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THROUGH THE LOOKING GLASS: EUROPEAN PERSPECTIVES ON NON- PROFIT VULNERABILITY, LEGITIMACY AND REGULATION

*Dr. Oonagh B. Breen**

The ability of an NGO to govern itself free of outside interference is not—any more than the right to freedom of association—absolute—but any restrictions imposed must have a legal basis, serve a legitimate purpose and not be disproportionate in their effect. Some admissible restrictions are expressly recognised in international standards and others may be inferred from them.¹

This Article reviews European institutional efforts to develop a European regulatory framework for non-profit organizations and chronicles the motivations for this new endeavour on the part of the European Union (“EU” or the “Union”). Set initially against a background of concerns over terrorism financing, the EU’s interest in regulation of non-governmental organizations (“NGOs”)² has expanded beyond the remit of counter-terrorism measures to include greater scrutiny of non-profits under the heading of accountability and transparency. This Article explores the tensions inherent in the roll-out of any pan-European legislative agenda, which are magnified in the case of the non-profit sector given the varying legal definitions of charitable and public benefit entities, the regional differences in the supervision of such entities, the absence of a point of reference for exchange of learning and experience at a

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1. Council of Europe, *Expert Council on NGO Law, Second Annual Report: The Internal Governance of Non-Governmental Organisations*, ¶ 17, OINGConf/Exp. 1/2010 1 (Jan. 2010).

2. This Article uses the terms non-profit organization (“NPO”) and non-governmental organization (“NGO”) interchangeably. In general, the European Commission also uses both terms. In the past, the Commission seemed to favour the NGO concept. See, e.g., *The Commission and NGOs: Building a Stronger Partnership*, COM (2000) 11 final (Jan. 18, 2000) (a Commission Discussion Paper which sought to suggest ways of providing a more coherent Commission-wide framework for co-operation with NGOs that had hitherto been organised on a sector-by-sector basis). More recently, in the development of its guidelines to prevent use of NGOs for terrorist financing purposes, the Commission has switched from NGO to NPO terminology. *The Prevention of and Fight Against Terrorism Financing Through Enhanced National Level Coordination and Greater Transparency of the Non-profit Sector*, COM (2005) 620 final (Nov. 29, 2005).

transnational level within the EU, and the operational distance between agencies charged with NGO supervision, financial crime regulation, and counter-terrorism security.

Part I outlines the international call for better non-profit regulation in the wake of 9/11 and the universal problems experienced in giving full effect to that call. Part II then considers the particular historical and legal difficulties that the EU has experienced in legislating for non-profit organizations in the past. Part III moves on to review European efforts to implement the Financial Action Task Force ("FATF") Special Recommendations. In this regard, the Article looks at the 2005 Communication on the Prevention of and Fight Against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-Profit Sector, promulgated by the European Commission (the "Commission"), and how it attempted to introduce a regulatory (albeit 'voluntary') regime for charities and the non-profit reaction to these Commission initiatives.

Part IV turns its attention to the EU's re-assessment of its counterterrorism strategy in the context of non-profit organizations in light of three important reports carried out between 2007 and 2009. These reports, though coming from different perspectives, make a common point regarding non-profit regulation: the best European regulation is based on empirical evidence of abuse, is proportional to the perceived wrong, and is sensitive both to existing national regimes and to the flexibility that humanitarian organizations, in particular, require to carry out their missions in areas of high risk. Part V reviews the Commission's most recent foray in the area of non-profit regulation with the release of its Discussion Paper on Voluntary Guidelines for EU-based non-profit organizations. It outlines the challenges facing the European Commission as it works towards the publication of its proposed Communication on Voluntary Guidelines for EU-based Non-profit Organizations in 2011 and how these challenges are likely to affect international non-profits' delivery of their charitable missions within and without the European Union.

Part VI concludes that the current institutional passion for combating the financing of terrorism appears set to be the driving influence behind the proposed European regulation of non-profit organizations. It is submitted that a more balanced approach, which would still speak to the prevention of terrorism, would be to focus on improving non-profit governance in those areas that raise concern at EU level or that may particularly benefit from a concerted European (as opposed to an ad hoc Member State) policy solution. In this context the contrasting regulatory experiences of the United States Department of the Treasury (with its focus on the enforcement of anti-terrorist financing guidelines) and the Council

of Europe's Expert Council on NGO Law (with its focus on internal NGO governance) are briefly set out as diverging policy options for the European Commission's consideration.

I. THE BACKDROP TO EUROPEAN REGULATION

In October 2001, the FATF, in response to 9/11, issued nine special recommendations on terrorist financing. Special Recommendation ("SR") VIII focuses on the activities of non-profit organizations and requires that:

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:

- by terrorist organisations posing as legitimate entities;
- to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.³

The FATF SR VIII created a political climate in which it was seen as unacceptable for a signatory state to have ineffective laws overseeing non-profit activity in the context of combating terrorist financing.⁴ In his book, *Agendas, Alternatives and Public Policies*,⁵ John Kingdon identifies the prerequisites for effective policy change as being the convergence of three streams, namely, a recognised and existing "problem," an available and waiting "solution," and the necessary catalytic "political climate" to force problem and solution together through an open policy

3. Financial Action Task Force [FATF] & Groupe d'Action Financière [GAFI], *FATF IX Special Recommendations*, at 3 (Oct. 2001).

4. See G8 Finance Ministers' Statement at Deauville, (May 17, 2003), available at http://www.minefi.gouv.fr/fonds_documentaire/archives/communiqués/2003/c0305192_angl.htm; see also G8 Justice & Home Affairs Ministers, *Recommendations for Enhancing the Legal Framework to Prevent Terrorist Attacks* (May 11, 2004), available at http://www.usdoj.gov/criminal/cybercrime/g82004/G8_Recs_Legal_Frameworks_Prevent_Terrorism.pdf; Press Release, Council of the Eur. Union, Council Declaration on the EU Response to the London Bombings (July 13, 2005) [hereinafter London Bombings Press Release], available at <http://register.consilium.europa.eu/pdf/en/05/st11/st11116.en05.pdf>.

5. JOHN KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* (Eric Stano ed., 2d ed. 2003).

window thereby creating policy change.⁶ When a policy window opens, in the words of Kingdon, “participants dump their conceptions of problems, their proposals, and political forces into the choice opportunity, and the outcomes depend on the mix of elements present and how the various elements are coupled.”⁷ In other words, prevailing circumstances affect policy outcomes in so far as they influence our conceptions of both the problem and the likely solution. Identifying those prevailing circumstances can thus help us better understand resulting policy outcomes that emerge.

The FATF Special Recommendations seized upon the catalytic event that was the political turmoil following the 9/11 terrorist attacks to open a new policy window in respect of non-profit regulation. Finding the correct ‘solution’ to push through that window has not proven easy. To a large degree, there is lack of agreement as to the nature of the ‘problem,’ making it all the more difficult to arrive at a consensual solution. Policymakers may argue that public security and the wider public interest demand greater regulatory oversight of charities post 9/11 due to their perceived vulnerability to abuse through terrorist financing. Non-profits may concede the argument in favour of regulation if two conditions are met—first, the reality of the perceived threat is supported by empirical evidence; second, the measures are proportional to the likelihood of the alleged threat occurring. As yet, there has been no meeting of the minds on these all important issues of threat and proof.

The recent pace of regulatory change in NGO governing legislation in a number of FATF member states, however, would seem to imply a willingness by national governments to take action.⁸ Undoubtedly, the close scrutiny of states’ progress via FATF mutual evaluation reports has put

6. *Id.* at 88.

7. *Id.* at 166.

8. Reference in this regard can be made to the Charities and Trustee Investment (Scotland) Act, 2005, (A.S.P. 10), the Charities Act, 2006, c. 50 (Eng.), the Charities Act (Northern Ireland), 2008, c. 12, and Charities Act, 2009 (Act No. 6/2009) (Ir.). Many of the newer EU member states have completely overhauled their non-profit regimes in recent years. Note, for instance, Poland’s introduction of its Law on Public Benefit Activity and Volunteerism, (Poland), 2003; Law on Non-Profit Legal Entities, (Bulgaria), Amendment 2006, SG No105/22.12.2006 (2006); and Estonia’s Non-Profit Association Act, (Estonia), 1996, Amendment 2006, RT I 2005 and its 2005 amendments to Foundations Act 1995, Foundation Act (Estonia), 1995, Amended 2005, RT I 2004. More sporadic change is evident amongst older EU continental member states. *See, e.g.*, Belgium’s La Loi de L’Association Sans But Lucratif, (Belgium), Amended 2002.; Spain’s Foundation Law 2002; and Finland’s Foundation Law (Finland), 109/31, Amended 248/2001.

pressure on states to act.⁹ The FATF has an oversight ally in the form of the United Nation's ("UN") Counter Terrorism Committee, which, in furtherance of Security Council Resolution 1373 (imposing binding obligations on all states to adopt a series of counterterrorism measures), monitors the extent to which states have the necessary laws and regulations in place to ensure that charities and other non-profits are not being used to finance or otherwise support terrorism.¹⁰ There is thus great emphasis on the need for new or revised non-profit regulation. The form that this regulation should take, however, has proved more difficult to devise. A related area, yet to be tackled by legislators and policymakers alike, is the acceptable impact of any such measures on non-profit organizations and their missions.¹¹

9. See, e.g., FATF & GAFI, *Third Mutual Evaluation Report Anti Money Laundering and Combating the Financing of Terrorism: UK and Northern Ireland*, at 244 (June 29, 2007), available at <http://www.fatf-gafi.org/dataoecd/55/29/39064399.pdf>, awarding the UK a "largely compliant" rating for SR VIII on the basis that at the time Northern Ireland's legislation did not cover the registration, transparency, and supervision of charities. Ireland received a "partially compliant" rating from the FATF on the basis that "Ireland is in the process of completing a review of its NPO sector, but has not yet implemented measures to ensure accountability and transparency in the sector so that terrorist organisations cannot pose as legitimate non profit organisations, or to ensure that funds/assets collected by or transferred through non-profit organisations are not diverted to support the activities of terrorists or terrorist organisations." See FATF & GAFI, *Third Mutual Evaluation Report Anti Money Laundering and Combating the Financing of Terrorism: Ireland*, at 135 (Feb. 17, 2006), available at http://www.antimoneylaundering.gov.ie/en/AML/FATF-Third_mutual_eval.pdf/Files/FATF-Third_mutual_eval.pdf. In a subsequent follow-up report on the UK in 2009, the FATF recognised that the United Kingdom had made significant progress in addressing deficiencies identified in the 2007 Report to be removed from the regular follow-up process and agreed that it should henceforth report on a biennial basis.

10. In Ireland's case, a United Nations Security Council Counter-Terrorism Committee requested that Ireland review and update its charity legislation amid fears that charities set up in Ireland could be abused. This was the political driver that prioritised the enactment of new charity regulation. See S.C. Res. 816, U.N. Doc. S/Res/816 (Aug. 18, 2003); see also, 589 Dáil Deb. Col. 3 (Oct. 5, 2004). New Zealand's legislative efforts culminating in the Charities Act 2005 stemmed from a similar UN request to that country. See *Security: New Zealand Response to the United Nations Security Council Counter-Terrorism Committee*, N.Z. MINISTRY OF FOREIGN AFFAIRS & TRADE (April 30, 2004), <http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/International-Security/0-NZ-UN-Counter-Terrorism-April-04.php>.

11. ERIC ROSAND, ALISTAIR MILLAR, & JASON IPE, CTR. ON GLOBAL COUNTERTERRORISM COOPERATION, CIVIL SOCIETY AND THE UN GLOBAL COUNTERTERRORISM STRATEGY: OPPORTUNITIES AND CHALLENGES (Sept. 2008).

In its 2002–2003 Annual Report, the FATF, noting the level of member non-compliance with SR VIII, recognized the complexity of the issues involved and the need for further guidance.¹² In an effort to facilitate better implementation of SR VIII, the FATF issued a Best Practices Paper in 2002¹³ and a subsequent Interpretative Note in 2006.¹⁴ The Best Practices Paper highlighted the need for governments to focus their oversight of non-profit organizations in the core areas of a) financial transparency; b) programme verification; and c) administration.¹⁵ The Interpretative Note, issued four years later, reflects the continuing difficulties experienced by member states in giving tangible effect to SR VIII.¹⁶ To this end, it reiterates the general objectives of SR VIII and the general principles for compliance. In particular, it focuses on the need for countries to a) engage with non-profit organizations through appropriate outreach to the sector; b) promote effective oversight and monitoring of such organizations; c) undertake effective investigation and information gathering; and d) put in place appropriate mechanisms for international cooperation.¹⁷ Notwithstanding these clarifications, uncertainties of application still remain.¹⁸ FATF members, amongst which are fifteen of the EU's Member States and the European Commission,¹⁹ still experience

12. FATF & GAFI, *Annual Report 2002–2003*, ¶ 28 (June 20, 2003), available at <http://www.fatf-gafi.org/dataoecd/13/0/34328221.pdf> (noting that “[w]ith regard to assessing compliance levels for SR VIII, FATF members continue to consider the best way to accomplish this task taken into account the best practices paper issued by FATF on this subject in October 2002. The FATF is likely to continue examining appropriate assessment criteria in the context of development of further guidance on this recommendation.”).

