FATF R.24 REVIEW: WHITE PAPER
GLOBAL NPO COALITION ON FATF COMMENTS

August 2021

We welcome the opportunity to contribute as Global NPO Coalition on FATF to the **FATF White Paper on Recommendation 24 and we also refer to our earlier policy paper**.

I. GENERAL REFLECTIONS:

NPOs including philanthropic actors contribute to the fight against money laundering and terrorism financing

As representatives of the non-profit sector, we **support the important fight by the FATF as well as regional and national policy makers against money laundering and terrorism financing. We consider that based on FATF policy and international Human Rights standards**, measures taken must be risk based, proportionate and must take into account fundamental Human Rights and civic freedoms such as the right of assembly and the right of association and foundation.

The NPO sector **contributes with its own due diligence efforts, awareness-raising exercises and through many of the sectors' activities/programmes** to identifying and mitigating potential risks related to money laundering and terrorism financing.

We are pleased to see that increasing evidence and the outcomes of National and Supranational Risk Assessments (the latter at EU level) show that **risks related to Not-for-Profit Organisations has been lowered** in recent years. NPOs are generally legitimate actors and many of their activities contribute to lowering or preventing criminal behaviour in our societies.

Unintended consequences and cases of overregulation of AML/CFT policy on the NPO and Philanthropy sector

Unfortunately, AML and CFT policy has had **unintended consequences and a chilling effect on the important work of NPOs[1],** including philanthropic actors, in delivering aid and benefit to the public good including movement of philanthropic funds and giving across borders. The NPO sector needs an enabling environment to do its public benefit work, yet we see that some AML and CFT policies have had a chilling effect on legitimate philanthropic and other public benefit/non-profit activity. Governments have, in some cases, also used the AML/CFT policy as an excuse to shrink the operating environment for civil society. The 2019 report of the UN Special Rapporteur on the promotion and protection of human rights

[1] See Global FATF NPO Coalition contributions to this 2021 FATF unintended work stream sections I – IV - https://fatfplatform.org/news/global-npo-coalition-input-to-fatf-unintended-consequences-workstream/

and fundamental freedoms while countering terrorism found that since 2001, 140 governments have adopted counter-terrorism measures that have had the following impact on NPOs:

- National legal provisions that restrict rights key to civil society: freedom of expression and opinion, freedom of association, freedom of assembly, and the right to participation..
- Limiting civil society access to financial services, refusal to open or the arbitrary closure of bank accounts, inordinate delays or termination of transactions, and onerous administrative requirements.
- Accusing civil society of being a "threat to national security" or labelling them as "enemies of the State."

Examples include:

i. Suppression of the NPO sector through lack of the risk-based approach under Recommendation 8.

We have seen numerous cases where national governments have not undertaken any or a proper risk assessment of the NPO sector and have crafted blanket legislation aimed at the entire NPO sector (and not those potentially at risk), which is not in line with Recommendation 8 or other FATF Recommendations. It is striking that numerous countries in Latin America have included NPOs as **reporting entities** even though they have not carried out a sectoral risk assessment and there is no evidence of the misuse of NPOs. A couple of European governments have also designated NPOs as so-called "obliged entities" putting them under reporting requirements, without a sectoral risk assessment justifying such an approach.

ii. Misuse of the FATF Standards and mutual evaluations to justify regulation that violate fundamental human rights provisions.

The FATF Standards and mutual evaluations have been misused by some governments to justify regulation that directly violates wider fundamental human rights provisions.

iii. De-risking of NPOs, MVTS (money or value transfer service) providers or correspondent banking relationships; and financial exclusion.

Banks and other financial service providers impose stricter **due diligence measures** on the NPO sector, making it more difficult for philanthropy and NPOs to operate across borders to respond to societal needs. It is becoming **more difficult to get access to formal banking** services since banks are de-risking/excluding parts of the sector. Some banks/financial service providers are no longer serving the charitable/public benefit sector since they consider it too risky (see list of resources at the end of the paper) and/or due diligence is becoming too costly and the risk is unevenly allocated to those processing the funds. There is also a decline in correspondent banking due to complex due diligence processes, specifically in cross-border contexts when intermediaries are involved. Intermediaries cannot rely on a process of another provider in a different country, leaving them with too much residual risk.

