFC understands that the EC Directorate-General Justice, Freedom and Security will build on input received to propose possible follow-up action. In this context, we would like to underline the following comments and recommendations:

1. We believe that based on the outcome of both studies; there is **no scope for specific legislation or a general Code of conduct regarding Transparency and Accountability (T&A) of foundations at EU level.**
2. We support a **proportionate and partnership approach at national, EU and international level** and wish to recall that **any measure**, by EU countries and other countries member of the Financial Action Task Force (FATF), to address T&A and counter-terrorism concerns **should not undermine the integrity and independence of action of foundations and their international work.**
3. We generally welcome the main recommendation of the ECNL study that **specific T&A measures where needed should be designed at the national level in consultation with foundations and other NPOs.** The importance of NPOs' involvement for the success of T&A initiatives was clearly illustrated in the ENCL report.
4. We believe that the **role of the EU could be that of a facilitator to assess policy impact, support research, exchange of information and practices between stakeholders.** The resource implications of follow-up action will need to be examined.
5. We think that it is crucial to acknowledge the key finding of the ECNL study: **there is no single model/solution to uphold transparency and accountability.**
6. We consider that **foundations' board and staff are the best placed to develop effective T&A and due diligence policy and practices** to sustain their public benefit mission. The EFC **will be pleased to contribute to discussions** with the Commission and stakeholders **and share experience and developments on T&A in the foundation sector.**

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<sup>1</sup>. EFC Comments on the Matrix study to assess the extent of abuse of non-profit organisations for financial criminal purpose, September 2008. [www.efc.be/ftp/public/EU/JAI/2008\\_EFCComment\\_Matrix\\_prov.pdf](http://www.efc.be/ftp/public/EU/JAI/2008_EFCComment_Matrix_prov.pdf) (61kb)

### III - EFC Specific comments

1. The EFC believes that based on the findings of the ECNL study, which have confirmed the preliminary results of the 2008 Matrix study<sup>2</sup>, **there is no scope for specific legislation regarding Transparency and Accountability (T&A) of national foundations and other NPOs or soft law approach (Code of conduct) at EU level.**

The EFC repeatedly expressed to the Commission its **reservations about the usefulness of developing a general EU NPO Code of conduct**<sup>3</sup>. As we already suggested, the Commission may however wish to develop a code of conduct for parties benefiting from EU funds, but this should not be specific to NPOs, but address all EU funds beneficiaries and service contractors.

The ECNL report acknowledges a growing number of T&A initiatives (some 140). As illustrated in the study, many framework codes were developed by the non-profit sector at national and EU levels catering for specific NPO communities, including foundations. In the field of self-regulation, the foundation sector started developing codes of conduct in the early 1990's. As an example, the European Foundation Centre Code of Practice was initiated in 1994 and was officially approved in 1996 and reviewed in 2006. This process gave rise to a series of national codes tailored to the various jurisdictions. As at 2008, 12 out of the 21 associations of foundations and donors in Europe had developed codes of practices, standards, charters, quality marks and frameworks.

2. We support the stated need for **a proportionate and partnership approach with foundations and other NPOs at national, EU and international level, based on the 5 principles** agreed upon at the Justice and Home Affairs Council of December 2005<sup>4</sup>.

The EFC believes that any measure, by EU and other countries including members of the Financial Action Task Force (FATF), to address T&A and Counter-Terrorism (CT) concerns **should not put at risk the integrity and independence of action of foundations and NPOs or undermine their international activities**. Regulatory and public authorities should neither attempt to take control of NPOs' activities nor stand-in for NPOs.

3. We welcome the call for dialogue, cooperation, and **active involvement of NPOs to develop, where appropriate, and promote effective and proportionate T&A measures that cater for the different types of NPOs**, while as mentioned above, safeguarding their integrity and upholding their international work. In this context we recommend that

- ✓ **the assessment of needs and risks should be jointly carried out** by NPOs and public authorities in the Member States building upon cross-sector learning and consultation.
- ✓ **the design and impact assessment of T&A and CT policy recommendations at national and international level (FATF) should be done in cooperation with the NPO sector**. The importance of NPOs' involvement in the success of T&A initiatives was clearly illustrated in the ENCL report. This is crucial both to assess the impact of measures on the NPO sector and to evaluate the effectiveness of the measures in achieving the set objectives.