13. FATF & GAFI, *Combating the Abuse of Non-Profit Organizations: International Best Practices* (Oct. 2002) [hereinafter *Combating the Abuse of Non-Profit Organizations*], available at <http://www.fatf-gafi.org/dataoecd/53/53/34260889.pdf>.

14. FATF & GAFI, *Interpretative Note to Special Recommendation VIII: Non-Profit Organisations* (Feb. 2006) [hereinafter *Interpretative Note to SR VIII*], available at <http://www.fatf-gafi.org/dataoecd/43/5/38816530.pdf>.

15. *Combating the Abuse of Non-Profit Organizations*, *supra* note 13.

16. *Interpretative Note to SR VIII*, *supra* note 14.

17. *Id.* ¶ 6.

18. Mark Pieth, *Criminalising the Financing of Terrorism*, 4 J. INT'L CRIM. JUST. 1074, 1075 (2006) (observing that the distinction between charitable functions and the support of guerrilla warfare is not easy, a problem unresolved by the Interpretative Note to Special Recommendation VIII).

19. Newer members of the European Union who are not members of the FATF are currently members of the Council of Europe's Moneyval process. Comprising twenty-eight permanent members and two temporary members, Moneyval obtained associate member status of the FATF in January 2006, having previously enjoyed observer status. Within the FATF, Moneyval is viewed as a FATF style regional body (“FSRB”).

difficulties with SR VIII and are unable to agree on a common approach to its implementation to date.²⁰

The difficulties experienced in a European context stem in part from the fact that the EU has not played a regulatory role in the past in regard to non-profit organizations. The reasons for this regulatory void are best attributed to a combination of historical and legal factors, discussed below.²¹ Whether the policy window that has now opened as a result of the FATF SRs will enable the EU to overcome this regulatory void is an open question. Much will depend upon whether the prevailing circumstances, linked as they are to anti-terrorist concerns, will be influential enough to overcome the past legal and historical obstacles and result in the development of an appropriate policy solution.

II. THE MANDATE FOR REGULATORY REVIEW

Historically, the Treaty of Rome was silent on the role of non-profit organizations under EU law. For almost fifty years, the only express reference to non-profit organizations in the Articles of the Rome Treaty was a negative one. Article 54 of the Treaty on the Functioning of the European Union (“TFEU”) expressly excludes non-profit bodies based in one Member State from the right to establish in the territory of another Member State, a right that is enjoyed by for-profit companies and EU workers.²² This difference in treatment highlights the EU’s preference for fa-

20. For the comments of the European Commission in this regard, conceding to such difficulties, see 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*, at 9, COM (2005) 620 final (Nov. 29, 2005) [hereinafter Commission Communication (2005) 620 final]; see also Eur. Comm’n, Directorate-General Justice Freedom & Security, *Independent Scrutiny in Response to Recommendation 41 of the EU Counter Terrorist Financing Strategy to Assess the EU’s Efforts in the Fight against Terrorist Financing: Final Report*, 5 (2007) [hereinafter *Independent Scrutiny Report*]. The report noted that in the context of the FATF Special Recommendations, “there are still problems with regard to definitions of terrorism . . . and a consensus on policy towards NPOs (SRVIII) is still to be reached.” *Id.*

21. See *infra* Part II.

22. Article 54 of the TFEU provides: “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.” Consolidated Version of the Treaty on the Functioning of the European Union art.54, Sep. 5, 2008, 2008 O.J. (C 115) 69 [hereinafter TFEU].

cilitating economic actors within the EU. For a Treaty founded on economic interests and corresponding trade rights, which created a community for many years known as the “European *Economic Community*,” this initial disregard for non-profit bodies is unsurprising.²³

It was not until 2000, with the ratification of the Treaty of Nice, that a specific reference to “civil society” first appeared in the governing provisions of the Treaty.²⁴ The Nice Treaty amended Article 257 TEC to include reference to “organised civil society” as one of the constituent groupings to be represented by the Economic and Social Committee, thus giving non-profit organizations an indirect (though largely ineffective) voice in European affairs.²⁵ More recently, the Treaty of Lisbon paid further lip service to the important role that civil society organisations play in European democracy,²⁶ yet even this fleeting reference is a watered down version of earlier draft provisions that attempted to formalise institutional interaction with civil society organizations.²⁷ From a constitu-

23. See Case C-70/95, *Sodemare SA v. Regione Lombardia*, 1997 3 C.M.L.R. 591, 604 (noting that “[Article 54 TFEU] . . . has the function of assimilating companies, firms and other legal persons, other than those which are non-profit-making (hereinafter normally referred to as “commercial companies”), to natural persons who are nationals of Member States, for the purposes of freedom of establishment. Thus, non-profit-making companies, firms and other legal persons do not benefit from freedom of establishment.”).

24. Between 1957 and 2000 there were protocols to various Amending Treaties that did refer to charities and non-profit organizations such as Declaration 23 of the Treaty on European Union (“The Conference stresses the importance, in pursuing the objectives of Article 117 of the Treaty establishing the European Community, of cooperation between the latter and charitable associations and foundations as institutions responsible for social welfare establishments and services.” Treaty on European Union, Declaration 23, July 29, 1992, 1992 O.J. (C 191)) and Declaration 38 of the Treaty of Amsterdam (“The Conference recognises the important contribution made by voluntary service activities to developing social solidarity. The Community will encourage the European dimension of voluntary organisations with particular emphasis on the exchange of information and experiences as well as on the participation of the young and the elderly in voluntary work.” Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Declaration 38, Oct. 2, 1997, 1997 O.J. (C 340)). These declarations, however, had no legal basis in European law, and thus do not provide a source of legal rights to such organizations.

25. See Article 300 of the TFEU, introduced upon the ratification of the Nice Treaty, which makes specific reference to “civil society” and its right of representation within the European Economic and Social Committee. TFEU art. 300.

26. See Article 15 of the TFEU, promising a level of transparency and openness in the operation of the Union’s institutions so as to “promote good governance and ensure the participation of civil society.” *Id.* art. 15.

27. Earlier draft provisions required European institutions to “maintain an open, transparent and regular dialogue with representative associations and civil society.” The

tional perspective, therefore, the European approach towards non-profit organizations has progressed from a negative to a superficially positive attitude.

In practice, European institutions have adopted a functional approach towards non-profits. The European Court of Justice has found non-profits to be subject to community law in areas ranging from labour law²⁸ to competition law,²⁹ and recent case law confirms that non-profit organizations enjoy the same rights under the Treaties as for-profit entities in relation to the free movement of capital between Member States.³⁰ With regard to Community legislative competence, as long ago as 1987, the Committee on Legal Affairs and Citizens' Rights of the European Parliament suggested three potential Treaty bases that could provide Community competence over non-profit organizations.³¹ The utility of these various Treaty provisions has been somewhat mixed.

Article 18 TFEU, with its focus on prohibition of discrimination on the basis of nationality, has provided the European Court of Justice (the "ECJ") with an indirect and limited means of reviewing national laws that discriminate against certain member-based non-profit associations.³² The use of Articles 114 TFEU and 352 TFEU as legislative bases has

ratified version of Lisbon (Article 19 TFEU), however, limited this more specific promise of engagement to churches and religious organizations. *Id.* art. 19.

28. Case C-29/91, *Sophie Redmond Stichting v. Hendrikus Bartol*, 1992 E.C.R. I-3189 (holding that functionally there was nothing to prevent the application of the Directive on the Transfer of Undertakings to non-profits on the transfer of their employees).

29. The European Court of Justice has held that the non-profit-making nature of the entity in question or the fact that it seeks non-commercial objectives is irrelevant for the purposes of defining it as an "undertaking" for the purposes of the application of European competition law. *See* Case C-244/94, *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v. Ministère de l'Agriculture et de la Pêche*, 1995 E.C.R. I-4013, ¶ 21; *Joined Cases C-180/98 to C-184/98 Pavlov Stichting Pensioenfond Medische Specialisten*, 2000 E.C.R. I-6451, ¶ 117.

30. *See, e.g.*, Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt Munchen fur Körperschaften*, 2006 E.C.R. I-8203; Case C-318/07, *Hein Persche v. Finanzamt Lüdenscheid*, 2009 E.C.R. I-359.

31. Eur. Communities & Eur. Parliament, *Report on Non-Profit Making Associations in the European Community* (Jan. 8, 1987) (by Nicole Fontaine) (citing Article 18 TFEU (ex Article 12 TEC); Article 114 TFEU (ex Article 95 TEC) and Article 352 TFEU (ex Article 308 TEC)).

32. Case C-172/98, *Commission of the European Communities v. Belgium*, 1999 E.C.R. I-3999 (holding that Belgian laws that made the granting of legal personality to non-profit membership associations contingent on the presence of Belgian nationals in the organization or its governing structure breached Article 18 TFEU, which prohibited discrimination on the grounds of nationality).

proven more controversial. Article 352, while providing the broader basis for community action,³³ requires unanimity within the European Council (the “Council”) for the successful passage of any regulation—a difficult feat with twenty-seven Member States involved. Article 114, on the other hand, has the advantage of requiring only a qualified majority vote within the Council but it is more limited in its use since it only applies to a narrower range of Council measures, most specifically “measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”³⁴ The absence of a user-friendly legal basis for non-profit regulation at the EU level may thus be seen as a contributing factor to the lack of a proactive legislative agenda on the part of the Commission in the past.

The Commission has also tended to emphasize the facilitative role played by NGOs in advancing the European agenda (a role greatly welcomed by the Commission),³⁵ more so than any supervisory role that the Commission feels it should play in relation to these organizations. In its White Paper on European Governance, issued in July 2001, the Commission mentions the need for stronger NGO governance but sees its role as being to encourage such an outcome as opposed to regulate for it.³⁶ Yet,

33. TFEU art. 352 (providing that “[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, [and this Treaty has] not provided the necessary powers, the Council [shall], acting unanimously on a proposal from the Commission” and after consulting the European Parliament, take the appropriate measures.”).

34. See Case C-436/03, *European Parliament v. Council*, 2006 E.C.R. I-3733 (determining whether the Regulation on the Statute for a European Cooperative Society was correctly adopted on the basis of Article 352 TFEU or whether Article 114 TFEU provided a more appropriate legal basis); see also Oonagh Breen, *EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society*, 10 INT'L J. NOT-FOR-PROFIT L. 50, 63–64 (2008).

35. *Commission White Paper on European Governance*, at 14–15, COM (2001) 428 final (July 25, 2001) (noting that “[n]on governmental organizations . . . often act as an early warning system for the direction of political debate This offers a real potential to broaden the debate on Europe’s role. It is a chance to get citizens more actively involved in achieving the Union’s objectives and to offer them a structured channel for feedback, criticism and protest.”).

36. *Id.* at 15 (providing that “[w]ith better involvement comes greater responsibility. Civil society must itself follow the principles of good governance, which include accountability and openness. The Commission intends to establish, before the end of this year, a comprehensive on-line database with details of civil society organisations active at European level, which should act as a catalyst to improve their internal organisation.”). This database, the Register of Interest Representatives, currently lists over 3,000 bodies, one-third of which are NGOs. See *Register of Interest Representatives*, EUR. COMM’N,

within a three-month period of the events of 9/11, the Commission's interests in regulating non-profits changed dramatically, in line with Kingdonian prevailing circumstances.

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As a full member of the FATF, the EU has sought to give effect to the FATF Special Recommendations on the suppression of terrorist financing within the framework of the Treaty on European Union ("TEU") and the TEC. Such measures are additional to those measures taken by the EU's respective Member States in fulfillment of their obligations under the FATF SRs and UN Resolution 1373/2001.³⁷ The European Commission used the FATF Special Recommendations as a basis for combating terrorist financing at the EU level by establishing European Action Plans and enacting Framework Decisions.³⁸ Spurred on by the Madrid and London bombings in 2004 and 2005, the European Council turned its attention to the regulation of non-profit organisations,³⁹ which in turn

<https://webgate.ec.europa.eu/transparency/regrin/consultation/search.do?reset=> (last visited Apr. 7, 2011).

37. *European Union Report to the Counter-Terrorism Committee—Res 1373* (Dec. 12, 2001), available at http://www.europa-eu-un.org/articles/en/article_1031_en.htm.

38. Council of the European Union, *Note from the Presidency: Co-ordination of Implementation of the Plan of Action to Combat Terrorism*, 12800/01 (Oct. 16, 2001), available at <http://register.consilium.europa.eu/pdf/en/01/st12/st12800.en01.pdf>; Council of the European Union, *Conclusions Adopted by the Council (Justice and Home Affairs)*, 12156/01 (Sept. 20, 2001), available at <http://register.consilium.europa.eu/pdf/en/01/st12/st12156.en01.pdf>; Council Framework Decision on Combating Terrorism, 2002/475/JHA, 2002 O.J. (L 164) 3 (EC) [hereinafter Council Framework Decision on Combating Terrorism]; Council of the European Union, *European Union Action Plan to Combat Terrorism—Update of the Roadmap*, 10773/2/02 REV 2 (July 17, 2001); Council of the European Union, *EU Plan of Action on Combating Terrorism*, 10010/04 (June 1, 2004), available at <http://register.consilium.europa.eu/pdf/en/04/st10/st10010.en04.pdf>; Council of the European Union, *The European Union Counter-Terrorism Strategy*, 14469/4/05 REV 4 (Nov. 30, 2005), available at <http://register.consilium.europa.eu/pdf/en/05/st14/st14469-re04.en05.pdf> (noting at paragraph twenty-nine that "tackling the misuse of the non-profit sector remains a priority. We must also ensure that financial investigation is an integral part of all terrorism investigations. These measures and others which build on the Financial Action Task Force's recommendations, form part of the EU's comprehensive strategy for combating terrorist financing.").