The AML/CFT regulation is clearly negatively impacting cross-border giving. The different risk appetite of individual banks (non-comparability of CDD/KYC processes) and a decline in correspondent banking is impacting NPOs and foundations ability to move funds across border.
A recent piece of research undertaken by Philanthropy Advocacy (DAFNE & EFC initiative) in 2020/2021 revealed that the fight against terrorism and financial crime has led to the introduction of new laws/rules

affecting the philanthropy/foundation sector (e.g., implementation of EU Anti Money Laundering Directive, or reactions to recommendations of the Financial Action Task Force) in Europe.

Data provided by national experts showcased how NPOs including philanthropic organisations in many EU Member States face difficulties in accessing financial services which may at least, to some extent, be caused directly by bank de-risking policies. The most common issues encountered by foundations were:

- opening a bank account (e.g., reported by experts in Belgium, France, Italy, Luxembourg)
- maintaining a bank account (e.g., reported by expert in Bulgaria, Estonia, Italy, Luxembourg)
- transferring funds across the borders (e.g., reported by the expert in Finland)
- funding certain activities (e.g., reported by the experts in France, Italy, Spain)
- funding certain regions (e.g., reported by the experts in France, Luxembourg, Spain)
- funding certain organisations (e.g., reported by the expert in Spain)

The collected data illustrates that the implementation of AML policies has made administration more complicated (e.g., Czech Republic, Bulgarian, Finland, Poland, Portugal, Romania and Spain).

Evidence on financial exclusion was also collected in the report on TF risks mapping in the NPO sector led by Global NPO Coalition´s experts in 17 Latin American countries during 2020.[2] Approximately half of the NPOs surveyed are aware of cases of financial exclusion of NPOs— denial of financial services or excessive and onerous delays in banking procedures—and half of them consider that the situation has worsened in the context of the COVID-19 pandemic. Evidence of the frequent and growing obstacles faced by NPOs in Latin America has been shared by Global NPO Coalition members in numerous fora at the regional and national levels. More information is provided in the links to illustrate that matter.[3]

[2] https://www.icnl.org/post/report/terrorism-financing-risk-in-nonprofit-organizations-in-latin-america. English translation forthcoming.

[3] https://www.gafilat.org/index.php/es/noticias/101-taller-regional-sobre-implementacion-del-enfoque-basado-en-riesgo-y-de-risking.
https://fatfplatform.org/assets/PDFs/COMUNICADO-DE-PRENSA-CONFERENCIA-21-11-19-UNIVERSIDAD-AUSTRAL-ENGLISH-VERSION.pdf

Specific concerns around the BO concept and inappropriate application to the NPO sector

The term **"beneficial owner"** intends to provide more transparency into complex for-profit company law structures with the aim of identifying those that benefit financially from such structures[4]. The concept of a beneficial owner as the one benefiting financially or directing in the case of sometimes complex for profit/private interest set-ups **does not fit the non-profit sector which explicitly does not benefit private interests but the general public.** Clarification is hence needed on if and how this policy should be applied to the non-profit sector.

A few countries (including EU Member states) have also considered the obligation for NPOs and foundations to report on their **grant or scholarship recipients as BOs**, which is clearly not an appropriate interpretation with the intended rationale of the BO approach to fight money laundering and terrorism financing nor is it risk based.

