



GLOBAL NPO COALITION ON FATF INPUT FOR MITIGATING OPTIONS ON UNINTENDED CONSEQUENCES WORKSTREAM

Suppression of the NPO Sector and Conflicts with Fundamental Human Rights

Based on the cases presented in the Global NPO Coalition on FATF's submission on Unintended Consequences, it is clear there is a gap between FATF's risk-based approach, as applied to nonprofit organizations (NPOs), and the implementation of FATF standards. This is a function of two factors:

- 1) The current methodology for FATF country evaluations lacks criteria that would signal over-regulation and inappropriate implementation of the risk-based approach, both in the technical and effectiveness components.
- 2) In the five years since revision of Recommendation 8, it has become clear that implementation of the new standard needs to be significantly improved.

To address these gaps, we recommend that FATF consider the following mitigating options to address the suppression of the nonprofit sector:

1. STANDARDS UPDATE OPTIONS

We recommend that the Interpretive Note (IN) of Recommendation 8 be updated based on the suggestions in the attached Annex. Because it is part of the standard, the IN is a key tool and resource for states implementing R8. Given the problematic track record on implementation since R8 was revised in 2016, there is a need to fill gaps and provide more nuanced and detailed guidance.

2. METHODOLOGY / PROCESS OPTIONS

- i. Establish mechanisms in the evaluation process that signal instances of over-regulation and misapplication of the risk-based approach in order to prevent and mitigate disproportionate and inadequate application of the standards.
- ii. Establish criteria to address over-regulation. The current methodology for FATF country evaluations lacks criteria that would address over-regulation and inappropriate implementation of the risk-based approach, both in the technical and effectiveness components. For example, fragmentation of AML/CFT reporting obligations across multiple regulatory entities creates duplication and unnecessary costs for both NPOs and government.
- iii. Include in the scoping phase for all evaluations, as part of the MER methodology, an analysis of the unintended consequences of the FATF standards. This should include potential misapplication of R8 related concerns, including how countries have monitored and mitigated specific unintended consequences (such as de-risking, potential threats to financial inclusion, NPO suppression, and conflicts with human rights).
- iv. Ensure evaluators safeguard and guarantee an effective, targeted and proportionate approach. From the point of view of the evaluation, untargeted, disproportionate measures that restrict the operating space of the NPO sector should be considered non-compliant and inconsistent with the country's obligations under International Humanitarian



Law/International Human Rights Law/International Refugee Law (IHL/IHRL/IRL) and UN Security Council Resolution (UNSCR) 2462.

- v. Ensure that the evaluators challenge the effectiveness and the use of resources of the country when they detect untargeted, disproportionate or blanket measures imposed on the NPO sector.
- vi. Provide further clarity on the sources of information that one would expect to be consulted in a risk assessment, including qualitative and quantitative data from government officials, NPOs and other experts, and a literature review. Provide advice on how to balance these different forms of evidence.
- vii. Ensure that evaluation teams include NPO experts. Where they do not, evaluators often do not have the necessary background needed to assess the sector effectively. Therefore, evaluators should be provided with training on NPOs and an appropriate implementation of R8, as well as the opportunity to consult with experts during the evaluation process.
- viii. Ensure that there is a clear, standardized means of input for NPOs into the evaluation process. Further, the process should reach out to a broad, representative group of NPOs to allow for diverse opinions that can help inform the evaluators, especially at the FSRB level. Evaluators should ensure that independent nonprofit input is safe and possible, and avoid reliance on government organized NGOs (GONGOs).
- ix. Ensure that the methodology supports and emphasises the review of the NPO sector's self-regulatory practices and other sectoral soft law measures in addition to laws and regulations when evaluating risk mitigating measures.
- x. Amend the FATF's follow-up procedures to allow action in cases of misapplication of the FATF standards – making it a reason for entry into enhanced follow-up processes in cases of abuse – and to receive information and input from NPOs in the process.
- xi. Provide clear advice on what to do if an assessment under 8.1a finds no or low risk of TF - specifically, that no assessment 8.1b or 8.1c may be necessary, with the only further action being to schedule a reassessment in line with 8.1d.

3. ENGAGEMENT OPTIONS

- i. Provide guidance on how NPOs can submit input to evaluators prior to the visit; particularly, prior to completion of the scoping paper, as it defines the parameters of the evaluation. There could be FATF templates for inputs into the MER made available to NPOs for a streamlined input, especially at FSRB level, accompanied with active calls for input.
- ii. Encourage FSRBs to establish formalized dialogue and engagement with the NPO sector similar to the FATF example of continuous engagement and formal PSCF seats. FATF should establish a regular regional mechanism for working and monitoring the challenges arising from the TF risks mapping along with other unintended consequences that could arise in the future. The Global NPO Coalition is willing to collaborate with FSRBs on an action plan to jointly address the challenges identified in the recent TF risks mappings (e.g. where regional RA efforts exist, such as GAFILAT, MONEYVAL: Western Balkans and Turkey, etc.)