39. Council of the European Union, *Declaration on Combating Terrorism*, 7906/04 (Mar. 29, 2004), available at <http://register.consilium.europa.eu/pdf/en/04/st07/st07906.en04.pdf> (issued after the Madrid bombings and committing the Commission to strengthening the accountability and transparency of charities and stating a European strategic objective as being to

informed the Commission's policy statement on the implementation of the FATF's SR VIII at European level in November 2005.⁴⁰ Commission Communication (2005) 620 spoke to two issues—the need for enhanced national coordination by Member States and 'relevant actors'⁴¹ in the exchange of information to cut off terrorist financing; and secondly, the need to address vulnerabilities of non-profit organizations to terrorist financing and other criminal abuse.

In this latter regard, the Commission set out its European implementation strategy for SR VIII through a series of recommendations to Member States and in a framework for a Code of Conduct for Non-profits to promote transparency and accountability best practices.⁴² Prior to the framework's publication, the Commission issued a draft version for public consultation in July 2005. The draft was not well received by the non-profit sector from either a procedural or substantive perspective. Procedurally, in allowing initially for only a 6-week consultation window, the Commission breached its own Minimum Standards on Consultation of Interested Parties,⁴³ which requires that consultations be open for at least an eight-week period, a breach much commented upon in the submissions received.⁴⁴ Even though the time was subsequently extended to eight weeks, the summer timing still rankled with respondents.

“[d]evelop and implement an EU strategy on the suppression of terrorist financing, including the regulation of charitable organisations and alternative remittance systems”); see also London Bombings Press Release *supra* note 4 (noting in response to the London bombing the Council's determination to agree a code of conduct to prevent misuse of charities by terrorists by December 2005).

40. Commission Communication (2005) 620 final, *supra* note 20. The Communication was issued after discussions at workshops organized by the Commission in October 2004 and April 2005 and following public feedback in response to a public consultation on a draft recommendation and Code of Conduct.

41. These actors include government justice or treasury officials, Financial Intelligence Units, specialized financial police, Public Prosecutor's Offices, Customs Authorities, Tax Revenue Services, intelligence services, financial regulators, and the Central Bank.

42. Commission Communication (2005) 620 final, *supra* note 20, annex.

43. *Communication from the Commission, Towards a Reinforced Culture of Consultation and Dialogue—General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, COM (2002) 704 final (Dec. 11, 2002).

44. See *Public Consultations*, EUR. COMM'N, http://ec.europa.eu/home-affairs/news/consulting_public/consulting_0014_en.htm (last visited Apr. 7, 2011), for the responses of ActionAid International, the EU Civil Society Contact Group, and the Carmichael Centre for Voluntary Groups, Ireland, on this issue. This is not an isolated occurrence; non-profits again chided the Commission in July 2010 for the lack of advance notice to comment on its Discussion Paper on the voluntary guidelines. See also Hanneke de Bode, *EU Non-profits and Counterterrorism Consultation: Your Opinions?*, EUCLID NETWORK (Sept. 3, 2010), <http://www.euclidnetwork.eu/news.php/en/404/eu>

Substantively, the inclusion of a list of ‘risk indicators’ to identify non-profits involved in terrorist financing or other criminal purposes in the proposed Code of Conduct caused consternation for many NGOs.⁴⁵ Those indicators included such matters as: (a) the sharing of office space and legal or accountancy service providers; (b) the presence on the board of directors or trustees who hold positions with other non-profits; (c) a low ratio of employees to funds managed; and (d) the fact that funds distributed or collected fluctuated suddenly in amount.⁴⁶ All of these were said to constitute risk factors pointing to criminality rather than efficient NGO administration. The Commission’s draft proposals regarding financial management risk factors also lacked coherency. It is a common EU Programme requirement (many of which are administered by the Commission) that new bank accounts be established for each individual project run and that separate financial and auditing records should be kept. Yet, for the purposes of its Code, the Commission had proposed that the holding of multiple banks accounts by an NGO would constitute a risk factor, as would a sudden change in the amount of funds disbursed or collected.

The effect of this risk indicators list, according to respondents,⁴⁷ would have been to confuse NGO operational efficiency measures with suspect terrorist/criminal activities. It did not go unnoticed by non-profits that the Commission’s first serious engagement in the regulation of the sector was one based not on facilitating the sector but rather suspicion of it.⁴⁸

non-profits-and-counterterrorism-consultation-your-opinions [hereinafter EUCLID NETWORK].

45. See Eur. Comm’n, *Draft Recommendations to Member States Regarding a Code of Conduct for Non-Profit Organisations to Promote Transparency and Accountability Best Practices*, at 2, JLS/D2/DB/NSK D (2005) 8208 (July 22, 2005), available at http://ec.europa.eu/home-affairs/news/consulting_public/0014/draft_recommendations_en.pdf.

46. *Id.* at 7–8.

47. For a complete list of the submissions received by the European Commission, see *Public Consultations: Open Consultation on the Document “Draft Recommendations to Member States Regarding a Code of Conduct for Non-Profit Organisations to Promote Transparency and Accountability Best Practices,”* EUR. COMM’N, http://ec.europa.eu/home-affairs/news/consulting_public/consulting_0014_en.htm (last visited Apr. 7, 2011).

48. Letter from Carmichael Ctr. for Voluntary Groups, Ireland, to Dir. Gen. Justice, Freedom & Security, Eur. Comm’n, (Aug. 22, 2005), available at http://ec.europa.eu/home-affairs/news/consulting_public/0014/contributions/carmichael_centre_for_voluntary_group_s%20ireland_en.pdf (noting that “[p]revious attempts by the sector to get EU-level

The final version of the Framework Code, published in 2005 as part of Commission Communication (2005) 620, omitted the risk indicators annex entirely.⁴⁹

Communication (2005) 620 called on EU Member States to better oversee their non-profit sectors through maintaining/creating publicly accessible registration systems for all non-profits; to provide greater financial transparency guidance to non-profits; and to encourage compliance with the proposed Framework Code.⁵⁰ Acknowledging that the primary purpose of the Communication was to prevent abuse of non-profits by terrorist financing, an ancillary hope of the Commission was that the proposed enhanced transparency and accountability measures would also help to protect organisations from other forms of criminal abuse.⁵¹ Not content to leave the initiative solely in the hands of Member States and non-profits, the Communication also provided that the Commission would consider further “whether in certain circumstances community funding of non-profits could be linked to compliance with enhanced transparency and accountability measures.”⁵²

The actual provisions of the Framework for the Code relate predominantly to the need for registration of non-profit organisations and the proper keeping of accounts.⁵³ Although the Commission recognised the need for coordination amongst Member States in the Code’s operation, no guidance was given in the Communication as to how this could best be achieved,⁵⁴ nor was there any consideration of how the additional

recognition for NGOs and NPOs in the form of the European Statute of Association have not received similar attention from the European Commission. It is disappointing that this first stage to recognition is to take place based on suspicion of our sector rather than appreciation for its potential to bring the EU closer to the citizen.”); *see also* Letter from CONCORD (Eur. NGO Confederation for Relief & Dev.), to Franco Frattini, Comm’r for Justice, Freedom & Security, Eur. Comm’n (Sept. 26, 2005), *available at* http://ec.europa.eu/home-affairs/news/consulting_public/0014/contributions/concord_en.pdf (noting that “[f]rom the very legitimate concern to prevent financing from terrorism the Commission proposal has taken as a starting point NPOs as a problem that needs to be better controlled and regulated. We believe a more constructive approach would have been to see NPOs as a resource and reach out in a dialogue with civil society on what can be done and improved to curb this problem as much as possible.”).

49. *See* Commission Communication (2005) 620 final, *supra* note 20.

50. *Id.* at 2.

51. *Id.* at 9.

52. *Id.* at 10.

53. *See id.* at 11–16.

54. *Id.* at 12 (“[T]he Recommendation and the Framework for a Code of Conduct should not in any way hinder legal cross border activities of NPOs. The aim of the Euro-

Code requirements would affect existing national regulatory requirements. However, as part of its commitment to the implementation of Communication (2005) 620 at the European level, the Commission promised further Commission engagement with the non-profit sector on the proposed code. Specifically, it pledged to establish an informal contact group in 2006 and to organize a conference with representatives of the non-profit sector and relevant authorities to consider further implementation of principles laid down in the Recommendation and Framework for a Code of Conduct.⁵⁵

Following the publication of the Commission's Communication, the European Council reaffirmed its commitment to a code of conduct and agreed on five key principles in relation to the future treatment of non-profit organizations, recognizing that:

- Safeguarding the integrity of the non-profit sector is a shared responsibility of states and non-profit organisations.
- Dialogue between Member States, the non-profit sector and other relevant stakeholders is essential to build robust defences against terrorist finance.
- Member States should continually develop their knowledge of their non-profit sector, its activities and vulnerabilities.
- Transparency, accountability and good governance lie at the heart of donor confidence and probity in the non-profit sector.
- Risks of terrorist finance are managed best where there are effective, proportionate measures for oversight.⁵⁶

Implementation of the Framework code to date has been sporadic. The Commission has organized three conferences on non-profit sector accountability and transparency with the most recent occurring in July 2010. Participation, however, is by Commission invitation only and no information on the conference or its deliberations are otherwise publicly available. The promised contact group, first mentioned in Commission

pean approach is thus to establish common principles on which national implementation can be based.”).

55. *Id.* at 9.

56. Press Release, Council of the Eur. Union, 2696th Council Meeting: Justice and Home Affairs (Dec. 1–2, 2005), at 32, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/05/296&format=HTML&aged=0&lg=sl&guiLanguage=en>.

(2005) 620 and given further consideration by the Commission in 2006,⁵⁷ never materialised and the Commission formally abandoned the idea in October 2007.

IV. THE REPORTING ERA: INDEPENDENT SCRUTINY, MATRIX AND EUROPEAN CENTER FOR NON-PROFIT LAW (“ECNL”) STUDIES

In the past five years since the publication of Communication (2005) 620, the EU has both reviewed and revised its broader counterterrorism strategy in the context of non-profit oversight. Three reports are worthy of mention in this regard; the first in 2007 assessing EU progress on its counter terrorist financing strategy in the implementation of the FATF special recommendations (“Independent Scrutiny Report, 2007”) and two later reports dealing respectively with the vulnerability of non-profits to financial crime (“Matrix Report, 2008”) and with public and self regulatory initiatives to improve non-profit transparency and accountability (“ECNL Study, 2009”).

A. The Independent Scrutiny Report

A robust anti fraud (including anti tax fraud) regime would be of more general value to the [non-profit] sector and produce better data than a [Terrorist financing] oriented regime toned down for political reasons.⁵⁸

In 2007, the European Commission published an Independent Scrutiny Report evaluating the EU’s efforts in the fight against terrorist financing under the FATF’s Special Recommendations and the EU Counter Terrorist Financing Strategy. According to the report, the fact that the FATF Recommendations and Special Recommendations did not constitute treaty obligations but were rather “informal political commitments” left their implementation more vulnerable to national and regional politics with the effect that five years later, the nine special recommendations were still regarded as “Work in Progress.”⁵⁹ In particular, the Report identified a number of structural difficulties that complicated the EU’s task of giving effect to the FATF’s ordinances at European level, many of which are particularly pertinent to European non-profit regulation efforts and

57. See Eur. Comm., *Draft Minutes, European Forum for the Prevention of Organised Crime: Minutes of the Round Table Meeting of 30th March 2006 on “Preparatory Meeting to the Conference Transparent NPO Governance,”* at 1, Brussels JLS/D2/DB D (2006) [hereinafter *Draft Minutes, European Forum for the Prevention of Organised Crime*].

58. *Independent Scrutiny Report*, *supra* note 20, at 34.

59. *Id.* at 4.

the associated difficulties experienced at EU level with regard to the implementation of SR VIII.

