

7-1-2015

European Non-profit Oversight: The Case for Regulating From the Outside In

Oonagh B. Breen
Sutherland School of Law

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Business Organizations Law Commons](#), [Comparative and Foreign Law Commons](#), [European Law Commons](#), [Nonprofit Organizations Law Commons](#), [Taxation-Transnational Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Oonagh B. Breen, *European Non-profit Oversight: The Case for Regulating From the Outside In*, 91 Chi.-Kent L. Rev. 991 (2016).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol91/iss3/7>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

EUROPEAN NON-PROFIT OVERSIGHT: THE CASE FOR REGULATING FROM THE OUTSIDE IN.

OONAGH B. BREEN*

INTRODUCTION

When it comes to the regulation of non-profits in a European context, some explanation is always required. First, what do we mean by European? Is it meant as a shorthand term for the individual approaches of the various Member States, all 28 of which comprise the European Union? Or, does it refer more specifically to the institutional confederated approach of the EU, acting through the auspices of the European Commission or expressing its views through the European Council or Parliament? Adopting the first approach leads to a kaleidoscope of events and developments as each Member State, as we shall see, retains sovereignty to regulate charities in accordance with its own national laws and policies. The fact that European countries operate under either a common law or civil law legal system adds another layer of complexity to the regulatory scene and results in Member States lacking a common regulatory language and culture when it comes to promulgating non-profit laws. Even within single Member States, there can be additional wrinkles when discussion turns to the enforcement of charity law. In the United Kingdom alone, one finds three different pieces of charity legislation, creating three different charity regulators; each jurisdiction with its own nuanced way of applying the law.¹

If, instead, one chooses to descend down the rabbit hole of the “European regulation of non-profits,” an equally murky world emerges. The European Union draws its competency from those areas of law, which under its treaties Member States have ceded to or shared with it. In those areas in

* Senior Lecturer in Law, Sutherland School of Law, University College Dublin. Email oonagh.breen@ucd.ie. I am grateful to participants at Chicago-Kent’s conference and at ARNOVA for their helpful comments on this paper.

1. England and Wales act under the Charities Act 2011 with the Charity Commission for England and Wales; Scotland boasts the Office of the Scottish Charity Regulator (OSCR), which operates under the Charities and Trustees’ Investment Act (Scotland) 2005, while in Northern Ireland the principal agency is the Charity Commission for Northern Ireland (CCNI) which operates under the Charities Acts (Northern Ireland) 2008-2013.

which it has exclusive competence, only the EU can act.² Examples of such areas would include monetary policy for the Member States whose currency is the euro, and matters relating to the customs union.³ In areas in which competence is shared between the EU and Member States, such as the internal market, agriculture and fisheries and development cooperation and humanitarian aid, Member States can act only if the EU has chosen not to.⁴ In other words, EU action in a given field has the capacity to crowd out individual Member State competence to act.

Remaining areas falling outside these categories can be further divided in two, namely: areas in which the EU has competence to support, coordinate or supplement actions of the Member States⁵ and areas in which the EU has competence to provide arrangements within which EU Member States must coordinate policy.⁶ In the case of the former, covering matters ranging from culture, tourism, industry, civil protection and the promotion of health, the EU may *not* adopt legally binding acts that require the Member States to harmonize their laws and regulations. In the latter instance, Member State coordination is required in the areas of economic and social policy and employment.

When it comes to the European regulation of non-profits, the European Commission faces many of the same pressures and constraints experienced at a national level. It suffers, however, from an additional disadvantage in that, arguably, it lacks jurisdictional competence to regulate non-profits *qua* non-profits. One might compare this situation, not unfairly, to one of federal-state competency: while a federal legislator may have a better overview of the broader regulatory issue and perhaps a macro solution to hand, in the absence of state relinquishment of sovereignty (or, at least, a willingness amongst states to coordinate their individual approaches along federal lines), the federal regulator will be powerless to intervene. The European Commission has experienced the harsh reality of this situation in its recent bruising and ultimately unsuccessful attempt to secure the passage of the proposal for a European Foundation Statute (“EFS”). Although the requirement for Member State unanimity and the European Council’s inability to deliver this level of consensus scuppered

2. Consolidated Version of the Treaty on the Functioning of the European Union art. 3, Mar. 30, 2010, 2010 O.J. (C 83) 53 [hereinafter TFEU] (text available at http://europa.eu/pol/pdf/qc3209190enc_002.pdf#page=52).

3. THE EU CUSTOMS UNION: PROTECTING PEOPLE AND FACILITATING TRADE, EUROPEAN COMMISSION (Nov. 2014), http://europa.eu/pol/pdf/flipbook/en/customs_en.pdf.

4. TFEU, *supra* note 2, art. 4.

5. *Id.* art. 6.

6. *Id.* art. 5.

the Commission's proposal, failure to pass the proposed regulation has not relieved the Commission of the problems it identified as giving rise to the need for the EFS in the first instance.

Part I reviews the rationale for the EFS proposal, the political concerns that left it vulnerable to veto and highlights the structural challenges faced by the Commission when it comes to legislating for non-profits at a European level. The argument is advanced that extant a purely functional approach, European regulation of non-profits from "the inside out" is difficult in the absence of a valid treaty basis.

Switching from a European Commission besieged in its non-profit regulatory attempts by legislative limitations and lack of Member State buy-in, we turn to another regulator whose non-profit oversight has become a subject of increasing scrutiny. Since the events of 9/11, the Financial Action Task Force ("FATF") has concerned itself not just with the development of anti-money laundering measures but also with counter terrorist financing regulation. This latter responsibility led it to introduce non-profit oriented recommendations and best practice principles to prevent the exploitation of vulnerable non-profits. The national rollout of these intended protective measures has led some governments to over-regulate nonprofits in the name of security. Accepting criticisms that despite the noble intentions behind the FATF's non-profit recommendations, their widespread application to charities had been disproportionately negative, the FATF embarked upon a review of its guidance on non-profit vulnerability.

Part II examines NGO attempts to influence the FATF reform process and efforts, supported by the European Commission, to extract a fairer process for dealing with NGOs under FATF Recommendation 8. The Commission's role in assisting NGOs to bring pressure on the FATF to be more accountable and transparent in its dealings with the sector presents an interesting vignette of one regulator laying siege to another in the greater good of better non-profit oversight. The Commission's involvement in "regulating from the outside in" has arguably strengthened NGO relations and resulted in the Commission demanding a higher level of transparency of the FATF than it itself has been willing to provide to NGOs in the past.

I. THE SAD AND SORRY TALE OF THE DEMISE OF THE EUROPEAN FOUNDATION STATUTE

Apart from the obvious connections with development cooperation and humanitarian aid, in which competence is shared, the more general regulation of the broader church of non-profit organizations falls into the zone in which the EU may not adopt legally binding acts that require

Member States to harmonize their laws and regulations but must rather work to support actions of the Member States. Indeed, one has to search the treaties carefully to find mere mention of non-profit organizations and their treatment under European law. The founding Treaty of Rome expressly excluded non-profit bodies from the fundamental freedom of establishment.⁷ This is perhaps not surprising when one considers that the Treaty of Rome dealt with the establishment of the European *Economic* Community, the emphasis clearly placed on for-profit rather than non-profit activity. The 2001 Nice Treaty⁸ amended Article 257 of the TEC to make reference in the treaties for the very first time to “civil society,” including in the membership of the European Economic and Social Committee “parties representative of civil society.”⁹ Nice left the scope and extent of civil society, however, entirely undefined. NGOs quickly sought to build upon this treaty reference, calling for the introduction of a further treaty article to give a legal basis to structured civil dialogue and legitimate the various initiatives taken by the Commission to instigate a civil dialogue.¹⁰

Nine years later, Article 11 of the Treaty of Lisbon went one step further by providing for “an open, transparent and regular dialogue with representative associations and civil society” and the European institutions.¹¹ Moreover, Article 15 of the TFEU (Article 255 of the TEC) now declares that “in order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible,” leaving open the possibility for stakeholders such as NGOs to be both better informed and more influential in the European institutional decision-making process than in previous eras.

The jurisprudence of the European Court of Justice (“ECJ”) in recent years has also further strengthened the rights of NGOs within European law. Case law now firmly establishes that the right of free movement of

7. *Id.* art. 54 (ex art. 48 TEC) (“Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. ‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, *save for those which are non-profit-making.*”) (emphasis added).

8. The Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 1, 2003, 2001 O.J. (C 80) 44. The treaty was signed by European leaders on February 26, 2001, but came into force on February 1, 2003.

9. TFEU, *supra* note 2, art. 300.

10. See PLATFORM OF EUROPEAN SOCIAL NGOS, DEMOCRACY, GOVERNANCE AND EUROPEAN NGOS: BUILDING A STRONGER STRUCTURED CIVIL DIALOGUE 2–3, 6 (2001), http://ec.europa.eu/governance/contributions/social-ngos_en.pdf.