- iii. Make NPO engagement mandatory in the NPO risk assessment and evaluation processes. Evaluators should consider the quality of the engagement as part of their evaluation of risk assessments, including the representativeness and independence of the NPOs consulted, and the degree to which NPOs were engaged. (This may include engagement with watchdog and human rights organizations, in cases where it is not safe for domestic NPOs to openly engage on these issues.)
- iv. Set up a web-based process or a regular email address for FATF and FSRBs that NPOs can use to submit comments during as well as after (as follow up to) the evaluation process, as was successfully done in FATF's open public comment process for revision of R8.
- v. Establish collaboration with teams of evaluators – through training before mutual evaluations and support/advice during mutual evaluations – taking into account the needs and concerns of each region regarding the R8. Similar to the FATF's own list of experts from the private sector, the FATF and Global NPO Coalition could define a list of regional experts for both FSRBs and countries to turn to in case they need it, including [Expert Hub](#) resources/experts.

4. GUIDANCE OPTIONS

- i. Update the Recommendation 8 Best Practice Paper in line with new 2016 Recommendation 8 and latest guidance and include good practice examples.
- ii. Provide guidance on the FATF definition of NPOs. Whilst understanding is definitely improving, further clarity would be helpful on when an informal fundraising drive becomes a 'legal arrangement', and what 'primarily engaged in raising or distributing funds' means in practice.
- iii. Develop clearer guidance for governments and evaluators about the MER effectiveness review – especially on how to measure effectiveness for NPO-related measures. It should be clear that the 'rule-based' approach which affects the entire NPO sector or entire 'class' of organizations (e.g. associations) is not in line with FATF standards and will yield negative scoring.
- iv. Develop guidance with human rights expert bodies and practitioners on what constitutes "proportionate" measures in line with international human rights and humanitarian law (IHL/IHRL/IRL and UNSCR 2462).
- v. Develop guidance on what 'risk-based, targeted supervision' means in practice, with emphasis on the range of appropriate measures.
- vi. Provide additional necessary guidance to FSRB Secretariats on NPO engagement and on effectiveness around Standards evaluation.

5. TRAINING OPTIONS

- i. Enhance capacity building for governments on the risk-based approach for Recommendation 8 and other recommendations that impact NPOs, and on NPO engagement in particular.
- ii. Raise awareness among evaluators that untargeted measures and overregulation restricting the general operating space of the NPO sector will be considered ineffective. Standardize the practice of evaluations that have reported on overregulation, contributing to the restriction of NPO operating space. Enhance evaluators knowledge of possibilities to stress



- negative outcomes of NPO overregulation, in order to be consistent with Immediate Outcome 10.
- iii. Ensure that evaluators are cognizant of the country's obligations under IHL/IHRL/IRL and UNSCR 2462.
 - iv. Ensure that evaluators are free to recommend appropriate training to governments where there are clear indications of prior or ongoing suppression of NPOs or rights.

We also resubmit the following comments to address conflicts with fundamental human rights:

The framework of the risk-based approach adopted by FATF in R1 and the 2016 revised R8, including the Interpretive Note,¹ Best Practices Paper² and Typology Report,³ is consistent with international human rights standards, but require concrete guidance for appropriate implementation. While the risk-based approach is aimed at making CFT measures more effective, it also helps inform how human rights obligations can be incorporated into them. The R8 Interpretive Note and Best Practices Paper make it clear that one-size-fits all, check-the-box approaches are not risk-based. CFT measures that identify risk, assess risk mitigation measures and are based on net risk are consistent with former UN Special Rapporteur Scheinin's caution: "Before resorting to derogations, States must make a careful analysis of the situation, examine if and which derogating measures are necessary, and choose from among the different options the one that will be the least restrictive for the protection of the rights in question."⁴

In addition, to be consistent with R8 and human rights standards, any restriction on NPOs must meet the proportionality test. Although States can only derogate from fundamental rights for specific purposes and then only to the extent necessary and in a proportionate and temporary manner, many CFT measures impose blanket restrictions on humanitarian assistance and certain speech and associational rights. This results in undue disruption of vital civil society programmes, contrary to R8. This is the ultimate litmus test in determining whether a CFT measure complies with IHRL and IHL obligations. If it disrupts legitimate programmes, then it does not meet R8 standards.

The following criteria should be considered when reviewing risk mitigation measures and in the evaluation process and to make CFT measures consistent with states' human rights obligations:

Characteristics of Measures that Meet Human Rights Standards

- Designed to address a specific risk
- Necessary to mitigate the risk
- Proportionate to the risk
- Time limited
- Least intrusive measure

¹ FATF, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations Updated 2020 <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/fatf%20recommendations%202012.pdf>

² FATF, Best Practices Combatting the Abuse of Non-Profit Organizations (Recommendation 8) 2015 <http://www.fatf-gafi.org/documents/documents/bpp-combating-abuse-npo.html>

³ FATF, Risk of Terrorist Abuse of Non-Profit Organizations, 2014 <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf>

⁴ Schenin, promotion and protection of human rights and fundamental freedoms while countering terrorism (2006)



- Targeted and material in scope

Characteristics of Measures Inconsistent with Human Rights Obligations

- One size fits all
- Check box lists
- Strict liability/zero tolerance standards
- Blanket (not targeted) approach
- Disrupts activity of legitimate NPOs