For example, in Latin America, numerous regulations have recently been approved that establish a BO registry. A recent case that was endorsed by international experts was Argentina. The Argentine tax authorities (AFIP) approved Regulation 4697[5] to require the registration of beneficial owners for a wide range of legal vehicles that include companies, partnerships, investment funds, civil associations, and foundations. The new regulation does not stipulate a threshold, that is, any person holding at least one share (or interest in an investment fund) should be considered a beneficial owner. The text of the regulation is unclear and confusing: not only must beneficial owners be registered with enough details on identity (e.g., name, tax identification number, number of shares or ways in which control is exercised), but so too must the directors, and other officers, including those with a power of attorney to represent the entity before the Argentine tax administration. On the other hand, shareholders and beneficial owners must report the number of shares or votes they own, and their value. This new regulation will clearly be a new burden for the vast majority of NPOs.

[4] The recent RUSI paper on Beneficial Ownership: https://rusi.org/publication/occasional-papers/whose-benefit-reframing-beneficial-ownership-disclosure asks some sharp questions about efficacy around the BO concepts but does not specifically refer to its application to the NPO sector

And recent EBA guidelines https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2021/963637/Final%20Report%20on%20Guidelines%20on%20revised%20ML%20TF%20Risk%20Factors.pdf on ML/TF risk factors (which does not relate to NPOs).

[5] https://www.boletinoficial.gob.ar/detalleAviso/primera/227833/20200415 (Spanish only)

Nigeria's Companies and Allied Matters Act (CAMA) revised in August 2020 is the latest legal regime governing beneficial ownership applicable to corporate entities. CAMA provisions require persons who hold significant control (those who exercise at least 5% of the unrestricted voting rights at any general meeting of the public or private company) to disclose particulars of such control. It also mandates the disclosure of beneficial interests in a company, even where such interests are held through nominal holders or in trust. Disclosures of disclosure of multiple directorships are now compulsory and there is a prohibition of membership as a director in more than five public companies. The above provisions will help to unmask the true human and legal persons behind corporate entities, help the authorities to combat asset shielding and uncover the quantum of interest/power/control they wield in those entities. However, they apply only to private companies limited by shares and to public companies. Non-profits or bodies registered as Incorporated Trustees, do not have shareholders, nor do their registered trustees have voting rights and weighted shares. Therefore, numerous legislative proposals (esp. NGO Bills) designed to regulate and interfere with foreign funding for non-profits under the guise of satisfying beneficial ownership requirements, lean towards overregulation of the non-profit sector.

i. Security and privacy rights concerns around the level of detail and access to (public) BO information

Where BO information is made accessible to the general public, privacy rights and in some cases even security concerns arise from those individuals being listed as BO. This applies in particular if the level of detail of BO information includes name and residing address) and is accessible to the general public even if only granted upon request. Moreover, similar concerns were raised by the **Council of Europe's Venice Commission**, which considers that the reporting obligations imposed on NPOs concerning the origin of their financing is aimed at pursuing the legitimate aim of ensuring national security and prevention of disorder and crime under Article 11(2) ECHR and Article 22(2) ICCPR, since their aim is to provide the state with the necessary information to fight against crime, including terrorism financing and money laundering. *On the contrary, the obligation to make public* the information about the source of the funding (public disclosure obligation) does not appear to be capable of pursuing the same objective. While this was written in end 2019 for the disclosure of the financial data and information (including donor identity), similar (if not the same) arguments will apply to privacy concerns for beneficial ownership disclosure.

On the European BO registers related issues, you may interest in this article: https://www.loyensloeff.com/en/en/news/news-articles/court-doubts-the-legitimacy-of-the-dutch-ubo-register-n22168/

The Privacy First NPO is considering filing a case against the Dutch UBO register to a higher court after the court in the Hague rejected their claim that the UBO violates the right to privacy, but the Court did express doubt about the legitimacy about the (partially) public nature of the register. In case of doubt about the legitimacy of the UBO-register, the court could ask preliminary questions to the ECJ. In this context, the court indicated that it has its doubts about the legitimacy of the (partly) public accessibility of the UBO-register, considering that this may go beyond what is necessary to realize the objectives of the Directive.