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<sup>2</sup> Extent of abuse of non-profit organisations for financial criminal purpose, *Matrix insight*, April 2008. Study commissioned by the European Commission's Directorate –General Justice, Freedom and Security.

<sup>3</sup> [http://www.efc.be/ftp/public/eu/jai/2005\\_EFCCommentsJAI\\_Code.pdf](http://www.efc.be/ftp/public/eu/jai/2005_EFCCommentsJAI_Code.pdf) (220kb)

<sup>4</sup> Member States should take into account the following principles when implementing measures aimed at preventing terrorist abuse of the non-profit sector: " 1. Safeguarding the integrity of the non-profit sector is a shared responsibility of states and non-profit organisations. • 2. Dialogue between Member States, the non-profit sector and other relevant stakeholders is essential to build robust defences against terrorist finance. • 3. Member States should continually develop their knowledge of their non-profit sector • 4. Transparency, accountability and good governance lie at the heart of donor confidence and probity in the non-profit sector. • 5. Risks of terrorist finance are managed best where there are effective, proportionate measures for oversight". 2696<sup>th</sup> Council meeting – Justice and Home Affairs, 1-2 December 2005.

4. The EFC agrees with the main outcome of the ENCL research that open coordination and exchange of best practices should be the way forward. The EU could play the role of a facilitator. The **added-value at EU level would be to support research, exchange of information and practices** between stakeholders concerned across sectors. EU financial assistance could also help support research on the impact of counter-terrorism measures on NPOs' development and activities. The EFC had already shared with DG JFS its comments on the creation of a Centre of excellence to promote NPO accountability and transparency and serve as an ongoing resource for information and exchange. The EFC outlined that the EC could undertake a feasibility study on the setting up of such Centre to review its objectives, access (-incl. language issues), governance (involvement on NPOs), and financial sustainability. The EFC had also signalled in its comments to the Matrix Study that **the resource implications of follow-up action will need to be examined**. In particular, the Commission should clarify whether it intends to use the financial programme "Prevention of and Fight against Crime" and other EU funding schemes (7<sup>th</sup> research framework programme, lifelong learning and vocational training schemes, etc.) to support actions aimed at enhancing NPO transparency and reinforcing NPO capacities against financial crime, including terrorist financing.
5. **A clear finding of the ECNL study is that there is no single model/solution to uphold T&A.** As stated in the ENCL report "*a single system or initiative cannot be replicated as a model in other cases. Instead, a contextual analysis is needed, building upon several factors, i.e. the legal system and the level of development of regulation and the NPO sector*".

We agree with the starting point for the ECNL report that **NPOs have a broad concept of accountability** including upwards accountability towards governments, donors the public at large and downwards accountability towards partners and beneficiaries.

In this context, it is crucial to understand that T&A initiatives have not been designed to address counter-terrorism concerns, and a potential broad tightening of (self) regulations is unlikely to address these concerns in any better and effective way, while having a detrimental impact on the activities of legitimate NPOs, and the integrity of the sector.

T&A can be achieved in a number of ways tailored to the local and national contexts and cultures. However it **is important to document different models**, understand the contexts in which they were developed and their evolutions, and make those findings available.

Foundations' T&A initiatives are aimed at enhancing foundations' governance and effectiveness, forging a professional and accountable sector, maintaining the trust in the sector, and not least developing mutual benefit relationship with partners and beneficiaries. Individual foundations have developed over the years a series of mechanisms and tools to advance good governance and accountability. These include among others the development of codes of ethics, conflict of interest policies for trustees and staff members, and in some cases whistleblower policies. These policies apply to the grantmaking process as well as to all investment and business decisions and related matters.

