

## OECD's Public Consultation Document "Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard"

### Spanish Association of Foundations: Response to the OECD consultation on the Common Reporting Standard

April 29<sup>th</sup> 2022

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#### 1. Foundation sector in Spain.

Spanish legal framework only recognises foundations for purposes of general interest (public benefit foundations) in accordance with the recognition of the right of foundation for the general interest, according to article 34 of the Constitution. Civil Code does not recognized particular interest foundations.

Foundations in Spain are subject to a supervision system exercised by the Public Administration at the national level or at the regional level (Autonomous Regions), without prejudice to the tax control to which they are subject.

The foundation sector in Spain represents about 0.8% of GDP:

- It's formed by 9,218 foundations.
- Employs around 267,000 people.
- Generates an expense of more than 8,500 million euros.
- Benefits 43.71 million people.
- Carries out activities in various fields of general interest: social, educational, environmental, research or cultural, among others.

More information: <https://conocerelsector.fundaciones.org/>

Given the possibility that foundations and other non-profit entities may be considered financial institutions for the purposes of applying the CSRs, Spanish Association of Foundations (AEF) would like to insist in some considerations and proposals made by other representative entities of the NPO sector at European and international level.

#### 2. Comments and proposals.

- a. We agree that the application of the CRS to the public-benefit sector could lead to "highly undesirable outcomes" for the following reasons:

## **More costs and administration if considered as reportable Financial Institutions (FI):**

If these public-benefit foundations were to qualify as reporting FIs, they would be put under additional reporting duties. They would have to gather information on “reportable account holders”, which would in the case of public-benefit foundations include detailed reporting on donor(s) and members of the board as well as grant recipients. Such reporting could lead to very heavy administrative and costly efforts since foundations that benefit the general public sometimes have thousands of grant recipients. They would have to extend their already legally required due diligence on beneficiaries significantly so as to identify all grant payments that have been made to reportable jurisdictions and collect detailed information on those grants and their recipients. Public-benefit organisations would need to follow the common design of the rules and the use of a specific internationally accepted schema for reporting FIs. Even a large foundation such as the Wellcome Trust, which had previously invested many millions in a new grant management system, had to spend a great deal of senior staff time ensuring that the system generated the information required for CRS reporting, and significant time was spent extracting that information from the system in a form that could be used to complete the CRS schema.

As far as we are aware, there is no software product on the market that meets this need. Moreover, foundations would have to design their own due diligence forms for grant applicants to complete (the models generally in use are designed for genuine FIs, not for NPOs), train their staff to deal with queries from applicants, and delay making grant payments until the beneficiary had provided satisfactory responses to the due diligence questions.

## **Additional reporting burdens would significantly reduce philanthropic funding sources:**

Many public-benefit foundations in Europe are endowed, and they finance their public-benefit activities with the income generated from the asset allocation/investment of their endowments. Even if not all endowments are very large, in many cases assets are managed professionally. The additional reporting requirements created by the CRS would imply identifying equity and debt interest holders, in particular of founders, donors, and members of the board, but also beneficiaries. Foundations potentially will have to identify and report on hundreds of beneficiaries (be they individuals and/or legal entities). This additional reporting would represent a significant cost and would reduce the amount that they would otherwise spend on public-benefit activities.

For example, estimating that additional reporting efforts would imply a cost to larger foundations of around €4,000 annually – and this for a country with 3,000 relevant foundations – would entail a total €12,000,000 loss per year for that country’s foundation sector. That is €12,000,000 that would have to be spent to comply with the CRS rather than on public-benefit purposes for which the assets were initially intended. Considering that there are an estimated 147,000 foundations in Europe, these extra costs would be significant.

### **b. We consider that national laws and regulation lower risk of abuse for the following reasons:**

**Lowered risk for NPO abuse in FATF contexts as well as in comparison to for-profit actors:**

We consider that the potential risk of Investment Entities claiming to be NPOs is overstated without any clear supporting evidence being provided. Quite to the contrary, we consider that national regulation and supervision, including registration and reporting duties under national laws, reduce the risk of abuse as also evidenced by national and regional risk assessments. In this context it needs to be noted that the Financial Action Task Force (FATF) has revised its assessment of NPO risks downwards since the CRS text was first published in 2014. The FATF approach is relevant to the CRS because we suspect that anyone engaged in AML-CTF activities is not going to be declaring the income they are using to fund those activities.

As the source of the potential risk of tax evasion suggested by those governments referred to in the questions on pages 61-62 is the NPO itself, that risk should be addressed by the government in the NPO's home country through the use of a properly funded registration and supervision system, including the use of tax audits where appropriate, which we consider to be the case for public-benefit foundations and NPOs (see more below). The NPO sector as a whole does certainly not pose a greater risk than the private sector entities excluded from RFI status when, for example, a typical private company does not have to register with a supervisory body or show that it provides public benefit. Why would tax evaders even try to use an NPO which faces these restrictions when it is so much easier to set up a private company that they can control?