In Luxembourg cases are pending at the ECJ to contest the UBO register. Lawyers in NL are advising clients including NPOs to wait with the registration after the ruling of the ECJ (to be expected before March 2022).

ii. Specific concerns around the BO concept and its application to the NPO sector

The term **"beneficial owner"** is not correctly understood at national level. Where it refers to those directing NPOs (board members or executive staff), its use has had a chilling effect as it gives the impression that board members of public benefit organisations own or benefit personally from the organisation. The wording **"beneficial owner",** along with the privacy and data concerns, is discouraging qualified potential candidates from joining the Boards of NPOs and public benefit foundations.

iii. Duplication of reporting efforts with regard to BO policy and other reporting requirements

Beneficial Ownership (BO) policies are applied differently to the NPO sector across the globe. Where NPOs are required to report on BO information (information on those directing the organisation) and include such information in BO registers (as is the case in the EU) this often creates duplication of reporting efforts since such information is already at the disposal of supervisory authorities or even respective company registers.
The Dutch investigative journalists platform Follow the Money calculated that the Dutch UBO registration costs are likely to be around € 220 million for all legal entities for something that is not necessary as all the data that is required to be accessed for ML and TF investigations by authorities is already in the CoC register. Setting up the registry is a € 9 million bill for the government, maintenance probably around 500 K a year.

The report on TF risks mapping in the NPO sector led by Global NPO Coalition´s experts in 17 Latin American countries during 2020 highlighted that "Surveyed NPOs report that they are subject to frequent and redundant oversight requirements from multiple government bodies, and that they devote significant resources to complying with these regulations. The vast majority of NPOs are not aware of efforts to simplify or harmonize measures on the part of the various public entities that regulate the sector. Regulatory systems that are neither targeted nor proportionate disrupt and discourage the work of NPOs. Moreover, by forcing allocation of disproportionate public resources to the regulation of the entire sector, including NPOs that pose little or no risk of being misused for TF, these systems lack the effectiveness required by the FATF…[6]"

II. SPECIFIC REFLECTIONS ON A POTENTIAL REVIEW OF R.24 in the light of the FATF White Paper on Recommendation 24:

[6] https://www.icnl.org/post/report/terrorism-financing-risk-in-nonprofit-organizations-in-latin-america. English translation forthcoming.

QUESTION 1 (part 1): COVERAGE OF ALL LEGAL ENTITES NPOS UNDER R.24 POLICY IS NOT IN LINE WITH RISK BASED APPROACH

Based on its own standards, FATF policy has to be risk based, fit for purpose and proportionate and in line with fundamental rights.

FATF has been focusing on **specific risks related to parts of the NPO sector** (subset of NPOs covered by FATF recommendations) around the **potential abuse for terrorism financing** but it has not clearly assessed to what extent the NPO sector would be covered by the FATF policy on beneficial ownership/money laundering. FATF in its R.24 guidance in 2014, and the 2019 Best Practices paper, mentions that legal entities can include NPOs, but it is clearly not in line with the current risk-based approach to include **all** NPOs in the BO policy. We consider that it is necessary, in the context of the revision of R.24, to carefully assess the different nature and risks related to different legal entities before agreeing on the policy revision.

If FATF considers the **inclusion all NPOs** (those that have a legal personality/are legal entities) in its AML R.24 policy and rules around beneficial ownership, and suggests a further tightening of the approach, a careful assessment has to be undertaken to review whether the revised approach with regards to NPOs regarding Money Laundering/Beneficial Ownership is **actually risk based, proportionate and whether the measures proposed are fit for purpose.**

1. **Have the AML/CFT risks of the entire NPO sector been assessed?**

While **risk assessments** at national level have **included NPOs (and only the subset of NPOs covered by R.8)** to assess **risks related to terrorism financing abuse,** NPOs have so far not been systematically included in the assessment of money laundering risk.

We argue that there is not sufficient evidence and analysis of money laundering and terrorism financing risk to the entire NPO sector to justify its inclusion in R.24.