1. No Fully Informed Baseline Assessment of Threats and Risks to the EU

Notwithstanding the myriad of action plans, action points, and activities introduced by EU committees relating to combating the financing of terrorism (“CFT”), the EU lacks the capacity to undertake an ongoing internal review mechanism for its anti-money laundering and CFT measures. The report highlighted the absence of “a key instrument”—a fully informed baseline assessment of threats to the EU.⁶⁰ According to the report, “without this, there is no way to direct the efforts and set priorities, nor attribute success nor learn from failure. There are overlaps, gaps and difficulties in coordination.”⁶¹

There is thus, in the words of Keohane, a paradox in the EU’s role in counter-terrorism:

On the one hand, governments agree in principle that co-operation at the EU level is a good thing because of the cross-border nature of the terrorist threat. On the other hand, they are slow to give the Union the powers . . . and resources . . . it would need to be truly effective.⁶²

This difficulty is particularly acute in the context of SR VIII, given the absence of any EU wide assessment of the risk posed by the tens of millions of non-profits operating in the EU. The report acknowledged attempts to fill this knowledge void in the context of non-profit organizations but conceded that these efforts were not proving successful.⁶³

2. Cultural Differences in Old and New Member States’ Approach

Prior to the ratification of the Lisbon Treaty the EU did not exercise primary responsibility for CFT measures. Under the Maastricht Treaty’s three-pillar structure, the EU had direct effective powers under the first pillar relating to communautarised areas whereas matters arising under

60. *Id.* at 18.

61. *Id.*

62. Daniel Keohane, *The Absent Friend: EU Foreign Policy and Counter-Terrorism*, 46 J. COMMON MKT. STUD. 125, 129 (2008).

63. *Independent Scrutiny Report*, *supra* note 20, at 33 (noting that “currently there is no EU wide assessment of the risk [non-profits] pose in the terrorist financing context The ongoing absence of substantial and accepted corpus of empirical evidence of misuse impedes the dialogue with the third sector that the EC and some MS seek in order to develop effective policy.”).

either the second pillar (dealing with common foreign and security) or the third pillar (dealing with justice and home affairs) relied on efforts to coordinate, harmonise, and influence policies at an intergovernmental level.⁶⁴ Decisions taken under the third pillar relating to CFT took the form of framework decisions,⁶⁵ which gave considerable leeway to national parliaments in the transposition of law, which in turn led to significant legal variation across national legislation.

The Scrutiny Report observed that “member states and their agencies are cautious in the extent to which they will allow the EU to take steps that impinge on national security issues arrangements unless it is part of a wider political process.”⁶⁶ The cultural differences in approach between older EU Member States (comprising FATF members) and newer EU Member States (which learned to tackle anti-money laundering under the Council of Europe’s Moneyval process) further exacerbated this legislative reticence. The former group approached FATF measures from the perspective of maintaining the integrity of the financial system—a First Pillar matter—whereas the latter’s exposure under the Moneyval process had its roots in judicial cooperation, more associated with Third Pillar matters. According to the Scrutiny Report, there were thus “divergent approaches to AML/CFT on policy and in operational matters, which can feed back as particularism at the political level.”⁶⁷ The effect of this regional division has had implications for the EU’s implementation of SR VIII because of the division of opinion amongst Member States on the nature of regulation required.⁶⁸

3. Management of Key Individual Specialists

With regard to the general implementation of the FATF SRs, even in areas in which the EU has competence to act for Member States, the Scrutiny Report found that the qualitative nature of Member State consultation varied dramatically depending upon whether policies were based on the input of experienced front line professionals in law enforcement and financial intelligence, well versed in the highly complex environment of CFT, or upon the contribution of hard pressed government officials nominally responsible for the area. This problem is magnified in the context of European non-profit regulation, an area in which

64. Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1.

65. See, e.g., Council Framework Decision on Combating Terrorism, *supra* note 38.

66. *Independent Scrutiny Report*, *supra* note 20, at 19.

67. *Id.*

68. *Id.* at 22 (noting that “implementation of SR VIII is still under discussion within the EU and awaits consensus regarding the policy towards NPOs, where a number of MS have strong reservations”).

the Scrutiny Report noted there was no effective control environment due to an absence at the EU level of a centralised system of registration, accreditation, monitoring, and fiscal controls. Creation of such a centralised system would require a level of cooperation between national agencies that currently does not exist and even if it did, success would not be guaranteed since “nearly all member states are missing elements of such a system, and time and expense will be needed to put them in place, which again raises resources issue with respect to both individual NPOs and national level cooperation mechanisms.”⁶⁹ Perhaps more damning, the Scrutiny Report raised a spectre that not all Member States were convinced that an effective control system requires elements of registration and closer monitoring.⁷⁰

Turning to the Scrutiny Report’s findings on the specific implementation of SR VIII, the report found generally that terrorist financing of non-profit organisations was not a prime concern in many European Member States.⁷¹ The report went so far as to query whether any additional gains would be made through the introduction of a specialist terrorist-financing regime for charities that could not be achieved through a tweaking of existing regimes.⁷² In the words of the report, “of the three main objectives of SR VIII, posing as legitimate entity is seen as a form of conspiracy, whilst the use of NPOs as conduits, and for the purposes of diversion, are seen as forms of money laundering and fraud,” leading authors and respondents alike to conclude that it might simply be wiser to strengthen existing anti-fraud measures instead.⁷³ Conscious also that an effective anti-terrorist influenced regulatory regime for non-profits might undermine the work of non-profit organisations engaged in reducing the influence of militant groups in sensitive areas simply because they were working in these areas, the report concluded that superior information on those militant groups could better be obtained through existing powers or other covert means.⁷⁴

That the Commission intended to heed the advice of the Independent Scrutiny Report and to adopt a broader basis for reviewing the good governance of EU-based non-profits seemed a strong possibility in late 2007. Abandoning its plan to create a twenty-four-member contact group

69. *Id.* at 33.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 34.

drawn from the public and private non-profit sector⁷⁵ to implement the Non-profit Framework Code, the Commission instead funded two studies on the non-profit sector that were designed to begin to resolve the European information deficit in relation to the sector, identified by the Scrutiny Report.

B. The Matrix Report (2008)

In the absence of reliable information on the real level of threat, vulnerability and compliance, and without adequate understanding of the potential benefits of new legislation the EC should be cautious about introducing new forms of regulation and legislation.⁷⁶

The European Commission appointed Matrix to research and report on the most serious and frequent types of financial criminal activity affecting non-profit organizations in the EU. Matrix was asked to estimate the volume and value of these offences at EU level and to identify appropriate policy responses that might reduce non-profit vulnerability to financial criminal abuse.⁷⁷ A worthy study from a European governance perspective—the results would assist the EU in ensuring that European grants at least were expended in a transparent and accountable fashion. The first difficulty encountered by Matrix was the lack of reliable statistical databases on non-profit abuse in any Member State or across the EU as a whole. Many of the questions posited in the Delphi study elicited a high level of non-responsiveness notwithstanding the general nature of the questions asked.⁷⁸ Moreover, the literature review revealed a great

75. The creation of the contact group was first announced by the Commission in its Commission Communication (2005) 620 final, *supra* note 20. It was intended that both the Commission's Communication and the FATF Interpretative Note on SR VIII would serve as a basis to define the exact mandate of the group. See *Draft Minutes, European Forum for the Prevention of Organised Crime*, *supra* note 57, at 3.

76. MATRIX INSIGHT, STUDY TO ASSESS THE EXTENT OF ABUSE OF NON-PROFIT ORGANISATIONS FOR FINANCIAL CRIMINAL PURPOSES AT EU LEVEL, EUROPEAN COMMISSION, DG JUSTICE, FREEDOM AND SECURITY 8 (Apr. 3, 2008) [hereinafter MATRIX REPORT], available at [http://ec.europa.eu/home-af-](http://ec.europa.eu/home-af-fairs/doc_centre/terrorism/docs/study_abuse_non_profit_orgs_for_financial_criminal_purposes_avril09.pdf)

[fairs/doc_centre/terrorism/docs/study_abuse_non_profit_orgs_for_financial_criminal_purposes_avril09.pdf](http://ec.europa.eu/home-af-fairs/doc_centre/terrorism/docs/study_abuse_non_profit_orgs_for_financial_criminal_purposes_avril09.pdf) (report commissioned by the European Commission Directorate-General Justice, Freedom and Security).

77. *Id.* at 13.

78. Questions in the Delphi Study ranged from, "Could you estimate the number of instances of financial abuse of NPOs in your country of residence in the last 12 months? (this should **not** be restricted to legal cases)" to "In your opinion, do you think the number of instances of financial abuse of NPOs has increased or decreased in the last five years?" *Id.* at 70–75.

reliance of existing data on journalistic and unsupported case descriptions.⁷⁹ Given these lacunae, Matrix was forced to substantially modify its data collection plans (eliminating entirely a second-round Delphi study) and to settle for collation of a “general picture of the NPO abuse field” instead of the desired “accurate quantified estimates of volume, impact, incidence or prevalence” of non-profit financial abuse.⁸⁰

Two interesting and related findings emerge from the Matrix Report. The first relates to incidence and prevalence of non-profit financial abuse within the EU. According to the Report:

If the available information is to be believed, the incidence and prevalence of NPO financial abuse in the EU are limited. Nevertheless, some level of criminal and terrorist misuse exists. The extent to which this is judged to be “a serious threat” depends on the tolerance levels of the observers [W]ithout better databases, reporting mechanisms and monitoring systems there is no way of knowing whether the expert group estimates are realistic or merely badly informed.⁸¹

This finding led the authors to call for any imposed regulatory response to be a proportionate one, noting that stricter regulatory legislation “could create costs that might damage efficiency and effectiveness of the sector.”⁸² These findings are entirely consistent with the findings of the Independent Scrutiny Report. Referring specifically to the current levels of compliance with the FATF recommendations, the EU Communication (2005) 620 recommendations, and the proposed codes of conduct thereunder, the report urged that notwithstanding the importance of governmental and EU regulation in this context, the need for any further regulation had to be approached with caution “especially considering the UK and US records.”⁸³

Secondly, the Matrix Report recognised the potential for governments in politically challenged environments to use regulation to undermine the work of non-profit organisations.⁸⁴ Drawing on UK research,⁸⁵ the report

79. *Id.* at 6.

80. *Id.* at 7.

81. *Id.* at 66. Statistically, there was very little evidence of non-profit abuse as regards terrorist financing. According to Matrix, “In terms of court trials, in 2005–06 a total of 303 persons across Europe were tried on terrorism charges (the majority, 205, in Spain) and a further 136 court proceedings were reported as ongoing. No information was available either formally or informally about the involvement of NPOs in these cases.” *Id.* at 28.

82. *Id.* at 66–67.

83. *Id.* at 8.

84. *Id.* at 33.

referred to the negative effect that counterterrorism legislation in particular had already had on non-profit organisations, noting the implications of unintentional violation of counter-terrorism measures for non-profits and suggesting that the burden of mitigating this risk had led to scaling back of humanitarian work in some areas.⁸⁶

The message sent out very clearly from the Matrix Study was thus that a first step along the path to greater regulation of non-profits must involve a more accurate understanding of the true level of threat to these organizations. The need for such empirical data was essential to enable a proportionate and appropriate response. In addition, Matrix saw the way forward for European regulation of non-profits as involving the conducting of a periodic victimisation survey with an adequate budget to generate an effective database to assess threat and vulnerability trends, examine the efficacy of preventive measures, and monitor regulation and legislation; the creation of a virtual NPO 'college' to encourage greater information exchange; a proactive media strategy; maintenance and improvement of non-profit registers; training and tools for non-profit self-regulation; simple due diligence models; NPO to NPO mentoring; and identification of a lead agency in every Member State.⁸⁷

C. ECNL Report (2009)

The disconnect between the areas covered by ongoing public and self regulation initiatives and the FATF and EC recommendations signal the difficulties [Member States] face when attempting to implement recommendations in their national contexts⁸⁸

85. Most particularly the work of International NGO Training and Research Center ("INTRAC") and National Council for Voluntary Organisations ("NCVO"). See INT'L NGO TRAINING & RESEARCH CTR., www.intrac.org (last visited Apr. 7, 2011); see also NOLAN QUIGLEY & BELINDA PRATTEN, NCVO, SECURITY AND CIVIL SOCIETY: THE IMPACT OF COUNTER-TERRORISM MEASURES IN CIVIL SOCIETY ORGANIZATIONS (2007), available at http://www.ncvo-vol.org.uk/uploadedFiles/NCVO/Policy/Civil_Society_and_Participation/2007%2001%2024%20Security%20and%20Civil%20Society-A%20report%20from%20NCVO.pdf.

86. MATRIX REPORT, *supra* note 76, at 33–34.

87. *Id.* at 8–9.

88. Eur. Ctr. for Not-for-Profit Law [ECNL], *Study on the Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organizations in the European Union*, at 94 (2009) (by Nilda Bullain & Katerina Hadzi-Miceva) (commissioned by the European Commission Directorate-General Justice, Freedom and Security) [hereinafter ECNL Study], available at http://ec.europa.eu/home-affairs/doc_centre/terrorism/docs/initiatives_improving_transparency_accountability_npos_avr09.pdf.

The Commission published the second of the two commissioned reports in April 2009.⁸⁹ The ECNL Study on Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union sought to consider the measures adopted in the twenty-seven EU Member States to improve non-profit transparency and accountability in the overall context of international and European initiatives to address the risk of non-profits being used as conduits for terrorist financing.⁹⁰ To this end, the study focused on the response of Member States to the implementation of the FATF SR VIII in light of Commission Communication (2005) 620, the interpretative note to FATF SR VIII, and the FATF Best Practices Paper on SR VIII.