In 2007, the EFC and the US Council on Foundations released a joint set of stewardship principles and guidelines for accountable international grantmaking and operating activities that are relevant to their respective memberships as well as to the broader international donor community.

We share the views that **there are complementary roles for both public regulation and self-regulation** to achieve effective T&A. At the same time, any new measures in the field should clearly assess actual needs, objectives and existing practices and schemes. In this context we would like to recall our previous comments *on monitoring compliance*.

- First, **the cost of demonstrating compliance should be commensurate and not outweigh the benefits gained** both in terms of public oversights/regulations, and privately run monitoring systems. The issue of independent private bodies monitoring raises a series of questions that should be taken into account. These include:
  - The financial sustainability of monitoring schemes - who takes the cost of monitoring? Granting a seal, monitoring compliance and renewing a seal, having an appeal system, all these activities have a cost, which in most cases would be charged

to the applicant organisation – this could be an issue for small non-profit organisations in particular.

-- In addition, the liability of private monitoring agencies is an issue of concern for NPO umbrella organisations.

- Second, we wish to stress that **T&A private monitoring can take different forms**, with accreditation schemes as one possibility - a method which has mostly been explored by fundraising NPOs. We strongly recommend that other approaches are encouraged and supported e.g. self-assessment and reporting tools, quality frameworks, and benchmarks.

6. How can we address the perceived “disconnect” between the areas covered by public and self regulation initiatives and the recommendations of the EC<sup>5</sup> / FATF<sup>6</sup> on T&A and the prevention of the abuse of NPOs for criminal/terrorist financing purposes? Here, we believe it is important to recall a key conclusion of the Matrix report that “NPO employees and volunteers are best placed to prevent and expose fraud and corrupt practices”. Along the same line we believe that **foundations’ board and staff are the best placed to develop effective due diligence policy and practices in line with the scope of their public benefit mission and activities**. We do not see the need for the legislator to develop due diligence rules.

In 2008 the EFC and the Donor and Foundation Networks in Europe (DAFNE) decided to co-operate on the issue of transparency, accountability/ risk management of public benefit foundations in Europe. The following activities are foreseen in this regard in the coming months:

- A mapping and an analysis of foundation regulatory frameworks. The output will be a study including: an outline and analysis of existing legislative governance, transparency and accountability rules for foundations from a comparative perspective.
- An analysis of governance and self regulation/codes of conduct in the foundation sector in Europe with regard to transparency and accountability by mapping and assessing existing national, transnational level Foundation codes and initiatives across Europe (including candidate countries) and the organisation of peer learning events on foundations transparency/accountability approaches.

The EFC will be pleased to contribute to discussion with other NPOs, the Commission and national stakeholders and share experience and developments on T&A in the foundation sector.

We believe that to ensure effective dialogue at EU-level on NPO T&A, any consultation exercise should take into account the need for NPO umbrella organisations to consult their members according to the minimum consultation procedures set out by the European Commission. In the current context, access to document is also important. It would have been useful to have access to the full ECNL report including the annexes to the study to be in a position to provide a fully informed commentary on the development of self-regulation activities. Any further dialogue at EU level should be focused, with clear common objectives and address those topics (policy/(self)regulations/practices) according to the needs identified by the stakeholders.

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<sup>5</sup> EC communication “Prevention of and Fight against Terrorist Financing through enhanced national level coordination and greater transparency of the non-profit sector”, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0620:FIN:EN:PDF> (138kb)

<sup>6</sup> Special recommendations VIII on Terrorist financing and NGOs (2001) (<http://www.fatf-gafi.org/document/9/0.2340.en.32250379.32236920.34032073.1.1.1.1.00.html>), best practice paper SRVIII (2002) (<http://www.fatf-gafi.org/dataoecd/39/19/34033761.pdf>, 59kb) and Interpretative Notes to the Special Recommendations (2006) (<http://www.fatf-gafi.org/document/53/0.3343.en.32250379.32236947.34261877.1.1.1.1.00.html>)