



EXPLORING
TRANSPARENCY AND ACCOUNTABILITY

REGULATION OF PUBLIC-BENEFIT



ALAPI
FORAS FO
ONDAZIONE FON
OND FONDAS FONDS
FUNDAÇÃO FUNDACION FU
FUNDACJA FUNDANIE NADACI
STICHTING STIFTUNG STIFTELSE TRU
ZAKLADA ALAPITVANYOK AN FORAS FO
FONDAZIONE FONDAZZJONI FOND FONDA

External consultants

- The European Center for Not-for-Profit Law (ECNL)
- Thomas von Hippel, freelance researcher

Additional guidance was given by members of the EFC Legal Committee and Donors and Foundations Networks

EFC Legal Committee*

- Eleanor Boddington, The Wellcome Trust, United Kingdom, Chair
- Ludwig Forrest, King Baudouin Foundation, Belgium, Vice-Chair
- Henrique Antunes, Fundação Luso-Americana para o Desenvolvimento, Portugal
- Rui Chancerelle de Machete, Fundação Luso-Americana para o Desenvolvimento, Portugal
- Isabelle Combes, Fondation de France, France
- John Coughlan, Academy of European Law Foundation, Germany
- Michele de Meo, Fondazione Roma, Italy
- Mall Hellam, Open Estonia Foundation, Estonia
- Kerstin Hötzel, Academy of European Law Foundation, Germany
- Sabien Khan, The Wellcome Trust, United Kingdom
- Ewa Kulik-Bielinska, Stefan Batory Foundation, Poland
- Beatriz Rabadán López, Fundación ONCE, Spain
- Kristiina Rintala, Suomen Kulttuurirahasto, Finland
- Stefan Stolte, Stifterverband für die Deutsche Wissenschaft, Germany
- Ronald van der Giessen, Oranje Fonds, The Netherlands

DAFNE members*

- Network of Belgian Foundations, Belgium
- Bulgarian Donors Forum, Bulgaria
- Czech Donors Forum, Czech Republic
- Council of Finnish Foundations, Finland
- French Centre for Funds and Foundations, France
- Association of German Foundations, Germany
- Hungarian Donors Forum, Hungary
- Philanthropy Ireland, Ireland
- Association of Italian Foundations and Savings Banks (ACRI), Italy
- Association of Foundations in the Netherlands (FIN), Netherlands
- Norwegian Association of Foundations, Norway
- Polish Donors Forum, Poland
- Portuguese Foundation Centre, Portugal
- Romanian Donors Forum, Romania
- Russia Donors Forum, Russia
- Slovak Donors Forum, Slovakia
- Spanish Association of Foundations, Spain
- Association of Swedish Foundations, Sweden
- SwissFoundations, Switzerland
- Third Sector Foundation of Turkey (TÜSEV), Turkey
- Association of Charitable Foundations, UK
- Ukrainian Philanthropists Forum, Ukraine

*Current membership as of September 2011

Information used for the regulatory mapping of this publication is based on the information in the EFC Legal and Fiscal Country Profiles provided by the EFC's network of foundation law experts. The full Country Profiles, giving names and contact details of the experts, can be found at www.efc.be.

Information used for the self-regulatory mapping of this publication is based on information and materials supplied by the following organisations:

Belgian Network of Foundations, Belgium	Banque de Luxembourg, Luxembourg
Bulgarian Donors Forum, Bulgaria	Association of Foundations in the Netherlands (FIN), Netherlands
Czech Donors Forum, Czech Republic	Polish Donors Forum, Poland
Realdania, Denmark	Portuguese Foundation Centre, Portugal
Open Estonia Foundation, Estonia	Romanian Donors Forum, Romania
Council of Finnish Foundations, Finland	Russia Donors Forum, Russia
French Centre for Funds and Foundations, France	Slovak Donors Forum, Slovakia
Association of German Foundations, Germany	Spanish Association of Foundations, Spain
Philanthropy Ireland, Ireland	SwissFoundations, Switzerland
Association of Italian Foundations and Savings Banks (ACRI), Italy	Third Sector Foundation of Turkey (TÜSEV), Turkey
Valmiera Region Community Foundation, Latvia	Association of Charitable Foundations, UK
Non-Governmental Organisation Information and Support Centre (NISC), Lithuania	European Foundation Centre (EFC), Belgium
	Council on Foundations, United States

Funders

The EFC and DAFNE would like to express our thanks to the following organisations for their generous support of this initiative:

- Fondazione Cassa di Risparmio di Bolzano - Stiftung Südtiroler Sparkasse
- Foundation Pro Victimis
- Gebert Rűf Stiftung
- Körber-Stiftung
- The Wellcome Trust

Copyright © European Foundation Centre (EFC) 2011. All rights reserved. Reproduction by any means mechanical or electronic is prohibited without express written consent of the publisher. Quotation from this publication is authorised subject to full identification of source. Every effort has been made to ensure the quality of information in this document. However, the EFC cannot guarantee the accuracy and completeness of information published in this document. The EFC is not responsible for consequences resulting from use of information provided in this document. The EFC expressly disclaims all liability for, damages of any kind arising out of use of, reference to, reliance on, or performance of the information given in this document. For additional copies of this publication and further information on the EFC and its activities, please contact: legal@efc.be.

FOREWORD

With the strings tightening on government purses across Europe and the role and influence of non-profit organisations growing, a number of questions have been raised concerning the legitimacy of foundations in particular and whether existing public regulation and self-regulatory frameworks are enough to ensure that the sector is open and held accountable. Seeking to offer answers to these questions, the EFC and DAFNE mapped and analysed how the transparency and accountability of foundations is framed by legal and tax legislation and self-regulatory initiatives across Europe. We hope that the resulting study will prove a valuable resource for the sector.

However, this study is only the beginning. While the overall picture painted by the study's findings is positive, there is inevitably some room for improvement. Foundations, with the support of peer networks and associations like DAFNE and the EFC, must take this opportunity to reinforce the good work that has already been done in the field of transparency and accountability; to improve our position with our many stakeholders and maintain foundations' hard won reputation for integrity that has placed them among the most trusted institutions in society.

This project also marks an important step in strengthening the strategic partnership between DAFNE and the EFC. By bringing the 6,000 plus members we represent together in this way, we aim to facilitate a broader, deeper understanding of the sector, both externally and among one another, and to amplify the voice of foundations throughout Europe. We are confident that this collaboration will be the first of many.

Finally, we extend our sincere thanks to all who have contributed time, expertise, or resources in support of this initiative.

Gerry Salole

Chief Executive Officer
European Foundation Centre

Rosa Gallego

Chair
DAFNE Steering Committee

CONTENTS

Executive summary	6
1. Introduction	8
2. Rationale for accountability and transparency regulation	9
2.1 What are the arguments for accountability and transparency regulation?	9
2.2 What is accountability and transparency regulation?	10
2.3. What is the political context?	11
3. Comparative mapping of the regulatory framework	12
3.1 Establishment	12
3.2 Public-benefit status and requirements for tax exemption	13
3.3 Governance	15
3.4 Publicity, reporting requirements and auditing	16
3.5 External supervision	19
3.6 Counter-terrorism	20
4. Comparative mapping of self-regulatory tools	21
4.1 Codes of conduct	21
4.2 Method of certification	22
4.3 Access to information on participating organisations	22
4.4 Scope of self-regulatory mechanisms	22
4.5 Governance and management	23
4.6 Reporting requirements	23
4.7 Monitoring the use of funds	24
4.8 Accountability towards beneficiaries	24
4.9 Fundraising	24
4.10 Compliance mechanisms	24
4.11 Promotion	25
4.12 Impact	25
5. Analysis of the European (self-) regulatory framework	27
5.1 Foundation law and foundation tax law	27
5.2 Comparative overview of self-regulatory framework	30
6. Are regulatory and self-regulatory mechanisms effective?	32
6.1 What level of regulation is appropriate?	32
6.2 No need for European regulation on transparency and accountability	33
6.3 Are there fundamental gaps in existing (self-) regulation on transparency and accountability?	34
6.4 Is there a need for more public regulation at national level?	36
6.5 What is the role of self-regulatory mechanisms?	38
7. Key conclusions and recommendations	41
7.1 Key conclusions	41
7.2 Recommendations	42
8. Methodology and tools	43
8.1 Study team and roles	43
8.2 Definitions	43
8.3 Methodology	44
ANNEX I Questionnaire for field study on self-regulatory tools	46
ANNEX II Self-regulatory mechanisms included in the field study	47

EXECUTIVE SUMMARY

We are all answerable to someone. Whether that someone is a colleague, friend, spouse, or neighbour it is a fact of life: there is always someone waiting to appraise you. But while this responsibility for our actions is inevitable, the degree of accountability that is demanded often seems to have a direct correlation to the behaviour of the individual in question. For example, an employee who consistently meets deadlines is asked less by their boss to account for how they use their time than the disorganised colleague who is always late. A misbehaving teenager receives more questions from their parents than their angelic sibling does.

Applying this same general rule to foundations provides some serious food for thought, particularly given recent, and mounting, public scrutiny of foundation activities, spending, and influence. If foundations are not vigilant of their behaviour now, like the tardy colleague or the naughty teenager, they may be ruining the consequences later. This study therefore represents a first and important step to analyse whether, and to what extent, existing public regulations, as well as self-regulation efforts, are imposing suitably high standards of behaviour. To put it simply: Are foundations in Europe sufficiently transparent and accountable?

For clarity's sake, it is necessary to first define what is meant by these two complementary terms:

TRANSPARENCY: An obligation or willingness of public-benefit foundations to publish and make available relevant data to stakeholders and the public.

ACCOUNTABILITY: An obligation or willingness of public-benefit foundations to account for their actions towards their stakeholders.

It must also be acknowledged from the outset that across the countries surveyed there are distinct differences in the ways

that accountability and transparency are understood; thus there is no objective system of benchmarks against which regulatory effectiveness in this sense can be measured. Having said this, some general trends and cross-cutting conclusions did surface:

- Accountability and transparency are “hot topics” both within the foundation sector and at the political level. During the last decade, many countries have amended their legal framework for foundations, affecting accountability and transparency regulations in a broad sense. Additionally, there are several ongoing discussions about legal reforms: At the EU-level and in some Member States regulatory measures are being considered to prevent the abuse of NPOs, including foundations, for financial criminal purposes.
- Specific, formal regulations in this regard are imposed with similar rationales across the countries surveyed:
 - (a) There is a perceived higher risk of financial abuse and mismanagement from foundations due to their unique governance structures. Unlike companies, foundations do not have shareholders to answer to.
 - (b) Foundations' receipt of a specific public-benefit status and tax exemptions goes hand in hand with an increased requirement to answer to the public and the State.
 - (c) The ambitious public role and potential impact of foundations seems to attract a certain scepticism.
- The legal comparative analysis illustrates that no fundamental gaps exist in the legal framework for transparency and accountability of public-benefit foundations. In all countries a certain minimum standard is upheld and there are measures in place to ensure that foundations are pursuing the purposes for which they were set up.
- While no fundamental gaps in legislation were detected, there may be room for improvement in some cases. Access to registration data, ensuring good governance, and effective reporting and supervision were highlighted in

some countries as elements of the regulatory framework to be improved upon. However, regulation should be proportionate and should not overburden foundations with unnecessary administration. An important tool to improve accountability and transparency is self-regulation, as is already in place in many countries.

- Self-regulatory mechanisms are tailored tools to optimise effective operations, accountability and transparency of public-benefit foundations through commonly accepted standards. In many countries one or more self-regulation initiatives already exist. However, self-regulatory tools tend to lack compliance mechanisms and there is generally a lack of monitoring of their application.
- There is no need for European regulation on the matter. A “one size fits all” solution at European level would not be possible given the vastly differing legal traditions and cultures of the Member States. Transparency and accountability are achieved in a number of ways and through different mechanisms and concepts; there is no single model which could encompass this and harmonisation is neither a possibility nor a desired measure. Instead of harmonisation of national regulations, a new optional supranational legal form such as the currently discussed European Foundation Statute would be helpful, as it could serve as a benchmark of good governance within the EU and beyond.

What do these conclusions imply for European foundations and the way forward? DAFNE and EFC members should be encouraged to openly discuss best practices, particularly in the implementation of self-regulatory mechanisms. This should be coupled with enhanced dialogue at national level, with governments and legislators, to influence the political debate about the role of foundations and to strategically

position foundations as part of the solution, not part of the problem, in the policy arena.

National governments need to be continually convinced of the need for a more enabling legal and fiscal environment for the sector. One way in which governments could improve the legal and fiscal environment for the sector would be by more widely applying the principle of proportionality in reporting and other transparency and accountability regulations. Foundations should also ideally be involved in the policy development process when it comes to addressing issues in NPO sector transparency and accountability.

Moreover, the EU could take a more proactive role in assisting ongoing national processes by helping to inform stakeholders and share good practices from across the Member States. It would be worthwhile examining whether the EU could provide a platform for exchange of best practices among Member States. This could take several forms and could include a forum for dialogue, in order to promote accountability and transparency and serve as an ongoing resource for information and exchange.

Overall, the snapshot provided by this study presents a positive image of European foundations’ efforts to be both accountable and transparent. But this must not foster a feeling of self-satisfaction or lead to the slippery slope of complacency. Public-benefit foundations in Europe must continue to be vigilant, following the formal regulations and fiercely upholding self-regulation. After all, in the end we all have to answer to somebody, and isn’t it preferable that this somebody isn’t a legislator with long rolls of red tape?

1. INTRODUCTION

In 2009, the European Foundation Centre (EFC) and the Donors and Foundations' Networks in Europe (DAFNE) network together decided to review the issue of transparency and accountability of public-benefit foundations in Europe.

EFC, DAFNE and their respective members have always strived towards transparency and accountability. Now, with increased political interest in the matter, they are even more committed to ensuring that existing regulatory and self-regulatory mechanisms are well designed and are being used to their full effect.

This DAFNE/EFC study comes at a crucial political moment: EU institutions, as well as several national governments have in recent years sought to address the issue of transparency and accountability of non-profit organisations (NPOs), particularly in the context of preventing the potential abuse of NPOs for financial criminal purposes and terrorist financing.

The main objective of this study is to provide the foundation sector, public authorities, and other interested parties with an overview and analysis of regulatory and sector-developed self-regulatory approaches to ensuring the transparency and accountability of public-benefit foundations in Europe. It should be noted that this study did not survey individual foundation practices or policies and principles developed by individual foundations. This

study also assesses the need for actions to enhance transparency and accountability of public-benefit foundations.

The study seeks answers to the following questions:

- What is the rationale behind having rules on transparency and accountability for public-benefit foundations, as organisations without shareholders?
- What is the operating environment with regard to transparency and accountability for public-benefit foundations and their donors and funders, based on legislation and self-regulation? What are overall and recent trends? Are existing transparency and accountability mechanisms well designed and are they being used to their full effect? Can significant gaps be identified?
- What is the role of self-regulation? What can be said about the relationship between public regulation and self-regulation - are they considered as complementary tools in achieving an optimal state of accountability and transparency?
- Is there a need for more action at the level of the national or EU legislator, the foundation sector, and/or for combined efforts?

2. RATIONALE FOR ACCOUNTABILITY AND TRANSPARENCY REGULATION

2.1 WHAT ARE THE ARGUMENTS FOR ACCOUNTABILITY AND TRANSPARENCY REGULATION?

Foundations are autonomous private entities established with private funds, so what justifies regulatory frameworks that demand accountability and transparency? Legal scholars and researchers have discussed this question taking into account the specific structure of foundations as asset-based and purpose-driven organisations without owners and shareholders and have come up with several arguments in favour of such regulation, which are summarised as follows:

2.1.1 PRINCIPAL/AGENT THEORY

There is a growing argument¹ that the foundation sector should, like the corporate sector, adopt a “principal/agent” approach to how an organisation should be governed and controlled. In the corporate sector, transparency and accountability are considered useful instruments to prevent abuse by corporate governing bodies. According to the so-called “principal/agent theory”, the board of a for-profit company is the “agent” which acts on behalf and in the interest of the shareholder as the “principal”. The danger is that the agents may in some cases act more in their own interest, for instance through self-dealing (e.g. sell private real estate to the company at a very high price). Therefore, it is mandatory that decisions made by the board are transparent so that shareholders are informed and can react when decisions appear risky and or when the behaviour of the board is deemed negligent.²

Researchers are of the opinion that the essence of the “principal/agent” theory could also apply to foundations. However, there are some stumbling blocks, since the way in which public-benefit foundations are established and governed means that, unlike corporate entities with shareholders, they do not have “built-in” structural mechanisms to avoid abuse. The good governance of a foundation essentially depends on the ethical standing of its board, so a foundation can be seen as more vulnerable to mismanagement than other types of legal

entities. In the case of a foundation, who would be the stakeholder or “principal” in whose interest the board acts? Beneficiaries can claim no proprietary rights on the assets. Founders or donors dedicate their money to the purpose of the foundation and do not have any own economic interest in the foundation; their interest to exercise control is therefore not comparable to that of shareholders in a for-profit company. In addition, foundations are often set up for a very long period and in many cases in perpetuity, certainly going beyond their founders’ lifetimes. Therefore, even if one could argue that the founder does retain a vested interest in controlling board activities, this would hardly be maintained beyond his/her lifetime, hence the board acts on behalf of the foundation itself and not on behalf of the founder or beneficiaries. This specific structure leads to a control issue which could be addressed by having regulatory frameworks on transparency and accountability and external supervisory structures. In particular in civil law countries, the argument is used that transparency and accountability are important tools to ensure that the will of the founder (i.e. the public-benefit purpose) and the foundation as an independent entity are protected against misconduct by the foundation board/other organs and misuse of the foundation funds.