The ECNL Study begins to tackle the information deficit that exists at a European level in relation to statutory and non-statutory regulatory measures currently underway in the twenty-seven Member States of the EU. Following interviews with over 130 government officials and policymakers, non-profit lawyers and practitioners, and research centres across the Union, ECNL identified more than 140 self-regulation and public regulation initiatives relating to non-profit accountability and transparency undertaken in the past five years.⁹¹ As part of the study, ECNL sought to carry out an in-depth analysis of selected initiatives in terms of the motivating factor behind their introduction and an assessment of their impact to date. The breadth of the research undertaken also allowed ECNL to begin to identify common trends in these initiatives, with a view towards identifying and creating best practice.

The ECNL Study begins to identify the challenges that face the EU when it seeks to act at the EU level in relation to non-profit organizations. Like the Independent Scrutiny Report, the study found regional differences a factor influencing implementation—in this case, the differing common law and civil law conceptions of the ‘non-profit sector.’⁹² The treatment of non-profits under common law is governed by the legal concept of charity.⁹³ Thus, in the UK’s three legal jurisdictions⁹⁴ and in

89. *Id.*

90. *Id.* at 8–9.

91. *Id.* at 8.

92. *Id.* at 11–18.

93. *Id.* at 12.

94. The United Kingdom comprises, apart from England and Wales, the devolved governments of Scotland and Northern Ireland. The parliamentary assemblies of the latter two regions possess competence to legislate independently in the realm of charity regula-

Ireland, regulators focus on the activity of an organisation and whether it provides a public benefit.⁹⁵ Qualifying organisations, or 'charities,' are subject to a more stringent regime of regulation than other non-profits.⁹⁶ Yet, it is estimated that charities account for only half the 865,000 non-profits in the UK.⁹⁷ In contrast, civil law treatment of non-profits is based upon legal form and not activity.⁹⁸ In many civil law jurisdictions, the purpose of registration as either an association or foundation is to obtain legal personality and basic tax exemptions although it is becoming more common for extra tax exemptions to be awarded to a subset of these registered non-profits that serve publicly beneficial purposes.⁹⁹

In European terms, this divergence in terminology can lead policymakers to talk at cross-purposes since 'the sector' in common law countries commonly refers to the smaller 'charity sector' (which tend to enjoy similar treatment when it comes to registration, reporting, and tax issues) whereas 'the sector' in civil law countries tends to refer to the broader 'non-profit sector,' which includes but is in no way limited to public benefit organisations that are subject to a range of registration, reporting, and tax requirements. Culturally, registration—a term used frequently in the Commission Communication (2005) 620 and FATF documents—has different connotations depending on one's common law or civil law perspective. In the former, registration refers to "an act of state acknowledgement of eligibility for public support"¹⁰⁰ whereas in the latter registration refers to "the act of acquiring legal personality, quite independent of any eligibility for tax benefits."¹⁰¹

Understanding this legal and cultural divide between European Member States is crucial to the development of any proposed EU level common action in so far as it indicates that the 'non-profit sector' is not a homogenous entity. For its part, the FATF takes a narrow interest in non-profit organisations, defining them in its Interpretative Note on SR VIII as comprised of "legal [entities] or organization[s] that primarily engage in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out

tion with the exception of matters relating to tax, which are decided on a uniform basis for the entire United Kingdom by the parliament at Westminster.

95. ECNL Study, *supra* note 88, at 12.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

of other types of ‘good works.’”¹⁰² Closer to home, the European Commission has drawn on this FATF guidance, proposing that its suggested more stringent non-profit registration and accountability requirements should apply to those non-profits “that are wishing to take advantage of special tax treatment, access to public grants, [and] the right to public fundraising.”¹⁰³ Yet, as the ECNL Study points out,¹⁰⁴ this categorization works efficiently only in common law jurisdictions. Many civil law countries lack the charity/public benefit concept and in its absence different laws provide tax benefits and state support to a variety of non-profit forms using various accountability standards. Even in those civil law countries that have a concept equivalent to public benefit, there is no uniform application of tax benefits or accountability requirements, making it at best difficult to conceive of a European-wide measure that could reach the non-profit sector and regulate it accordingly.¹⁰⁵

The nub of the challenge, identified by the Study, relates to the difficulties of the imposition of top-down regulation. In the words of the Study authors, “the need to overcome the basic differences between the two major legal systems in addition to the varying cultural and historical factors may make any attempt at a pan-European regulatory or self regulatory initiative extremely challenging.”¹⁰⁶ Given the obstacles to a top down harmonization of non-profit regulation, the study instead comes at the problem from a bottom up perspective. The Study identifies more than 140 non-profit regulatory initiatives introduced in the twenty-seven Member States of the EU, aimed at enhancing non-profit transparency and accountability over the past five years.¹⁰⁷

The report outlines nineteen of these initiatives (comprising both public and self-regulatory measures) in detail.¹⁰⁸ The selected initiatives are viewed by the authors as examples of best practices in areas ranging from registration and reporting,¹⁰⁹ accounting,¹¹⁰ fundraising,¹¹¹ certifica-

102. *Interpretative Note to SR VIII*, *supra* note 14, ¶ 4.

103. Commission Communication (2005) 620 final, *supra* note 20.

104. ECNL Study, *supra* note 88, at 13.

105. ECNL Study, *supra* note 88, at 13 (This led the ECNL to comment that “the implementation of the requirements of EC COM and FATF SR VIII, which seem to treat the ‘NPO sector’ as a homogenous entity, would be more easily enforceable in the common law systems (through the charity concept) than in the civil law systems.”).

106. *Id.* at 15.

107. *Id.* at 130.

108. *Id.* ch. IV.

109. Case studies of Ireland’s proposed registration and reporting system under the new Charities Act 2009; of Malta’s integrated system of registration, reporting and regu-

tion and accreditation,¹¹² codes of conduct,¹¹³ to public benefit status,¹¹⁴ and counter-terrorism.¹¹⁵ In addition, an attempt is made to gauge the potential transferability of these programmes to other jurisdictions.¹¹⁶ Amongst the chosen jurisdictions is a good mixture of old EU Member States (e.g., Ireland, the UK, and the Netherlands) and newer Members (Poland, Malta, Estonia, Bulgaria, and Hungary), allowing also for a consideration of regulatory practices in both civil and common law systems with non-profit regimes at different degrees of maturity and establishment.

To a degree, there is some alignment between the aims of the FATF guidelines, the objectives of Commission's Communication (2005) 620, and the policy goals of a number of the national initiatives considered by ECNL. There is thus a strong focus on registration and public database requirements, as well as requirements relating to accounts, reporting, and monitoring of non-profits. A divergence, however, does exist between the EU/FATF emphasis on 'know your donor/beneficiary' principles, which according to ECNL, are scarcely addressed in recent national initiatives, as well as those issues which Member States are concerned with but which feature to a much lesser extent in EU/FATF documents—namely, public benefit status; NPO accounting and bookkeeping; internal governance; fundraising; and transparency of public funding.¹¹⁷

lation; of the central registry systems in the UK, Austria, and Bulgaria; and of the proposed European registers under Guidestar. ECNL Study, *supra* note 88, at 31.

110. Case study of the UK's Statement of Recommended Practice for Charity Accounting (the "SORP")—described by ECNL as "[a] comprehensive framework and set of standards for charity accounting and interpretation on how to meet those standards." ECNL Study, *supra* note 88, at 30.

111. Case study of Ireland's mixed regulatory model for fundraising and of Finland's Money Collection Act. *Id.* at 67.

112. *Id.* at 33 (drawing on examples from Austria (Austrian Seal of Quality for Donations to Charities), Hungary (Trademark of Trust scheme), The Netherlands (International Committee on Fundraising Organisations ("ICFO") and Central Bureau on Fundraising)).

113. *Id.* at 72–77 (presenting case studies of both the Estonian Code of Ethics of Non-profit Organizations ("The most successful effort to develop a sector-wide code in CEE") and Irish Code of Corporate Governance for Irish Development Non-profit Organisations).

114. *Id.* at 28, 49–51, 60–63 (presenting case studies of The Netherlands and Bulgaria as interesting model approaches to public benefit status).

115. *Id.* at 40–45 (presenting a case study of the Charity Commission for England and Wales' Counter Terrorism Strategy—the only explicit counter-terrorist strategy for the NPO sector published by a European regulator).

116. ECNL Study, *supra* note 88, at 31.

117. *Id.* at 94.

D. Implications of Matrix and ECNL Studies for Pan-European Non-profit Regulation

Whereas the Matrix Report comes from a financial abuse perspective and the ECNL Study comes from a mapping of existing accountability structures perspective, the message they deliver to the Commission is similar: favouring bottom-up accountability based on a better empirical understanding of the European non-profit sector. Both reports focus on the need for some determination of the common interests of stakeholders if policy implementation is to be advanced. Identifying one such interest as the strengthening of the non-profit sector, ECNL outlines the advantages that a successful achievement of this interest would hold for Member States (by increasing capacity to comply with public regulation), the EU (by making the sector a reliable and significant partner in the fight against terrorism and money laundering), and for non-profits themselves (by improving relationships with regulators through an increased capacity to understand the need for regulation).

Matrix, for its part, envisages a strengthening of the sector through institutional changes, including the creation of European mechanism (e.g., a virtual NPO college) to allow non-profit representatives and public officials at national and EU level to share information and good practices, thereby building up expertise in particular areas. Matrix acknowledges the uneven development and maturity of the European non-profit sector, however, when it advocates the creation of non-profit to non-profit mentoring schemes across the EU.¹¹⁸ Both reports admit that much work remains to be done before the principle of ‘know your donor, know your beneficiary’ can be achieved effectively at EU level. Whereas Matrix calls for better due diligence by non-profits in this regard,¹¹⁹ ECNL is more circumspect citing the need for further discussions and progress in other areas as a precursor to achieving this principle.¹²⁰

The sector’s generally positive response to both reports shows broad support for the common findings that there is little evidence of non-profit abuse for terrorist financing purposes and that to continue to base regula-

118. MATRIX REPORT, *supra* note 76, at 68.

119. *Id.* at 9 (advocating that “[t]he simplest procedures such as checking the references and CVs of prospective staff are often the most effective. These measures should add value to the general management of NPOs as well as contribute to threat reduction.”).

120. ECNL Study, *supra* note 88, at 30 (“Given that the implementation of these principal recommendations is highly sensitive and that many interests are involved, it would seem that in order to have a fruitful stakeholder discussion on these issues, [achievement of] the previously described [ECNL recommendations] would be useful . . .”).

tory efforts purely on this ground is unjustified.¹²¹ Rather, non-profits urge that any future role of the EU should be driven by proportionality and subsidiarity, thereby complementing existing or encouraging new regulation at a national level.¹²² At a meeting in April 2008 to discuss the recommendations of and follow-up to the Matrix Report, the Commission, in response to non-profit submissions, stated that “any follow up action would be proportionate and focused on the threats” and that “enhanced NPO transparency has to be considered in a larger perspective, that good governance and transparency help provid[e] assurance that NPOs operate with integrity and effectiveness in meeting their mission purposes.”¹²³ The Commission, therefore, stressed the importance of a “focus on prevention rather than repression.”¹²⁴ The extent to which the Commission and, indeed, other EU actors adhere to these principles is questionable in light of recent developments, to which we now turn.

V. RECENT DEVELOPMENTS 2009–2010

The strong support for a subsidiarity approach to non-profit regulation espoused by Matrix and ECNL has not found universal acceptance in the EU. In the words of the European Counter Terrorism Coordinator, “Since non-profit organisations frequently have an international profile, it is necessary to find international solutions, notably at EU level, as a com-

121. See Cordaid, Contemporary Minutes of Commission Meeting on Non-Profit Sector Transparency, EC, DG JLS (Apr. 25, 2008); see also EU CIVIL SOC'Y CONTACT GROUP, CONTRIBUTION ON NPO TRANSPARENCY AND COUNTER-TERRORISM 2 (2009) [hereinafter EU CIVIL SOC'Y CONTACT GROUP] (observing that “[c]ounter-terrorism concerns should not overlook the other obligations of the NPO sector, and the EC should address transparency and accountability issues under a wider and mutually reinforcing approach. A pure counter-terrorism approach would create the feeling that initiatives are singling out the NPO sector without justification rather than contributing to strengthening it, and would jeopardize ownership by NPOs.”); MARK SIDEL, REGULATION OF THE VOLUNTARY SECTOR: FREEDOM AND SECURITY IN AN ERA OF UNCERTAINTY 97–98 (2010).

122. EU CIVIL SOC'Y CONTACT GROUP, *supra* note 121, at 1; see also EUR. FOUND. CTR., COMMENTS ON THE STUDY “RECENT PUBLIC AND SELF-REGULATORY INITIATIVES IMPROVING TRANSPARENCY AND ACCOUNTABILITY OF NON-PROFIT ORGANISATIONS IN THE EUROPEAN UNION” 2 (2009), available at http://www.efc.be/EUAdvocacy/EFC%20Statements/2009_EFCcomment_ECNLrpt.pdf (adopting a more hard-line approach that “based on the findings of the ECNL study, which have confirmed the preliminary results of the 2008 Matrix study, there is no scope for specific legislation regarding Transparency and Accountability . . . of national foundations and other NPOs or soft law approach (Code of conduct) at EU level.”).