In the European Union context, the latest analysis at national and EU level show that the AML and CFT risk related to public benefit organisations has been reduced. The last EC Supranational Risk Assessment (SNRA) report, lowered the overall risk related to NPOs/philanthropy. This SNRA assessment also corresponds to a series of country level evaluations done by FATF (e.g., UK, Belgium, Norway, Spain, Latvia, Slovenia and Sweden). Including all NPOs into the beneficial ownership/money laundering policy appears to be not in line with a risk-based approach that FATF has established in R.1.

Moreover, there is no assessment related to lack of transparency regarding the NPO sector as a whole that identifies ML/CFT vulnerabilities or risks. If there is concern that a potential lack of transparency and accountability around NPOs could imply a risk of abuse for money laundering that would justify coverage under R.24, then this **needs to be fully assessed and analysed.**

2. **What transparency and accountability rules are already in place at national level to mitigate potential risks/provide information on NPOs?**

If there is concern that lack of transparency or accountability with regard to the NPO sector creates ML/TF risks, existing transparency and accountability rules including self-regulatory approaches (which NPOs need to follow) need to be further analysed.

NPOs are generally **regulated under national laws, and it is often a combination of legal and fiscal rules** that govern them. NPOs can take a variety of legal forms such as associations, foundations, limited liability companies or other forms. They are, according to our analysis, generally required to register in the process of being created and have to report annually to fiscal and legal supervisory authorities, which are responsible for checking that the NPO fulfils its legal obligation and that it pursues its public benefit mission. National laws generally ask NPOs to include information on board members/decision making bodies in company/association/foundation registers and/or to store that information with relevant legal or fiscal supervisory bodies.

National level assessments in the context of R.8 often revealed that those NPOs which are considered more exposed to risks (NPOs engaged in service delivery, larger organisations with international outreach, humanitarian organisations, etc.) are under stricter obligations and are more frequently checked by supervising authorities, tax authorities, banks (obliged entities), public and private donors and auditors.

These NPOs have also, in many cases, **adopted mitigating measures, including self-regulation,** and have internal systems of checks in place, apart from sector-initiated codes of conduct developed by the fundraising as well as the wider philanthropic sectors, which often includes guidance on governance, reporting, monitoring of the use of funds, as well as knowing your donors and knowing your beneficiaries. Public donors also have robust reporting requirements in place.

Overall, it is in the **self-interest of NPOs to act professionally,** to be transparent and accountable and to ensure that no abuse takes place. We would also like to recall that NPOs, including philanthropic organisations, are not, as a general rule, the legal entities engaging in or being used for money laundering or terrorism financing.

CONCLUSION: Only if the risk assessment reveals that there is a ML/CFT risk related to a potential lack of BO information with regard to a subset of NPOs, is an application of R.24 to NPOs to be considered. Otherwise, FATF might end up in five years time with yet another urgent work stream on unintended consequences of BO standards on NPO sector.

If the risk assessments conclude that an application of BO policy on NPOs is not justified, Recommendation 24 should be amended as follows to clarify that it only covers legal persons set up for private interests:

Recommendation 24 - Transparency and beneficial ownership of private interest legal persons

Countries should take measures to prevent the misuse of private interest legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of private interest legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money

laundering or terrorist financing. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

Alternatively a sentence can be added at the end of Recommendation: *The Recommendation shall not apply to legal entities which are set up exclusively for public benefit purposes that benefit the general public and the public interest*.

If risks related to some NPOs require to apply the BO concept to some NPOs - a meaningful application need to be developed

If the risk assessment concludes that ML/TF risks justify that a subset of NPOs are included in the BO policy, there is concern as to how the policy on BO is applied to the NPO sector, a sector that explicitly benefits the general public and not private interests. The FATF 2014 guidance and 2019 Best Practice paper does not provide much clarity in terms of who the BO of NPOs would be. More clarification would be needed.

As mentioned above, the term **"beneficial owner"** intends to provide more transparency for those that benefit financially from for-profit structures. Clarification is hence needed if and how this policy should be applied to the non-profit sector. Potentially the BO would in the cases of public benefit organisations be the one **"directing" the organisation (board or CEO level in most cases).**

A few countries (including EU Member States) have also introduced the obligation for NPOs and foundations to report on their **grant or scholarship recipients as BOs**, which is clearly not an appropriate interpretation of the intended BO rationale.