2.1.2 LEGAL SECURITY/CREDITOR PROTECTION

To ensure overall legal security and creditor protection, a certain level of regulation related to accountability and transparency is already commonly required as a consequence of creating a legal entity. The granting of legal personality normally protects the capital of a foundation from the founders’/donors’ creditors. Regardless of a foundation’s specificities, any legal person may be required to present its basic data and annual accounts in a public register, as a means to ensure that credible information is provided to all parties with whom the foundation enters into contracts. As shown in the study (see section 3.4 Publicity, reporting requirements and auditing), virtually all European countries require that foundations prepare and submit

¹ Grundprobleme von Nonprofit-Organisationen/Key problems of non-profit organisations, Thomas von Hippel, Habilitation 2006.

² However the ENRON scandal in 2001 shows that boards are just as vulnerable to mismanagement in for-profit companies or membership organisations.

their annual accounts with a the competent authority. It should be noted that more substantial economic activities and/or fundraising activities may be subject to stricter or additional controls to ensure legal security and creditor protection.

2.1.3 TAX EXEMPTIONS

In exchange for tax benefits, the state (including taxpayers) expects a foundation to undergo more detailed accountability requirements to show that it supports the general public interest. In short, governments give up part of their tax income because public-benefit foundations benefit the whole community. In addition, the tax exemption is seen as an instrument for division of labour between the state and private actors when it comes to benefiting the general public. Private initiatives may therefore only receive tax privileges if they show in a transparent and accountable manner that they benefit the public at large.

2.1.4. TRUSTEES FOR THE PUBLIC GOOD

Many foundations aim to tackle problems in society and aim to bring about social change; therefore the public at large has a legitimate interest in obtaining information about foundations.

2.1.5. ENLIGHTENED SELF-INTEREST

Many foundations believe that there is an internally driven, ethical obligation to undergo such regulation, stemming from their mission as public-benefit foundations. Transparency and accountability are therefore considered essential parts of sound management practice, in particular in our information society and in times when foundations often work in partnership with other players.³ Often there are strategic considerations for foundations to be transparent and accountable and thus to maintain public trust in the sector. Foundations need to undertake efforts to prevent and anticipate scandal in a climate of increased suspicion: "The public is most likely to become suspicious when it is uninformed..."⁴ In addition, being open to new ideas and to change in society will help foundations to improve their philanthropic activity and respond to new ideas and trends in society.

It should be noted that arguments in favour of transparency and accountability are subject to constraints imposed by the need for confidentiality regarding certain types of information that are usually protected under national laws, such as privacy of donors, funders and beneficiaries as well as trade secrets, patents etc. It is argued that some of the work foundations do, in particular in certain political environments, is more effective (and in some cases only possible) if the foundation leads from behind and does not disclose all information. Overall, the requirement for greater transparency of foundations has to go hand in hand with an understanding of the reality of foundations' work; an understanding that foundations may sometimes wish to pursue innovative, or what some might consider more risky, actions, which they as independent organisations are uniquely privileged to be able to do. The fact that increasing transparency and accountability requirements can in turn increase the administrative burden on foundations is used as an argument against the introduction of new, overly complex regulation.

2.2 WHAT IS ACCOUNTABILITY AND TRANSPARENCY REGULATION?

Transparency and accountability regulation refers to existing mechanisms, be they regulatory or self-regulatory, which answer the need for transparency and accountability of public-benefit foundations. These mechanisms relate in part to the governance and internal procedures of the foundation; however they primarily address publication and sharing of certain content with different stakeholders throughout the lifetime of a public-benefit foundation, e.g. in the process of establishment, later operations, in gaining a tax-exempt status etc. Furthermore, regulatory mechanisms seek to ensure compliance (supervision, sanctions) and safeguards for dissolution. As such, a range of regulatory areas are involved, beyond foundation law itself - tax law, charity or public-benefit legislation, accounting regulation, anti-money-laundering laws etc. Transparency and accountability are not only about sharing information but also about the process and the content of the information shared and what implications this has for the foundation and its stakeholders.

³ Foundations in Europe, Society, Management and Law, Bertelsmann Foundation, 2001, pages 409-430.

⁴ Frederick Keppel, Former Carnegie Corporation President.

2.3 WHAT IS THE POLITICAL CONTEXT?

Over the past several years there has been an increased interest in regulating the NPO sector, including foundations, throughout Europe and in introducing more accountability and transparency into this sector.⁵ Recent research has identified close to 140 initiatives on transparency and accountability from the 27 EU Member States and the European Economic Area (EEA), including over 65 public and over 70 self-regulatory projects.⁶ Further research suggests that this trend has continued during the past two years. In addition to these initiatives, there is also a growing interest among pan-European institutions to guide their members in good regulatory practices. The most notable example of the latter is the Council of Europe, which adopted its Recommendations on the Legal Status of NPOs in Europe in 2007, and has since established an Expert Council to monitor compliance of its Member States with the recommendations.⁷

The latest research also shows that the key driving force behind such regulatory and self-regulatory initiatives has been the growing social and economic importance of the NPO sector. This is especially true for foundations, which have assumed an increased role in addressing social and economic problems in Europe over the past decade. As economies struggle and welfare states shrink across the continent, foundations are increasingly seen as important partners for the government in providing solutions to societal problems, and pushing and developing innovative ideas. In some areas, such as research, this has already led to partnerships formally expressed at EU level.⁸

At the same time, part of the trend towards increased regulation comes in response to a perceived need across Europe and at EU level to safeguard NPOs against abuse for financial criminal purposes and terrorist financing. This was first initiated at the international level by the Financial Action Task Force⁹ with a Special Recommendation on Non-

profit Organizations in 2004. This was followed in 2005 by a Communication of the European Commission that addressed the issue of transparency and accountability of NPOs.¹⁰ In this Communication, a “code of conduct” for NPOs was proposed, an idea which was largely criticised by the sector. As a result, it was proposed to further assess the actual abuse of NPOs for criminal purposes and to analyse the existing regulatory and self-regulatory framework of NPOs with regard to transparency and accountability.

Consequently, the EC commissioned two studies to explore the current situation relating to the vulnerability of NPOs to terrorist abuse in the EU.¹¹ These studies point to the need for increased exchange and sharing of best practices among the Member States, but do not substantiate the need for EU-level regulation. In fact, the research found that proof of actual abuse of NPOs and foundations was limited. The research emphasises that the role of the EU should be a “facilitator” and potentially a “qualifier”, but not a “regulator”, when it comes to transparency and accountability of NPOs. Currently, an overall EU regulation seems to be “off the table” but the Commission is considering drafting EU guidelines for NPOs regarding their conduct in preventing, identifying and dealing with terrorist abuse.¹²

Despite the general acknowledgment by the EU and national governments of the importance and influence of the NPO sector, there still remains concern in the international arena about the potential abuse of this sector and need for tighter regulation. Foundations therefore need to work in partnership with governments in order to determine what evidence exists of terrorist abuse and to tackle the complex problem of potential abuse in the context of terrorist financing, in order to adopt the most effective solutions at national level.

⁵ For a thorough overview of recent European initiatives in this regard, see: Oonagh B. Breen, Through the Looking Glass: European Perspectives on Non-profit Vulnerability, Legitimacy and Regulation, Brooklyn International Law Journal, Volume 36, Issue 3, 2011, pages 947 - 991.

⁶ Study on Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union, ECNL, 2009, hereafter referred to as 2009 ECNL Study.

⁷ Council of Europe, Legal Status of Non-Governmental Organisations in Europe, CM/REC (2007) 14 (Oct. 10, 2007).

⁸ For example, the EFC Research Forum, formally known as European Forum on Philanthropy and Research Funding.

⁹ The Financial Action Task Force (FATF) was set up in 1989 by the G-7 summit with the mandate to propose measures to combat money laundering, and became the leading multilateral institution in developing standards in the fight against terrorist financing after 9/11 of 2001.

¹⁰ The Prevention of and Fight against Terrorist Financing through enhanced national level coordination and greater transparency of the non-profit sector. European Commission Communication (2005) 620 final - 29 November 2005.

¹¹ Study to Assess the Extent of Abuse of Non-Profit Organisations for Financial Criminal Purposes at EU Level (Matrix, 2008) and 2009 ECNL Study.

¹² Examples exist at national level also: The UK Charity Commission's has developed a Counter-terrorism Strategy and guidelines for charities in implementing it. In addition, increased scrutiny of NPOs happens through general anti-money laundering regulation (e.g. Finland, Ireland, Netherlands, Poland, and even in European Neighbourhood countries). These examples were collected for the 2009 ECNL Study.

3. COMPARATIVE MAPPING OF THE REGULATORY FRAMEWORK

For the purpose of comparative analysis, the existing legislative transparency and accountability rules for public-benefit foundations in some 30 countries were mapped. The results of the mapping exercise are provided in this section.¹³

3.1 ESTABLISHMENT

Rules related to transparency and accountability already apply to the process of establishing public-benefit foundations. The founder(s) have to define the key elements of the foundation: the purpose (in most cases public-benefit purpose), the assets/capital, and the organisational structure. The process may be linked to state approval and/or registration in a publicly accessible register, providing key information on the basic elements of the foundation.

3.1.1 PURPOSE

All countries surveyed require foundations to be set up for a clearly-defined purpose, while in 15 countries¹⁴ foundations are permitted only for the pursuit of public-benefit purposes. In most countries, a description of a foundation's purpose is publicly available.

3.1.2 ASSETS/CAPITAL

In nine of the countries¹⁵ surveyed, legislation stipulates a fixed minimum capital for setting up a public-benefit foundation. In a further eight countries¹⁶, while no fixed minimum capital is stipulated, there is usually in practice a minimum determined by the relevant State authorities. The relevant authorities usually qualify what is "reasonable" in correlation to a foundation's intended purpose. The public at large can therefore trust that in the majority of countries

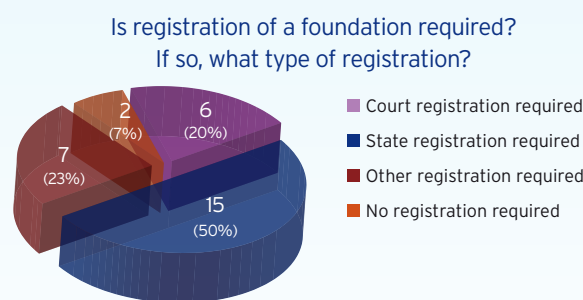
a public-benefit foundation owns a certain amount of assets, which are considered enough to pursue its statutory purpose.

3.1.3 STATE APPROVAL

In 18 countries¹⁷, state approval/court registration is required to set up a public-benefit foundation. State approval/court registration guarantees that the legal requirements for the establishment of a foundation are checked and reviewed by a State authority or a court.

3.1.4 REGISTRATION, CONTENT AND PUBLIC AVAILABILITY OF THE REGISTER

Registration is required in almost all the surveyed countries¹⁸. In Germany, the requirement to register is determined in federal State law i.e. every State has its own form and process of registration. However in Greece and France, no explicit registration requirement exists.



Note: 'other' includes: Cyprus (depends on the type of organisation), Germany (depends on federal state law), Ireland (registration with the Revenue Commission), Malta (register for legal persons), Netherlands (Register at Chamber of Commerce), UK (Charity Commission), Turkey (both court and state).

In most countries, registration is carried out by the State or a State body¹⁹, with the exception of six countries²⁰,

¹³ To conduct a comparative mapping and analysis of existing national laws with regard to transparency and accountability implies a certain challenge as different civil law and common law approaches, as well as different approaches to defining and interpreting legal terms, have to be taken into account.

¹⁴ Cyprus, Czech Republic, France, Hungary, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, UK, and Turkey.

¹⁵ Belgium, Czech Republic, Denmark, Finland, Malta, Romania, Slovakia, Spain, and Turkey.

¹⁶ France, Germany, Greece, Hungary, Italy, Luxembourg, Portugal, and Switzerland.

¹⁷ Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Luxembourg, Poland, Portugal, Romania, Slovenia, Spain, Turkey, and Ukraine.

¹⁸ Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, UK, Switzerland, Turkey, and Ukraine.

¹⁹ For example, the Charity Commission in the UK or a state run legal entities register in Lithuania.

²⁰ Belgium, Bulgaria, Czech Republic, Hungary, Poland, and Romania.

where registration with a court is required. In Turkey, registration is carried out by the court but with participation of the government. In the Netherlands, foundations are registered in the Register of Commerce, a private body.

In 24 countries²¹, public-benefit foundations are logged in a register that is publicly available, giving access to key data on foundations, including details about the founder; the purpose, name and registered office of the foundation; and in many cases information about the starting assets and the names of board members. Information about the dissolution is frequently also kept in the foundation register, or the foundation is removed from the register in case of dissolution.

However, in some countries these registries - while they are public by law - are not easily accessible, especially where registration lies with the local courts. For instance, in Hungary there is no centrally available official registry and, since monitoring is weak, court data are often obsolete.

3.2 PUBLIC-BENEFIT STATUS AND REQUIREMENTS FOR TAX EXEMPTION

Transparency and accountability are inherent aspects of the regulatory framework for the public-benefit and tax status of foundations. To become tax-exempt, a foundation must share its information with either its country's tax authorities or (in cases of automatic exemption) the foundation authority. As both authorities act on behalf of the wider public, they have a vested interest to see to it that a foundation that receives tax exemptions does actually pursue its public-benefit purpose. In case a foundation does not pursue its public-benefit purpose, it runs the risk of losing its public-benefit status and tax exemptions.

In the majority of countries surveyed, foundations must request special recognition from the tax authority²². However, in 6 of the 30 countries surveyed²³, tax exemption is automatic (i.e. given in relation to the legal form of a foundation). In these countries registration requirements are stricter, for instance state approval is required²⁴, and/or there is a minimum capital requirement²⁵, and/or foundations can only be established for public-benefit purposes.

In some European countries²⁶ basic tax exemptions, such as the exemption from income tax on non-profit income (grants and donations) are granted to a foundation as a legal form, while a special public-benefit status provides access to additional tax benefits for the organisation (e.g. exemptions on income from economic activities) and possibly for the donors to and beneficiaries of the organisation, as is the case in Belgium, for example.

Several countries²⁷ have established a separate "public-benefit" or "charitable" status through separate acts that may confer obligations and benefits on the organisations with this status beyond tax exemptions. In these countries foundations have to first file a request for the public-benefit status with the competent court, commission or State authority; and once they have received the status, they may register with the tax authority to receive tax exemptions²⁸. In other countries²⁹, there are specific benefits and related conditions (obligations) enlisted in the tax laws that confer the tax exemptions on foundations. In these cases, foundations usually have to file the request for exemptions to the tax authorities themselves.

Generally, tax-exempt foundations have to provide evidence to the tax authorities through their financial and/or annual reports that the money/income is spent on public-benefit purposes. In the majority of countries, they must demonstrate the following:

²¹ Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, UK, and Switzerland.

²² Such recognition is made using an explicit status such as "public-benefit organisation", "charity" (UK), ONLUS (Italy), ANBI (the Netherlands): Voluntary Organisation (Malta), etc.

²³ Belgium, Czech Republic, Finland, France, Luxembourg, and Slovenia.

²⁴ Belgium, Cyprus, France, and Luxembourg.

²⁵ Czech Republic, Finland, and Malta.

²⁶ Belgium, Hungary, Poland, and Romania.

²⁷ Bulgaria, Hungary, Ireland, Italy, Netherlands, Poland, and UK.

²⁸ In the Netherlands, it is the tax authority itself that decides on the request for an ANBI (public-benefit) status. Also, it is not always necessary to register separately with the tax authority upon receiving the status (e.g. this is not needed in Bulgaria).

²⁹ Germany, Slovakia, Estonia, Turkey, and Ukraine.

3.2.1 PUBLIC-BENEFIT PURPOSE AND BENEFITS TO THE PUBLIC AT LARGE

Foundations have to pursue a public-benefit purpose, as stipulated in foundation law or in order to receive tax exemptions. Countries have differing practices as to how such purposes are defined. While some countries have no clear definition, such as is the case in Cyprus, more often than not, guidelines are stipulated in law or other regulations describing what can constitute a public-benefit purpose. These almost always include a list of the purposes as potential areas of activity of the foundation. While most countries have an open list with listed case examples, some tax laws have a closed list of public-benefit purposes.

The tax law definition of a public-benefit purpose will often include conditions related to the target group (e.g. the public or a part of it; the needy or marginalised etc.) and conditions related to the dominance or exclusivity of pursuing these purposes (e.g. Netherlands, Germany, and UK). The most common criterion, found in 16³⁰ countries, is that the activities of a public-benefit foundation have to benefit the “public at large”.

3.2.2 NON-DISTRIBUTION CONSTRAINT

In the vast majority of countries³¹, foundations are required by law (in most cases by tax law) to follow a non-distribution constraint. This means that benefits cannot be distributed either directly or indirectly to any founder, donor, board member or employee of the foundation.