123. Sidel, *supra* note 121, at 97 (internal quotations and citation omitted).

124. *Id.*

plement to domestic measures.”¹²⁵ In his 2009 Strategy Implementation Report, referring to the Matrix and ECNL studies, the Coordinator claimed:

Based on these studies and the input received [from non-profits invited to comment on the studies], the Commission will further examine the right way to respond to the threat of potential abuse of non-profit organisations for terrorist financing purposes. The aim should be that all Member States are assessed as ‘compliant’ with regard to Special Recommendation VIII of the FATF.¹²⁶

These comments have prompted some NGOs to argue that the reports are being used by the EU to justify the implementation of FATF SR VIII “despite failing to provide supporting evidence that NGOs have been abused/exploited by terrorists.”¹²⁷

Notwithstanding its more accommodating stance in its response to the publication of the Matrix Report, the Commission too seems to have reconsidered its broader governance basis and once more has returned to counter-terrorism concerns as the basis for European non-profit regulation. In its 2009 Communication on the draft Stockholm Programme it proposed:

The instruments for combating the financing of terrorism must be adapted to the new potential vulnerabilities of the financial system and to the new payment methods used by terrorists. 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.¹²⁸

The Stockholm Programme, negotiated by the European Council, defines a five-year framework for the EU in the area of justice and home

125. Council of the European Union, Counter Terrorism Coordinator, *Revised Strategy on Terrorist Financing*, at 8, 11778/1/08 REV 1 (July 17, 2008).

126. Council of the European Union, Counter Terrorism Coordinator, *Report on the Implementation of the Revised Strategy on Terrorist Financing*, at 7, 8864/1/09 REV 1 (May 5, 2009).

127. Ben Hayes, *Statewatch, Briefing on EU Proposals to Increase the Financial Transparency of Charities and Non-Profit Organisations*, STATEWATCH.ORG (Jan. 2010), <http://www.statewatch.org/analyses/no-92-briefing-eu-financial-transparency-charities.pdf>.

128. *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).

affairs.¹²⁹ The Swedish Presidency's draft programme, published in October 2009, ominously directed the Commission "to propose legal standards for charitable organisations to increase their transparency and responsibility so as to ensure compatibility with Special Recommendation (SR) VIII of the Financial Action Task Force (FATF)."¹³⁰ This threat of legally binding measures, however, disappeared in the final version of the Stockholm Programme, which requested the Commission instead 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)."¹³¹

The Commission's response to date has been two-fold: in June 2010, it indicated its intention to publish a Communication on voluntary anti-terrorist financing guidelines for EU based non-profit organizations in 2011;¹³² and in July 2010, it published a short Discussion Paper on the proposed non-profit organization guidelines.

A. Commission Discussion Paper on NPO Guidelines under Consultation (Sept 2010)

On July 2, 2010, the Commission held its third transparency and accountability conference in the non-profit sector for a select group of invited non-profit organisations and representatives from Member State governments.¹³³ The Directorate General for Home Affairs ("DG Home") used the conference to launch its discussion paper on Voluntary Guidelines for EU based non-profit organizations. The four-page paper opens with the claim that there is concrete proof of the vulnerability of non-profit organizations for terrorist financing purposes.¹³⁴ The cited au-

129. Council of the European Union, *The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens*, 2010 O.J. (C 115) [hereinafter *Stockholm Program*].

130. Council of the European Union, *The Stockholm Programme—An Open and Secure Europe Serving the Citizen (Draft)*, at 23, 14449/09 (Oct. 16, 2009).

131. *Stockholm Programme*, *supra* note 129, ¶ 4.5.

132. *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) [hereinafter *Action Plan Implementing the Stockholm Programme*].

133. Eur. Comm., DG Home, *Discussion Paper on Voluntary Guidelines for EU Based Non-profit Organisations* ¶ 2.1.3 (July 2, 2010) [hereinafter *DG Home Voluntary Guidelines*], available at http://www.efc.be/EUAdvocacy/Documents/2010_DGHOME_NPOGuidelines_Discussion%20Paper.pdf.

134. *Id.* at 1.

thorities in support of this statement, however, date back to 2003¹³⁵ and no reference is made to the Commission's more recent commissioned studies that demonstrate that the risk of such abuse is remote in most instances of well-governed organizations. Proceeding from this basis of threat, the Discussion Paper identifies six specific areas in which the Commission intends to develop guidance, namely: a) basic principles for good non-profit organization practice; b) good governance; c) accountability and transparency; d) relations to the donor; e) relations to the beneficiary; and f) suspicious activity reporting.¹³⁶

The principles set out under these headings although addressed broadly to 'non-profit organizations' are aimed, as is common in previous EU documents, at entities that use their assets "exclusively for charitable or other legitimate purposes" and whose activities are "directed towards the attainment of the organisation's stated public benefit goals."¹³⁷ Once more, this approach applies a common law definition of "non-profit" to common and civil law jurisdictions alike, with all the attending problems identified by the ECNL Study that this creates.¹³⁸ Five of the draft guidelines are taken verbatim from the original Framework Code,¹³⁹ and for the most part, problems identified earlier with these requirements in the Commission's original 2005 consultation have not been taken into consideration.

One such example lies under the heading of accountability and transparency and relates to the requirement on non-profits to keep audit trails of all funds transferred outside the EU, including a requirement to carry out on-site audits of beneficiaries to ensure that funds are safe from terrorists.¹⁴⁰ The audit guideline makes no reference to already existing national reporting requirements for non-profits and thus may be assumed to be an additional requirement. More worryingly, the guideline makes no allowance for the compliance capacity of smaller organizations. The only concession to smaller organizations occurs in the recognition that

135. *Id.*

136. *Id.*

137. *See id.* at 2.

138. *See supra* note 88.

139. *See DG Home Voluntary Guidelines, supra* note 133. Guidelines 2.3(1), 2.3(3), and 2.3(5) pertain to transparency and accountability, and Guideline 2.5(1) pertains to relations to the beneficiary. Most of Guideline 2.3(10), dealing with the use of formal channels for money flows, also originates from the Framework Code of Conduct, although a qualifier to this guideline has been added to the effect that account may be taken of the varying capacities of financial sectors in different countries and in different areas of urgent charitable and humanitarian concerns.

140. *See id.* ¶ 2.3(3).

“[s]implified accounting and reporting requirements should apply to NPOs under a certain size,”¹⁴¹ but no similar concession is made in relation to audit requirements.

The Guidelines also lack clarity in their current form. Under the heading ‘Basic Principles for good non-profit organization practice’ the guidelines provide that a non-profit “will answer honestly all reasonable questions about its fundraising costs and it will do so within a reasonable timeframe.”¹⁴² There is no indication as to whether this refers to requests in general or requests simply from national regulators. Another of the Basic Principles’ provisions requires that “NPOs should consider, on a risk-based approach . . . making reference to publicly available information, to determine whether any of their own employees are suspected of being involved in activities relating to terrorism, including terrorist financing.”¹⁴³ The discussion document, however, is silent as to which government list of proscribed organizations should be used to vet employees or the consequences for the organization of any such finding.

Ambiguity persists also in relation to Suspicious Activity Reporting, with the guidelines providing that “NPOs should make a report to the Police or the Financial Intelligence Unit when there is any knowledge or suspicion of terrorist property/activity.”¹⁴⁴ Aside from the mandatory tone of this language, which does not sit with the voluntary nature of the guidelines, it is unclear to which Financial Intelligence Unit or police authority such reports should be made or at what level. Further problems can be identified in the guidelines on governance, one of which provides that “it is important for NPOs to have independent oversight of its charitable operations, whereby the oversight structure best could be defined following the individual organisation of the NPO.”¹⁴⁵ Yet, it is unclear from this statement whether independent oversight means board review of management decisions or some other form of external audit.

Risk indicator factors make a return in the Commission’s Discussion Paper, with non-profits being “asked to identify the specific risk which they have to face of being abused for terrorist financing purposes.”¹⁴⁶ The Discussion Paper suggests some broad-ranging criteria for determining the existence of such risk, which include non-profit:

141. *Id.* ¶ 2.3(1).

142. *Id.* ¶ 2.1(1).

143. *Id.* ¶ 2.1(6).

144. *Id.* ¶ 2.6(1).

145. *Id.* ¶ 2.2(1).

146. *Id.*

- involvement in programmes or projects in territories outside the EU, in particular in high risk areas (where terrorist activity is known to occur);
- co-operation with NPOs that conduct or contribute to programmes or projects in these areas;
- usage of alternative remittance systems or other payment methods, which are beyond the traditional financial mechanisms;
- difficulties in overseeing own projects, for example because of third parties being involved in them.¹⁴⁷

For EU-based non-profits working in high-risk areas where governmental control has broken down and/or terrorist organisations are known to be active, these requirements raise serious concerns. From a legal perspective, the guidelines are silent as to whom non-profits are to report the outcome of their risk evaluation; neither is there any discussion as to legal or liability consequences that meeting these risk indicators will have for non-profits. It is difficult to see how a requirement of this nature fits under a heading entitled ‘basic principles’ since no principle is stated—rather action is required on the part of the non-profit. The implication of this section is that meeting these risk indicators will result in a finding of non-profit abuse for terrorist financing purposes. In this regard, the thinking of DG Home Affairs appears to be at odds with the policy of DG Development, as expressed in the European Instrument for Democracy and Human Rights (“EIDHR”)¹⁴⁸ and in the Commission’s 2007 Communication on Fragile Situations.¹⁴⁹ In the Commission’s EIDHR Strategy Paper for 2011–2013, the Commission recognises its role under the EIDHR as being one allowing for the delivery of assistance in principle without the need for host government consent, thus enabling it “to focus on sensitive political issues and innovative approaches and to cooperate

147. *Id.* ¶ 2.1(5).

148. See Council Regulation 1889/2006, 2006 O.J. (L 386) (EC). The European Instrument for Democracy and Human Rights (“EIDHR”) is aimed at those difficult situations in which donors shift from direct engagement with governments to support other actors that can drive change. Procedures established under the EIDHR are well adapted to situations of fragility, which support alternative actors in situations that are not favourable to participatory development or to respect for human rights.

149. *Communication Towards an EU Response to Situations of Fragility*, COM (2007) 643 final (Oct. 25, 2007). The Communication acknowledges the important role played by civil society organizations in fragile situations, noting that these entities “have great potential for driving change, which can be maximised by facilitating their access to funding.” *Id.*

directly with local civil society organisations that need to preserve independence from public authorities, as well as to be active in countries that may be described as ‘difficult partnerships.’”¹⁵⁰

The Discussion paper does not address how the non-binding guidelines outlined therein will be applied by the Commission (for instance, whether they will be a factor in the awarding of European funding) nor is there any indication of the Commission’s expectations regarding Member States or national regulatory authority implementation of them. Despite DG Home Affairs’ strong interest in adopting a final proposal only after close consultation with the non-profit sector and Member States,¹⁵¹ there is pressure on the Commission to deliver on its commitments in the Stockholm Action Plan and to publish a Communication with recommendations on the prevention of non-profit abuse for terrorist financing in early 2011.¹⁵² A Communication would not be legally binding but would provide policy guidance for the Council of Ministers and the European Parliament.

B. Non-profit Sector Responses to Commission Discussion Paper

To date, the Commission’s consultation with non-profit bodies has been narrowly focused on a select group who were invited to its July meeting on non-profit transparency and accountability.¹⁵³ These bodies along with Member State representatives were asked to comment on the draft guidelines by mid-September, with the Commission proposing to consider submissions in October 2010.¹⁵⁴ No general public consultation

150. *Commission Strategy Paper 2011–2013: European Instrument for Democracy and Human Rights (EIDHR)*, at 13, COM (2010), 2432 (Sept. 23, 2010).

151. *See DG Home Voluntary Guidelines*, *supra* note 133.

152. *See Action Plan Implementing the Stockholm Programme*, *supra* note 132; *see also Commission Communication, The EU Counter-Terrorism Policy: Main Achievements and Future Challenges*, at 8, COM (2010) 386 final (July 19, 2010) (the Commission noting that, “Apart from legislation, the Commission also develops policy measures to counter terrorist financing, for example voluntary guidelines to address the vulnerability of non-profit organisations with regard to abuse for terrorist financing purposes. A Communication is planned for early 2011.”).

153. About fifteen non-profit bodies were represented at the Commission’s meeting in July, along with representatives of some, but not all Member States. In some instances the non-profit invitees received very little advance notice, putting them at a disadvantage when it came to representing their members. *See, e.g.*, EUCLID NETWORK, *supra* note 44 (noting that Euclid, a European network of civil society leaders, was invited to participate in the meeting one week before it occurred, giving it “little or no time to consult with members”).