Hence, clarification is needed for the standard on what type of information should be collected in the case of NPOs considered at risk: **those directing and in control of public benefit organisations (Chief Executive level and/or board level)** and not, for example, the beneficiaries such as the grant or scholarship recipients as mentioned above.

Where Beneficial Ownership (BO) policies are currently applied to the NPO sector, they do this differently across the globe and the question that comes up is whether there is room for some general policy guidance keeping in mind the risk-based approach that takes into account the specificities of the local risk and NPO reality.

Recommendation 24 - Transparency and beneficial ownership of legal persons

Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective

measures to ensure that they are not misused for money laundering or terrorist financing. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22. In the case of legal entities, which are set up exclusively for public benefit purposes that benefit the general public, those directing the organization e.g. the representative of that legal entity should be considered substitute Beneficial Owners.

QUESTION 1 (part 2) and 2: IS THE COVERAGE OF FOREIGN-CREATED LEGAL ENTITES NPOS UNDER R.24 POLICY IN LINE WITH RISK BASED APPROACH AND IF SO WHICH ONES/WHAT LINK WITH COUNTRY IS SUFFICIANT?

If Beneficial ownership information of legal entities incorporated outside the country shall be collected inside the country where it engages in activities, such entities must undertake more substantial business activities for example to enter into a business relationship with an obliged entity. Where the legal entity enters into multiple business relationships in different countries, a certificate of proof of beneficial ownership information of the "home country" shall be considered as sufficient proof of BO information.

QUESTIONS 3-8 Multipronged approach to collection of BO information

Where NPOs at risk are required to report on who directs/governs them in **company/association/foundation registers**, this information is generally provided by the NPO itself, but third parties can hold the NPO liable in case the information is not correct. Hence there is an incentive for NPOs to provide correct information to the company registers. We do not however have sufficient data to build an argument for the global level.

If **separate BO registers/BO clusters of information** are to be created, the question arises as to who collects and verifies this BO information. It would be a very costly endeavour to ask the state or public authorities to collect and verify this information but that could be an option. An additional external validation system via the FATF MER could also be considered.

Another option is to continue to request NPOs to self-report and to consider putting measures in place in case the information is not correct.

Where NPOs are required to report on BO information (information on those directing the organisation) and include such information in BO registers (as is the case in the EU), this often creates duplication of reporting efforts since such information is in most cases already at the disposal of supervisory authorities or even respective company registers. We hence recommend not to include specific BO registers but to refer to existing legal entity registers.

QUESTIONS 9-11 Adequate, accurate and up-to date information

Where NPOs at risk are required to report on who directs/governs them in **company/association/foundation registers**, this information is generally provided by the NPO itself, but third parties can hold the NPO liable in case the information is not correct. Hence there is an incentive for NPOs to provide correct information to the company registers. We do not however have sufficient data to build an argument for the global level.

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Another option is to continue to request NPOs to self-report and to consider putting measures in place in case the information is not correct.

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Questions 12 and 13 of the consultation: What level of detail of beneficial ownership information and who has access?

Where BO information (in particular names and residence of BO as is the case in the EU) is made accessible to the general public, **privacy rights and in some cases even security concerns** arise for those individuals listed as BO. This applies, in particular, if the level of detail of BO information includes name and residing address) as is the case in the EU, and is accessible to the general public even if only granted upon request.

It appears to be a more proportionate approach to only grant access to the name and residing address information to the **relevant authorities and not the general public.** We are hence in favour of making sensitive BO information accessible only to supervisory authorities. In this context it has to be noted that the EU 5th AML Directive requires EU Member States to set up publicly-accessible BO registers but experts question whether this approach is in line with fundamental rights and call to consider access only to supervisory authorities or "persons with a legitimate interest".