3.2.3 ASSETS IN CASE OF DISSOLUTION

In almost all countries, by law the assets of a public-benefit foundation cannot revert to private ownership upon its dissolution³². In case of dissolution, the assets must be used for public-benefit purposes. Most commonly, this is to take place by the transfer of the assets to another organisation with the same or similar purpose to that of the dissolved foundation.

3.2.4 REASONABLE ADMINISTRATION COSTS

In seven of the countries surveyed, the legislation refers to a maximum that can be spent on administration costs³³. In an additional seven countries³⁴, it is indicated that administration costs must be “reasonable” or “bona fide”. In Germany, many of the local (state-level) foundation laws demand that administration costs should be as low as possible. Meanwhile, in Slovakia, although no maximum amount for administration costs is specified, these costs must be accounted for separately.

3.2.5 TIMELY DISBURSEMENT OF INCOME

In all 30 countries, public-benefit foundations are either required by foundation law or tax law to spend their income for public-benefit purposes. The majority of countries do not stipulate when this spending must occur. In ten countries³⁵, however, there are requirements concerning the timely disbursement of income.

3.2.6 ECONOMIC ACTIVITIES AND FUNDRAISING ACTIVITIES

Foundation and tax laws may require more scrutiny where foundations undertake economic activity and fundraising.

3.2.7 INCREASED ADMINISTRATIVE BURDEN FOR CROSS-BORDER ACTIVITIES

A total of 16 countries³⁶ surveyed by the study show that a foreign-based foundation can benefit from the same tax breaks as a national foundation. Most countries grant tax benefits to “comparable” foreign foundations, however there is increased administrative burden for a foreign foundation to show that it is indeed comparable to a local counterpart.

³⁰ Austria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Poland, Portugal, Spain, UK, Switzerland, and Turkey.

³¹ Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Spain, Sweden, UK, and Ukraine.

³² There are several exceptions: in Hungary and in Lithuania, the initial sum of foundation assets may revert to the founders (except for foundations with a public-benefit status in Hungary); Latvia, Netherlands and Portugal leave the distribution of assets to the statutes of the foundation but include some limitations to ensure that the original goals are achieved.

³³ Belgium, Czech Republic, Denmark, Latvia, Spain, Turkey and Ukraine.

³⁴ Austria, Cyprus, Malta, Netherlands, Sweden, UK, and Switzerland.

³⁵ Czech Republic, Finland, Germany, Ireland, Portugal, Spain, Sweden, UK, Turkey, and Ukraine.

³⁶ Austria, Belgium, Bulgaria, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, Netherlands, Poland, Spain, Sweden, UK, and Switzerland.

3.2.8 DONOR/RECIPIENT REPORTING REQUIREMENTS

Tax authorities (in the interest of the general public) also receive information about public-benefit foundations via reporting obligations of donors. Most countries prescribe certain requirements in order for donors to claim tax benefits on their donations to public-benefit foundations. Donors wishing to receive tax breaks normally have to report on the donation in their annual tax returns. However, in Estonia, Finland, and Portugal, the recipient is also required to submit a “matching” report on the donors. In the UK and Ireland, the recipient charity may also claim all or part of the tax benefit, for which they need to submit proper documentation. In the UK, donors must also provide proof that any benefits received do not exceed the allowed sum.

In most countries donors have to submit a “receipt” from the recipient foundation in support of their claim. This can be quite onerous to provide, as is the case in Hungary where it entails a lot of bureaucracy. Bulgaria requires a contract between the donor and beneficiary, while in Poland a bank transfer from the donor is enough proof. Greece has an especially strict regime: to prove the details of the transaction every donation exceeding €300 must be deposited in an account opened for this purpose, and a voucher issued by the bank and signed by the donor. The tax authorities may, in many countries, require more detailed information/proof upon request, according to the law.

3.3 GOVERNANCE

As a general rule, the founder(s) have freedom to design the internal governance structure of a foundation, but the law gives them some guidance as to what needs to be addressed. For instance, private supervisory mechanisms, e.g. supervisory boards, monitoring by auditors or other third parties, are mandatory in

several countries. This is especially true in countries where the position of the State supervisory authority is comparatively weak.

3.3.1 SUPERVISORY BOARD

A total of ten countries³⁷ legally require some form of a supervisory body, the tasks of which usually include control over the governing board, as well as the appointment of an auditor and the board. Only Estonia and Portugal require all foundations to have a supervisory board in addition to a governing board. Four³⁸ countries require foundations with a public-benefit status to have a supervisory board, while Czech Republic, Slovakia and Hungary stipulate a supervisory body for larger foundations. In Hungary, the obligation to have a supervisory board applies only to organisations which both hold public-benefit status and have budgets of a certain size. In Austria meanwhile, supervisory boards are only required for private foundations.

3.3.2 GOVERNING BOARD

Approximately half of the surveyed countries³⁹ require a foundation to have a collective governing body, with more than one board member. Most countries where this is regulated prescribe at least three members for the board of directors. Portuguese legislation simply states that there must be an uneven number of board members, and in the Czech Republic the number has to be divisible by three.

In most countries, the board can be composed of individuals as well as legal entities, with the exception of some cases⁴⁰ that only allow “natural persons”. Generally, the founder is allowed to be a member of the board; however in Hungary, he/she along with his/her relatives must be in the minority, while in Sweden a founder cannot be the sole board member.

³⁷ Austria, Czech Republic, Bulgaria, Estonia, Italy, Poland, Portugal, Romania, Slovakia and Ukraine.

³⁸ Bulgaria, Italy, Poland and Ukraine.

³⁹ Belgium, Czech Republic, Denmark, Finland, France, Ireland, Latvia, Luxembourg, Malta, Slovakia, Slovenia, Spain, and UK.

⁴⁰ Austria for public-benefit foundations, Czech Republic, Denmark, Finland, Hungary, and Latvia.

The founder is free in most of the countries surveyed to define in the statutes how board members are appointed, and he/she usually makes the initial appointments. The power to appoint new board members can rest with the founder; with another natural or legal person; with the supervisory board of the foundation; or with the members of the board of directors (co-option system, also called a self-perpetuating board).

Only a small number of countries have mandatory rules regarding board appointments. For instance, in Denmark, the majority of the board members of commercial foundations must be persons not appointed by the founder or his/her family. Meanwhile in Austria, the initial members of the board of directors of a public-benefit foundation are appointed by a supervisory authority. In Hungary, only the founder or his/her successor may appoint or remove board members for the entire lifetime of the foundation.

3.3.3 DUTY OF CARE/LOYALTY

Generally, the governing board has the task of properly managing the foundation and to ensure that the public-benefit purpose is pursued. The board represents the foundation among third parties. In most countries, this representation function may be delegated to a director or officers of the foundation. The duty of care and the duty of loyalty of board members are recognised in all surveyed countries and are part of the respective legal provisions.

The duty of loyalty arises out of the “principal/agent” theory⁴¹ (see discussion in Section 2). As principals, the founders have not simply delegated the management to the board but have been superseded by the foundation itself. The board therefore is accountable to the foundation (and not to the founder nor to the beneficiary, neither

of whom can claim proprietary rights). Because the foundation owns itself and has no external owners/shareholders, controlling mechanisms become a crucial aspect of a foundation's functioning. Experts describe the duty of loyalty as a normative attempt to counterbalance the natural self-interest of board members. The duty of loyalty is provided for within the reviewed legislations, with rules on conflict of interest and non-distribution constraint⁴². Legislation also regulates the remuneration of board members. Almost all countries set limitations on the extent to which board members may be remunerated⁴³, while remuneration is prohibited in five countries⁴⁴.

The duty of care implies that board members must use their own skills to diligently manage the foundation. This duty is implemented by national legislation in different ways. Board members must ensure that the public-benefit purpose is pursued, taking into account the deed/statutes/law and the will of the founders. While board members have the right to amend foundations' statutes in the majority of countries, when doing so the foundation laws usually require that board members take into account the original will/intention of the founder. Members of the board are in most countries personally liable in cases of losses caused by (at least) grossly negligent acts or wilful defaults on their part (breach of duty). The liability of board members aims to ensure board members' duties of care and loyalty, in particular proper management of foundations' activities and assets and pursuance of their public-benefit purposes.

3.4 PUBLICITY, REPORTING REQUIREMENTS AND AUDITING

All 30 countries surveyed require foundations to prepare annual reports and annual accounts/financial records, and most countries require them to be filed with the relevant authorities. However, there are great differences between the content and form of these reports and how these are

⁴¹ See Doralt/Hemström/Kalss in European Foundation, a new legal approach, Hopt/Walz/Hippel, 2006, pages 136 and following with further references.

⁴² Described in section 3.2.2 of this study.

⁴³ Spain (with prior State approval) and Switzerland allow financial implications for services/activities beyond the regular board member duties. Other countries such as Slovakia and France, allow for reimbursement of expenses only; no compensation or fee is provided for any kind of work for the foundation. Many countries allow a reasonable level of financial remuneration (Denmark, Estonia, Finland, Latvia, and Sweden). In Denmark, the State supervisory authority may check whether the remuneration is appropriate and can reduce any remuneration deemed excessive. Austria requires approval by the foundation authority for any remuneration of board members by public-benefit foundations.

⁴⁴ Greece, Ireland, Lithuania, Luxembourg, and Slovenia.

submitted and made available for the public, as well as the extent of reporting (e.g. whether an audited report is needed or not). In fact, while overall foundations are required to account for their annual activities there is no identifiable trend in Europe as to what constitutes good practice with regard to reporting, and some gaps still exist.

3.4.1 REPORTING REQUIREMENTS

Financial information

Public-benefit foundations are required to prepare financial information in all surveyed countries and in general must file this with one or more authorities. However, in Hungary, Malta and the Netherlands there is no general requirement for foundations to file their annual financial reports, although in all three countries, foundations with a public-benefit status must submit their financial reports. In eight countries⁴⁵, foundations are required to report on financial information only, either in the form of annual budget/balance sheet, audited/unaudited annual accounts, or financial report.

Half of the surveyed countries⁴⁶ have specific accounting rules for foundations. In Belgium, for example, the accounting rules⁴⁷ are foreseen with different regimes for small and for large associations or foundations. Similarly, in Finland, the law specifies what information the audit report should contain, namely whether the assets of the foundation have been properly invested; whether the fees paid to the members of the bodies of the foundation are to be deemed reasonable; and whether the annual accounts and the annual report give a true and fair view of the finances and activities of the foundation. In both the UK and Ireland, it is the respective Charities Act that makes provisions related to foundations' accounting⁴⁸. In the Netherlands, only fundraising entities that have received a specific certificate (CBF-Keur) are required to make accounts following Dutch accounting rules.

In France, specific rules for associations and foundations, including particular regulations relating to registration of gifts, donations and legacies, are found in the accounting regulation⁴⁹. Swedish foundations are also subject to specific accounting regulations, but only with regard to certain aspects. German legislation provides minimum accounting standards in the German civil code (BGB), while every state (Bundesland) requires foundations to issue an annual financial report (Jahresabrechnung) containing a statement of assets and liabilities⁵⁰. In Turkey, it is the General Directorate of Foundations (the foundation supervisory authority) that determines the rules and regulations in accordance with which foundations are obliged to keep their accounting records. In Italy, foundations of banking origin have specific accounting rules foreseen by Decree n.153/1999 and subsequent administrative acts.

Annual activity report

More than half of the surveyed countries⁵¹ also require the submission of a report on the activities of the foundation. In countries where a public-benefit status exists, activity reporting is usually part of the annual report, in which there can be additional requirements relating to the use of budgetary resources or a demonstration of compliance with the public-benefit status requirements.

Annual action plan

In countries such as Latvia and Spain, foundations are required to submit an annual action plan to the administrative authority, in addition to their annual report.

⁴⁵ Austria, Cyprus, Finland, Germany, Greece, Luxembourg, Romania, and Ukraine.

⁴⁶ Belgium, Czech Republic, Finland, France, Germany, Hungary, Ireland, Italy, Netherlands, Poland, Slovenia, Spain (specific rules based on the general accounting rules) Sweden, UK, and Turkey.

⁴⁷ Law of 17 June 1921 on associations and foundations.

⁴⁸ In the UK, this is supplemented by the Charities Statement of Recommended Practice (SORP). The Charities (Accounts and Reports) Regulations 2008 require the methods and principles of SORP to be followed when accounts are prepared under the 1993 Act, although there are variations to this according to the type of organisation concerned. Exempt charities must keep proper accounting records and prepare accounts following the SORP, although they are not required by law to prepare an annual report. They must also provide copies of their accounts to members of the public on request.

⁴⁹ CRC 99-01, as amended by the opinion no. 2009-01 issued by the National council for accountancy (Conseil national de la Comptabilité).

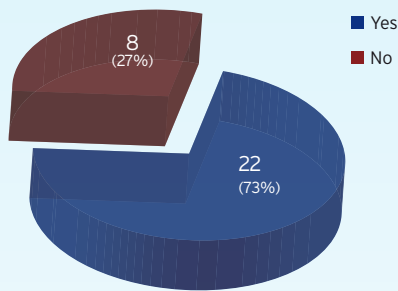
⁵⁰ In addition, some Bundesländer demand that foundations comply with the Generally Accepted German Accounting Principles and or issue an annual activity report (Tätigkeitsbericht).

⁵¹ Bulgaria, Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain (included in annual accounts), Sweden, Switzerland, the UK and Turkey.

Reporting on specific issues

Further reporting is required in some countries on fundraising activities (e.g. France and Poland); on the remuneration of directors and officers (Hungary, Slovakia); on the donations received and the grantees (beneficiaries) who were supported (e.g. Czech Republic and Slovakia). In Ukraine, public-benefit foundations must report to donors on the use of their

Do annual accounts and/or activity reports need to be made publicly available?



Note: the chart lists a country as 'yes' in instances where at least one major category of foundation needs to publish e.g. Hungary here is 'yes', even though it is only tax exempt public-benefit foundations to which this 'yes' applies. Similarly, Malta (only organisations enrolled as Voluntary Organisations), Netherlands (depends on size of turn over), and Sweden ('yes' only applies to larger foundations that conduct business and those set up by the state). In Denmark, commercial foundations are required to publish, whereas non-commercial foundations are not.

donations, demonstrating that the donations were used according to the donors' requests. In Ireland and the UK, reporting is differentiated according to a charity's budget size⁵². In Ireland, for example, charities with a budget under €100,000 may submit a simplified version of the annual accounts, while no report is required for those with a budget under €10,000.

3.4.2 PUBLICLY AVAILABLE REPORTS

The majority of countries stipulate that foundations' financial or activity reports should be publicly available, with ten⁵³ countries stipulating that all information disclosed to the authorities should also be in the public area. In Slovakia, although there are more detailed requirements for reporting, it is only the auditor's report that is published, appearing in the official Commercial Journal. In the UK, annual accounts of most foundations are published on the Charity Commission website: the amount of information included is greater for larger foundations, while charities are only required to make their accounts and reports available to the public upon request. However, in five countries⁵⁴ reporting does not have to be made public, while in a further six countries only certain types of foundations are required to publish their reports⁵⁵.

3.4.3 AUDIT REQUIREMENTS

Auditing is mandatory for all foundations in seven of the surveyed countries⁵⁶, and for practically all foundations in a further three countries⁵⁷. In 12 countries, a foundation's size determines whether it is subject to an audit. Size is most often determined by annual income and/or assets⁵⁸ and in some countries also by the number of people employed by the foundation⁵⁹. In a few countries, the type of foundation is the factor determining whether an audit would be required⁶⁰. There are only seven countries⁶¹ where there is no audit requirement.

⁵² Principle of proportionality.

⁵³ Belgium, Bulgaria, Czech Republic, Estonia, Greece, Lithuania, Luxembourg, Poland, Portugal, and Romania.

⁵⁴ Austria, Germany, Latvia, Slovenia, and Turkey.

⁵⁵ Commercial foundations only in Denmark and Netherlands; foundations with a public-benefit status only in Hungary; foundations of banking origin only in Italy; foundations registered as voluntary organisations only in Malta; and only larger foundations that conduct business and those set up by the State must do so in Sweden.

⁵⁶ Cyprus, Estonia, Finland, Greece, Lithuania, Slovakia and Sweden.

⁵⁷ In the Czech Republic all foundations and the larger endowment funds are subject to audit obligations. In France, public-utility foundations and corporate foundations, as well as larger endowment funds must have an auditor. In Switzerland, there is a general obligation for foundations with certain exceptions for smaller organisations and family and church-related foundations.

⁵⁸ Bulgaria, Belgium, Hungary, Ireland, Sweden and UK.

⁵⁹ Hungary (in case of Public Benefit Organisations), Poland, and Spain.

⁶⁰ Private foundations in Austria; commercial foundations in Denmark and the Netherlands; and foundations with a tax-exempt status in Turkey.

⁶¹ Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Ukraine.

3.5 EXTERNAL SUPERVISION

All the surveyed countries have a minimum level of supervision over foundations, however the form and extent of supervision varies greatly. Foundations are usually subject to supervision by the tax authority, and most countries have supervisory agencies with powers to inspect and intervene in management decisions in the case of mismanagement and dissolve a foundation in specific cases.

3.5.1 SUPERVISORY AUTHORITY

External supervision of foundations established for public-benefit purposes is generally more extensive than for private-purpose foundations⁶². In some countries only foundations with public-benefit status are supervised⁶³, while tax-exempt foundations are generally supervised by the tax authorities.