154. EUR. FOUND. CTR., THERE IS NO NEED FOR EU VOLUNTARY GUIDELINES FOR NPOS (Sept. 14, 2010), *available at* <http://www.efc.be/News/Pages/thereisnoneedforEuvoluntaryguidelines.aspx>.

has been undertaken to elicit the views of potentially affected non-profits on the draft guidelines. Indeed, neither the Discussion Paper nor the deliberations of the July meeting are publicly available on the DG Home Affairs website. It is thus unsurprising that the Commission has not published non-profit submissions received to date though some non-profits have published their submissions independently.¹⁵⁵

Non-profit responses to the Commission share a series of concerns with respect to the draft guidelines. These concerns cover the misplaced motivations behind and rationale for the guidelines, their proposed scope, the lack of clarity and consistency in the language used, and the failure in drafting the guidelines to fully appreciate and respect the diversity of the entities that make up the non-profit sector. Most of the submissions make the point that terrorist abuse of European based non-profit organisations is both rare and unlikely in the European context.¹⁵⁶ In a joint declaration on the proposed voluntary guidelines, the European Foundation Centre (“EFC”), Cordaid, and the Samenwerkende Brancheorganisaties Filantropie (“SBF”) point to the Commission’s own research in the form of the Matrix and ECNL Studies in this area to rebut the case of presumed vulnerability on the part of non-profits.¹⁵⁷ The EFC/Cordaid/SBF statement further calls on the Commission to disentangle specific counter-terrorist provisions from elaboration of general good practices in the discussion paper on the basis that “[c]riminal practices should be dealt with by crim-

155. See, e.g., Eur. Found. Ctr., Cordaid, & Samenwerkende Brancheorganisaties Filantropie, *Joint Comments on the Discussion Paper “Voluntary Guidelines for EU based Non-Profit Organisations,”* (Sept. 10, 2010), http://www.efc.be/EUAdvocacy/Documents/EFC_CordaidJoint-SBF-comment_10September.pdf [hereinafter *Joint Comments on the Discussion Paper*]. The EUCLID Network and Humanitarian Forum have also published their submissions. ECNL provided the author with a copy of its response to the Commission, Eur. Ctr. for Not-for-Profit Law, *Comments on Discussion Paper, “Voluntary Guidelines for EU based Non-Profit Organisations,”* (Sept. 10, 2010). BOND informed the author that it submitted a letter supporting the submission of EFC/Cordaid/SBF that raised no new issues. Email from Katherine Astill, Sector Advocacy Officer, BOND, to Oonagh Breen, Senior Lecturer in Law, School of Law, University College Dublin (Sept. 27, 2010, 11:46 GMT) (on file with author).

156. See EUCLID NETWORK, *supra* note 44 (drawing on the comments of experts present at the Commission’s July meeting); see also The Humanitarian Forum, *Response to Consultation Paper from European Commission: Enhancing Transparency and Accountability of the Non-Profit Sector* (Sept. 1, 2010) [hereinafter *Response to Consultation Paper from European Commission*] (arguing that the threat of the sector is overstated and the case for additional measures in respect of non-profits is unproved).

157. *Joint Comments on the Discussion Paper, supra* note 155.

inal law and not by tightening the requirements, oversight and operating frameworks of a single sector, namely that of NPOs.”¹⁵⁸

A common theme in the submissions is the disappointment expressed at the Commission’s failure to appreciate and articulate the immense value of the non-profit sector to the EU in terms both of service delivery and also as a facilitator of European integration. The EFC/CORDAID/SBF joint declaration finds it regrettable that the

role of NPOs and their contribution to stable and healthy societies is not always clearly acknowledged, nor is their vital contribution in areas such as conflict resolution or addressing violent radicalism. NPOs play a crucial social and economic role in Europe and beyond and their contribution to the public benefit is highly valuable to society and should not be called into question.¹⁵⁹

Two submissions take the Commission to task over its non-contextual use of the term ‘voluntary’ guidelines.¹⁶⁰ In its submission, the ECNL cites the negative experience of American non-profits under the US Treasury Department’s Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities.¹⁶¹ The common difficulty with ‘voluntary’ guidelines, as is illustrated by the American experience, is that what may be voluntary in theory can evolve into de facto legal requirements for those subject to them.¹⁶² Given that the Commission is silent as to the intended use of the guidelines, the fact that the voluntariness element of the guidance might be overlooked in practice both by European institutions and other government bodies is a live issue. In the words of the ECNL, “[i]f the EC or MS were, for example, to incorporate

158. *Id.* at 2.

159. *See id.*; *see also* *Response to Consultation Paper from European Commission*, *supra* note 156, at 1 (to the effect that the guidelines show little “visible understanding of the great work done by NGOs from Islamic countries or the West alike, nor of the challenges they face”).

160. *See Joint Comments on the Discussion Paper*, *supra* note 155 (arguing that there is no need for the proposed new voluntary guidelines); *see also* ECNL, *Comments on Discussion Paper “Voluntary Guidelines for EU Based Non-Profit Organisations,”* at 2 (Sept. 14, 2010) [hereinafter ECNL Comments].

161. U.S. DEP’T OF THE TREASURY, U.S. DEP’T OF THE TREASURY ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES [hereinafter ANTI-TERRORIST FINANCING GUIDELINES].

162. ECNL Comments, *supra* note 160, at 2 (citing the example of the federal agency running the Combined Federal Campaign invoking the Treasury Guidelines to insist that recipients of CFC funding certify that they did not “knowingly employ individuals or contribute funds to organizations found on the . . . terrorist related lists promulgated by the U.S. Government, the United Nations, or the European Union.” Although later reversed, this requirement cost non-profits a significant amount in lost funding.).

certification of compliance with the guidelines as a condition of funding, the guidelines would become, in effect, legal requirements.”¹⁶³

Moreover, in cases in which Member States imposed different mandatory requirements at national level to the European voluntary guideline criteria, this could cause great confusion for non-profit organizations faced with choosing between contradictory standards. A further fear is raised in this regard by the Humanitarian Forum, which suggests that the draft guidelines could be used by non-EU governments in a manner oppressive to non-profit organizations and their activities, particularly in regions in which “NPOs may be under suspicion for providing competition with, or advocacy against, oppressive and/or corrupt Governments.”¹⁶⁴

Nearly all the submissions seek to clarify the role of the Commission in relation to the non-profit sector and the context for its Discussion Paper. For ECNL, the purpose of the guidelines is “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.”¹⁶⁵ Achievement of this goal would require the guidelines to lose their prescriptive tone and instead serve as “descriptors of the common issues and practices, leaving room for further development of a diverse range of practices, appropriate to particular kinds of NPOs, to lessen the risk of diversion of funds.”¹⁶⁶ In its submission, ECNL argues that the EU is in a position to act as a convener, bringing Member States and their best practices together to be shared precisely because of the lack of specific regulation at an EU wide level that could otherwise serve as a reference point for the guidelines.¹⁶⁷ The Euclid Network (“Euclid”) also sees value in the recasting of the guidelines but in its model based on good governance principles, the Commission’s role is not one of convener but of adjudicator, empowered both to stimulate good governance and to reward those organizations actively trying to implement them through its financial regulation and funding practices.¹⁶⁸

In contrast to both ECNL and Euclid, the EFC/Cordaid/SBF joint declaration seeks to eliminate the Commission from the non-profit regulato-

163. *Id.* at 3.

164. *Response to Consultation Paper from European Commission, supra* note 156, at 3.

165. ECNL Comments, *supra* note 160, at 3.

166. *Id.* at 4.

167. *Id.*

168. EUCLID NETWORK, *supra* note 44.

ry picture entirely.¹⁶⁹ In this regard, these comments are consistent with EFC's earlier responses to the 2005 Framework Code of Conduct.¹⁷⁰ Dismissing the basis for the guidelines as ill founded, these organizations argue that the improvement of non-profit management and governance should be left to non-profits, their support organizations, and networks.¹⁷¹ The uncompromising wording of the joint declaration leaves little room for the Commission to play any regulatory role in relation to the sector. According to its signatories, it is for Member States (rather than the EU) to maintain an open dialogue and to cooperate with non-profit organizations in any review of the scope and impact of FATF SR VIII. The only mention of the Commission in this context is a preemptive warning to it not to add to the regulatory burdens already borne by non-profits in the implementation of the Stockholm Programme.¹⁷² The Humanitarian Forum also queries the rationale for the guidelines, asking in what specific respects existing charity law and regulation in EU Member States is perceived as inadequate for the task of combating the financing of terrorism.¹⁷³

All of the submissions seen by the author urge the Commission to re-draft the guidance in more precise and consistent terms with greater appreciation of the intended non-profit audience¹⁷⁴ and the roles played by that audience (whether grant-making or programmatic). In this regard, ECNL highlights certain inconsistencies in the draft that result in an apparently non-binding measure implying in some of its provisions that

169. *Joint Comments on the Discussion Paper*, *supra* note 155, at 2.

170. See EFC, *Comments on the Discussion Document, "Draft Recommendations to Member States Regarding a Code of Conduct for Non-Profit Organisations to Promote Transparency and Accountability Best Practices: An EU Design for Implementation of FATF Special Recommendation VIII—Non-profit Organisations,"* (2005), available at http://www.efc.be/EUAdvocacy/Documents/2005_EFCCommentsJAI_Code.pdf.

171. See *Joint Comments on the Discussion Paper*, *supra* note 155, at 2.

172. *Id.* at 2 (calling "on the Commission and EU Member States to ensure that any initiative, as part of the implementation of the Stockholm programme action plan, does not lead to new layers of rules and red tape or introduce unrealistic regulatory provisions and/or financial obstacles, which would hinder the sector's ability to perform vital work on behalf of its beneficiaries in Europe and beyond, including NPOs that work in conflict zones").

173. *Response to Consultation Paper from European Commission*, *supra* note 156, at 1.

174. The ECNL Comments are particularly strong in this regard in seeking that the Commission clarify its intended target audience as being either all non-profits or merely public benefit/charitable organizations with clearer distinctions being drawn between the standards expected of both big and small non-profits and those non-profits engaged in grant-making as opposed to direct programme delivery. ECNL Comments, *supra* note 160, at 5–6.

non-profits “should do” certain actions, stating in others what non-profits “must do,” while declaring in yet further provisions what non-profits “will do.”¹⁷⁵ The Humanitarian Forum submission takes the Commission to task for its vague references to required higher standards and better practices that should be followed by non-profits.¹⁷⁶ It points out that to encourage non-profits to “adopt practices in addition to those required by law that provide additional assurances that all assets are used exclusively for charitable or other legitimate purposes” is not helpful when the Commission does not outline the nature of these practices.¹⁷⁷ Similarly, in an EU system that does not have a recognized or harmonized system of accounting procedures, a requirement that non-profits follow “proper book-keeping practice” in paragraph 2.3.1 of the draft Guidelines without further elaboration does not lead to greater clarity. Such equivocation has adverse consequences for non-profits, according to Humanitarian Forum, since it forces them to guess what is meant and how particular guidelines will be applied in practice, with resulting “confusion, over-caution and unnecessary expense—or confused disinterest” on the part of affected organizations.¹⁷⁸

As to the next steps, if the Commission heeds the responses received to date, it will need to substantially revise its guidelines and to engage in wider public consultation in advance of proceeding with its proposed Communication in 2011. One must hope that ECNL’s expressed confidence in due process is well placed¹⁷⁹ and that, in contrast to previous occasions, sufficient time will be allocated for effective public consultation.

VI. THE WAY FORWARD: TAKING WISDOM WHERE ONE FINDS IT

Legitimacy and public integrity are vital to [non-profit organizations] and are essential to the effectiveness of their mission As transparency and accountability are demanded of NGOs, however, the same transparency and accountability are needed from governments Of-

175. *Id.* at 8 (referring respectively to paragraphs 2.1.6, 2.1.4 and 2.1.1. in the Guidelines).

176. *See Response to Consultation Paper from European Commission, supra* note 156, at 2.

177. *DG Home Voluntary Guidelines, supra* note 133, ¶ 2.1.3.

178. *Response to Consultation Paper from European Commission, supra* note 156.

179. The ECNL Comments go so far as to say that ECNL “is aware that wider consultations are planned for once the current draft is revised.” ECNL Comments, *supra* note 160, at 6. At the time of writing, there is still no public reference to the Discussion Paper on DG Home Affairs webpage.

ficials who make public claims and establish policies on the basis of alleged NGO associations with terrorism have a responsibility to justify such assertions. Responsible NGOs should not be made to invest resources in proving their bona fides in the absence of legitimate charges or verifiable evidence.¹⁸⁰

There is much truth in the old adage—it's not what you do, it's the way that you do it. NGOs play many important roles in the European Union: from policy advisors to policy advocates. They act as valuable conduits between the institutions and the citizenry in areas ranging from direct service provision to grassroots involvement and both help to give voice to pluralist agendas as well as providing a focal point for bringing common interests together. In as much as they play an important part in dispelling the democratic deficit in the EU, it is also important to shine a bright light on their involvement, thereby ensuring it is carried out with integrity. Institutional concern to ensure such good governance would indeed be a welcome starting point.

Yet, as this Article demonstrates, the institutional concern spearheading the current move towards European regulation of non-profits is driven less by governance concerns and far more by combating the financing of terrorism. It is inevitable that this latter prevailing circumstance will colour any resulting policy solution. As the Commission's own reports have shown, to adopt this approach is to put the cart before the horse. Arguably, it would be far better to focus on improving the governance of EU-based non-profits in those areas that either raise concern at EU level or may benefit from a European as opposed to an ad hoc Member State approach. As the Independent Scrutiny Report showed, a direct focus on better governance will reap many indirect benefits that will assist in combating the financing of terrorism. Examples of both models currently exist in the form of the United States Treasury Guidelines (an anti-terrorism model) and the recommendations on NGO Governance from the Council of Europe's Conference on International NGOs (a governance model).