11. TFEU, *supra* note 2, art. 11.

capital applies to non-profit organizations.¹² Equally, in the area of tax law the application of the “non-discrimination principle” has forced (sometimes reluctant) Member States to treat comparable “foreign” charities (meaning charities which are established elsewhere in the EU but operate within the borders of the Member State) equivalently to domestically established charities when it comes to tax exemption or relief,¹³ thereby facilitating the growth of cross-border philanthropy.

And yet, it remains the case that the want of an appropriate treaty basis makes it difficult to regulate or legislate for non-profit organizations at a European level. Without such a treaty basis, the EU institutionally is often powerless to act and must instead rely either on the individual responses of its Member States or proceed by way of soft law alternatives. On occasions when the European Commission has sought to introduce enabling or oversight legislation for non-profits, the only treaty lifeline open to it has been Article 352 of the TFEU.

The exercise of Article 352, while providing the Commission with the required legislative basis, comes at a high price. It provides that if action by the Union should prove necessary, within the framework of the policies defined in the treaties, to attain one of the objectives set out in the treaties, and the treaties have not provided the necessary powers, the Council, *acting unanimously* on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Unanimity amongst 28 Member States is, at best, difficult to achieve. Failure to reach the necessary consensus can and does result in entire proposals, regardless of their merit or support within the non-profit sector, falling by the wayside. Attempts to adopt the EFS on the basis of Article 352 have proved, if anything, to be a sobering experience for all involved without the wished-for happy ending.

In February 2012, the European Commission published its Proposal for a Council Regulation for a European Foundation Statute which, if adopted, would provide a new and optional European legal structure for

12. See Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, 2006 E.C.R. I-8203.

13. See Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, 2009 E.C.R. I-00359, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-318/07> (follow “Curia” link under “Judgment”); Case C-25/10, *Missionswerk Werner Heukelbach eV v. Belgium*, 2011 E.C.R. I-00497, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-25/10> (same); Case C-39/04, *Laboratoires Fournier SA v. Direction des vérifications nationales et internationales*, 2005 E.C.R. I-2068; Case C-10/10, *Commission v. Austria*, 2011 E.C.R. I-05389, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-10/10> (same).

certain public benefit organizations.¹⁴ The road to this proposal was long, stretching well back to European Commission public consultations in 2006 on *Future Priorities for the Action Plan on Company Law and Corporate Governance*,¹⁵ in which an impressive rate of 55% of the respondents to the consultation unanimously endorsed the Commission's proposal for a feasibility study on the need for a European Foundations Statute.¹⁶ The securing of Commission support for a feasibility study, subsequently published in 2009,¹⁷ was the result of an impressive feat of non-profit lobbying in an environment that up to that time had not proved amenable to non-profit regulatory proposals.¹⁸ This "one step forward" for European non-profit regulation was accompanied by the proverbial "two steps back" for, in the same year as the publication of the *Future Priorities Report*, the Commission withdrew its proposals for Regulations on the Statute for a European Association ("ESA")¹⁹ and the statute for a European Mutual Society,²⁰ introduced in 1991, on the overarching grounds that they "were found not to be consistent with the Lisbon and Better Regulation criteria, unlikely to make further progress in the legislative process or found to be no longer topical for objective reasons."²¹

A. Rationale for Proposal

According to proponents of the EFS proposal, European enabling legislation was essential not only for the future growth of cross-border philanthropy in Europe but to remove existing obstacles which denied foundations the benefits of a common market enjoyed by their for-profit counterparts. With an estimated 110,000 foundations in operation with

14. See generally EUROPEAN COMM'N, PROPOSAL FOR A COUNCIL REGULATION ON THE STATUTE FOR A EUROPEAN FOUNDATION (FE) (2012).

15. See DIRECTORATE GEN. FOR INTERNAL MKT. & SERVS., CONSULTATION AND HEARING ON FUTURE PRIORITIES FOR THE ACTION PLAN ON MODERNISING COMPANY LAW AND ENHANCING CORPORATE GOVERNANCE IN THE EUROPEAN UNION, SUMMARY REPORT (2006), http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf [hereinafter FUTURE PRIORITIES REPORT].

16. *Id.* at 26.

17. UNIV. OF HEIDELBERG, CTR. FOR SOC. INV. & MAX PLANCK INST. FOR COMPARATIVE AND INT'L PRIVATE LAW, FEASIBILITY STUDY ON A EUROPEAN FOUNDATION STATUTE – FINAL REPORT (2009), http://efc.issuelab.org/resource/feasibility_study_on_a_european_foundation_statute_final_report?_ga=1.151023292.448896650.1389109535 [hereinafter FEASIBILITY STUDY].

18. See Oonagh B. Breen, *EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society*, INT'L J. NOT-FOR-PROFIT L. 50, 51 (2008).

19. *Commission Proposal for a Council Regulation on the Statute for a European Association*, COM (1991) 273 final (Mar. 6, 1992) OJ C 99/1.

20. 1992 O.J. (C 99/40).

21. 2006 O.J. (C 64) 3.

assets in excess of €1,000 billion in Europe alone, the feasibility study found that over 67% of these bodies were engaged in international activity, giving rise to a further growth in cross-border activity.²² Foundations operating in more than one jurisdiction encountered additional costs (and often difficulties) in establishing, registering and operating outside their home territory. According to the study, the estimated costs of these legal barriers amounted to between €101 million and €178 million per annum.²³

An enabling statute that would provide a common European vehicle instantly recognized and accepted in all EU Member States and subject to a common supervisory regime administered at a national level was thus an appealing proposition to the European foundation sector. The promulgation of the EFS by European regulation would ensure a European standard throughout all Member States, creating for the first time an agreed definition of what constituted a public benefit entity for the purposes of cross-border philanthropy. However, the effect of such a definition would go much further than merely removing national barriers to establishment but would also set the parameters for both European supervision and enforcement of European foundation law on the one hand, and the awarding of national tax exemption on the other.

The feasibility study considered five different models to overcome the legal barriers to cross-border national foundation activity within the EU. Of the five considered, the authors recommended as their preference “the European Foundation Model with additional tax exemption” on the grounds that:

[S]uch a European Foundation would mean the most expectable cost reduction effects (from the feasible models). . . The potential cost reduction could add up to 91m to 101.7m euros (138m to 178.7m euros, minimum capital included). The approach would create the most far-reaching incentive for funding trans-national European causes, and would have the greatest potential to foster science and research funding as well as other causes of European interest. It would also lead to a shared concept of a European public good, even though such a concept may only be feasible for a limited list of purposes mentioned in European Treaties, such as the goal to promote R&D and the competitiveness associated therewith.²⁴

This proposal formed the basis of the European Commission’s ill-fated 2012 proposal. Between the release of the feasibility study in 2009 and the publication of the Commission’s proposal in 2012, supporters of

22. FEASIBILITY STUDY, *supra* note 17, at 149.

23. *Id.* at 178.

24. *Id.* at 221.

the EFS rallied together, explaining to the wider public as well as European institutional bodies why an EFS was needed to enable trans-European philanthropic efforts to reach their potential.²⁵

B. Political Concerns and the Veto Block

The Commission's 2012 proposal for the EFS was, at the very least, an ambitious one. Two issues of particular concern gave rise to Member State disquiet, namely the proposed definition of public benefit and the provision for automatic and universal tax exemption for European Foundations ("FEs"). A third difficulty that arguably weakened Member State consensus on the proposed EFS related, ironically, to the very nature of the definition of "foundation" employed in the Commission's proposal. Protracted negotiations on these issues weakened the momentum towards promulgation and while these were not the only sticking points encountered by the Commission in its attempt to guide the proposal through the European Council, it is arguable that these three matters are symptomatic of the greater difficulties experienced in the EU when thoughts turn to European non-profit regulation.