While most countries will have a competent ministry entrusted with the supervision of foundations⁶⁴, only two countries have supervisory bodies especially designated for foundations⁶⁵. In some countries⁶⁶, regional (as opposed to national) bodies undertake the supervision of foundations. Some countries have two different supervisory systems depending on the type of foundation⁶⁷. Meanwhile in common law countries, public independent bodies which stand outside the hierarchy of public administration and have all necessary competence to supervise the sector⁶⁸.

Furthermore, courts and registration authorities play a supervisory role in many countries and have the ultimate power to dissolve a foundation or remove

it from the registry. However, supervisory powers of courts are usually limited to actions upon initiation of an interested third party or the public prosecutor. Only three countries⁶⁹ are without specific legal or regulatory provisions to supervise foundations other than what is prescribed for any legal person⁷⁰.

3.5.2 EXTENT OF SUPERVISION

The legal and procedural powers granted to State supervisory bodies vary greatly across the 30 countries surveyed. For the most part, State supervisory bodies have the right to obtain information or to initiate inquiries. The board of a foundation must send annual reports and annual accounts to the relevant State supervisory authority as a means of preventive supervision. In some cases certain acts, governance decisions⁷¹, or documents must be approved by the relevant authority.

In nine of the countries, only limited powers are given to the supervisory authorities⁷², such as courts acting upon requests from other stakeholders⁷³ or public authorities with powers for receiving and reviewing annual reports. In Slovakia and Ukraine, supervisory authorities only have the power to make inquiries to foundations about the reports they submit.

However, in other countries, the authorities have much greater powers to, among other things, undertake inspections on site⁷⁴; intervene in case of management failure; order the board to take a specific action; dismiss the board or its members; or appoint a "commissioner" or a new director.

⁶² Only "Voluntary organisations" in Malta and ANBI organisations in the Netherlands are not subject to supervision.

⁶³ Usually by a special body (Bulgaria, Italy, and Malta) or the competent ministries (Romania and Ukraine).

⁶⁴ Usually Ministry of Justice or Ministry of Interior; the Protectorates in Spain; the public prosecutor in Hungary and the Netherlands; or other State bodies such as the National Board of Patents and Registration in Finland or the Council of National Bequests in Greece.

⁶⁵ Foundation authority under the Bundes-Sportförderungsgesetz (BSFG) in Austria; and the Directorate on Foundations in the Ministry of Interior in Turkey. ⁶⁶ Germany, Sweden, and Switzerland.

⁶⁷ Austria for private and public foundations; Denmark for commercial and non-commercial foundations.

⁶⁸ Charity Commission in the UK and Charities Regulatory Authority in Ireland.

⁶⁹ Czech Republic, Estonia and Lithuania.

⁷⁰ Supervision by the tax authority as a taxpayer organisation; by the social security and/or labour agency if they have employees; by state agencies that supervise public spending if they receive public funds, etc.

⁷¹ Amendment of statutes or liquidation.

⁷² Belgium, Cyprus, Czech Republic, Estonia, Greece, Latvia, Lithuania, Netherlands, and Romania.

⁷³ Tax authorities that investigate only in relation to fiscal matters.

⁷⁴ Warranted inspections are permitted in Bulgaria, Hungary, and Sweden and unwarranted inspections in Austria, Poland, and Turkey. In France, public-benefit foundations are subject to inspection if they raise funds from the public and their donors claim tax benefits.

Finally, supervisory authorities, or courts on the initiatives of such authorities may have the right to dissolve (and/or suspend, or transform) a foundation⁷⁵. It should be noted that in some countries despite the legal powers vested in the supervisory authorities, supervision is not in practice as effective as might be expected, mainly due to lack of capacity of the supervisory authority⁷⁶.

3.6 COUNTER-TERRORISM

3.6.1 LEGISLATION

Two thirds of the countries surveyed by this study have specific national anti-terrorism legislation, which brings with it further regulatory obligations for foundations. The EU Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing also has a regulatory impact. In eight countries, national anti-terrorism measures include requirements for foundations. For example in Bulgaria⁷⁷, all NGOs are required to adopt internal regulations which are then submitted to the State Agency on National Security within four months of their establishment. There are further requirements⁷⁸ for all legal entities with regard to financial transactions. Since 2004, foundations in Poland are obliged to register financial transactions carried out on somebody else's behalf or in somebody else's name, in order to identify the person or organisations initiating the transaction, as well as the transaction's beneficiaries.

While there is no specific national anti-terrorism legislation in Switzerland, new regulations have been introduced⁷⁹ on money laundering, which require that

a financial intermediary starting a new relationship with a foundation ask first for information about the founder, the authorised representative, and the categories of persons who may be beneficiaries, as well as the board members of the foundation. In France⁸⁰ and Belgium, the legislation places specific obligations on lawyers, notaries, and accountants/auditors to alert the specified authorities of suspicious transactions by clients (among whom may be foundations). The supervisory role of the Charity Commission in the UK requires it to take steps to detect charities involved in terrorism, to intervene to protect against the misuse of charity assets e.g. through freezing orders and the suspension or removal of board members, and to refer suspicions of criminal activity to the police.

3.6.2 GUIDANCE TOOLS AND CONSULTATIONS

Few specific guidance tools exist in the countries surveyed to support foundations' compliance with their countries' respective counter-terrorism measures. Exceptions are Poland⁸¹, which has an e-learning course on the regulations and requirements that eligible institutions must meet, and Austria where the fiscal authority offers guidance to foundations. Meanwhile, the UK Charity Commission has issued a guidance note entitled "Charity Commission Counter-terrorism Strategy" and is developing a series of compliance toolkits entitled "Protecting Charities from Harm".

Overall, there is a lack of consultation with the foundation sector regarding the issue of counter-terrorism measures across Europe, with the exception of four countries.⁸²

⁷⁵ The court may dissolve a foundation in other countries as well but through a standard litigation procedure; whereas in these countries there is a special procedure envisioned in the legislation that is based on supervisory powers

⁷⁶ Examples of weak enforcement in Cyprus, Hungary, Italy and Luxembourg have previously been reported to ECNL.

⁷⁷ The Act on Measures Against Financing of Terrorism came into force in Bulgaria in 2003.

⁷⁸ Under the Act on Measures Against Money Laundering.

⁷⁹ By the Swiss Financial Market Supervisory Authority.

⁸⁰ In France, lawyers, notaries and auditors advising clients in relation to the creation or management of endowment funds must make a declaration to a special committee on financial inquiry in cases where they suspect that the funds used may come from money laundering operations or may be linked to terrorist financing.

⁸¹ Developed by the Polish General Inspector of Financial Information at the Ministry of Finance.

⁸² Austria, Germany and the UK have all indicated that the relevant supervisory authority has engaged in consultation with the foundation sector. In Austria, this is an informal consultation process initiated by the fiscal authority. In the UK consultations on the government's proposed strategy and the Charity Commission's response to this were held in 2007 and 2008. In Poland, the sector (operating through NGO representatives in the Public Benefit Activity Council at the Ministry of Social Policy) is seeking to engage the Ministry of Finances in a discussion on the possibility of amending the law to exclude foundations and associations from the regulations in part, which impose on them the same obligations to which financial institutions (banks, credit institutions, insurance companies, investment funds) are subject.

4. COMPARATIVE MAPPING OF SELF-REGULATORY TOOLS

Since the early 1990s, there has been a growing debate around and interest in developing codes of conduct, principles of good practice and self-regulatory frameworks for public-benefit foundations. The impetus stems from the will of foundations to enhance their governance; forge a professional and efficient sector; support the sharing of good practice and learning; maintain and strengthen trust in the sector; and to protect the political space in which they operate and develop clear and mutually-beneficial relationships with partners, funders and beneficiaries. Self-regulation initiatives have therefore in most cases been developed independently from concerns about criminal abuse and anti-terrorist financing.

For the purpose of mapping and analysis, a field study was undertaken among national associations of donors and foundations in European countries (mainly DAFNE members but also other national experts) to identify the principles of good practice, ethical codes, charters, quality marks and frameworks specifically targeting public-benefit foundations. The study found that 15 associations of foundations have developed codes of practice or standards, which provide the key source for this study (See Annex I for the questionnaire and Annex II for the list of associations and their self-regulatory mechanisms). Where applicable reference has also been made to additional self-regulation mechanisms. It should be noted that the study did not survey individual foundation practices, or policies and principles developed by individual foundations.

4.1 CODES OF CONDUCT

A total of 19 codes of conduct/ethical codes or principles specific or directly relevant to public-benefit foundations were identified. Six⁸³ of these are donors' forum initiatives, while a further nine initiatives⁸⁴ are from the national associations of foundations in the countries concerned. Four of the initiatives⁸⁵ were drawn up collaboratively by informal groups of foundations or non-profit organisations, while two codes⁸⁶ have an intrinsically international scope.

Looking at countries individually, a more complex picture emerges. In some cases, no national code exists specific to public-benefit foundations. In Italy, the Association of Italian Foundations and Savings Banks (ACRI) provides guidelines for developing a code of ethics to its members, while the Latvian Community Foundation Movement has drafted standards of action and governance. In France, foundations can look to other foundations that publish their own individual codes, and/or apply for certification by external initiatives⁸⁷.

In Spain, several initiatives are afoot, including the Principles of the Spanish Association of Foundations (AEF) and accompanying materials, such as model foundation statutes that make recommendations beyond the legal requirements and documents offering guidance for individual foundations on establishing their own codes of conduct. Other initiatives include the codes of practice from the regional associations of foundations in Andalusia and Catalonia, the Code of Conduct of the Coordinating Committee of

⁸³ Bulgaria, Czech Republic, Poland, Romania, Slovakia, and Russia.

⁸⁴ Belgium, Finland, Germany, Italy, Netherlands, Portugal, UK, Spain and Switzerland.

⁸⁵ Denmark, Estonia, Luxembourg, and Spain.

⁸⁶ The EFC Principles of Good Practice (accompanied by the Illustrative Practice Options) and the EFC and Council on Foundations Principles of Accountability in International Philanthropy.

⁸⁷ The Comité de la Charte du don en Confiance has defined an ethical and deontological charter which must be respected by organisations wishing to receive the label. IDEAS is a label given to the foundations or associations which respect the IDEAS Guide of Good Practices, covering three fields: governance, financial management, and efficiency of action.

Development Cooperation NGOs, and the Principles of Transparency and Best Practice project run by the Fundación Lealtad⁸⁸.

Germany also has a wide range of initiatives in place, including a Donation Seal⁸⁹ and a Transparent Civil Society Initiative⁹⁰ which has been adopted by the Association of German Foundations. In Poland, a sector-wide code of conduct for NGOs exists⁹¹, which encourages self-monitoring and adherence to the code on an on-going basis using an online evaluation tool.

For several countries where no foundation specific self-regulation mechanisms exist, the issue is nonetheless under discussion, and in some cases self-regulation mechanisms are currently being developed or are expected in the near future. In Ireland, the 2009 Charities Act has not yet come fully into force but will see the creation of a new supervisory authority, the Charities Regulatory Authority, which will agree codes of practice for fundraising, operational and administrative aspects within the sector. In Turkey, the Third Sector Foundation of Turkey (TÜSEV) is currently preparing a set of principles of good practice⁹². Developments are also underway in Lithuania⁹³.

4.2 METHOD OF CERTIFICATION

Most mechanisms are self-certified⁹⁴, including instances where adherence to the self-regulation mechanism is a condition of membership/part of the membership declaration. However, there is generally no active monitoring of compliance and no certification procedure as such. One exception is the Luxembourg Code de Bonne Conduit, which uses a combination of peer and third-party certification: Five out of six

commitments are peer-reviewed, whereas the financial transparency commitment is outsourced to an external auditor who certifies the annual accounts of adhering organisations.

4.3 ACCESS TO INFORMATION ON PARTICIPATING ORGANISATIONS

Most of the national associations or donors' forums surveyed publish information on their membership (e.g. list of members of the association appears on the association's website). Members of the association can therefore be clearly identified as adherents to any code of conduct or set of standards with which the association requires its members to comply.

4.4 SCOPE OF SELF-REGULATORY MECHANISMS

The self-regulatory mechanisms reviewed are largely internal and apply to members of the relevant donors' forum or national association of foundations only⁹⁵. However, a number of these organisations are ambitiously trying to go beyond their membership and open up their initiatives to the entire foundation sector of their respective countries, or even beyond.⁹⁶

In general, the self-regulatory mechanisms do not have any international or cross-border scope. And while no explicit reference is made to international activities within the mechanisms, it was noted by some respondents to the field study that these activities are implicit within the mechanism's scope for foundations operating internationally.⁹⁷

Those with a clear international or cross-border outlook include Spain's AEF Principles⁹⁸; the Code of Ethics

⁸⁸ Fundación Lealtad developed nine standards of transparency and best practices as a result of consultations with many entities directly or indirectly related to the non-profit sector. The foundation has a team of analysts who examine the information provided by the foundation, conduct interviews, and visit NGOs.

⁸⁹ Known as the Spendensiegel, the seal is awarded by the German Central Institute for Social Issues (DZI).

⁹⁰ Established in 2010 the Initiative transparente Zivilgesellschaft has been adopted by Transparency International Germany e. V. and numerous partners from the non-profit sector (including the Association of German Foundations).

⁹¹ The Charter of Principles for NGO Activities, prepared by the National Non-Governmental Initiatives Forum (Karta Zasad).

⁹² According to TÜSEV, the closest to a self-regulation mechanism presently in place is its online members' database, an initiative of the foundation aiming to promote the transparency and visibility of the 120 foundations and associations that make up its members.

⁹³ An NGO Commission has been established, which will work on this issue during the next two to three years.

⁹⁴ This is the case for the codes analysed in Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Netherlands, Poland, Portugal, Romania, Spain (AEF Principles) and Russia, and with the EFC Principles of Good Practice.

⁹⁵ The following are non-binding: ACRI Code of Ethics, the AEF materials; 2007 Grant Risk Management Guidelines from the Association of Charitable Foundations (ACF); the SwissFoundations Code, The EFC/CoF Principles of Accountability in International Grantmaking.

⁹⁶ As is the case in Denmark, Germany, Slovakia, Spain, and Switzerland, and with the EFC Principles.

⁹⁷ Italy, Portugal, and Spain (AEF Principles and Fundación Lealtad).

⁹⁸ The principles set the work of AEF members in a wider context of national and international collaboration and cooperation: "...foundations must try to respond to the expectations of the global community as an expression of solidarity with the most underprivileged areas, and this frequently involves participating in national and international projects that require the collaboration of two or more foundations working together to form a synergy."

of the Slovak Donors' Forum and their Standards of Foundation Practice⁹⁹; and the EFC Principles of Good Practice and the EFC/Council on Foundations Principles of Accountability in International Philanthropy.

4.5 GOVERNANCE AND MANAGEMENT

Clear guidance on governance and management is given in 16 of the codes analysed.¹⁰⁰

A number make recommendations or have requirements that go beyond the provisions of the respective national legislation. For instance, the self-regulation code of the Network of Belgian Foundations requires that the composition of the foundation's governing bodies is included in the annual report. The Council of Finnish Foundations' Good Foundation Practice makes explicit the competency requirement of the foundation board¹⁰¹, while the Code of Conduct of the Association of Foundations in the Netherlands (FIN) outlines in greater detail some specific tasks and areas of responsibility for members of a foundation's board¹⁰².

The Code of Ethics of the Slovak Donors Forum goes further and recommends continuous training for board members, which is not stipulated in the Slovak legislation. Training for board members is also suggested by the Swiss Foundation Code, which additionally provides guidance on a balanced board composition and appropriate orientation for new board members. On the role and responsibilities of trustees, the UK's Association of Charitable Foundations' Guidelines "Tackling external grant fraud: a guide to help charitable trusts and foundations deter and detect fraud" makes the practical suggestion to designate

a particular trustee with responsibility for anti-fraud issues, something which goes beyond the legislation.

A total of 13 codes¹⁰³ contain specific rules concerning human resources policies, while 19 codes¹⁰⁴ specifically address conflict of interest policies. It should be noted that five of these codes¹⁰⁵ have been developed in countries where there are no legal requirements regarding conflict of interest.

4.6 REPORTING REQUIREMENTS

A total of 20¹⁰⁶ of the codes clearly recall the legal obligation that foundations have with regard to reporting requirements and/or outline further recommendations for good reporting. Out of these, the codes in 11 countries¹⁰⁷ make additional recommendations going beyond the legal requirements. For instance, the Slovak Donors Forum asks that foundations prepare an annual social impact report, submit a list of awarded grants to the forum, and publish an annual report online¹⁰⁸. Similarly in Italy, foundations are encouraged to report to stakeholders on the social impact of their activities and to make reports available on their websites. Some foundations also increasingly seek an external audit of their accounts. In Spain, the AEF Principles recommend that foundations, among other things, open up their facilities and projects to the community; create and maintain active and accessible lines of communication with the media; and prepare reports or other informative documents about their activities. The AEF Principles also recommend that foundations participate in evaluations carried out by prestigious institutions, and undergo regular audits¹⁰⁹.

⁹⁹ "For grants awarded outside Slovakia, the foundation takes appropriate steps to control the use of funds".

¹⁰⁰ Belgium, Denmark, Estonia, Finland, Germany, Italy, Luxembourg, Netherlands, Portugal, Slovakia, Spain - within the code of ethics of the Catalanian Association of Foundations, Fundació Lealtad, and AEF Principles, UK, Switzerland, and the EFC Principles of Good Practice.

