Response to Ministry of Justice consultation on European Commission proposal on succession and wills

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For more information contact:
Gareth Siddorn
Policy and Public Affairs Officer
03000 123 221
gsiddorn@cafonline.org
BACKGROUND AND INTRODUCTION

- The Charities Aid Foundation (CAF) is a registered charity that aims to help charities and social enterprises make the most of their money. CAF provides financial, investment and fundraising services and works directly with tens of thousands of charitable organisations across the UK and internationally.

- CAF has a strong history of campaigning for changes in policy and legislation in order to improve the giving environment and to secure supportive legal, fiscal and regulatory conditions for donors, charities and social enterprises. Our knowledge and understanding - gained through direct experience and research - makes us a trusted voice on giving and the effective use of charitable funds.

- CAF offers the CAF Legacy Account, which allows donors to name CAF as a charitable beneficiary and provide a Letter of Wishes setting out which charities they would like to support. CAF then carries out the request on the donors’ behalf with the money we receive from their executor. The CAF Legacy Account requires donors to name only one charity in their will (CAF) and also allows the donor to make changes to their Letter of Wishes without the need to update their will. This can significantly simplify the administration process and can reduce both time and costs.

- CAF expects to be in receipt of approximately £3 million of legacy funds in 2009. On average, CAF is processing some eighty estates at any one time.

- CAF welcomes the opportunity to respond on this issue but is disappointed that the consultation is in breach of the ‘Consultation and Policy Appraisal Code’ of the ‘The Compact on Relations between Government and the Voluntary and Community Sector in England’. This is outlined on page 53 of the consultation document, which states that: ‘Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible’.

QUESTION 1

*Is it in the national interest for the Government, in accordance with Article 4 of the UK’s Protocol on Title IV measures, to seek to opt in to the Regulation? If not, please explain why?*

CAF does not believe that it is in the national interest for the Government to seek to opt in to the Regulation and has two primary areas of concern in this respect: mandatory/forced heirship rules and ‘clawback’.

- **Mandatory/forced heirship**, whereby a proportion of an estate is deemed disposable and it is stipulated to whom the remainder should be allocated, could have an adverse effect on legacy income for charities in the UK. According to Remember a Charity, legacy income for charities totals £1.3 billion in each year. CAF supports the current UK legal position which places the wishes of the deceased above those of his/her relatives. Put simply, CAF believes that it is the right of the individual to decide whether, and to what extent, they wish to support charitable causes in their will.


Clawback can occur in jurisdictions where mandatory/forced heirship rules exist. The basic principle is that if the disposable portion of an estate (comprising of both testamentary/legacy and lifetime gifts) exceeds the imposed limit then beneficiaries can make a claim to prevent testamentary gifts being made, or indeed ‘clawback’ gifts made during the lifetime of the deceased. In most cases this takes place in reverse chronological order i.e. claims can be made first in relation to testamentary gifts and then in respect to the most recent gifts made prior to death.

This presents a serious threat to UK charities, specifically in relation to income from voluntary donations, legacy income and the potential of so-called ‘lifetime legacies’.

Levels of charitable giving could decrease if donors seek to ensure that they do not exceed the stipulated disposable portion of their estate upon their death. This could result in severe cash-flow problems for charities. Charities could also not be entirely confident that the donations they receive will not be ‘clawed back’ at a later date, bringing into doubt a charity’s title to the assets, creating an (unrealised) contingent liability. This would have a significant effect on the ability of charity trustees to undertake activities in accordance with their charitable purposes, to the detriment of beneficiaries. Similarly, the financial health of an individual charity could be put at serious risk if they were subjected to a clawback claim which represented a significant proportion of their income. An unreasonable administrative burden may also be placed on charities in order to prepare for such an eventuality.

The potential for clawback claims could, in addition to reducing the ability of donors to leave legacy gifts of their choosing, lead to donors voluntarily limiting their legacy giving in order not to exceed the stipulated disposable portion of their estate. The importance of legacy income to UK charities is outlined above and a significant reduction would clearly have an adverse impact on the sector.

CAF, in partnership with HM Treasury, currently co-chairs an informal working group on lifetime legacies. Lifetime legacies allow a donor to make an irrevocable gift to a charity during their lifetime, of shares, property or cash, while retaining the benefit of the income or use of the gift for the term of their life. If the potential for clawback claims existed then this would restrict the potential benefits of such a mechanism. Charities could no longer be entirely confident that they would receive the legacy and, as such, would not be able to utilise lifetime legacies as working capital or as part of their long-term financial planning.

**QUESTION 2**

*Should the proposed Regulation apply throughout the UK if the UK opts in to the Regulation? If not, please explain why*

Whilst CAF is, in principle, in favour in increased uniformity in the regulation of charities across the UK, we are strongly opposed to the proposed Regulation (for the reasons outlined above) and would not wish to see the UK opt in. If the Regulation were to be applied, exempting certain parts of the UK would add complexity, possibly create confusion and certainly impose an even greater administrative burden as charities and donors seek to optimise legacy giving around the country.
QUESTION 3

Do you agree with the Partial Impact Assessment If not, please explain why

CAF broadly agrees with the conclusions of the Partial Impact Assessment. Policy Option 1 (exercise the right to opt-in to the Regulation) accurately identifies that this would have cost implications for the third sector, as a result of increased administrative burden and the threat posed to legacy income. However, CAF does not accept that the Regulation would result in ‘greater certainty and predictability’ for the individual. This may be the case in terms of certainty about which law would apply to their estate upon their death (although this is limited by the lack of a clear definition for ‘habitual residence’) but not in relation to their charitable giving. As outlined above, it is possible that lifetime and/or testamentary gifts could be ‘clawed back’ by the beneficiaries of the donor’s estate regardless of the stated wishes of the deceased. This also flies in the face of the long established British principle of complying, wherever possible, with a legator’s wishes at the time of death - a principle enshrined in the laws of the UK.

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