C. Defining Public Benefit – Pleasing Some of the People None of the Time

Among the most provocative features of the Commission's proposed regulation was the inclusion of a lowest common denominator definition of "public benefit purpose" setting the parameters for what constituted a European notion of philanthropy, at least for cross border purposes. Part of the challenge in this regard proved to be the difficulty of accommodating the divergent concepts of common law and civil law philanthropy within the one European regulatory definition. The common law approaches the concept of "charity" through the interpretational lenses of "charitable purpose" and "public benefit." Both of these terms have, over the centuries, been the subject of judicial interpretation and more lately statutory (re)definition, resulting in common law countries such as the United Kingdom and Ireland enjoying a rich, if somewhat complex, toolkit for deciding whether an organization qualifies as charitable or not. Core to this charity test is the dual

25. Gerry Salole, *Why is the European Foundation Statute Needed?*, INT'L J. NOT-FOR-PROFIT L. 75, 75-84 (2008); EUROPEAN FOUND. CTR., *IT'S TIME FOR A EUROPEAN FOUNDATION STATUTE* (2011); ALLIANCE PUBLISHING TRUST, *PHILANTHROPY IN EUROPE: A RICH PAST, A PROMISING FUTURE* (Norine MacDonald & Luc Tayart de Borms eds., 2008); *Commission Proposal for a Council Regulation on the Statute for a European Foundation*, COM (2012) 035 final (Feb. 8, 2012).

aspect of a list of defined charitable purposes *and* a requirement of sufficient benefit to the public. In contrast, civil law jurisdictions do not share the common law concept of “charity” and the judicial traditions of these jurisdictions are not dependent upon case law in the development of the law as in Ireland and England. Given that the driving forces behind the EFS were foundations based in civil law jurisdictions, it is perhaps unsurprising that the proposed definition of a “public benefit purpose” fitted a civil law perspective of the term. To this end, Article 5 of the EFS provided that a public benefit purpose included:

- (a) arts, culture or historical preservation;
- (b) environmental protection;
- (c) civil or human rights;
- (d) elimination of discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination;
- (e) social welfare, including prevention or relief of poverty;
- (f) humanitarian or disaster relief;
- (g) development aid and development cooperation;
- (h) assistance to refugees or immigrants;
- (i) protection of, and support for, children, youth or elderly;
- (j) assistance to, or protection of, people with disabilities;
- (k) protection of animals;
- (l) science, research and innovation;
- (m) education and training;
- (n) European and international understanding;
- (o) health, well-being and medical care;
- (p) consumer protection;
- (q) assistance to, or protection of vulnerable and disadvantaged persons;
- (r) amateur sports;
- (s) infrastructure support for public benefit purpose organizations.

This definition, however, was not co-extensive with the common law definition of “charitable purpose.” It omitted, for instance, the advancement of religion entirely; and the notion of being “exclusively” for charitable purposes—an integral part of the common law test—was also absent from early European drafts. Moreover, the use of the descriptor “public benefit purpose” caused confusion for common law countries, devoid as it was of the common law understanding of the essential tests for public benefit. The fear was expressed that the new European usage of “public benefit” would

be open to wide interpretation and could give rise to inconsistent applications under the national laws of different countries. Finding compromise that could accommodate both the secular approach of certain civil law jurisdictions and the common law canons of interpretation regarding the parameters of philanthropy proved to be extremely difficult.

D. Taxing Questions – Competence, Sovereignty and Definition

Another arresting and ultimately troubling feature of the proposed EFS was the provision for universal tax-exempt status of FEs by virtue of their establishment so that “in all cases, [tax exemption] treatment should be applied without any need for the FE or its donors or beneficiaries to prove that the FE is equivalent to domestic public benefit purpose entities.” In other words, existence as an FE *per se* would be sufficient for it to be considered as an equivalent tax-exempt domestic charity, no further national inquiry being entertained. The EFS reversed the burden of proof that up until this time had lain with the foreign charity to prove its tax equivalent status to the tax authority of the host Member State. The automatic acceptance of tax legitimacy by virtue of the FE label proved to be extremely controversial amongst Member States with the fear being that a host tax authority would be forced to grant tax relief to an FE registered in another Member State but active in the host country without having the ability to scrutinize the latter’s purposes in the same way as it would scrutinize a domestic charity applying under national law.

Tax law is an area in which the EU does not have competence to make legally binding decisions that require Member State harmonization. The Commission’s approach initially, at least, was that the EFS tax provisions did not amount to tax harmonization but were rather an application of the non-discrimination principles. However, the Member States’ strong attachment to the notion of national tax sovereignty coupled with discord over the definitional scope of public benefit purpose entities led to a number of Member States vetoing these provisions.

The European Council began its scrutiny of the EFS proposal in April 2012, under the tenure of Danish Government. Although the issue remained on the agenda of the next three European Council Presidencies,²⁶ not even a subsequent compromise version of the tax provisions garnered

26. Cyprus took over the Presidency of the European Council from Denmark on July 1, 2012 and was followed six months later by Ireland and then Lithuania. Lithuania handed over the EFS portfolio to the Greek Presidency in January 2014 before finally the Italian Presidency dropped the EFS from its legislative agenda in December 2014.

unanimous agreement, leading to the Lithuanian Presidency ultimately dropping the tax provisions from the proposal in November 2013.²⁷

E. 'Foundation' – What's in a Name?

A third challenge which came to light during the legislative scrutiny process was the fact that the regulation focused on only one type of legal vehicle—the foundation. While at first glance, this may not have seemed problematic and indeed might have been viewed as a natural extension from previous Commission proposals which had dealt respectively with the creation of the European public companies²⁸ (successfully) and the European Association²⁹ (unsuccessfully), the type of foundation envisaged by the EFS was very much a civil law concept. Given the number of active European foundations, the vast majority of support for the EFS came from continental Europe and the representative body for European foundations, the European Foundation Centre.³⁰

The difficulty, however, was that in common law countries the foundation was less a legal concept and more a descriptive label. Typically, charitable companies (namely, companies limited by guarantee) and charitable trusts were the legal vehicles of choice in common law countries when it came to cross-border philanthropy. Both of these legal forms, however, fell outside the scope of the EFS proposal. Article 2 of the EFS proposal defined a “public benefit purpose entity” as: “a foundation with a public benefit purpose and/or similar public benefit purpose corporate body without membership formed in accordance with the law of one of the Member States”.³¹

Although the company limited by guarantee met the condition of incorporation, it had members whereas a trust, while not having members, was unincorporated, placing both entities outside the functional definition of an FE.

27. The tax provisions contained in the proposal for a European Foundation Statute (EFS) were officially withdrawn, following a meeting of COREPER—the group of EU Member States' political representatives—on November 8, 2013 in the aftermath of the presentation of the Lithuanian compromise text.

28. Council Regulation 2157/2001, 2001 O.J. (L 94) (EC) (Council regulation of 8 October 2001 on the Statute for a European company (SE)).

29. *Proposal for a Regulation of the European Parliament and of the Council on the Statute for a European Association*, COD (1991) 0386, subsequently withdrawn by the Commission, *Communication from the Commission to the Council and the European Parliament: Outcome of the Screening of Legislative Proposals Pending before the Legislator*, COM (2005) 462 final.

30. See EUROPEAN FOUND. CTR., <http://www.efc.be> (last visited Sept. 18, 2015).

31. *Commission Proposal for a Council Regulation on the Statute for a European Foundation*, COM (2012) 35 final.

For common law countries, therefore, the attractiveness of the EFS proposal was more limited and it did not enjoy the groundswell of support from the charity sector that might otherwise have prompted these Member State governments to work harder at the proposal's adoption.³² This lack of fulsome support can be seen from the rather negative response of the British Minister for Employment Relations and Consumer Affairs to the Commission's Consultation on Future Priorities in 2006 querying whether the UK considered it a useful exercise to carry out the then proposed EFS feasibility study³³:

[T]he UK does not see value in further investigating the possible need for a European Foundation. We are not aware of any demand for such a vehicle from business or elsewhere. A European Foundation would add unnecessarily to the amount of company legislation without identified benefits. We believe that the EU should not expend further resources on considering such a vehicle.

The UK's continued insistence on the EFS proposal's irrelevance is further evidenced by more recent 2015 correspondence between the Chairman of the House of Lords EU Justice Sub-Committee and Rob Wilson MP, Minister for Civil Society at the Cabinet Office, noting that the subcommittee was "pleased to see the Commission withdrawing proposals where there is no realistic prospect of agreement in the Council" before formally clearing the proposal from parliamentary scrutiny.³⁴

F. Structural Challenges and Lessons

One of the challenges of a co-decision legislative process, to which the EFS proposal was subject, is getting all necessary parties on board within an acceptable time frame. While proponents of the EFS proposal managed to secure European parliamentary support³⁵ and support of the regional and social committees,³⁶ European Council approval proved to be beyond their reach. The legal requirement for Member State unanimity

32. Attorney Gen., N. Ir., Colloquium on European Developments in Charity Law, Belfast (Feb. 28, 2014).

33. See *Select Committee on European Union Fortieth Report*, HOUSE OF LORDS (Mar. 28, 2006), <http://www.publications.parliament.uk/pa/ld200607/ldselect/lducom/187/187232.htm>.

34. See Letter from David Lidington MP, Minister of Europe, Foreign and Commonwealth Office, to the Chairman (July 1, 2015), <http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/cwm/CwMsubE31Mar-10Jul15.pdf>.

35. See generally European Parliament Resolution of 2 July 2013 on the Proposal for a Council Regulation on the Statute for a European Foundation (FE), EUR. PARL. DOC. (COM 0035-2012/0022) (2013).