¹⁰¹ "The administration of members of the Council shall include the expertise required for operations and for asset management."

¹⁰² For example, the board, among other tasks, implements policy related to the granting of donations and other forms of support; determines the procedure of handling and completing donation requests; creates a plan for the resignation and/or re-appointing of board members; draws up criteria for the evaluation of projects; and provides a description of the administrative organisation and the method of internal control.

¹⁰³ Bulgaria, Denmark, Estonia, Finland, Italy, Netherlands, Romania, Slovakia, and Spain (all initiatives reviewed).

¹⁰⁴ Bulgaria, Czech Republic, Estonia, Finland, Germany, Italy, Netherlands, Poland, Portugal, Romania, Slovakia, Spain (all initiatives reviewed), Russia, Switzerland, and the EFC Principles of Good Practice.

¹⁰⁵ Bulgaria, Romania, Netherlands, Slovakia, and Switzerland.

¹⁰⁶ Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Italy, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Spain (AEF Principles, Coordinating Committee of Catalanian Foundations, Fundació Lealtad, and Coordinating Committee of Development Cooperation NGOs) Russia, and Switzerland.

¹⁰⁷ Bulgaria, Czech Republic, Denmark, Germany, Italy, Luxembourg, Netherlands, Romania, Slovakia, Spain (AEF Principles) and Russia.

¹⁰⁸ Foundations are encouraged to distribute an electronic version of their annual reports to their stakeholders.

¹⁰⁹ Under Spanish law external audit is required only for larger foundations.

4.7 MONITORING THE USE OF FUNDS

A total of 19 codes¹¹⁰ give guidance pertaining to the use of funds, with many addressing fiduciary principles, funds spent on overhead costs¹¹¹, and “know your beneficiary” rules or additional control mechanisms. For instance, The Council of Finnish Foundations recommends that the regular distribution of grants within a framework of clear procedures; that foundations’ governing bodies include experts; and that the board has guidelines on assets management. Similarly, in the Netherlands, FIN members are encouraged to formulate a policy on asset management and investment, and are given guidance on how such a policy could be constituted. In Portugal and Germany¹¹², general recommendations are provided on the regular monitoring of the foundations’ work and procedures, as well as the use of financial resources (particularly levels of administrative expenses) and investment strategies.¹¹³

Many of the codes¹¹⁴ make references to foundations’ commitments towards donors and towards the public, and to the monitoring of the use of funds. In Denmark¹¹⁵, foundations are asked to regularly evaluate their grantmaking work in relation to their statutes and strategy to ensure that goals are met, while in Italy foundations are encouraged to develop rules governing the relationship with beneficiaries, and the selection, financing and careful monitoring of projects. Foundations in the UK¹¹⁶ are also provided with guidance regarding how to “know your beneficiary” and verify the identity of individuals seeking funding. In Slovakia, foundations adhering to the Standards of Foundation Practice are expected to conduct a survey in order to verify that the money has actually been spent for the public-benefit purpose.

4.8 ACCOUNTABILITY TOWARDS BENEFICIARIES

A total of 13 codes surveyed address transparency and accountability towards grantees/beneficiaries¹¹⁷.

In three of the codes¹¹⁸, it is recommended that foundations involve grantees/beneficiaries in programme design/evaluation. In the case of Slovakia, foundations are encouraged to invite grantees and other stakeholders to share the lessons learned in the board/staff meetings, retreats or learning exchanges.

By its nature, the focus of the EFC/CoF Principles of Accountability in International Philanthropy is very much concerned with the conduct of funders operating abroad and the responsibilities of these organisations when operating in this way: this includes their behaviour and accountability towards their beneficiaries in diverse environments.

4.9 FUNDRAISING

Only two¹¹⁹ of the codes specifically refer to fundraising by foundations. In the case of Spain, the AEF Principles state that when necessary, foundations should also endeavour to fundraise and attract third parties in order to finance their activities.¹²⁰ Other codes exist which focus specifically on fundraising organisations¹²¹, however these have not been examined in depth by this study.

4.10 COMPLIANCE MECHANISMS

Responses related to six¹²² codes indicated that compliance with the code by adhering organisations is actively monitored. In both the Czech Republic and Poland, the donors forum itself carries out checks on participating organisations’ annual reports as a

¹¹⁰ Bulgaria, Czech Republic, Denmark, Finland, Germany, Italy, Luxembourg, Netherlands, Portugal, Slovakia, Spain (all initiatives discussed), UK, and Russia, and the EFC Principles of Good Practice and the EFC/CoF Principles of Accountability in International Philanthropy.

¹¹¹ The Russia Donors’ Forum states that members agree to strive to keep administrative costs to a minimum.

¹¹² Portuguese Foundation Center and the Association of German Foundations.

¹¹³ Both these sets of principles also include recommendations on monitoring and evaluation of foundations’ programmes.

¹¹⁴ Bulgaria, Czech Republic, Luxembourg, Slovakia, Spain (all initiatives), Russia and the EFC Principles of Good Practice.

¹¹⁵ Danish Principles of Good Practice for Charitable Foundations.

¹¹⁶ UK Association of Charitable Foundations’ 2007 Guidelines.

¹¹⁷ Finland, Italy, Netherlands, Poland, Portugal, Romania, Slovakia, Spain (Andalusian Association of Foundations and Coordinating Committee of Catalonian Foundations), UK, and Russia, EFC Principles of Good Practice (and the Illustrative Practice Options), and the EFC/CoF Principles of Accountability in International Philanthropy.

¹¹⁸ Poland and Slovakia, and the EFC/CoF Principles of Accountability in International Philanthropy.

¹¹⁹ The code of the Slovak Donors Forum and Spain’s AEF Principles.

¹²⁰ Principle 6: Balance and efficiency in management of resources.

¹²¹ For example: France (Comité de la Charte du Don en Confiance), Germany (Central Institute for Social Issues (DZI)), Ireland (Irish Charities’ Tax Reform Group’s Guiding Principles for Fundraising), Luxembourg (Code de bonne conduite des organismes faisant appel à la générosité du public), Spain (Code of Conduct of the Coordinating Committee of Development Cooperation NGOs), UK (among others the voluntary code for members of the Institute of Fundraising).

¹²² Czech Republic, Ireland, Poland, Slovakia, and Spain (Fundación Lealtad and the Coordinating Committee of Development Cooperation NGOs).

means of reviewing compliance with the codes, while in Slovakia the Standards of Foundation Practice of the Slovak Donors Forum, has its own internet monitoring system of its members' use of the Standards.

All organisations signing up to the Principles of Transparency and Best Practice project of the Fundación Lealtad in Spain agree to be monitored¹²³ by a third party, with the results published in the guide *Guía de la Transparencia y las buenas prácticas de las ONG*. Application of the Irish Charities Tax Reform Group's Guiding Principles for Fundraising is monitored by a monitoring group, which takes appropriate action in case of non-compliance.

Responses related to 12 codes¹²⁴ indicated that non-compliance with the self-regulatory initiative can incur sanctions, with most mentioning exclusion from the relevant association/donors forum or project as a possible sanction. Only one DAFNE member reported having excluded a member for non-compliance with the self-regulatory mechanism. In Spain, compliance with the Code of Conduct of the Coordinating Committee of Development Cooperation NGOs (ONGD) is overseen by a Monitoring Committee, who may propose sanctions for review by the governing body of the organisation concerned.

4.11 PROMOTION

The internet is used as the main forum for promotion of the self-regulatory mechanisms or codes, with organisations announcing their adherence to the relevant codes via their own websites. In eight countries¹²⁵, organisations are also encouraged to announce their adherence to the code in their annual report.

A total of four national associations/donors forums¹²⁶ indicated that they regularly organise events to promote their self-regulatory mechanisms. For instance, in Denmark, the foundations that initiated the Danish Principles of Good Practice for Charitable Foundations meet twice yearly. In addition these

Danish foundations have held three symposia open to all foundations in Denmark, Norway and Sweden.

The Swiss Foundation Code is regularly mentioned in articles published and speeches given by the initiating body SwissFoundations. The code has also been published in hard copy and is available in bookshops.

In contrast to the general trend of promoting their codes and standards, in the UK the 2007 Grant Risk Management Guidelines are restricted to ACF members only. However, the guidelines ask users for feedback and for further examples of controls being used by organisations, as well as for information on cases of external grant fraud.

4.12 IMPACT

4.12.1 FOUNDATIONS' VIEWS ON INCREASED DEMAND FOR TRANSPARENCY AND ACCOUNTABILITY

Respondents in 9 of the countries¹²⁷ surveyed noted that foundations have reacted positively to an increased demand for transparency and accountability and where applicable the development of self-regulatory mechanisms. The general feeling is that these codes answer calls from government for increased transparency and accountability, and that they also enhance levels of trust and foundations' credibility among their stakeholders and society. It should be noted that the responses from most countries indicated that no evidence had been found to suggest that grants have been or are being misused by beneficiaries for criminal purposes. For example, the response from the Association of German Foundations noted that while such misuse may occur, they had not themselves come across or been made aware of any specific cases. Only the responses from Bulgaria and the UK mentioned examples of misuse in their respective countries.

In Slovakia, all members of the Slovak Donors Forum have been through a self-assessment process¹²⁸ and their overall evaluation of the usefulness of

¹²³The group examines information provided by the foundation, conducts interviews, and visits the organisations.

¹²⁴Belgium, Czech Republic, Finland, France, Italy, Luxembourg, Poland, Portugal, Slovakia, and Spain (AEF Principles and Coordinating Committee of Development Cooperation NGOs), and the EFC Principles of Good Practice.

¹²⁵Czech Republic, Estonia, Finland, Ireland, Italy, Luxembourg, Slovakia, and Switzerland.

¹²⁶Denmark, Germany, Italy, and Switzerland.

¹²⁷Finland, Germany, Luxembourg, Poland, Portugal, Slovakia, Spain (AEF), Switzerland, and Turkey.

¹²⁸Standards of Foundation Practice self-assessment tool.

the Forum's Standards as a management tool was very positive. In Switzerland, foundations do not, in general, perceive any increased demand for transparency and it is felt that levels of public (and government) trust in the sector are high. Foundations consider membership of the SwissFoundations association as a positive label that not only gives added security, but also offers the chance to belong to a group of progressive and innovative players within the sector.

On the whole, disclosure of information for use in databases and reports has not been problematic; although a minority of foundations in Turkey (10 out of 120 TÜSEV members) were hesitant in supplying financial information for inclusion in and public availability via the TÜSEV membership database. In Poland, some foundations found that disclosure increased their administrative burden. It was reported that in Denmark, progress in getting more foundations to adhere to the established principles has been slow, making it difficult to accurately assess their impact.

4.12.2 EXTERNAL STAKEHOLDERS' VIEW OF SELF-REGULATORY MECHANISMS

Respondents from a total of 7 countries¹²⁹ reported that self-regulatory mechanisms are perceived positively by external stakeholders and are seen as helping to increase public trust in the sector. In Poland, it was noted that a debate on regulation only tends to take place when there is a particular problem in relation to the sector or the actions/activities of specific organisations. It was reported that in Finland, the self-regulation mechanism had proved useful in countering negative views during recent public incidents involving foundations. Meanwhile, responses from several countries pointed to the lack of monitoring and compliance mechanisms and the possible need for these, in order for self-regulation initiatives to gain more credibility in the eyes of external stakeholders. Two responses¹³⁰ reported lack of interest/awareness by external stakeholders.

¹²⁹Estonia, Finland, Poland, Portugal, Spain (AEF), Switzerland, and Turkey.

¹³⁰Luxembourg, and UK.

¹³¹Finland, Luxembourg, Poland, Portugal, Spain, and Switzerland.

¹³²Realdania, Denmark on behalf of the group of foundations initiating the Danish Principle of Good Practice for Charitable Foundations and the Association of German Foundations.

4.12.3 POSITIVE AND NEGATIVE IMPACTS OF SELF-REGULATORY MECHANISMS AND AN OPEN POLICY

Most responses reported positive effects as a result of having greater transparency and several countries outlined the usefulness of the self-regulatory tool during discussions with the media and governments. In the Czech Republic, an open policy has led to an increase in the number of articles published in the media concerning philanthropy and foundations' activities. Responses from six countries¹³¹ reported that the increase in self-regulatory initiatives or soft law approaches has been very beneficial, leading to foundations having identifiably amended their practices for the better. In Luxembourg, the self-regulatory initiative has, for certain foundations, resulted in one or more of the following: a clearer separation of functions (between directors and managers) in foundations; a better tracking of foundations' accounting systems for restricted and designated donations; and the hiring of external auditors to certify annual accounts. In Switzerland, many boards checked their principles and processes on the basis of the Swiss Foundation Code and implemented new regulations. Although impact assessment has not been conducted on many of these self-regulatory initiatives, two of those surveyed¹³² did feel that their introduction has certainly raised the issue of transparency and accountability on the agendas of most foundations.

There are some potentially negative impacts, such as the possibility of an increased bureaucratic burden on foundations, as mentioned in the response from Poland, and an increase in unsolicited grants proposals. However, negatives have sometimes been transformed into positives, as in the case of Switzerland. There, SwissFoundations publishes a list of its members including their addresses and a short description of each organisation's purpose. This has prompted organisations to communicate more clearly what they do and do not support - most SwissFoundations members now outline their grant criteria on their website.

5. ANALYSIS OF THE EUROPEAN (SELF-) REGULATORY FRAMEWORK

As we have seen from both mappings (Sections 3 and 4), transparency and accountability elements can be found in the different parts of the regulatory and self-regulatory frameworks that govern a foundation's life, from the process of establishment, in later operations and in relation to its different stakeholders.

This section provides an analysis of the transparency and accountability elements that inform stakeholders about foundations gaining, maintaining, and, in some cases losing a specific status, within foundation law, charity law/public-benefit legislation and tax law or self-regulation, as outlined in the matrix below.

	FOUNDATION LAW	TAX LAW	CHARITY LAW / PUBLIC-BENEFIT LEGISLATION	SPECIAL FIELD OF LAW	SELF-REGULATION
GAINING A SPECIFIC STATUS	Formation; having legal personality	Tax exemption	Public-benefit status (charity status)	Approved to conduct fundraising, run a welfare institution etc.	Formation
MAINTAINING A SPECIFIC STATUS	Ongoing supervision/ annual reporting	Ongoing supervision/ annual reporting	Ongoing supervision/ annual reporting	Specialised supervision / reporting	Self-reporting or peer review
LOSS OF A SPECIFIC STATUS	Dissolution	Loss of tax exemption	Withdrawal of public-benefit status (charity status)	Withdrawal of approval	Withdrawal of seal of approval/ exclusion from membership

Based on the matrix, the comparative analysis uses the following breakdown of the information disclosed during the lifetime of a foundation:

- Information about gaining a specific status and how this information is submitted
- To whom are foundations accountable at each stage?
- Content of the information shared with relevant stakeholders at each stage
- Tools of enforcement when information is not submitted, or misuse/illegal actions have occurred

5.1. FOUNDATION LAW AND FOUNDATION TAX LAW

5.1.1 ESTABLISHMENT/GAINING A SPECIFIC STATUS

- Gaining a specific status and how the information is submitted

An act involving a public authority (registration and/ or approval) is needed for a foundation to obtain legal personality. This formation act is made publicly available in all surveyed countries either through a public register or access to the founding act.

In some cases the establishment of a foundation may automatically lead to tax exemption, although in most surveyed countries an additional registration/ approval with fiscal authorities is needed to obtain a tax-exempt status. The information submitted is normally not accessible to the public but is kept with the fiscal authorities. In some countries foundations can obtain a special public-benefit status, which is a prerequisite for tax exemption but not dealt with in tax law (e.g. the UK and Irish charity status, Italian ONLUS status, and similarly in Bulgaria, Hungary, Malta, Poland, Portugal and Romania).

b) To whom are foundations accountable?

During the phase of establishment and beyond, public-benefit foundations are accountable to the supervisory/registration authority and the general public, which engages with the foundation as a legal entity. The registration authority/court registers the foundation if legal requirements are fulfilled. Where additional approval/registration is required for tax exemption (e.g. gaining a public-benefit status), the foundation is accountable to the tax authorities and - where applicable - the public-benefit registration authority, and indirectly to the public at large.

c) Content of the information

It is implicit in the national legislations covered in the study that the registration authority/court checks if the legal requirements are fulfilled.¹³³ In case of a special public-benefit status, this would only be granted if legal requirements are met. The tax authorities only approve eligibility for tax exemptions if sufficient documentation is provided showing that the tax law requirements are met. Both the legal and tax law requirements are defined by the respective national laws, but the mapping showed that they include, in general, the following

elements: pursuance of a public-benefit purpose; assets; organisational structure; intention to use assets for public-benefit purpose (non-distribution constraint; no assets revert back to private ownership; administration costs/remuneration costs within certain limits); scope of activities (limitation on fundraising/economic activities where appropriate); and additional criteria related to gaining a public-benefit status.

d) Tools of enforcement

The supervisory/registration authority in most countries may simply refuse to approve/register a foundation if requirements are not fulfilled.¹³⁴ The general public has no enforcement rights but may, for example, inform the supervisory authority about certain circumstances and may inform the police/ state attorney in case of criminal acts.¹³⁵ Where applicable, the authority would not grant a public-benefit status if the legal requirements are not met. Where applicable (because tax-exempt status is not automatic), the fiscal authorities do not grant a tax-exempt status to those organisations that do not provide sufficient documentation to show that the public-benefit status requirements are met.