#### **Regulation lowers risks of abuse:**

Public-benefit foundations are under regulation and supervision, including registration and reporting duties under national laws as follows:

- **Regulation.**

Public benefit foundations constitute legally autonomous assets which are devoted to a public-benefit purpose. According to national laws, donors/founders can neither revoke their contributions to a public-benefit foundation, nor induce a return flow of funding to themselves. The assets have to belong exclusively and irrevocably to the foundation. Neither the founder, nor the foundation boards or the beneficiaries can claim it. In the event of the dissolution of a public-benefit foundation, the assets must be transferred to another tax-exempt body with the same or a similar goal. Public-benefit foundations hence follow a non-distribution constraint. Furthermore, foundations are governed by an independent board, which must implement the foundation's mission in a fiduciary capacity – for which board members are fully liable. The tax-privileged status of a foundation depends on specific requirements outlined by national laws including the pursuance of a public-benefit purpose and benefitting the general public. (For more information please read OECD and Geneva Centre for Philanthropy. Taxation and Philanthropy, 2020 <https://www.oecd.org/ctp/taxation-and-philanthropy-df434a77-en.htm> and Philea comparative highlights available here: <https://philea.eu/wp-content/uploads/2021/12/Comparative-Highlights-Of-Foundation-Laws.pdf>).

- **Registration and supervision.**

Public-benefit foundations are registered according to national laws either with the company register/court or specific foundation register. They are also monitored by public supervisory bodies and/or fiscal authorities. As demonstrated by Philea's [country reports of the legal environment for public-benefit organisations across Europe](#), European

jurisdictions foresee supervision by either a public administrative body, a court and/or tax authorities.

- **Reporting.**

Public-benefit foundations are **required to report** on their finances on at least an annual basis to one or more external authorities, be this the tax authority; a state or independent supervisory authority; or a combination of both.

Thanks to national registration and reporting duties, and rules putting public-benefit foundations under monitoring by a public authority, public-benefit foundations present a very low risk of being used to evade taxes or being abused for money laundering or terrorism financing. Additional reporting requirements hence do not seem risk-based or proportionate and are simply not necessary.

**c. We consider that the CRS must align with privacy rights and FATCA.**

**Additional reporting burdens need to take privacy rights into account.**

Apart from the concern about disproportionate, rather than risk-based, reporting requirements, there are also concerns that the reporting requirements could conflict with the human rights and safety of individual grant recipients, if for example the disclosure of a human rights defender's identity would put his/her safety at risk.

**FATCA contains an exemption for charities**

The US reporting standard FATCA, from which the CRS is strongly inspired, contains an exemption for charities, and it is simply not understandable why the CRS would not also contain an exemption for NPOs/public-benefit organisations/philanthropic organisations. Under FATCA, non-profit entities are deemed compliant financial institutions and therefore not subject to reporting obligations. There have not, as far as we are aware, been any indications that this has been misused for purposes circumventing FATCA reporting obligations.

**d. Conclusion**

**Public-benefit foundations should be exempt from CRS.**

The inclusion of public-utility foundations in the OECD Common Reporting Standard cannot be justified because their legal structure and existing transparency and accountability regulation limits the use of foundations for tax evasion purposes to the minimum. Public-benefit foundations should be exempt from CRS for the following reasons:

- Foundations have legal personality and are made up of independent assets assigned to a public-benefit purpose.
- The goods belong exclusively and irrevocably to the foundation. Neither the founder, nor the foundation boards or the beneficiaries can claim them.
- The founder(s) of public-benefit foundations cannot revoke the foundation, nor obtain reimbursement of funds in any other way.
- In the event of the dissolution of a public-benefit foundation, a re-evaluation of the assets for the benefit of the founder or his legal successor is generally excluded. In this case, they must be transferred to another tax-exempt body with the same or a similar goal.

- Public-benefit foundations are subject to **state supervision** (by the Supervisory Authority for Foundations and in general by the Tax Administration) and must present an annual audited report including an activity report and annual accounts.
- **Foundation boards** are fully liable for their actions.

Including public-benefit foundations under the CRS would have a critically negative effect on the sector, putting additional reporting duties on entities which are already closely monitored. It would consume significant resources for reporting duties on beneficiaries that even imply human rights concerns. If we want to ensure that foundations continue to support the public, we need to provide for an enabling space for the sector and avoid an unnecessary increase in bureaucracy and red tape, which will discourage future funders and foundations. Covering foundations/NPOs under the CRS would lead to heavy administrative burdens that would limit the resources that public-benefit foundations have at their disposal for pursuing activities which are beneficial for all of society.

Therefore, [Philea](#) has since 2019 made an explicit call on the OECD to provide for a carve-out scenario for public-benefit foundations.

The issue could be addressed by including tax-exempt public-benefit foundations that are registered and under supervision as non-reporting financial institutions according to section VIII B.

The issue could be addressed by extending the carve-out foreseen in the definition of Investment Entities with respect to active NFEs to include those entities that are Active NFEs by virtue of being a non-profit entity, as described in subparagraph section VIII D(9)h. The carve-out could be limited to those non-profit entities that are subject to review by a public authority and that have complied with the requirement to register with the relevant authority in the country of residence. This would have the additional benefit of aligning the treatment of non-profit entities under the CRS and FATCA.

### 3. Spanish Association of Foundations.

The Spanish Association of Foundations (AEF) is a private and independent association, declared of public utility and national in scope. It brings together more than 860 Spanish foundations of the most diverse sizes, purposes and fields of action, which, due to the volume of income, expenses, assets and employees, represent the majority of the sector. It is the second largest in Europe in number of associates. Its mission is to work for the benefit of the foundational sector, in favor of its development and strengthening, using the principles of independence, professionalism, transparency and sustainability.

[www.fundaciones.org](http://www.fundaciones.org)

As a national association of foundations, AEF is a member of [Philea](#).