36. See *Opinion of the Committee of the Regions on "The Statute for a European Foundation,"* 2013 O.J. (C 17/13); *Opinion of the European Economic and Social Committee on the "Proposal for a Council Regulation on the Statute for a European Foundation (FE),"* 2012 O.J. (C 351/13).

certainly hampered this process and while, undoubtedly, those who supported the EFS did well to keep the issue alive over the course of five successive Council presidencies, ultimately lack of sufficient progress on the proposal tarnished its appeal for incoming Council presidents, who in their short reign of six months aspire to leave behind a list of their own legislative achievements, rather than spend precious time negotiating around past presidencies' albatrosses. From a political perspective, therefore, unless the next presidency shares your passion on the importance of advancing a legislative proposal or can reinvent your idea to make it their own, there is little chance, in the absence of Member State consensus, of a proposal remaining on the agenda.

And yet, many of the problems that the EFS proposal set out to tackle still remain. Cross border philanthropy does not fully enjoy the benefits of the common market. Establishment and legal regulatory costs make it more difficult for a charity to operate across jurisdictions in a tax-effective manner.³⁷ Matters are improving, thanks to ECJ jurisprudence and Commission enforcement notices, but there is still some way to go. There was no appetite amongst Member State governments to invest the required resources in the setting up of registration and supervision processes for the proposed FE.

Until the EU works out at a macro level how best to support interstate philanthropy and charitable giving and until it resolves at a European Council level what purposes and activities fall within an agreed inclusive European definition of public benefit entities, full regulatory enablement of the sector will not be achieved. And this has consequences for regulation. For effective regulation is only truly possible when the area to be regulated is mapped and the ground rules are set as to who is covered and in what situations. In the absence of a legal basis that requires less than unanimity, it will remain extremely difficult for the Commission to create a European non-profit enabling space within which to create a non-profit regulatory framework that has buy-in across the EU.

37. TRANSNATIONAL GIVING EUR., EUROPEAN FOUND. CTR., TAXATION OF CROSS-BORDER PHILANTHROPY IN EUROPE AFTER PERSCHE AND STAUFFER: FROM LANDLOCK TO FREE MOVEMENT? 44 (2014) (noting that “[t]he landmark judgements (sic) of the European Court of Justice force Member States not to discriminate [against] foreign EU-based public benefit organisations and their donors. However, this study reveals that barriers continue to exist. Several Member States have not yet removed discrimination and even where they have, problems remain. [Public Benefit Organisations] and their donors encounter a lack of legal clarity, long and complicated procedures, and significant additional translation and consultancy costs to show their comparable status. Within the EU no formal or uniform approach to the comparability test is foreseen: Usually it is the competent tax authority who decides on a case-by-case basis whether a foreign PBO is considered comparable to a domestic one.”).

II. FATF OVERSIGHT: THE NON-PROFIT SECTOR FIGHTS BACK

A. *The Regulatory Context*

Following the events of 9/11, the world and its institutions turned their attention to the task of curtailing and preventing the funding of terrorism. The non-profit sector was seen as particularly vulnerable to abuse by terrorist factions who might wish to launder money through innocent charities or to set up bogus charities as fronts for terrorist activity and funding. For its part, the UN Security Council issued Special Resolution 1373 in 2001, which obliged all States to criminalize assistance for terrorist activities, to deny financial support and safe haven to terrorists, and to share information about groups planning terrorist attacks.³⁸

Further effect was given to this goal by the FATF³⁹ passing in 2001 of nine Special Recommendations aimed at countering terrorist financing. The FATF was founded in 1989, comprising of 34 Member States, two regional councils,⁴⁰ eight regional associate members and a host of observer bodies.⁴¹ The FATF is an intergovernmental body charged with setting standards to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.⁴² Special Recommendation VIII (“SR VIII”)⁴³ focused on the vulnerabilities of the non-profit sector and tasked FATF Member States with

38. S.C. Res. 1373, 4 (Sept. 28, 2001). Resolution 1373 was followed in 2013 by UN Security Council Special Resolution 2129, which further recognized “the need for Member States to prevent the abuse of non-governmental, non-profit and charitable organizations by and for terrorists, and call[ed] upon non-governmental, non-profit, and charitable organizations to prevent and oppose, as appropriate, attempts by terrorists to abuse their status, while recalling the importance of fully respecting the rights to freedom of expression and association of individuals in civil society and freedom of religion or belief, and noting the relevant recommendation and guidance documents of the Financial Action Task Force.” S.C. Res. 2129 (Dec. 17, 2013).

39. Described by Ben Hayes, civil society legal analyst, as “the most powerful agency you never heard of”. KAY GUINANE, CIVICUS, GUEST ESSAY, THE INTERNATIONAL ANTI-TERRORIST FINANCING SYSTEM’S NEGATIVE EFFECT ON CIVIL SOCIETY RESOURCES, STATE OF CIVIL SOCIETY REPORT 251 (2015).

40. Namely, the European Commission and the Gulf Cooperation Council.

41. Including, *inter alia*, the UN, the World Bank and Interpol. For a full list of all members, associates and observers see *FATF Members and Observers*, FATF, <http://www.fatf-gafi.org/about/membersandobservers/> (last visited Mar. 22, 2016).

42. See *About*, FATF, <http://www.fatf-gafi.org/about/> (last visited Oct. 2, 2015).

43. FATF, FATF IX SPECIAL RECOMMENDATIONS (2001), [http://www.fatf-gafi.org/media/fatf/documents/reports/FATF Standards - IX Special Recommendations and IN rc.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf) [hereinafter SR VIII]. In February, 2012, the FATF revised the 40 and the IX Recommendations. The FATF integrated its nine special recommendations on the financing of terrorism into its 40 Recommendations. See Press Release, FATF, FATF Recommendation (2012), [http://www.fatf-gafi.org/media/fatf/documents/Press handout FATF Recommendations 2012.pdf](http://www.fatf-gafi.org/media/fatf/documents/Press%20handout%20FATF%20Recommendations%202012.pdf) (last visited Jan. 14, 2016).

ensuring that their charity regulatory frameworks were robust enough to withstand terrorist manipulation of their non-profit entities.⁴⁴

The effect of SR VIII was to require all Member States to undertake greater scrutiny and supervision of non-profit activity. In support of this end, the FATF published a non-binding Best Practices Paper (“BPP”) in 2002 and a binding Interpretative Note on SR VIII in 2006, the purpose of the latter being to define what constituted a non-profit organization and what exactly SR VIII required.⁴⁵ The FATF’s standards, comprising of 40 standards on anti-money laundering measures and the nine standards countering terrorism funding, now represent an “essential element of the global ‘good governance’ agenda promoted by the United Nations, European Union, International Monetary Fund (IMF), World Bank and regional development banks.”⁴⁶

B. Greater Protection or Simply Excessive Regulation?

Attempts by many governments to give effect to SR VIII have resulted (sometimes directly, sometimes indirectly) in the imposition of restrictive laws that have reduced the enabling civic space in which non-profit organizations traditionally operate. In their 2012 Report, *Legalising Surveillance, Regulating Civil Society*, StateWatch and the Transnational Institute examined the actions of 159 FATF Member States to give effect to SR VIII.⁴⁷ In the words of the report’s preface, “the study shows that SR VIII has created a system of onerous rules and regulations that have great potential to subject NPOs to excessive state regulation and surveillance, which restricts

44. The wording of SR VIII provides:

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (i) by terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

SR VIII, *supra* note 43.

45. FATF, BEST PRACTICES: COMBATING THE ABUSE OF NON-PROFIT ORGANISATIONS (RECOMMENDATION 8) (2015), <http://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf> [hereinafter BPP].

46. STATEWATCH & HUMAN SECURITY COLLECTIVE, COUNTERING TERRORISM OR CONSTRAINING CIVIL SOCIETY? THE IMPACT OF FINANCIAL ACTION TASK FORCE RECOMMENDATIONS ON NON-PROFIT ORGANISATIONS IN CENTRAL AND EASTERN EUROPE AND CENTRAL ASIA 4 (2015).

47. BEN HAYES, TRANSNATIONAL INST./STATEWATCH, COUNTER-TERRORISM, ‘POLICY LAUNDERING’ AND THE FATF: LEGALISING SURVEILLANCE, REGULATING CIVIL SOCIETY (2012), <http://www.statewatch.org/analyses/no-171-fafp-report.pdf> (last accessed Oct. 16, 15) [hereinafter LEGALISING SURVEILLANCE REPORT].

their activities and thus the operational and political space of civil society organizations.”⁴⁸

The *Legalising Surveillance Report* found that an unintended effect of SR VIII’s evaluation system was to endorse some of the most restrictive non-profit regulatory regimes in the world, while simultaneously providing strong encouragement to some already repressive governments to introduce new rules likely to restrict the political space in which NGOs and civil society actors operate.⁴⁹ The report’s findings in this regard have been further corroborated by independent academic studies, reports published by ICNL and Civicus⁵⁰ and interestingly, other global institutions.⁵¹ The World Bank, for instance, has questioned the suitability of SR VIII, noting that:

The rarity of instances of terrorism financing by NPOs, when contrasted against the enormous scope of the sector, does raise the question of whether, *in and of itself*, government regulation is the most appropriate response.⁵²

In a wide-ranging and well-referenced work, Douglas Rutzen further evidenced the adverse consequences of government regulation in this area, identifying ten common regulatory practices introduced by governments that have the direct or indirect effect of constraining the operating space for civil society organizations.⁵³ Six of these measures arise in the context of efforts at FATF compliance and include:

- (1) requiring prior government approval to receive international funding;
- (2) capping the amount of international funding that a CSO is allowed to receive;
- (3) requiring that international funding be routed through government-controlled entities;

48. *Id.* at 7.