5.1.2 MAINTAINING A STATUS

a) Maintaining a specific status and how the information is submitted

During the lifetime of a foundation, it is checked whether the requirements for its status (legal personality, public-benefit status, tax-exempt status) are continuously met. Annual reports are generally submitted to the supervisory authority and an auditor reviews the financial report, where legally required. In most cases, annual reports are also made publicly available.

¹³³In case of a special public-benefit status, this would only be granted if legal requirements are met.

¹³⁴When some requirements are missing in the registration application, the registration authority will first typically call the foundation to complete its application. Refusal would usually happen only after the failure of the foundation to submit supplemental documentation.

¹³⁵ For example in the Netherlands interested persons have the competence to require the court to take measures in the interests of the foundation.

Most countries require that changes to the foundation's key data are updated in the register, which is publicly available in most cases. Tax authorities review annual financial and activity reports, as well as the tax declaration of the foundation in most cases.

b) To whom are foundations accountable?

Public-benefit foundations are accountable during their lifetime to various stakeholders, namely supervisory authorities, tax authorities, auditors, and the general public (directly and/or indirectly via the supervisory/tax authority). The general public has access to the registers in those 24 countries with a publicly-available register and to annual reports where they are made publicly available. Fiscal authorities also review the tax declarations of foundations where appropriate.

c) Content of the information

It is implicit in the national legislation across the 30 countries surveyed that the above-mentioned stakeholders check/review the relevant information as follows:

- Supervisory authorities review annual financial statements and annual activity reports.
- Supervisory and/or fiscal authorities monitor whether foundations fulfil legal requirements and pursue their public-benefit purpose.¹³⁶ Promotion of efficiency in operations and pursuit of public-benefit purpose, such as limitation on administration costs of foundations, is provided for in a few foundation and/or foundation tax laws.
- Supervisory authorities also monitor whether governance requirements are lawfully implemented and reporting/auditing is properly undertaken where required.

- Auditors undertake the audit, where legally required.
- Fiscal authorities review the tax declarations of foundations.
- The general public has access to the registers in those 24 countries with a publicly available register and to annual reports, where they are made publicly available.

d) Tools of enforcement?

The tools vary according to the authorities carrying out the enforcement. In most countries, the supervisory authority may have the power to:

- Ensure required documents are delivered
- Make inquiries upon review of reports
- Undertake inspections
- Object to board decisions and intervene in case of mismanagement
- Dismiss board members
- Approve/disapprove decisions on certain issues (amendment of statutes/liquidation rules; remuneration of board members; contracts in case of conflict of interest)
- Initiate withdrawal of the public-benefit status
- Initiate dissolution of the foundation

Fiscal authorities can request more information or a closer review of the foundation's activities, and start the process of withdrawing a foundation's special tax-exempt status. They can also require the foundation to pay back received advantages. The auditor may comment in the auditor's report, where appropriate. The general public has no enforcement rights but may, for example, inform the supervisory authority about certain circumstances, and may inform the police/state attorney in case of criminal acts.

¹³⁶ Non-distribution constraint; no assets revert back to private ownership; administration costs are reasonable, duty of loyalty and duty of care are observed etc.

5.1.3 LOSS OF A STATUS

a) Loss of a specific status and how the information is submitted

The public-benefit status is withdrawn. The tax-exempt status is withdrawn. The foundation is dissolved through the withdrawal of the legal personality removal from the register.

b) To whom are foundations accountable?

At the moment of dissolution, public-benefit foundations are accountable to the supervisory authority and the general public. In case of loss of public-benefit or tax-exempt status, the general public is either informed through a register or through obtaining the information via the organisation itself.

c) Content of information

The foundation no longer has public-benefit/tax-exempt status. In case of dissolution, the public-benefit foundation as a legal entity no longer exists. In some countries the fact of a foundation's dissolution is itself recorded in the relevant register; in others the dissolved foundation is simply removed from the register.

d) What are tools of enforcement?

In most countries, the supervisory authority is involved, and may even be an initiator, in the dissolution process of foundations. According to most of the reviewed legislations, dissolution is the last resort of supervisory authorities (and may take place against the will of a foundation's governing bodies) in the case where assets no longer exist or the purpose of a foundation can no longer be pursued. In case of loss of public-benefit/tax-exempt status, it is the supervisory or tax authority that can

withdraw the status against the will of the governing organ of the foundation.

5.2 COMPARATIVE OVERVIEW OF SELF-REGULATORY FRAMEWORK

The study focused on self-regulatory mechanisms or codes of conduct developed by national foundation networks specifically for foundations.¹³⁷

a) Type of information and how it is submitted

The type of information provided differs according to individual self-regulatory mechanisms even within one country. The foundation codes imply a declaration of intent, whereas some specific mechanisms imply a certification or seal of approval. In many countries, national networks or associations of foundations make basic data about their members publicly available. All the self-regulatory mechanisms considered by the study require foundations to publish their annual reports, in many cases with involvement of an auditor. Some codes require foundations to report on their social impact.

b) To whom are foundations accountable?

Self-regulatory mechanisms address foundations' transparency and accountability to various stakeholders: the general public as well as partners, donors, and beneficiaries. Through these mechanisms, foundations are also transparent and accountable to each other, asserting to one another that they all undertake the same high level of transparency and accountability in their operations. The public at large is, in most countries, informed about the participation of a foundation in the self-regulatory mechanism either by the foundation itself (often via the foundation's website) or by the

¹³⁷ Only a side reference was made to codes/certification systems developed for fundraising organisations or NPOs in general. In addition, it should be noted that the study did not survey individual foundation practices, or policies and principles developed by individual foundations.

organisation issuing the self-regulatory mechanism (often also via a website/list).

c) Content of information

Adhering to a self-regulatory mechanism may imply different requirements, according to the various self-regulatory mechanisms:

- Pursuit of public-benefit purpose/use of funds
- Governance and management requirements
- Reporting and publicity requirements (publication of annual financial and activity reports)
- Accountability towards donors and beneficiaries and involvement of beneficiaries

d) What are the tools of enforcement?

Where applicable, the organisation issuing a certification will only do so if the requirements are met. The organisation that designed the self-regulatory mechanism may request that the foundation should fulfil certain requirements if the foundation has not already met the requirements of its own accord. The organisation issuing a certification will withdraw

the certification/declaration of intent or initiate membership exclusion, where appropriate.

The self-regulatory mechanisms developed by DAFNE members or by informal groups of foundations generally do not imply a certification system, but the voluntary subscription to agreed principles. If a foundation does not adhere to the principles, the organisation issuing the principles may, according to all the self-regulation mechanisms reviewed by this study, ask the foundation to comply or explain. Non-compliance may result in exclusion from membership or the initiative. However, only one DAFNE member reported having excluded a member for this reason. A total of six countries reported that adherence to the self-regulatory mechanism by organisations that have signed up to it is actively monitored.

6. ARE REGULATORY AND SELF-REGULATORY MECHANISMS EFFECTIVE?

6.1 WHAT LEVEL OF REGULATION IS APPROPRIATE?

From a broader policy perspective, it is important to emphasise that government regulation is essential not merely to enhance foundation accountability, but to create an enabling environment for foundations to flourish, to create a level-playing field for the sector, and to balance the interests of the sector in relation to other segments of society. Ideally, therefore, legal frameworks should provide clear and simple provisions which underpin foundations' capacity to operate efficiently and fulfil their objectives, while providing sufficient guarantees to the public of their transparency and accountability.

Developing a fair and flexible regulatory framework is challenging, since there is no blueprint as such: countries are very different in terms of their historical, cultural, social, political and legal contexts and this results in a range of legislative and policy solutions to tackle the same issues in the different national contexts.

For example, depending on the country's tradition of how foundations developed and what role they play in social development, one country may require a high starting capital from a foundation¹³⁸, while another¹³⁹ may require no property at all at the registration of the foundation, but both are legitimate approaches. When a country with no recent tradition of the foundation form introduces a requirement for starting capital¹⁴⁰, it can be seen as hindering the development of the foundations by erecting a barrier that many potential initiatives cannot fulfil, or it can be seen as

a strategic effort to ensure longer-term sustainability of foundations and the civil society organisations they support. To take another example, in a country with a "rule of law" culture and a customary tendency for transparency, prescribing in detail the information that should be included in an annual report may be seen as unnecessary bureaucracy, whereas in a country with a tradition of undertaking only what is prescribed, it may be a necessary tool to ensure minimum transparency. Therefore, regulation has to be evaluated within its proper historical and national context, and the impact it is expected to have must also be considered.

Regulatory frameworks should take into account the principle of proportionality. Legal requirements should be in proportion to the size and capacity of the foundation to which they apply. Furthermore, the foundation sector itself is highly diverse. This diversity also means that a number of issues are best regulated by the foundations themselves; otherwise arbitrary solutions may be imposed without regard to the organisational context.¹⁴¹ Misplaced regulation can, for example, place pressure for higher pay-outs, leading to investment policies with risk profiles that boards are not prepared for, and that could erode elements of foundations' autonomy. Heavy regulation can have unintended side effects, such as damaging entrepreneurship in foundations. It may, for instance, result in risk aversion, preference for larger NGOs as beneficiaries, or preference for domestic instead of international activities. Compliance with fiduciary responsibilities and legal requirements, therefore, should not become more important than pursuit of core public-benefit objectives for foundations.

¹³⁸ France.

¹³⁹ Netherlands.

¹⁴⁰ Like the Czech Republic in 1998.

¹⁴¹ For example, practices ensuring accountability in operations and governance.

However, there needs to be a minimum level of accountability ensured: regulation needs to seek a balance between the autonomy of the foundation and the public interest in ensuring that funds are spent according to the public-benefit purposes.

An important principle to take into consideration is consultation and more broadly, a participatory process for the development of regulatory frameworks. The success of such initiatives depends to a large extent on the involvement of the sector to which they will apply in developing them. The most successful public regulatory initiatives rely on consultation with - and in some cases joint design by - the relevant sector.

6.2 NO NEED FOR EUROPEAN REGULATION ON TRANSPARENCY AND ACCOUNTABILITY

With this in mind, it is important to recognise that there cannot be any “one size fits all” regulation that could be universally applied in Europe. At the same time, there are principles related to transparency and accountability, such as those spelled out above, that can be identified and that governments and foundations themselves can and should translate into context-specific regulatory and self-regulatory frameworks and provisions.

The mapping showed that there is no need for specific legislation/legal standards or a general code of conduct/voluntary guidelines regarding transparency and accountability of foundations at EU level. Transparency and accountability requirements for public-benefit foundations are well addressed in the various national and regional laws of the 27 Member States. However, based on different legal traditions, accountability and transparency are achieved in a number of ways and through different mechanisms and concepts. In many countries the existing combination of self-regulation and binding rules form a very effective scenario with regard to transparency and

accountability. Often transparency and accountability requirements are part of the state supervision and/or tax regulation, which have a long-standing tradition in the respective environments and cultures. Hence there is no single model/solution to uphold transparency and accountability and harmonisation is neither possible nor a desired measure.¹⁴²

Having said that, the transparency and accountability requirements drafted for a European Foundation Statute (as a supranational legal form) could serve as a benchmark of accountability, transparency and good governance across the EU and beyond.¹⁴³ The supranational legal form would also bring much-needed clarity to both the use of the term “foundation”, the precise meaning of which varies from country to country and may refer to very diverse undertakings, ranging from personal benefit to commercial endeavours; as well as providing a common definition for Europe of public-benefit purpose. The European Commission has committed to putting forward a proposal on a European Foundation Statute by the end of 2011.¹⁴⁴ An impact assessment is underway and while the details of the Commission's proposal are yet to be announced, several proposals for the regulation have already been published, namely the EFC's Proposal for a Regulation on a European Statute for Foundations (2005)¹⁴⁵ and The European Foundation: A New Legal Approach, an initiative of the Bertelsmann Stiftung.¹⁴⁶ Both proposals address key questions on the registration, internal governance, and supervision of the European Foundation. Concerning the transparency and accountability of the European Foundation (requirements regarding reporting, auditing, and the publication of such information), both the EFC and the Bertelsmann Stiftung project proposals require the European Foundation to produce an annual report describing the foundation's activities in pursuit of its public-benefit purpose and annual

¹⁴² A good overview of the current state of the debate on European regulation transparency and accountability of public-benefit organisations can be found in Oonagh B. Breen, Through the Looking Glass: European Perspectives on Non-profit Vulnerability, Legitimacy and Regulation, Brooklyn International Law Journal, Volume 36, Issue 3, 2011, pages 947 - 991.

¹⁴³ In 2007 the European Commission launched the process for a Feasibility Study on a European Foundation Statute, which was prepared during 2008 by experts from the Max Planck Institute for Comparative and International Private Law in Hamburg and the Centre for Social Investment at the University of Heidelberg. It can be downloaded at http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm

¹⁴⁴ See European Commission communications Towards a Single Market Act - For a highly competitive social economy 27.10.2010 COM (2010) 608 final and Single Market Act - Twelve levers to boost growth and strengthen confidence, 13.04.2011 COM (2011) 206 final

¹⁴⁵ Available at www.efc.be

¹⁴⁶ http://www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_15347__2.pdf

accounts. In both cases the requirement for external auditing is reserved for foundations operating above a certain financial threshold.

In this context, it seems clear that the current role of the EU should be a “facilitator” and potentially a “qualifier” but not a “regulator” when it comes to the transparency and accountability of public-benefit foundations. The EU could take a more proactive role in assisting ongoing national processes by helping to inform stakeholders and share good practices from across the Member States. It would be worthwhile examining whether the EU could provide a platform for exchange of best practices among Member States. This could take several forms and also include a forum for dialogue, in order to promote accountability and transparency and serve as an ongoing resource for information and exchange. Underlying this is the need for solutions to be designed through consultation with the sector as a whole to ensure that the initiatives are as rich and complete as possible.

6. 3. ARE THERE FUNDAMENTAL GAPS IN EXISTING (SELF-) REGULATION ON TRANSPARENCY AND ACCOUNTABILITY?

The mapping of the regulatory and self-regulatory frameworks across the European countries shows no fundamental gaps, and corresponds to the rationale behind transparency and accountability regulation as follows:

6.3.1 CREDITOR PROTECTION

National legislators have developed individual instruments to ensure creditor protection. The granting of legal personality will normally protect the capital of the foundation from creditors of the founders/donors. The establishment procedure for foundations generally involves a public authority/court, which checks whether the foundation fulfils the requirements to gain legal personality. Foundations are required to present their basic

data in a public register as a means to ensure that credible information is provided to all parties with whom the organisation enters into contracts. As shown in the study, virtually all European countries require that foundations prepare and submit their annual accounts to a relevant authority. It should be noted that in some countries more substantial economic activities and/or fundraising activities may be subject to stricter or additional controls to ensure legal security and creditor protection.

6.3.2 MECHANISMS TO PREVENT MISMANAGEMENT AND ABUSE

Foundations are autonomous from the state but at the same time they do not have a “built-in” mechanism to control against abuse within their governance structure: they generally have no owners or shareholders who would have a vested interest - direct incentives - to protect the organisation. The issue becomes relevant as soon as the foundation is set up. During the process of establishment, no control issue exists because the founder has the free choice to either set up a foundation or not. It is only after the foundation is formed that the will of the founder needs further support/protection. The “good governance” of a foundation depends significantly on the ethical standing of its board, so the foundation can be seen as more vulnerable to mismanagement than other types of legal entities. However, the analysis has shown that existing regulation (a combination of transparency and accountability regulation and external supervisory structures) provides for a solid system of control over foundations and their governing bodies, which takes the specific governance structure into account.

The duty of care and the duty of loyalty of board members are recognised in all surveyed countries and are part of the respective legal provisions. The duty of loyalty is expressed by the reviewed legislations in a number of ways, including by conflict

of interest rules, non-distribution constraint and limitation, or even prevention, of remuneration of board members. The duty of loyalty is intended to act as a counterbalance to the natural self-interest of board members. The duty of care implies that board members must diligently apply their own skills for the proper management of the foundation. This duty is implemented by national legislation in different ways, generally through rules that ensure that the will of the founder needs to be taken into account when changing statutes. Members of the boards are in most countries personally liable in cases of losses caused by (at least) grossly negligent acts or wilful defaults on their part (breach of duty). The liability of board members aims to ensure board members' duties of care and loyalty, in particular proper management of the foundations' activities and assets and pursuance of the public-benefit purpose. It therefore appears that national foundation laws provide for a regulatory framework with regard to governance and duties of board members, which play a significant role to ensure accountability and control of foundations.

In addition, external supervisory structures exist in all European countries. The main recipient of information provided during the lifetime of a foundation is the State supervisory authority. The authority acts on behalf of various stakeholders (founder, beneficiary, public at large, donor), which all have a legitimate interest in the proper management of the foundation and the proper pursuit of a foundation's public-benefit purpose. Some national legislations foresee that internal control mechanisms be developed through supervisory boards. In many countries with stricter transparency requirements, where annual activity reports and annual financial information are publicly available, the public at large also ensures that a foundation pursues its public-benefit purpose in line with the will of the founder.