The FATF R.24 policy approach needs to start with the question as to **what purpose the collection (and potential publication) of BO data on NPOs serves.** Why is BO information collected and who needs to have access to ensure that the BO data collection and its use is fit for purpose? If the rationale of collecting BO information is to **identify ML/TF abuse cases, it needs analysing whether identifying the person who controls an NPO helps in such detection.** With collecting information on who governs NPOs (information which is anyway available in many countries) not much is gained. **The case of NPOs differs significantly from for-profit structures and private interest organisations where private individuals receive financial benefits from a legal entity.** In this context it should be stressed that international human rights standards protect the NPO sector – via the freedom of association – so they cannot be treated the same as the profit sector, as proportionality standards differ.

To detect abuse cases within the NPO sector, domestic and foreign law enforcement agencies and/or tax authorities will, in most cases, be easily able to access BO information but will want to then request detailed financial information from the NPOs concerned. The respective fiscal and criminal laws provide for relevant rules to enable such investigations. **Information on who directs the organisation, while relevant, will not be the decisive piece in the puzzle, since this information is readily available to relevant authorities** and in many cases even to the public at large if that information is included in company registers (which is the case in many countries). In this context, the question of accuracy and liability of BO information comes into play. The company/association/foundation registers generally generate public trust for the limited set of information included. But **is there really need to create another level of BO administration to collect the information that is already available to authorities** (and often the general public) and only potentially some more data on the residence of the BO?

In addition, we argue that **disclosure requirements for the NPO sector have to be proportionate considering international human rights law, in relation to the risks to be addressed within the AML/CFT framework.** Privacy rights concerns with regard to the disclosure of the financial data and sensitive private information (including BO/board member or CEO or donor identity) must be taken into account and weighed in. It is important to try and find nuanced solutions for the NPO sector that is proportionate to the right of privacy, freedom of association, and a risk-based policy approach. **As a reminder, the NPO sector enjoys international human rights protection, unlike the private sector (business at large), and therefore needs a different/tailored approach from regulators and standard setters.**

In this context, certain Council of Europe Venice Commission legal opinions on the issue of proportionality of disclosure requirements for the NPO sector in relation to the AML/CFT framework could be relevant.

https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)007-e

While this was written for the disclosure of the financial data and information (including donor identity), similar (if not the same) arguments will apply to privacy concerns for beneficial owners' private data disclosure.

CDL-AD (2017)01 - Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad of Hungary, § 55.

*"83. The Venice Commission deems it necessary to **distinguish between "reporting obligations" and "public disclosure obligations"** imposed on associations concerning their financial resources. A "reporting obligation" consists in reporting the amount and the origin of the funding to the relevant authorities. In contrast, a "public disclosure obligation" consists in making public, for instance on the website of the association concerned or in the press or the official journal, the source of funding (either domestic or foreign) and potentially, the identity of donors. The goal of a public disclosure obligation is not to inform the authorities but to inform the public. Disclosure duties normally add up to already existing reporting obligations."*

*95. In conclusion, the Venice Commission considers that the **reporting obligations** imposed on associations concerning the origin of their financing can be considered as pursuing the **legitimate aim of ensuring national security and prevention of disorder and crime** under Article 11(2) ECHR and Article 22(2) ICCPR, since their aim is to provide the state with the necessary information to fight against crime, including terrorism financing and money laundering. **To the contrary, the obligation to make public the information about the source of the funding (public disclosure obligation) does not appear to be capable of pursuing the same objective**."*

https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)002-e

*87. Concerning the justification of ensuring openness and transparency of funding, the Commission accepted in respect of Hungary that ensuring transparency is a legitimate means to identify the possible illicit origin of financing but added in respect of Romania that "enhancing transparency would by itself not appear to be a legitimate aim (...); rather, transparency may be a means to achieve one of the (...) aims set out in Article 11(2) ECHR". Thus, **transparency may be an important means for combating fraud, embezzlement, corruption, money-laundering or terrorism financing, but can be abused as a pretext for establishing extensive scrutiny over associations, as recognized by the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association**. Certain disclosure requirements in the interest of transparency can also raise **privacy concerns**. Thus, as stated in the Guidelines on Freedom of Association, "the state shall not require but shall encourage and facilitate associations to be accountable and transparent". Therefore "transparency" should not be understood as a legitimate aim in itself, but rather is to be accepted as a means to achieving a legitimate aim. When a State invokes transparency as a justification, its link with one of the legitimate aims indicated in the second paragraph of Article 11 ECHR must be established.*