49. *Id.* at 10.

50. See Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, 17 INT’L J. NOT-FOR-PROFIT L. 5 (2015); GUINANE, *supra* note 39.

51. See, e.g., Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), *Rep. submitted in accordance with Human Rights Council Resolution 24/5*, 35, U.N. Doc. A/69/365 (Sept. 1, 2014) noting “the battle against crime and terrorism has been used by some States as a cover for imposing politically motivated restrictions on civil society funding. The Special Rapporteur thus remains concerned about the risk of over-regulation that FATF recommendations introduce (see A/HRC/23/39).”

52. Emile Van der Does de Willebois, *Non-profit Organizations and the Combating of Terrorism Financing a Proportionate Response* 33 (World Bank Working Paper No. 208, 2010), <http://issuu.com/world.bank.publications/docs/9780821385470>

53. Rutzen, *supra* note 50, at 10.

- (4) prohibiting CSOs from receiving international funding from specific donors;
- (5) constraining international funding through the overly broad application of counterterrorism and anti-money laundering measures; and
- (6) imposing onerous reporting requirements on the receipt of international funding.

The practical effects of such measures are again highlighted in the recent *Civicus State of Civil Society Report* for 2015. In her guest essay in that report, the Director of the non-profit Charity and Security Network, Kay Guinane, referred to a number of legislative changes introduced by countries as a result of their FATF evaluations, all of which result in excessive regulation of CSO funding.⁵⁴ These include:

- Spain's passing of a new law requiring all NGO donations over €1000 to be reported to the national government;⁵⁵
- Uzbekistan's insistence that NGOs get approval for foreign grants and report each financial transaction using these funds to the Ministry of Finance on the next business day, no matter how small the individual transaction;⁵⁶
- India's requirement that all CSOs receiving foreign contributions must report them to the central government within thirty days of receipt;⁵⁷
- In response to its FATF evaluation, the British Virgin Islands passed a law requiring CSOs with more than five employees to appoint a Money Laundering Reporting Officer. Those with less than five staff need not appoint a separate officer but are still required to perform the Money Laundering Reporting Officer functions. Stiff fines are imposed for the failure to maintain any records required to be maintained.⁵⁸

54. GUINANE, *supra* note 39.

55. See Spanish Royal Decree (B.O.E. 2014, 304), passing the Regulation of Act 10/2010 on Anti-Money Laundering and Counter-Terrorist Financing, which completes the implementation into Spanish law of Directive 2005/60/EC.

56. See *NGO Global Monitor: Uzbekistan*, INT'L CTR. FOR NOT-FOR-PROFIT LAW, <http://www.icnl.org/research/monitor/uzbekistan.html> (last updated July 25, 2015).

57. Indian Foreign Contribution (Regulation) Act, 2010, No. 42, Acts of Parliament, 2010 (India); See *India*, COUNCIL OF FOUNDS. (last modified Oct. 2015), <http://www.cof.org/content/india>.

58. See FIN. SERVS. COMM'N, VIRGIN ISLANDS, ANTI-MONEY LAUNDERING AND TERRORIST FINANCING CODE OF PRACTICE, 2008 (2008), <http://www.bvifsc.vg/Portals/2/Anti-Money%20Laundering%20and%20Terrorist%20Financing%20Code%20of%20Practice,%202008.pdf> (consolidated by The Financial Services Commission on February 17, 2009). Fines range from \$3000 to \$30,000 with fines of up to \$10,000 for not keeping proper records. see ECNL ET AL., ILLUSTRATIVE

More recently, in a further indictment of the FATF's exercise of its regulatory role, the *Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* chided the FATF for missing opportunities to highlight when national legislative efforts to comply with SR VIII were at variance with international human rights law. In the words of Special Rapporteur Ben Emerson, "in its peer review processes, the Task Force has rarely criticized overregulation and lack of respect for human rights, focusing instead on cases of insufficient regulation."⁵⁹

C. FATF Evaluation – Understanding the Process

The peer review process mentioned by Special Rapporteur Emerson occurs in the context of the FATF mutual evaluation process. Unpacking how this process works is a useful exercise in better understanding the driving forces that have contributed to the introduction of the types of regulatory measures, referred to by Guinane and Rutzen above,⁶⁰ and the consequent foreclosing of civil society space.

Member State compliance with the FATF's recommendations is monitored in a two-step process. Each member carries out an initial self-assessment of compliance, which is followed up by a peer-to-peer mutual evaluation process and report. Based on the level of country compliance with the key FATF recommendations, reports, prepared by a team of financial, legal and law enforcement experts from other countries, rate countries as being somewhere on the scale between "compliant," "largely compliant," "partially compliant" or "non-compliant." The final reports are made publicly available and indicate the necessary steps required to be taken by a country if its compliance with the FATF recommendations falls short.⁶¹ The time between Mutual Evaluation Reports depends on the health of a

LIST OF OVERREGULATION OF NGOS: FOR DISCUSSION AT ICNL'S GLOBAL FORUM 2015 (2015), <http://www.icnl.org/globalforum2015/wp-content/uploads/2015/06/Illustrative-List-of-Overregulation-of-NGOs.pdf>.

59. Ben Emmerson (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism), *Rep. submitted in accordance with Assembly resolution 68/178 and Human Rights Council resolutions 15/15, 19/19, 22/8, and 25/7*, 36, U.N. Doc. A/70/371 (Sept. 18, 2015).

60. *See supra* note 50.

61. FATF Mutual Evaluation Reports can be accessed online at *Topic: Mutual Evaluations*, FATF, http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc%28fatf_releasedate%29 (last visited Oct. 23, 15).

country's assessment, with more frequent re-evaluations occurring of less compliant countries.⁶²

When it comes to compliance rates with SR VIII (now "R8"), the *Legalising Surveillance Report's* 2012 review of the Mutual Evaluation Reports of 159 countries found that⁶³:

just five countries [were] ... 'Compliant' – Belgium, Egypt, Italy, Tunisia and the USA – meaning that the 'Recommendation is fully observed with respect to all essential criteria'. A further 17 countries were found to be 'Largely compliant', meaning 'only minor shortcomings, with a large majority of the essential criteria being fully met'... The vast majority of the 159 mutual evaluation reports that were examined – 85% – designated countries as only 'partially compliant' or 'non-compliant'. 'Partially compliant' (66 of 159 countries, or 42%) signifies that the 'country has taken some substantive action and complies with some of the essential criteria'; 'non-compliant' (69 of 159 countries, or 43%) means 'major shortcomings, with a large majority of the essential criteria not being met'.

The low levels of compliance and the need for better engagement between the regulators and the regulated was further emphasized in the 2013 report prepared by the Center on Global Counterterrorism Cooperation ("CGCC"), following a two-year project led by the United Nations and aimed at developing a common understanding of sound practices to counter the risk of terrorism financing through the non-profit sector.⁶⁴ The project included two global-level meetings and five regional-level expert meetings. More than 50 states and 80 NPOs participated in the meetings, in addition to representatives of relevant UN and multilateral agencies, officials from the FATF and FATF-style regional bodies ("FSRBs"), and the financial sector.⁶⁵ One of the key findings of the CGCC report was the need for the

62. Thus by way of example, Australia's 3rd Mutual Evaluation Report in 2005 concluded that the country was compliant with 12 Recommendations; largely compliant with 14; partially compliant with 13; and non-compliant with 10. Rated as compliant or largely compliant with 13 of the 16 Core and Key Recommendations, Australia was placed under the regular follow-up process immediately after the adoption of this report. However, due to the lack of progress, it was placed under the enhanced follow-up process in February 2012, a process it exited in June 2014, having achieved a satisfactory level of compliance with all Core and Key Recommendations. See FATF, MUTUAL EVALUATION REPORT AUSTRALIA (2015).

63. LEGALISING SURVEILLANCE REPORT, *supra* note 47.

64. GLOB. CTR. ON COOPERATIVE SEC., TO PROTECT AND PREVENT: OUTCOMES OF A GLOBAL DIALOGUE TO COUNTER TERRORIST ABUSE OF THE NONPROFIT SECTOR, § v (2013) (noting that "Understanding and awareness about the risk of terrorism financing in the non-profit sector is uneven globally, and levels of compliance with Financial Action Task Force (FATF) Recommendation 8 are low. Yet, there is consensus on the key elements of an effective response, including the need for a risk-based approach that identifies and mitigates the risk of terrorism financing, proportionality, outreach to the sector, and engagement on a whole-of-government basis across relevant government agencies.").