6.3.3 TAX BENEFITS

In exchange for tax benefits, the State expects the foundation to undergo increased scrutiny to show that it benefits the public good and that the interests of the general public/all taxpayers are protected. The tax authority therefore checks (at the latest when the first tax declaration arrives) whether the requirements for tax exemption are fulfilled, in particular whether the public-benefit purpose is pursued. National legislators are free to decide on the requirements for the tax-exempt status of a foundation (and tax incentives for donors), however they appear to all follow some general principles as have been outlined in the study.¹⁴⁷

6.3.4 POLITICAL INFLUENCE

Because many foundations aim to tackle society's problems and bring about social change, some researchers argue that the public at large has a legitimate interest in obtaining information about these foundations. Some foundations also act as think tanks/give advice to political parties and hence engage in political activities (if not in party politics) or activities in areas that might otherwise fall within the remit of the State. Citizens vote for representatives who have the task to ensure that their interests and the interests of the general public are addressed. Public-benefit foundations would in these cases act as trustees for the public and hence need to inform the public about their actions. There was no evidence found that foundation or foundation tax law purposely responds to this aspect. However, it may indirectly have influenced the publicity requirements for all foundations or special (tax) rules related to restricting political campaigning or support of political party activities. The study did not address this aspect in more detail.

6.3.5 ENLIGHTENED SELF-INTEREST

Finally, many foundations believe that, since they are serving the public good, they have an ethical

¹⁴⁷ In a number of countries, requirements for tax exemption are outlined in civil law (public-benefit legislation); while in the UK and Ireland there is charity law.

obligation to undergo regulatory checks and have therefore integrated transparency and accountability into their management practices, usually beyond legislative requirements. Transparency and accountability practices are considered key tools to increase efficiency and effectiveness of public-benefit foundations and a tool to build public trust in the sector. However, the public cannot assume that all foundations pursue such a policy of “enlightened self-interest” with regards to transparency and accountability, nor can third parties (e.g. donors) rely on this, as it is simply an autonomous decision of the foundation to conduct itself in this way.

This “enlightened self-interest” in transparency and accountability plays a key role in the development and use of self-regulatory mechanisms and in the voluntary transparency and accountability actions of foundations, which go beyond fulfilling the legal requirements.

6.4 IS THERE A NEED FOR MORE PUBLIC REGULATION AT NATIONAL LEVEL?

No fundamental gaps were detected in the national regulatory frameworks governing foundations’ transparency and accountability. The supervisory authorities play a sufficiently strong role, although in some countries the tax authority could play a stronger role. The information provided appears in most cases to be appropriate to enable control/supervision of whether foundations fulfil the legal requirements, in particular the pursuit of their public-benefit purposes (and duties of due diligence). The enforcement mechanisms ensure that appropriate measures can be undertaken to ensure control. However, there may be room for improvement in some cases as outlined below:

6.4.1 REGISTRATION AND ACCESS TO REGISTRATION DATA

In the overwhelming majority of countries, foundations are logged in a public register. Among common law countries, the UK and Ireland have a national system of registering charities. In most civil law countries, however, registration is done by legal form. The registration records may therefore be distributed among various registration agencies or levels of administration. In some countries, this raises issues of the accessibility of the registry data. The 2009 ECNL study showcased the example of Guidestar Europe¹⁴⁸, who had sought this information but reported finding this difficult to accomplish in four civil law countries due to the lack, for various reasons, of an official database.¹⁴⁹ At the same time, a valid official database on NPOs is a basic requirement in the implementation of the FATF SRVIII¹⁵⁰, and as such is being considered in several European countries (also outside the EU).

6.4.2 SAFEGUARDING THE PURSUIT OF PUBLIC-BENEFIT PURPOSE

Two main types of regulatory provisions can be found in foundation law and/or tax law and are typically used to prevent abuse of foundation property and to provide an appropriate basis for tax exemption of foundations.¹⁵¹ The first set of provisions relate to the requirement that funds should be spent according to the designated public-benefit purpose, which are overwhelmingly applied in Europe. Another set of accountability measures relate to the promotion of effectiveness in the operation of foundations. They are a way to ensure that funds are spent not only according to the purpose of the foundation, but also in the most efficient way, thereby enhancing overall organisational effectiveness. The most typical of these are a limitation on administration costs, which

¹⁴⁸ The GuideStar project was an initiative to develop a self-regulatory model for providing information on NPOs that is linked to an official database containing comprehensive, valid, up-to-date and independently verifiable information on NPOs.

¹⁴⁹ For example in Germany and Hungary, this was due to the decentralised registration system; while in the Netherlands NPOs - including foundations - are registered in the company register and there is no mechanism to separate them out.

¹⁵⁰ Special Recommendation VIII of the Financial Action Task Force on NPOs.

¹⁵¹ Also called “minimum guarantees” for accountability.

is required by about half of the surveyed countries, and requirements for the timely disbursement of income. However, there are some questions around the usefulness of introducing a fixed limit on administrative spending into the legislation. Practice has shown that it is very difficult to implement a concrete limit in the law; this can be due to several factors, namely that the accounting legislation does not support such an approach or that the foundation sector is too diverse or too new to have these kinds of standards developed. In some Western European countries, the commonly accepted level of administrative costs for a foundation is included in NPO self-regulatory schemes; however, such practice is not common as yet in the newer Member States.¹⁵²

6.4.3 GOVERNANCE AND COLLECTIVE BOARD STRUCTURE

The study found that existing governance mechanisms generally provide for sufficient control and accountability. In fact, given the huge diversity in the foundation sector, governance is one of the areas where experience shows it is useful to leave the development of good practices to self-regulation. As a general rule, the founder(s) have the freedom to design the governance structure. However, there are some basic public regulatory requirements that are seen as necessary in order to ensure foundation accountability in most European countries¹⁵³. One requirement is collective governance (i.e. boards composed of more than one person) in order to ensure appropriate checks and balances in the decision-making process (i.e. not to make the fulfilment of the public-benefit purpose dependent on one person as the ultimate decision-maker)¹⁵⁴. Currently, just over half of European countries mandate more than one person on the board of the public-benefit foundation and in a number of countries a collective

board structure is suggested by the self-regulatory mechanisms used by foundations.

6.4.4 REPORTING AND ACCESSIBILITY OF REPORTS

All countries require foundations to prepare annual reports, and most countries require them to be filed with the relevant authorities. However, they differ widely as to the required content and form of the reports; how they are submitted and made available for the public; and the extent of reporting (e.g. whether an audited financial report is needed or not). In fact, while overall foundations are required to account for their annual activities, there is no identifiable trend in Europe as to what constitutes good practice, and some gaps may still exist.

One issue was raised by the foundations regarding financial reports, namely that (national and international) accounting standards are designed for for-profit companies, and in most cases legislation based on those standards does not recognise the special needs of public-benefit foundations. The reference to such accounting standards may therefore not be suitable for foundations; while the development and use of more appropriate standards would also provide a means for the authorities and the general public to better understand the nature of the work foundations do.

In the majority of countries surveyed, there is a general requirement that foundations' reports are made publicly available, but in a third of these countries the availability of public information on foundations is limited. In just a handful of countries is auditing not required. There are a few countries where reporting requirements overall could be considered to be "lighter", for example in Finland and the Netherlands, and in some newer Member States.¹⁵⁵ These countries do not have at least two of the

¹⁵² 2009 ECNL Study, page 18.

¹⁵³ In Cyprus and Greece the governance of public-benefit foundations is not addressed in detail by the law.

¹⁵⁴ See Handbook on Governance for Nonprofit Organisations, ECNL.

¹⁵⁵ Lithuania, Romania, and Slovenia.

above three types of accountability regulations in place (e.g. no requirement to make the report publicly available and also no audit requirement).

6.4.5 SUPERVISION

Foundations are subject to some level of oversight in every country, even where there is no specific oversight authority designated for foundations. In the majority of countries, supervisory authorities' powers imply inspections and the right to impose sanctions on a foundation's operations in case of mismanagement and abuse, but for about a third of countries, the power vested in the authorities is more limited, for example they may only review and ask about reports. However, the level of supervision is an area of regulation that depends to a high degree on the legal, cultural and historical context of individual countries. In a country where supervision may seem heavy-handed since there is a designated body with substantial staffing and wide competences (e.g. the Charity Commission in the UK), this may in fact be an asset to foundations, as it provides them with guidance and technical assistance in improving their accountability and transparency practices. Conversely, in some countries (e.g. the Netherlands), where reporting and supervision are not heavily regulated there is nonetheless a high level of compliance simply on account of the "rule of law" culture and hence no need for strong supervision, as compliance is assumed.

6.5 WHAT IS THE ROLE OF SELF-REGULATORY MECHANISMS?

Self-regulation is a useful tool to enhance transparency and accountability of public-benefit organisations.

6.5.1 BENEFITS

Overall, self-regulatory codes are more flexible than public regulatory frameworks, as they can be changed and adapted more easily to new trends/developments. The field study among DAFNE members and other national foundation experts showed that the existing transparency and accountability elements within the self-regulatory

mechanisms for foundations are important tools for improving the efficiency and management of foundations, and for increasing the legitimacy and integrity of the sector as a whole. DAFNE members identified additional benefits of self-regulatory mechanisms for foundations' internal organisation, for working with stakeholders, for dealing with "bad apples", and for long-term impact, as follows:

Foundations' internal organisation

- Promote sound investment policies
- Build better management standards and coherency
- Benchmark performance
- Provide better evaluation/monitoring tools

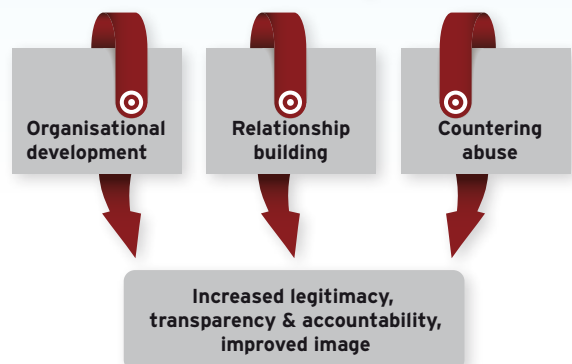
Cooperation and relationship-building with stakeholders

- Move towards greater cooperation between foundations
- Promote dialogue among foundations, beneficiaries and other actors
- Foster better relations and cooperation with public authorities
- Provide an opportunity to influence government practice and legislation and avoid unnecessary legislation

Dealing with abuse and "bad apples"

- Prevent potential misuse of support to third parties
- Counter public and media suspicion of foundations
- Identify and deal with problems before they affect the whole sector
- Tool to prevent government over-regulation

Role of self-regulation



Long-term impacts

- Promote good governance
- Promote transparency/accountability
- Strengthen the sector's integrity and legitimacy
- Improve the image of foundations

6.5.2 CHALLENGES

The study also demonstrated that self-regulation is not without challenges, some of which are outlined here:

- Self-regulatory codes and standards can only enhance organisational effectiveness of the individual foundations that sign up to them. Some mechanisms may be too technical or bureaucratic, making compliance burdensome. Other mechanisms may be too general and therefore ineffective.
- The promise of building trust and increasing cooperation within and outside the foundation community can only be realised if the mechanisms are accepted in the sector and among stakeholders. This could for example be facilitated if mechanisms are developed and promoted through a bottom-up and participatory process (ideally involving external stakeholders, especially beneficiaries and donors).
- Prevention of misuse of funds or detecting problems before they affect the whole sector will only happen if there is compliance.
- The benefits described above can only be realised if self-regulatory mechanisms gain acceptance and are applied within the sector, and gain the trust of the general public. This could be achieved by further developing and promoting compliance and monitoring tools.

6.5.3 ANALYSIS OF THE ROLE OF EXISTING SELF-REGULATORY INITIATIVES

Self-regulatory frameworks are seen by this study as important tools to promote an accountable and transparent operation of foundations. The sector has a responsibility to address governance, accountability and effectiveness both collectively and at the level of individual foundations through self-regulation

and individual practices. However, it is important to recognise the role and the limits of self-regulation, just as it is important to clarify those for public regulation.

The study has shown that national level self-regulatory mechanisms do not necessarily go beyond legal requirements. For example from among the countries in which activity reporting is not required, only a few have this requirement in their self-regulatory scheme. Less than half of the surveyed foundation codes prescribe or recommend reporting obligations beyond the legal requirements. Self-regulation of foundations typically addresses the need to spend funds efficiently and according to the public-benefit purpose; some countries also address issues related to asset management, administrative expenses or donor reporting. On the other hand, codes in only three countries (Italy, Spain, and UK) specifically mention the “know your donor” and “know your beneficiary” principle as defined in anti-money-laundering and counter-terrorism policies.

Responses related to 13 codes indicate that the self-regulation mechanism mentions the implementation of transparency and accountability towards grantees/beneficiaries, which will not be required by public regulation. However, no responses except those from Poland and Slovakia and those related to the EFC/CoF principles reported on grantee/beneficiary involvement in programme design or governance of the foundation in their self-regulatory mechanisms.

This study underscores the earlier findings by ECNL that public regulation and self-regulation are not a zero-sum game (i.e. the tenet that where there is more self-regulation, less public regulation is needed, or vice-versa, does not hold true). Rather, they should be considered as complementary tools in achieving an optimal state of accountability and transparency.¹⁵⁶ The balance and interplay between these two forms of regulation vary widely across Europe, but it can be seen that in countries with more developed regulatory frameworks for foundations, self-regulation is also

¹⁵⁶ 2009 ECNL Study, page 16.

more advanced, as a matter of the cultural and historical context.

In the UK and Ireland, the development of public regulation and self-regulation has been parallel and the role of both is equally important. In most of the “old” EU Member States with a civil law system (e.g., France, Germany, the Scandinavian countries) public regulation plays a slightly bigger role than self-regulation, but self-regulation mechanisms are more advanced than in the Central and Eastern European countries (“new” Member States). The latter have less developed NPO sectors and the role of public regulation is more substantial than the role of self-regulation.¹⁵⁷

Self-regulatory mechanisms of European foundations tend to lack compliance mechanisms and there is generally no strict monitoring of the application and impact of these mechanisms. Strong monitoring was reported by only very few countries and is generally more developed in codes for fundraising foundations. This does not mean of course that individual foundations do not apply monitoring or that they are not following the good practices set out in self-regulatory mechanisms or elsewhere (such assessment is beyond the scope of this study). However, it points to the need to ensure more consistent follow-up of such initiatives. More broadly speaking, there seems to be a lack of incentives to maintain (and review and improve) the system once it is developed. This also makes it more difficult to fulfil the long-term goals of strengthening integrity and legitimacy and creating an improved image of the sector.

As regards the impact of self-regulation, while several members of DAFNE reported positive impacts particularly in regard to internal organisational development of the foundation (e.g.

better management practices, clearer separation of functions, improved accounting/monitoring systems), there was less evidence in terms of the other positive outcomes. In particular, there was very little reported on preventing abuse or government over-regulation. The expected prevention of government over-regulation through self-regulation may seem elusive. Practice shows that effective self-regulation tends to build on a sound and relatively sophisticated regulatory system as its foundation.¹⁵⁸ In fact, in those countries where self-regulation is already strong, it can lessen the existing regulatory burden as the government could recognise that it may leave certain issues “in the safe hands” of self-regulatory bodies (as in the corporate sector). Ideally, this can lead to a co-regulatory model.¹⁵⁹ However, when self-regulation is still emerging and there are no clear compliance mechanisms it is unlikely to prevent governments from introducing additional requirements, if there is a perceived need to increase transparency and accountability for the sector.

¹⁵⁷ 2009 ECNL Study, page 17

¹⁵⁸ Almost half of the self-regulatory initiatives identified in the 2009 ECNL Study came from the UK and the Netherlands, countries with arguable highly developed regulatory schemes, while very few were identified in the new Member States.

¹⁵⁹ This is the case for fundraising organisations e.g. in Ireland and the Netherlands.

7.

KEY CONCLUSIONS AND RECOMMENDATIONS

7.1 KEY CONCLUSIONS

During recent years, there has been a great deal of interest in the accountability and transparency of public-benefit foundations from various stakeholders. The driving force behind most recent self-regulatory and legislative initiatives appears to be the increased economic importance of the sector and not counter-terrorism action, which needs to be acknowledged among policy-makers at the national and EU level.

The main rationale for having (self-) regulation governing the transparency and accountability of public-benefit foundations is threefold:

- The governance structure of foundations lacks the “safety valve” of owners or shareholders who have a vested self-interest in ensuring that the public-benefit purpose is pursued and controlling governance against abuse).
- Having public-benefit status/being in receipt of tax exemptions increases the demand for accountability to the public and the State.
- Foundations aim to tackle the society’s problems and bring about social change, and therefore have a duty to account to the public.

The comparative analysis shows that there are no fundamental gaps within the legal frameworks that govern the accountability and transparency of public-benefit foundations in Europe. In all countries, a certain minimum standard is guaranteed: Public-benefit foundations are duty bound to use their assets to pursue public-benefit purposes instead of promoting private-benefit purposes. There are clear control mechanisms in place that ensure a “safety valve” against abuse, including reporting/auditing requirements, governance requirements and state supervision. Information about foundations’ status and activities are sent, when requested and appropriate, to the state supervisory authority (in foundation law), the tax authority (in tax law) and are shared with the general public (either directly or via the authorities). The information provided enables sufficient control/supervision of whether foundations fulfil their legal

requirements, in particular the pursuit of their public-benefit purposes and, for governing organs, their duties of due diligence and care.