In revising its Voluntary Guidelines, the European Commission may choose to place ongoing emphasis on the need for effective counter-terrorism measures in the non-profit sector at European level, even though, as non-profit organizations are quick to point out, the 'fit' is not good. The fear for many non-profits may be that the Commission will be overly influenced by the United States' policy in this area, a policy that has drawn vociferous criticism from charities, human-rights watchdogs,

180. DAVID CORTRIGHT ET AL., FRIEND NOT FOE: CIVIL SOCIETY AND THE STRUGGLE AGAINST VIOLENT EXTREMISM 17 (2008).

and scholars since its introduction in 2002.¹⁸¹ The policy, contained within the United States Department of Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities,¹⁸² mirrors in structure the Commission's draft Code of Conduct, with guidance on fundamental principles of good charitable practice, governance accountability and transparency, financial accountability and transparency, programme verification, and anti-terrorist financing best practices, respectively.

In force since 2002, these guidelines were revised in 2006 and supplemented by a risk matrix in 2007.¹⁸³ These revisions have not addressed the concerns of US charities, which, in response to the guidelines, developed alternative principles of best practice for international charities in 2005.¹⁸⁴ Of particular concern to European based non-profits will be the 'know your donor/know your beneficiary' provisions, a principle that USAID has given effect to through its unpopular 'partner vetting system,'¹⁸⁵ and one that remains of concern to EU-based nonprofits in terms of the Commission's intentions in this regard.

181. See Nancy Billica, Political Scientist, Univ. Colorado, & Advisor to Urgent Action Fund for Women, Remarks at Panel Discussion: Safeguarding Charity in the War on Terror, Georgetown University Center for Public & Nonprofit Leadership (June 14, 2005), available at http://cpnl.georgetown.edu/doc_pool/Charity061405.pdf; see also Mark Sidel, *Counter-Terrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative Analysis of "War on Terror" States*, 10 INT'L J. NON-PROFIT L. 7, 13–14 (2008); AM. CIVIL LIBERTIES UNION [ACLU], BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" (2009) [hereinafter ACLU, BLOCKING FAITH, FREEZING CHARITY]; Mark Sidel, *Counter-terrorism and the Regulation of Civil Society in the USA*, 41 DEV. CHANGE 293 (2010) [hereinafter Sidel, *Counter-terrorism*]; U.S. Dep't of the Treasury, Response to Comments Submitted on the *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (2006), available at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/response.pdf> (responding to criticisms of the Guidelines).

182. ANTI-TERRORIST FINANCING GUIDELINES, *supra* note 161.

183. U.S. DEP'T OF THE TREASURY'S OFFICE OF FOREIGN ASSETS CONTROL, RISK MATRIX FOR THE CHARITABLE SECTOR (2007), available at http://www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf.

184. TREASURY GUIDELINES WORKING GROUP OF CHARITABLE SECTOR ORGS. & ADVISORS, PRINCIPLES OF INTERNATIONAL CHARITY (2005), available at http://www.independentsector.org/uploads/Policy_PDFs/CharityPrinciples.pdf; see also Sidel, *Counter-terrorism*, *supra* note 181, at 299 (documenting the charity/Treasury impasse on the primacy of the conflicting guidelines that still existed in 2009).

185. See *Issue Brief: USAID Must Consider Alternative Vetting Approaches*, CHARITY & SEC. NETWORK, http://www.charityandsecurity.org/analysis/Issue%20Brief_USAID_Alternative_Vetting

To be sure, the Commission stands in a much weaker position than the Department of Treasury in the US when it comes to implementing effectively any such code. The worst-case scenario for non-profits would be the introduction of an ill-conceived 'voluntary' European code of conduct that draws half-hearted support from Member State governments and is indiscriminately applied to non-profit organizations both by EU institutions, Member States, and third country governments in which some of these non-profit organizations operate. The effect of such application would be to burden compliant NGOs with an additional layer of bureaucracy, and if issued in its current form, cause confusion amongst NGOs as to what is actually required of them under the guidelines, leading in some cases to inevitable self censorship or restriction of humanitarian work in high risk areas. The absence of a centralised European oversight schema will also make it difficult to apply the code in an even-handed manner to all non-profits, resulting (again in a worst case scenario) in certain types of organizations being subjected to scrutiny under the code (for instance, Muslim charities) with others escaping entirely under the radar.¹⁸⁶

A better outcome for non-profits would be for the EU Commission to play to its strengths and to use its fulcrum position to act as a facilitator of information exchange and best practice for European non-profits. Again, achievement of this role is not something that can be accomplished overnight. As all the reports commissioned by the Commission over the past five years have demonstrated, effective and proportional regulatory action is only possible when it is based upon sound empirical research.¹⁸⁷ To this end, it may be worth learning from the practices of

¹⁸⁶Approaches (last visited Apr. 7, 2011) (describing the PVS as creating "unnecessary and potentially dangerous barriers for humanitarian groups providing relief in global hot spots").

¹⁸⁶ In this regard, consider the disproportionate effect that the anti-terrorist financing guidelines in the United States has had on Muslim charities. For a discussion, see ACLU, BLOCKING FAITH, FREEZING CHARITY, *supra* note 181.

¹⁸⁷ A recent DG Home invitation to tender to conduct a feasibility study on mapping out which actors and through which tools and steps could create a non-profit organisation observatory in the EU is thus a welcome step in the direction. See Commission Service Contract Notice 387044-2010, B-Brussels, *Feasibility Study on Mapping Out Which Actors, and Through Which Tools and Steps, Could Create a Non-Profit Organisations Observatory in the EU*, OJ S252/2010, available at <http://ted.europa.eu/udl?uri=TED:NOTICE:387044-2010:TEXT:EN:HTML>. The tender process closes in mid-February 2011 and ten months is allocated for the project's completion upon award, meaning the Commission should have better information on hand by early 2012. Of course, this date is still substantially later than the Commission's advertised 2011 date for the release of its proposed Communication on the Non-Profit Code of Conduct.

the Council of Europe (the “CoE”) in light of its recent forays into the area of NGO governance and best practice.

Founded in 1949, the CoE is Europe’s oldest political organization and comprises forty-seven members, which includes all Member States of the EU.¹⁸⁸ The Council was established to achieve greater European unity through the promotion of democracy, human rights, and the rule of law, and to develop common responses to political, social, cultural, and legal challenges in Member States.¹⁸⁹ The CoE and the EU enjoy good political relations, which were further strengthened in 2007, when the two entered into a Memorandum of Understanding that provided for a new framework for enhanced co-operation and political dialogue.¹⁹⁰ In terms of impact, the CoE is perceived as an intergovernmental structure whose decisions have relatively little impact on social and economic redistribution in Europe when compared to EU decisions.¹⁹¹ Conventions promulgated by the CoE are non-binding since the CoE cannot impose ratification except in the case of the European Convention on Human Rights. Equally, CoE recommendations are not legally binding on either an international or national level.¹⁹² However, in practice, Member States do bear them in mind when developing related legislation. Since the CoE cannot sanction violations by Member States, the CoE must work through the cajoling of governments and the encouragement of best practice.¹⁹³ To this end, the general influence of the CoE outside of the European Convention on Human Rights mirrors the current influence of the EU Commission in the area of European non-profit regulation.

At the heart of the CoE lies a quadrilogue of institutions: the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and

188. *Council of Europe in Brief*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en> (last visited Apr. 7, 2011).

189. *Mission Statement*, COUNCIL OF EUR., http://www.coe.int/t/e/social_cohesion/soc-sp/general_information/02_mission_statement/MISSION%20STATEMENT.asp (last visited Apr. 7, 2011).

190. Memorandum of Understanding between the Council of Europe and the European Union, CM (2007) 74 (May 10, 2007). Core areas of cooperation between the two currently include: human rights and fundamental freedoms, rule of law, justice and home affairs, fight against organized crime and corruption, culture, education, and other joint activities.

191. Silke M. Trommer & Raj S. Chari, *The Council of Europe: Interest Groups and Ideological Missions?*, 29 W. EUR. POL. 665, 666 (2006).

192. *Id.*

193. Matti Niemivuo, *Good Administration and the Council of Europe*, 14 EUR. PUB. L. 545, 545–46 (2008).

Regional Authorities, and the Conference of International NGOs (the "Conference"). Together, these actors actively participate in the policies and work programme of the CoE and reinforce co-operation between the CoE and the various associations in Member States. Since the introduction of participatory status for INGOs in 2003,¹⁹⁴ the Conference has been in a stronger position to influence policy development at the Committee of Ministers.

In 2008, the Conference established an Expert Council on NGO Law (the "Expert Council"), the task of which is "to contribute to the creation of an enabling environment for NGOs throughout Europe by examining national NGO law and its implementation, and promoting its compatibility with Council of Europe standards and European good practice."¹⁹⁵ The Expert Council has published two reports to date: its first report undertook a thematic study on the conditions for the establishment of NGOs with case studies of six countries: Azerbaijan, Belarus, France, Italy, Russia, and Slovakia.¹⁹⁶ In its second report, published in January 2010, the Expert Council turned its attention to the internal governance of NGOs and examined the scope for self-governance, supervision and intervention by authorities, accountability and transparency, management, and decision-making processes. This report included case studies of Armenia, Ireland, Luxembourg, Moldova, and the former Yugoslav Republic of Macedonia,¹⁹⁷ along with less detailed descriptions of practice in other CoE Member States based on the return of country questionnaires.

The Expert Council's recommendations, which were endorsed by the Conference of INGOs in January 2010, call on Member States to ensure, inter alia, that the scope of obligations relating to the auditing of accounts and reporting on activities is clarified and does not place an undue

194. Comm. of Ministers, Council of Eur., *Participatory Status for International Non-Governmental Organisations with the Council of Europe*, Res (2003) 8 (Nov. 19, 2003). Prior to 2003, NGOs enjoyed a lesser form of "consultative status" with the CoE.

195. Conference of INGOs of the Council of Eur., *Expert Council on NGO Law Terms of Reference*, OINGConf/Exp (2008) 1 (Jan. 2008).

196. Conference of INGOs of the Council of Eur., *Expert Council on NGO Law, First Annual Report: Conditions of Establishment of Non-Governmental Organisations*, OINGConf/Exp 2009 1 (Jan. 2009). The Conference of INGOs adopted this report on January 28, 2009, and made a series of recommendations regarding its implementation. See Conference of INGOs of the Council of Eur., *First Report of the Expert Council on NGO Law*, CONF/PLE (2009) REC 1 (Jan. 28, 2009).

197. Conference of INGOs of the Council of Eur., *Expert Council on NGO Law, Second Annual Report: The Internal Governance of Non-Governmental Organisations*, OINGConf/Exp (2010) 1 (Jan. 2010).

burden on NGOs.¹⁹⁸ It points out that the basis for public authorities to challenge the decision-making of NGOs should be limited to circumstances in which there is a legitimate public interest to be protected.¹⁹⁹ Furthermore, the report argues that the appropriate sanction against NGOs for breach of legal requirements applicable to them should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil, or criminal penalty on them and/or any individuals directly responsible.²⁰⁰ Clarity and proportionality are thus the keywords here.

This emphasis on institutional clarity and proportionality can also be seen in the CoE Recommendation (2007) 14 on the legal status of non-governmental organizations in Europe.²⁰¹ The Recommendation requires, *inter alia*, that the activities of NGOs should be presumed to be lawful in the absence of contrary evidence and that no external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent.²⁰² These principles give effect to the underlying legitimacy of non-profit organizations and require that any impediments to their operations be based on a sound legal basis.

At present, the work of the Expert Council on NGO Law is producing empirically sound accounts of European Member State NGO law and practice, thus assisting in the establishment of common trends of best practices and common problems. If the essence of these principles were to inform the European Commission in its relations with non-profit organizations and in the drafting of its voluntary code of conduct, a better outcome would be assured in achieving stronger NGO accountability and transparency through better governance while simultaneously, albeit indirectly, supporting the anti-terrorism agenda without undermining the achievement of non-profits' missions.

198. Conference of INGOs of the Council of Eur., *Internal Governance of NGOs*, recommendations 4, 6, CONF/PLE (2010) REC 1 (Jan. 27, 2010).

199. *Id.*

200. Comm. of Ministers, Council of Eur., *Legal Status of Non-Governmental Organizations in Europe*, para.72, CM/Rec (2007) 14 (Oct. 10, 2007) [hereinafter *Legal Status of Non-Governmental Organizations in Europe*]. Compare the approach of the Expert Council with that of the ACLU in ACLU, BLOCKING FAITH, FREEZING CHARITY, *supra* note 181, at 21 (calling on the U.S. Congress to provide charities with an opportunity to cure any issues before taking disruptive action).

201. *Legal Status of Non-Governmental Organizations in Europe*, *supra* note 200.

202. *Id.* cls. 67, 70.