65. Launched at an initial expert working-group meeting held in London in January 2011, the initiative consisted of five regional workshops, held in Bangkok (March 2011), Auckland (November

active participation of the non-profit sector to help build relationships of trust and confidence in emerging regulatory frameworks⁶⁶ and it is to the actualization of this finding that the next section now turns, first by considering briefly the EU Commission's past efforts to comply with R8 before turning to the latest efforts of civil society to refashion the FATF non-profit relationship of engagement.

D. The European Union Response

“Since non-profit organisations frequently have an international profile, it is necessary to find international solutions, notably at EU level, as a complement to domestic measures.”⁶⁷ As a regional FATF member in its own right, the European Commission itself has experienced difficulties in the past in giving full effect to R8. Its first efforts in 2005 took the form of a Commission Communication (from DG Justice), recommending, inter alia, a Framework for a Code of Conduct to enhance transparency and accountability of NPOs and to reduce the risk of abuse of the non-profit sector.⁶⁸ The Communication made recommendations to EU Member States as well as to NPOs, to “verify the identity and good faith of their beneficiaries, donors and associate NPOs,” and “keep full and accurate audit trails of funds transferred outside their jurisdiction.” The code request was prompted both by R8 and by European Council declarations following the 2005 London bombings.⁶⁹ Although conceding that “the Framework for a Code of Conduct should not in any way hinder legal cross border activities of NPOs,” and declaring that “the aim of the European approach is thus to establish common principles on which national implementation can be based,”⁷⁰ the Commission provided no guidance on how these common principles were to be achieved and following non-profit concerns, the code was never implemented.

2011), Nairobi (March 2012), Buenos Aires (November 2012) and Doha (January 2013), respectively. The aims of the initiative were to bring together experts from Member States, the non-profit sector and relevant international and regional organizations to discuss the risk of terrorism financing abuse in a regional context, to foster cooperation in that regard, and to promote the sharing of good practices.

66. See *supra* note 64.

67. Council of the European Union, Counter Terrorism Coordinator, Revised Strategy on Terrorist Financing No. 11778/1/08 REV 1 of 17 July 2008, 8.

68. *Commission of the European Communities, The Prevention of and Fight Against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-Profit Sector*, COM (2005) 620 final (Nov. 29, 2005) [hereinafter *Commission Communication (2005) 620 final*].

69. Council Declaration C/05/187 of 13 July 2005, following the London bombings, had already asked the EU to “agree a Code of Conduct to prevent misuses of charities by terrorists.” (available at http://europa.eu/rapid/press-release_PRES-05-187_en.pdf).

70. *Commission Communication (2005) 620 final, supra* note 68, at 12.

Nonetheless, in its 2009 Communication on the draft Stockholm Programme, the Commission focused on the need at European level to regulate non-profits:

We must have a mechanism that allows both adequate monitoring of financial flows and effective and transparent identification of people and groups likely to finance terrorism. Recommendations must be prepared for charitable organisations to increase their transparency and responsibility.⁷¹

The Stockholm Programme set out a five-year framework for the EU in the area of justice and home affairs. Negotiated by the European Council, the final version, published in 2010, mandated the Commission “to promote increased transparency and responsibility for charitable organisations with a view to ensuring compatibility with Special Recommendation (SR) VIII of the Financial Action Task Force (FATF).”⁷² Part of the difficulty for the Commission, as we have already seen in the context of the EFS, is the expectation that it will act in an area in which it lacks a legal basis for European non-profit regulation per se. Thus, finding the mechanism through which to give satisfactory expression to the goals of R8 has proven somewhat challenging.

Realizing perhaps its legislative limitations, the Commission sought to develop and introduce voluntary anti-terrorist financing guidelines for EU-based non-profit organizations to achieve R8 regulatory compliance. The substantive principles to this effect, outlined in a Commission Discussion Paper of 2010⁷³ that largely reflected the Commission’s earlier 2005 Communication proposals,⁷⁴ found little favor, however, with non-profit respondents.

The Commission’s desire to limit consultation on the 2010 Discussion Paper to a select group of invited non-profits and Member State representatives did little to endear it to the broader non-profit community who were neither given access to the Discussion Paper nor invited to comment upon it.⁷⁵ Public disclosure of the matters under discussion and dissemination of civil society’s perspective occurred only to the extent that invited non-

71. *Communication from the Commission to the European Parliament and the Council: An Area of Freedom, Security and Justice serving the Citizen*, at 23, COM (2009) 262 final (June 10, 2009).

72. Council of the European Union, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, 2010 O.J. (C 115).

73. See European Commission, *Discussion Paper on Voluntary Guidelines for EU Based Non-profit Organisations* (July 2, 2010).

74. Commission Communication (2005) 620 final, *supra* note 68.

75. For a full account of the content of the Discussion Paper and the background to civil society-EU relations at the time, see Oonagh B. Breen, *Through the Looking Glass: European Perspectives on Non-Profit Vulnerability, Legitimacy and Regulation*, 36 *BROOK. J. INT’L L.* 947, 976 (2011).

profits were prepared to publish their responses (along with copies of the Discussion Paper). In one such published response, the European Centre for Not-for-Profit Law (“ECNL”) sought to clarify the role of the Commission in relation to the non-profit sector and the context for the Discussion Paper.⁷⁶ Citing the purpose of the guidelines as being “to encourage NPOs to review their internal rules, to increase awareness about potential terrorism abuse and thus reduce the risk of NPOs’ possible abuse for terrorist financing purposes,”⁷⁷ ECNL advanced the view that achievement of this goal could only occur if the Commission dropped its prescriptive tone as a regulator and became instead an enabler of civil society. ECNL urged the Commission to act as a convener to bring Member States and their best practices together to be shared precisely because of the lack of specific regulation at EU level that could otherwise serve as a reference point for the guidelines.⁷⁸

To date, despite promises of further and wider consultation on the matter, the Commission’s voluntary guidelines, intended for release in 2011,⁷⁹ have yet to be published in their final form. The webpage of the Commission’s Directorate General for Home Affairs however still states that, “Voluntary guidelines for the sector could be a means to enhance transparency and accountability of NGOs and to reduce their potential abuse for terrorist financing. The Commission aims to closely involve the NGO sector and EU States in its work in this field.”⁸⁰

E. To the Barricades: Reclaiming the Concept of Civic Space

The first formal engagement on a bilateral basis between the FATF and interested non-profits on the reform of R8 took place on April 24, 2013 when the FATF hosted a consultation and dialogue meeting with non-profit organizations in London. That engagement, which followed a 2012 commitment by the Norwegian FATF presidency to enter in dialogue with non-profits regarding the implementation of R8,⁸¹ may well itself have been

76. ECNL, COMMENTS ON THE DISCUSSION PAPER ‘VOLUNTARY GUIDELINES FOR EU BASED NON-PROFIT ORGANISATIONS’ (2010).

77. *Id.* at 3.

78. *Id.* at 4.

79. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe’s citizens: Action Plan Implementing the Stockholm Programme*, at 40, COM (2010) 171 final (Apr. 20, 2010).

80. See *Financing*, EUROPEAN COMM’N, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/crisis-and-terrorism/financing/index_en.htm (last visited Oct. 30, 15).

81. See Bjorn S. Aamo, Pres., FATF, Address at the 40th Plenary Meeting of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (Mon-

prompted by the ongoing multilateral successes of the CGCC project,⁸² in which both the FATF and non-profits participated. This renewed prioritization of sector engagement was certainly welcomed with interest by all participants in the CGCC project in their final multi-lateral meeting in New York in March 2013.⁸³

A positive outcome of the April 2013 London bilateral meeting was the adoption by the FATF of a limited update of the International *Best Practices Paper: Combating the Abuse of Non-Profit Organisations*,⁸⁴ which included a highlighting of the message that measures to protect NPOs from misuse should not disrupt or discourage legitimate charitable activities. In his letter to NPO participants in June 2013 informing them of progress made subsequent to the April meeting, the FATF President, Bjorn Aamo, expressly acknowledged the contribution of the NPO representatives to the process and welcomed their input into the preparation of the planned NPO Typologies Paper.⁸⁵

The involvement of non-profits in this latter process was well coordinated, pitched at a high-level, and produced strong working papers and substantive suggestions. A number of NGO coalitions developed around these issues at both a European regional level and a transnational international level, resulting in the formation of a Non-profit Platform on the FATF. Funded by the Open Society Foundation and co-facilitated by ECNL in Budapest, the European Foundation Centre (“EFC”) in Brussels, the Human Security Collective (“HSC”) in The Hague and the Charity & Security Network (“CSN”) in Washington, D.C., the coalition sought to give voice and structure to non-profit contributions.⁸⁶ To this end, a self-

eyval), Development of the Global Network and other key elements of FATF work under the Norwegian Presidency (Dec. 3, 2012), <http://www.fatf-gafi.org/publications/fatfgeneral/documents/developmentoftheglobalnetworkandotherkeyelementsoffatworkunderthenorwegianpresidency.html>.