However, while no fundamental gaps in legislation were detected, there may be room to improve the rules on accountability and transparency in some cases. The potential for further development of the regulatory frameworks with regard to the access to registration data, ensuring good governance, and effective reporting and supervision was highlighted in some countries.

A comparative mapping and analysis of existing self-regulatory mechanisms in Europe revealed that these are flexible tools that optimise the effectiveness, accountability and transparency of public-benefit foundations. As always, there are opportunities to better structure and monitor the self-regulatory codes and standards in some countries, while greater awareness-raising about these mechanisms could lead to increased compliance with the mechanisms and recognition of their effectiveness in the sector and beyond.

The findings of the mappings and analyses suggest that there is no need for a European regulation on the transparency and accountability of public-benefit foundations, given that existing regulations provide appropriate tools. A “one size fits all” solution at European level would not be possible given the different legal traditions and cultures of the Member States. Accountability and transparency is achieved in a number of ways and through different mechanisms and concepts. Hence there is no single model/solution to uphold transparency and accountability, and harmonisation of national legislation is neither possible nor wanted. A new, optional, supranational legal form, such as the currently discussed European Foundation, would be helpful, because it could serve as a benchmark on accountability, transparency and good governance across the EU and beyond.

7.2 RECOMMENDATIONS

7.2.1 FOR FOUNDATIONS AND THEIR UMBRELLA ORGANISATIONS

Foundations should engage in discussions around minimum standards and best practices on transparency and accountability in Europe, and participate in a benchmarking exercise not only to identify existing practices, but also to examine their relevance and impact in given contexts. Doing this could also increase understanding of how the key principles of transparency and accountability can be effectively applied in different environments by regulatory and self-regulatory measures.

There is a need for enhanced dialogue at the national level with decision-makers, governments, and legislators, to influence the political debate about the role of foundations and to strategically position foundations as part of the solution, rather than part of the problem, in the policy arena. Meanwhile, self-regulatory initiatives in the foundation sector should seek synergies with public regulation processes at national and EU levels.

Foundations/their umbrella organisations should be more attentive to the implementation and enforcement of existing self-regulatory mechanisms by:

- Periodically reviewing and improving existing codes
- Developing more guidelines as to how they can be effectively implemented
- Consider developing indicators for a monitoring system and potential sanctions for non-compliance
- Identifying benefits that the mechanism can bring to internal and external stakeholders (through surveys, case studies etc.)

7.2.2 FOR NATIONAL GOVERNMENTS

National governments should continue to develop a more enabling legal and fiscal environment for foundations by, among other things, developing accounting standards that better fit their needs, and by more widely applying the principle of proportionality with regards to reporting requirements and in other regulations.

Governments should also seek to involve foundations in a participatory (i.e. not only consultative) policy development process in addressing issues relating to the whole NPO sector's transparency and accountability, and specifically in regard to legislation on counter-terrorism and counter-terrorist financing.

Member States of the EU should support and supplement the EU-level process for information-sharing and research.

7.2.3 FOR THE EU

The EU should assume a more proactive role in facilitating exchange of best practices in the development and implementation of regulations and self-regulatory initiatives relating to accountability and transparency of foundations among its Member States, as well as among government and civil society organisations. One option would be to initiate and host a stakeholder dialogue as part of a wider platform for exchange among the Member States. A dialogue between public-benefit foundations, the wider NPO sector and policy makers at national and EU level on accountability and transparency would help ensure that the EU is well informed about public and self-regulatory processes at the national level and that any action from the EU builds on, rather than duplicates, such efforts at the national level. Furthermore such dialogue would help to clarify the role of the European Commission in assisting national level processes and would promote exchange of best practices.

8. METHODOLOGY AND TOOLS

This section describes the tools and methodology that were used to conduct the study.

8.1 STUDY TEAM AND ROLES

The study team was composed of an international team of experts, including legal experts (with a special knowledge of the law of foundations, taxation of non-profit organisations, and European Union law), and practitioners with practical experience in foundation matters:

- The EFC member-led Legal Committee and EFC Legal Department staff, who together support one of the EFC's core objectives of creating an enabling environment for foundations and corporate funders in Europe.
- Members of the DAFNE network.
- A network of foundation law experts in the 27 EU Member States, as well as Switzerland, Turkey and Ukraine, which put country-specific information together in the form of the EFC's online Legal and Fiscal Country Profiles, which were a key resource for this study.
- The European Center for Not-for-profit Law (ECNL) and Thomas von Hippel, freelance researcher, served as external consultants to the study.
- ECNL along with the EFC Legal Committee and the DAFNE network acted as peer reviewers, reviewing the methodology of the study as well as the questionnaire for the mapping exercise.

8.2 DEFINITIONS

8.2.1 FOUNDATION

The definition of a foundation differs from country to country.¹⁶⁰ Nevertheless, there is a common thread of characteristics which European foundations share and which are highlighted in the proposed working definition:

An independent organisation (generally with its own legal personality), is supervised by a State supervisory authority, and serves a public-benefit purpose (in some Member States: any lawful purpose), for which a founder has provided a starting capital and determined the foundation's purpose and statutes.¹⁶¹

The study focused on public-benefit foundations, which are the most common type of foundation in Europe.¹⁶²

8.2.2 ACCOUNTABILITY

For the purposes of this study, accountability is understood as an obligation or willingness of a public-benefit foundation to account for its actions towards its multiple stakeholders (including beneficiaries, donors, and governments, as well as the public at large).¹⁶³

8.2.3 TRANSPARENCY

For the purposes of this study, transparency is understood as an obligation or willingness of public-benefit foundations to publish and make available data about:

- Their organisations (e.g. basic data regarding establishment: name, address, purpose, founder, decision-making body)
- Finances (e.g. publishing financial reports, undergoing audits)
- Programmes and operations (e.g. publishing annual activity reports)¹⁶⁴

8.2.4 TRANSPARENCY AND ACCOUNTABILITY

For the purpose of this study transparency is considered an indispensable mechanism for enacting accountability. A foundation provides certain information to the various stakeholders

¹⁶⁰ This is clearly illustrated in the EFC's Legal and Fiscal Country Profiles and Comparative Highlights of Foundation Laws, 2011.

¹⁶¹ Definition corresponds to a large extent to that included in the Feasibility Study on the European Foundation Statute, 2009, page 13.

¹⁶² In many countries the foundation law does not make a clear difference between private-interest and public-benefit foundations, the distinction being made only by tax law. A public-benefit status exists in many countries, even where a foundation can only be created for public-benefit purposes. Where appropriate, the study includes laws concerning all foundations, and puts special emphasis on rules governing foundations that have a public-benefit purpose, have received public benefit status, or are otherwise fall under such definition (depending on the legal system). For the purposes of this study, trusts (where they exist) and similar legal institutions and arrangements will be treated as functionally comparable to foundations and are, therefore, included in the scope of the study.

¹⁶³ Definition based on that used in the 2009 ECNL Study.

¹⁶⁴ Definition based on that used in the 2009 ECNL Study.

(including beneficiaries, donors, and governments, as well as the public at large) throughout the various stages of its lifetime. Sometimes the information is provided directly to the stakeholders and sometimes it is supplied through agents (e.g. the supervisory or tax authority, who act on behalf of the general public). Public-benefit foundations can only account for their actions towards their multiple stakeholders if they share relevant and sufficient information about themselves.

8.3 METHODOLOGY

The following methodology was used to capture data on both regulatory and self-regulatory initiatives related to the transparency and accountability of public-benefit foundations in Europe:

8.3.1 LITERATURE REVIEW

The EFC reviewed and researched existing literature and information on national foundation laws, and related transparency and accountability requirements. The EFC worked with its network of foundation law and foundation tax law experts to tackle any questions that arose in the review and provide the latest legal and tax updates. The following literature and information were reviewed:

- EFC Country Legal and Fiscal Profiles¹⁶⁵
Contains an overview of the diverse legal and fiscal environments of foundations across 30 countries (the 27 EU Member States, plus Switzerland, Ukraine and Turkey), drafted by national country experts. The structure was designed by the EFC's membership-driven Legal Committee in cooperation with legal experts.

- Stiftungsrecht in Europa¹⁶⁶
Contains a number of country reports as well as an analysis on selected foundation law topics. Because of recent legal reforms, some of the individual country information must be considered outdated. Nevertheless, the comparative analysis is a valuable source for analysis and debate on European foundation law among legal scholars.
- The European Foundation¹⁶⁷
Includes a thorough analysis of the rationale, the function and the reality of European foundation laws. In addition to giving recommendations on how a European legal form for foundations could look, the publication contains a comparative analysis of all relevant aspects of foundation laws and the laws on foundation taxation (but not selected country reports).
- Handbuch des internationalen Stiftungsrechts¹⁶⁸
Contains some extensive country reports¹⁶⁹ as well as analyses of tax law and European law topics.
- Feasibility Study on a European Foundation Statute¹⁷⁰
Provides an overview of the main types of foundations in EU Member States as well as their economic scale and regulatory environment. The study also examines the barriers to cross-border activities and their cost implications; as well as the role of a European Foundation Statute in eliminating these barriers and its further possible effects.

¹⁶⁵ Last published as a hard copy in May 2007 and updated electronically in 2010 and 2011.

¹⁶⁶ Hopt/Reuter, 2001.

¹⁶⁷ Hopt/Walz/von Hippel/Then, 2006.

¹⁶⁸ Richter/Wachter, 2007.

¹⁶⁹ Austria, Belgium, Denmark, Germany, England, France, Greece, Italy, Luxembourg, the Netherlands, Portugal, Sweden, and Spain.

¹⁷⁰ Centre for Social Investment of the Heidelberg University and the Max Planck Institute for Comparative and International Private Law, 2009

- Study on Recent Public and Self-Regulatory Initiatives Enhancing Transparency and Accountability of Non-profit Organizations (NPOs) in the European Union¹⁷¹

Provides analyses of more than 140 regulatory initiatives concerning the transparency and accountability of NPOs over the last five years in the 27 EU Member States. The Study was commissioned by the European Commission with a view to enhance the implementation of EU policies regarding the fight against terrorism and specifically, implementation of the Communication regarding NPOs.¹⁷²

8.3.2 REGULATORY MAPPING

The EFC Legal Committee, DAFNE and ECNL compiled a set of key issues to be covered by the regulatory mapping of the study in the form of a questionnaire together with some agreed definitions. The EFC Secretariat conducted the mapping and collected the information during autumn/winter 2010 and spring 2011.

8.3.3 FIELD STUDY ON SELF-REGULATION

The DAFNE network provided the EFC with English translations of their relevant self-regulatory measures, or sections thereof. The network also answered a questionnaire (see Annex I) developed jointly by the EFC, DAFNE and ECNL to identify key elements of existing self-regulatory mechanisms with regard to transparency and accountability. This information gathering was followed up with (telephone) interviews on questions of implementation etc., where appropriate.

8.3.4 ANALYSIS

The EFC Secretariat compiled comparative charts, as well as short summaries on the regulatory and soft law approaches in the various countries based on the findings of the mapping. ECNL and Thomas von Hippel worked in close cooperation with the EFC Legal Committee and the DAFNE network to analyse the data and comparisons, and drafted the conclusions with a view to identifying commonalities and trends across countries as well as areas for possible future action, taking into account recent initiatives/recommendations on NPOs' transparency and accountability developed by the European Commission.

¹⁷¹ European Center for Not-for-Profit Law (ECNL), 2009.

¹⁷² Commission Communication to the Council, the European Parliament and the European Economic and Social Committee: The Prevention of and Fight against Terrorist Financing through enhanced national level coordination and greater transparency of the non-profit sector, 29/11/2005. COM(2005) 620 final.

ANNEX I

QUESTIONNAIRE FOR FIELD STUDY ON SELF-REGULATORY TOOLS

1. Title of code of conduct for public-benefit foundations and initiating organisation.
2. If a certification system is used, what method of certification is used (e.g. self-, peer, or third party certification)?
3. Are details of participating organisations logged in a database or information service?
4. What is the scope of the self-regulation mechanism? Is it internal only, a foundations' initiative (e.g. Donors Forum), or another kind of initiative (e.g. European Foundation for Quality Management)
5. Does the self-regulation mechanism have any international (EU or cross-border) scope?
6. Content of the self-regulation mechanism - Are there specific rules concerning:
 - Board of directors (responsibilities, nomination, remuneration etc.)
 - Human resources policies
 - Conflict of interest policies
7. Reporting requirements: What kind of reporting is suggested/required? Does the self-regulation mechanism require:
 - The maintaining of reports/accounts and observance of transparency with respect to income, expenditure and assets?
 - The publication of annual accounts/reports (even if this is not required by law)?
8. Does the self-regulation mechanism contain requirements regarding the use of funds? If yes, which ones?
9. Are there specific rules regarding:
 - Implementation of principles of transparency and accountability towards grantees/beneficiaries?
 - Commitments made towards grantees/beneficiaries?
 - Involvement of grantees/beneficiaries in programme design and evaluation?
 - Involvement of grantees/beneficiaries in foundation governance?
10. Are there any specific rules related to the following fundraising matters?
 - Solicitation
 - Privacy issues
 - "Know you donor" requirements
 - Fundraising communication
11. Does the self-regulation document prescribe any compliance mechanisms? If yes, what are these?
12. Do individual foundations announce anywhere that they adhere to soft-law approaches (website, annual report etc.)? How is the self-regulation mechanism promoted among a wider audience (public, media, donors, grantees etc.)?
13. How do internal stakeholders perceive the issue of increased demand for transparency and accountability?
14. How do external stakeholders (media/donors/decision-makers/grantees) view the self-regulation initiatives? How has this been measured?
15. Have any negative effects of an open policy been reported? If yes, which ones?
16. Have soft-law approaches actually amended foundations' practices for the better?
17. Has misuse of grants by beneficiaries for criminal purposes ever been an issue in your country?

ANNEX II

SELF-REGULATORY MECHANISMS INCLUDED IN THE FIELD STUDY

INFORMATION SUPPLIED BY	TITLE OF INITIATIVE/ INITIATING ORGANISATION/ DATE ADOPTED
Network of Belgian Foundations, Belgium	Déclaration de Base - Réseau de Fondations Belges (RFB)" / Basisverklaring Belgisch Netwerk van Stichtingen (2003)
Bulgarian Donors Forum, Bulgaria	Code of Ethics (2004)
Czech Donors Forum, Czech Republic	Code of Ethics (2004)
Realdania, Denmark	Danish Principles of Good Practice for Charitable Foundations (2008); A group of Danish Foundations
Open Estonia Foundation, Estonia	Code of Ethics (2002); Roundtable of Estonian Non-Profit Organisations,
Council of Finnish Foundations, Finland	Good Foundation Practice (GFP) (2006)
French Centre for Funds and Foundations, France	Comité de la Charte du don en confiance (1989);
French Centre for Funds and Foundations, France	IDEAS Guide of Good Practices (2008); IDEAS
Association of German Foundations, Germany	Basics of Good Foundation Practice (2006)
Philanthropy Ireland, Ireland	Irish Charities Tax Reform Group, Guiding Principles for Fundraising (2008)
Philanthropy Ireland, Ireland	A Guide to Effective Giving (2010)
Association of Italian Foundations and Savings Banks (ACRI), Italy	Guidelines for a "Code of Ethics" (2008)
Banque de Luxembourg, Luxembourg	Code de bonne conduite des organismes faisant appel à la générosité du public (Code de bonne conduite) (2007); A group of five major Luxembourg foundations
Association of Foundations in the Netherlands (FIN)	Code of Conduct (2004; updated 2010)
Polish Donors Forum, Poland	Standards of the Polish Donors Forum (2004)
Portuguese Foundation Centre, Portugal	Principles of Good Practice (2008)
Romanian Donors Forum, Romania	Code of Ethics
Slovak Donors Forum, Slovakia	Code of Ethics (2000) and Standards of Foundation Practice
Spanish Association of Foundations, Spain	Principles of the Spanish Association of Foundations (2008), and Model Statutes and guidance on developing codes of good practice (2011)
Spanish Association of Foundations, Spain	Ethical Code for Foundations, Andalusian Association of Foundations
Spanish Association of Foundations, Spain	Ethical Code and Good Government of Foundations, Coordinating Committee of Catalanian Foundations
Spanish Association of Foundations, Spain	Principles of Transparency and Best Practice, Fundació Lealtad
Spanish Association of Foundations, Spain	Code of Conduct Coordinating Committee of Development Cooperation NGOs
Association of Charitable Foundations, United Kingdom	Guidelines: "Tackling external grant fraud: a guide to help charitable trusts and foundations deter and detect fraud" (2007)
The Russia Donors Forum, Russia	Code of Ethics Russian Donors Forum (2001)
SwissFoundations, Switzerland	Swiss Foundation Code (2009; first edition was 2005)
Third Sector Foundation of Turkey (TÜSEV), Turkey	TUSEV's members database
European Foundation Centre (EFC)	Principles of Good Practice (2006)
European Foundation Centre (EFC) / Council on Foundations (CoF)	Principles of Accountability for International Philanthropy (2007)



78, avenue de la Toison d'Or | 1060 Brussels, Belgium
t +32.2.512.8938 | f +32.2.512.3265 | efc@efc.be | www.efc.be