93. Under these circumstances, a "reporting obligation" which consists of reporting the amount and the origin of the funding (either foreign or domestic origin) to the authorities or to a regulatory state body to allow state authorities to fight against crime in an efficient manner appears in principle to be relevant/appropriate to the legitimate aim of fight against terrorism financing/money laundering.

*94. Nevertheless, for the Venice Commission, the same conclusion cannot be drawn concerning **a "public disclosure obligation".** Combatting terrorism is a duty incumbent upon the State, not upon the general public. The mere fact of letting the general public know what the sources of financing of a are given association does not seem to add to the effectiveness of the action of the authorities.*

*95. In conclusion, the Venice Commission considers that the reporting obligations imposed on associations concerning the origin of their financing can be considered as pursuing the legitimate aim of ensuring national security and prevention of disorder and crime under Article 11(2) ECHR and Article 22(2) ICCPR, since their aim is to provide the state with the necessary information to fight against crime, including terrorism financing and money laundering. **To the contrary, the obligation to make public the information about the source of the funding (public disclosure obligation) does not appear to be capable of pursuing the same objective.***

CONCLUSION: Taking a proportionate and effective approach

Measures put in place must be suitable and effective to address potential risks and they must be proportionate and enable public benefit work and cross borders giving. Efforts should first be undertaken to provide more guidance to ensure consistent and appropriate implementation of existing

policy. In addition, there may be appropriate measures that still need to be considered such as facilitation of cross-sectoral discussions (with NPOs, financial institutions, regulators and governments), so as to better identify and address potential risks and shortcomings. Lastly, there is no clear evidence that the construction of collecting information of NPOs beneficial owners/those that guide the organisations (which is in most countries already collected in association/foundation registers as a matter of company law) is an effective tool to mitigate potential money laundering or terrorism financing risks. Efforts must be made to ensure that public benefit work and cross-border giving are enabled and not restricted. Plus, the special protected status of the NPO sector in international law requires specific safeguards and different approach. It cannot be the same approach as for the for profit sector, but much more nuanced and emphasis on proportionality is needed, not to breach standards on freedom of association, as indicated by the Venice Commission already.

Taking into account fundamental rights and the role NPOs play

NPOs perform an important role as a watchdog, among others, and measures that would restrict their operational space would restrict their ability to carry out this role. While considering different policy options, we recall that FATF should carefully assess and weigh in the fundamental rights component. It is important in this context to keep in mind international human rights obligations, the rights to the freedom of association, the freedom of peaceful assembly and the freedom of expression, as well as the right to privacy. Adoption of legislative or administrative measures even **if not meant to negatively affect NPOs, can have an undue impact on them and hence have a chilling effect.** Particular attention should also be paid in this context to the protection of privacy, namely when it comes to BO information and potential registers and what type of information is collected and made accessible to the public. It is important to clarify how the BO information is collected and stored and how existing registers or storage of information could be used in this context to avoid unnecessary administrative burden.

In announcing his Call to Action at the UN Human Rights Council in February 2020, the Secretary-General underscored "that even necessary efforts to combat terrorism must not compromise human rights. Otherwise, counter-terror actions will be counterproductive." Any new FATF R.24 policy proposals should hence always take into consideration **what rights and fundamental freedoms are at stake and balance them against the public interest, while conducting a thorough impact assessment.**

We as a sector are at your disposal to assess and discuss current and future policy approaches in this regard and provide additional resources, evidence, and background for effective policymaking.