82. See *supra* note 64 and accompanying text.

83. Ctr. On Global Counterterrorism Cooperation, *Preventing Terrorist Abuse of the Non-Profit Sector: Summary Observations* (Working Document, Final Expert Working Group Meeting on Preventing Terrorist Financing Abuse of the Non-profit Sector in New York Mar. 5-7, 2013), <http://www.un.org/en/sc/ctc/briefings/2013/npo/docs/working-document-4-5feb.pdf>.

84. BPP, *supra* note 45 (first published in 2002, subsequently revised in 2013 and 2015).

85. Letter from FATF on Best Practices Paper on Recommendation 8 to All NPO Participants of the FATF Consultation and Dialogue Meeting with Non-Profit Organisations (June 25, 2013) (noting “it is without a doubt that the work of the FATF on this paper has benefitted extensively from the April 2013 Consultation meeting and the written comments that we received from the NPO sector after the Consultation meeting. . . I once again thank you for your constructive cooperation over the past year on this important update.”).

86. See *About Us*, FATF PLATFORM, <http://fatfplatform.org/about/> (last visited Oct. 30, 2015).

styled Transnational NPO Working Group on FATF submitted recommendations to the FATF on the proposed Typology Review in February 2014.⁸⁷

The key recommendations made were that the typologies should be evidence based; they should distinguish between potential risk (i.e., vulnerability) and actual abuse; they should recognize the diverse structures and functions of NPOs and avoid an overbroad definition of terrorist financing; and they should recognize risk mitigation procedures employed by the NPO sector.⁸⁸ The FATF provided the Transnational NPO Working Group with an opportunity to respond to the draft report in June 2014.

Published in June 2014, the *Risk of Terrorist Abuse in Non-profit Organisations Report* sought to examine in detail how and where NPOs were at risk of terrorist abuse.⁸⁹ Using case studies as well as input collected from law enforcement, other government actors and non-profits themselves, the report was intended to increase awareness of the methods and risk of abuse for terrorism of the non-profit sector, both domestically and internationally and to serve as a basis for a more comprehensive revision of the *Best Practices Paper on Combating the Abuse of Non-Profit Organisations (Recommendation 8)*.⁹⁰ The final report included several of the recommendations advanced by the Transnational NPO Group, most particularly reference to: a) the positive role played by civil society in increasing human security worldwide; and b) the special protections the sector has under international human rights law and international humanitarian law.⁹¹ Outstanding issues not adequately addressed by the Typologies Report, however, remained in the form of concerns of the frequent conflation of vulnerability and risk of abuse in the substance of the report.⁹²

F. NPO Restructuring of the Regulatory Space: The Revised BPP 2015

Building on the momentum created by this engagement over the past twelve months, non-profit coalitions have engaged both directly and proactively with the FATF in the revisions of the *Best Practices Paper on Combating the Abuse of Non-Profit Organisations* (“BPP”), but also indirectly

87. See TRANSNATIONAL NPO WORKING GROUP ON FATF, RECOMMENDATIONS: FINANCIAL ACTION TASK FORCE TYPOLOGY REVIEW (Feb. 2014), <http://fatfplatform.org/wp-content/uploads/2015/02/NPO-Sector-Typology-Position-Paper-FATF.pdf>.

88. *Id.*

89. FATF, RISK OF TERRORIST ABUSE IN NON-PROFIT ORGANISATIONS (2014).

90. BPP, *supra* note 45.

91. Letter from the Transnational NPO Working Group to Co-Chairs of the RTM Working Group and to the FATF/GAFI Secretariat (Aug. 7, 2014) (on file with author).

92. *Id.*

through the channels of the EU Commission and U.S. Treasury to bring pressure on the FATF to be more transparent in its dealings and deliberations. The value of these inputs can be seen in the documents released by some of these collectives, which document the iterative process that preceded and influenced the revised BPP, published in June 2015.⁹³ The detailed nature and high quality of these initial non-profit recommendations gave weight to the coalition's call for "continuous formal consultation between the NPO sector and FATF, including participation in the Private Sector Consultative Forum."⁹⁴

In their initial recommendations to the FATF, the Transnational NPO Working Group proposed a number of reforms to the 2013 BPP to adopt a targeted approach towards the implementation of R8 rather than a one-size-fits-all approach and calling for proportionality in risk mitigation measures. The draft *Best Practices Paper on Combating the Abuse of Non-Profit Organisations*, released by the FATF in March 2015, took account of these particular concerns, giving effect to them specifically in paragraphs 7a, b and e (dealing with targeted approaches), paragraph 21 (dealing with proportionality), a new section V (dealing with access to financial services) and the separate creation of an annex of examples of good NPO practices with the express admonition that such examples were not to be treated as a formal checklist of required practices, much to the satisfaction of the NPO Working Group.⁹⁵

Much less to the satisfaction of the Working Group, however, was the consultation process undertaken by the FATF in relation to the March 2015 draft. The draft paper was released on a strictly confidential basis only to the invitees of the FATF Consultation and Dialogue Meeting with NPOs held in Brussels on March 25, 2015. The draft BPP expressly stated that it

93. See, e.g., Lia van Broekhoven, *Initial NPO Input into FATF Revision of the R8 'Best Practices Paper'*, CHARITY & SEC. NETWORK (2014), [http://www.charityandsecurity.org/sites/default/files/files/2014%20dec%2018%20Core%20Group%20s%20submission%20to%20the%20BPP%20review\(1\).pdf](http://www.charityandsecurity.org/sites/default/files/files/2014%20dec%2018%20Core%20Group%20s%20submission%20to%20the%20BPP%20review(1).pdf) (noting that the sharing of these non-profit recommendations with the FATF Secretariat arose from the latter's invitation and in light of preceding discussions between non-profit coalitions and FATF officials in Paris in October 2014).

94. *Id.* The Private Sector Consultative Forum plays an important role in fostering effective implementation of the FATF Recommendations by bringing together representatives of sectors that are subject to AML/CFT requirements (the financial sector and other designated businesses and professions), civil society, and policy makers to discuss issues of common interest. See, e.g., *Dialogue with the Private Sector*, FATF, <http://www.fatf-gafi.org/documents/news/private-sector-forum-march-2015.html> (last visited Nov. 3, 15).

95. See FATF, *Draft Best Practices Paper on Combating the Abuse of Non-Profit Organisations (Recommendation 8)* 20 (Working Draft, FATF Consultation and Dialogue Meeting with Non-Profit Organisations in Brussels, Belgium Mar. 25, 2015), [http://www.charityandsecurity.org/system/files/files/NPO-BPP-PostPDG-TonNPOinvitees-FINAL%20\(1\)\(1\).pdf](http://www.charityandsecurity.org/system/files/files/NPO-BPP-PostPDG-TonNPOinvitees-FINAL%20(1)(1).pdf).

was “not for further distribution to any persons outside or within your organisations.”⁹⁶ As noted by the Working Group’s April 2015 response to the draft BPP:

[W]e also remain concerned by the limited and indirect process of sharing the draft and the short time for response. This undermines the FATF’s commitment to outreach to the sector. If several national delegations and the European Commission had not agreed to engage in open consultation with the NPO sector[,] many of the signatories to these comments would not have seen the draft. As it is[,] in some regions NPOs did not get the opportunity to see the document or comment on it.⁹⁷

It is interesting to note the reference here to the inclusive role of the European Commission in this process, which was a far cry from the Commission’s aforementioned poor consultative record in respect of its own Discussion Paper on Voluntary Guidelines in 2010.⁹⁸ It remains an open question as to whether this commendably facilitative approach—which borders on the convener role earlier urged upon the Commission by ECNL—will become the norm for all future Commission direct engagement with NPOs or whether such an approach is only likely to be adopted when the Commission is a participant (as opposed to lead negotiator) in a related FATF consultation.

G. Non-profit Gains in FATF Regulatory Space: The Return of the Jedi?

Reflecting for a moment on the outcomes of recent FATF engagement with the non-profit sector in its review of R8 compliance practices, one might query whether FATF oversight was under siege from the sector and wonder to the extent that it might have been, what victories, if any, did the non-profit insurgents secure for their efforts. Perhaps one of the most tangible outcomes has been the FATF’s announcement that in the future it will hold an annual formal consultation with non-profit organizations on specific issues of common interest and that it will organize ad hoc exchanges on technical matters.⁹⁹ The announcement was made at the FATF’s plenary meeting in Brisbane in June 2015, the same meeting that saw the publication of the revised BPP.

96. *Id.* at 2.

97. FATF, *Joint NPO Comments on FATF Draft Best Practices Paper on Combating the Abuse of Non-Profit Organisations (Recommendation 8)* 2 (Working Draft as of Mar. 2015, Apr. 24, 2015).

98. See *supra* note 75 and accompanying text.

99. *Outcomes of the Plenary Meeting of the FATF, Brisbane, 24-26 June 2015*, FATF, <http://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-plenary-june2015.html> (last visited Nov. 6, 15).

Arguably, the direct engagement of the non-profit coalition on both the revisions of the BPP and the preparation of the Typologies Paper has given the FATF a far greater appreciation of the sector's capacity to contribute to R8 reform in an effective manner, leading to the promise of more formal future ongoing engagement. With the recent conclusion in November 2015 of an FATF public consultation on a proposed revision of the Interpretive Note to R8 to take account of the new Typologies Report and revised BPP,¹⁰⁰ the opportunity to give effect to this promise awaits to be fulfilled. Non-profits have responded to the FATF's call for feedback;¹⁰¹ the extent to which the FATF will take these views on board in its revised note remains to be seen.¹⁰²

One interesting feature of the FATF non-profit engagement has been the willingness of nonprofits to engage in their own regulation—nonprofits have not been averse to regulation but have sought good regulation that respects the principles of freedom of association and assembly and that is proportionate in application and enforcement. The sector's challenging of the broad statements of the FATF regarding the vulnerability of the entire NPO sector and development of NPO typology has the rationalizing effect of drawing to the regulator's attention the fact that if a sham/complicit organization is more correctly defined as a non-NPO, then imposition of greater regulation on NPOs in general will not solve the problem at hand, as such non-NPOs will not be caught.

Similarly, NPO awareness of the political implications of confusing concepts of "risk" and "vulnerability" and the potential adverse impact of document lists that become viewed as checklists or isolated case studies that become accepted as the norm for the sector without any empirical evidence of their prevalence is extremely refreshing. It challenges the regulator to a) become more accountable and transparent; b) to distinguish between useful illustrative examples and policy statements; and c) to engage in better crafted drafting so that FATF terms are clear and precise and

100. See *Public Consultation on the Revision of the Interpretive Note to Recommendation 8 (Non-profit Organisations)*, FATF (Nov. 6, 2015), <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-npo-inr8.html> in which the FATF especially welcomed the views of the NPO sector "in order to ensure that practical knowledge and experience, in particular from service NPOs, can be properly reflected in the Interpretive Note to Recommendation 8."

101. See GLOBAL NPO COALITION ON FATF, COMMENTS ON THE FATF ON THE OPEN, PUBLIC COMMENT PROCESS, SEEKING INPUT FROM NPOS ON REVISION OF THE INTERPRETIVE NOTE (IN) FOR RECOMMENDATION 8 (2015), <http://fatfplatform.org/wp-content/uploads/2015/11/GlobalCoalitionCommentsINRevision.pdf>.

102. The FATF will meet in February 2016 to review consultation feedback received before determining the next steps towards finalizing the Interpretive Note to R8 later in 2016.

set out clearly when action is not required as much as when it is. Admittedly, non-profits have not won this latter battle yet.

A win-win for the FATF that comes out of this non-profit engagement must be the realization of the regulatory gains that can be made when a regulator's oversight is under siege. One area in which this is particularly relevant is the current discussions over R8 and the issue of de-risking. De-risking refers to the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk in line with the FATF's risk-based approach. In the words of the FATF,

De-risking can introduce risk and opacity into the global financial system, as the termination of account relationships has the potential to force entities, and persons into less regulated or unregulated channels. Moving funds through regulated, traceable channels facilitates the implementation of anti-money laundering/countering the financing of terrorism (AML/CFT) measures.¹⁰³

This is a particular concern for certain non-profits either because of the conflict areas in which they work—e.g., Somalia or Syria, or because of the nature of the charity—e.g., Islamic charities, in particular.¹⁰⁴ These charities have found themselves victims in a banking system that has sought to close their accounts as the easiest way to ensure compliance with the CFT standards of bodies such as the FATF. The latest report from the Overseas Development Institute highlights the dangers of over-regulation in this regard:

[B]anks also generally consider that dealing with INGOs increases their exposure to risks of censure or fines under counter-terrorism measures. The result, as bluntly stated in letters sent by HSBC to charities whose accounts it had closed, is that they are deemed to be 'outside [the] risk appetite' of the bank... Simply put, the limited revenue that most INGOs may generate for a bank is not sufficient to justify the risks that banks believe doing business with INGOs will expose them to.¹⁰⁵

The 2015 revision of the BPP guidance on "Access of NPOs to Financial Services" was informed by NGO insights and evidence of the practical

103. *FATF Clarifies Risk-based Approach: Case-by-case, Not Wholesale De-risking*, FATF (Oct. 23 2014), <http://www.fatf-gafi.org/documents/news/rba-and-de-risking.html>.

104. See, for instance, Mark Tran, *Somalis Fear Barclays Closure of Remittance Accounts Will Cut Lifeline*, GUARDIAN (June 24 2013), www.theguardian.com/global-development/2013/jun/24/somalis-barclays-remittance.

105. Victoria Metcalfe-Hough et al., *UK Humanitarian Aid in the Age of Counterterrorism: Perceptions and Reality* 13 (Humanitarian Pol'y Grp., Working Paper, 2015), <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9479.pdf>.

effects of banks' de-risking.¹⁰⁶ The wording of the BPP to the effect that "financial institutions should not view NPOs (as that term is defined by FATF) as high risk simply because they may operate in cash-intensive environments or in countries of great humanitarian need"¹⁰⁷ coupled with BPP advice to banks when assessing the potential risk of an NPO to take into account:

a) any measures that the NPO itself may have in place to mitigate risk; and

b) any regulatory requirements that may apply to the NPO, including those which are not specifically aimed at AML/CFT, but which nevertheless help to mitigate terrorist financing risk, such as good governance, due diligence measures and reporting requirements on its activities for tax or other purposes¹⁰⁸

is very much driven by non-profit dialogue and experience in this regard.

The extent to which future successes are possible will only become apparent over time as the next round of Mutual Evaluation Reports are carried out. To this end, a watching brief must be kept on the compliance rates of Member States with R8 balanced against the introduction of new proscriptive national regulations ostensibly warranted by FATF but adversely affecting non-profit activity. If the advice of UN Special Rapporteur Emerson is heeded, evaluators will need clear guidance to aid their interpretation of R8 and the courage to identify and call out instances of Member State wrongful reliance on FATF principles to curtail civic space rather than to protect against the threat of terrorist financing.

CONCLUSION

The capacity for bespoke European regulation of non-profit organizations remains, at least to this author's mind, a distant and remote prospect. European regulation is not, nor should it be, impossible when approached on a functional basis. Thus, where the prescription (or indeed, proscription) relates to the structure, operations or substantive activity in which the EU has competence to regulate (be it competition law, labor law, workers' rights etc.) the fact that such regulation affects non-profit as well as for-profit actors will be a matter of little importance. It is when the focus of the

106. Further evidence of the dangers of derisking for the non-profit sector can be seen in TOM KEATINGE, DEMOS UNCHARITABLE BEHAVIOUR (2014), <http://www.demos.co.uk/files/DEMOSuncharitablebehaviourREPORT.pdf?1419986873>.

107. BPP, *supra* note 45, at [68].

108. *Id.* at [69].

regulation is upon the activities of non-profits *qua* non-profits, as we have seen, that difficulties in terms of European competence (in the narrow sense) and European consensus (in the broader European Member State context) will arise.

This article has sought to shed light on some of the underlying factors that inform these regulatory misadventures. The lack of an available legal treaty basis forcing non-profit regulation into the straitjacket of Council unanimity is not aided by the traditional cultural and legal divergences that exist within a community of 28 Member States. Even when these cultural differences can be overcome, the regulatory areas of most interest frequently border on those areas most sensitive to Member State sovereign control (e.g., tax policy) or seek to impose new regulatory regimes in areas in which many Member States have yet to work out their own robust regimes (e.g., the effective regulation of charities). The six-month rotation of the presidency of the European Council results in the existence of a short-term policy window such that only those legislative proposals for which there is the greatest collective need or priority will remain on the policy and legislative agenda. To end here would thus give credence to the view that European regulation of non-profits is simply an empty promise.

And yet, the facilitative role of the European Commission in the recent non-profit drive to reform FATF regulation of non-profit activities does open up a glimmer of opportunity. It raises the potential for the Commission to use its capacity as a convener of Member States, coupled with its broad understanding of potential non-profit vulnerability to terrorist financing in the cross border philanthropy arena, to raise NGO governance standards while simultaneously reducing the potential for over-zealous FATF over-regulation. It is too early to tell whether this quixotic chimera can be attained or whether we are simply tilting at windmills in our quest for a European regulator.