



General comments on 2020 EC Action Plan: Towards a new comprehensive approach to preventing and combating money laundering and terrorism financing

25th August 2020

We welcome the opportunity to contribute as a loose coalition of Not for Profit Organisations (NPOs) to the consultation on the European Commission Action Plan for a comprehensive Union policy on preventing money laundering and terrorism financing. We have also submitted our contribution, which focuses on the NPO perspective online. In addition, we are flagging some general remarks in this letter and would welcome the opportunity to **discuss them** with the representatives of the European Commission in the near future.

Non-profit organisations contribute to the fight against money laundering and terrorism financing and see to lower own risks

As representatives of the non-profit sector we strongly **support the important fight by the EU against money laundering and terrorism financing**. Furthermore our sector is contributing with own due diligence efforts and staff training carried out by umbrella bodies/self-regulation and through many of its sectors 'activities/programmes to identify and mitigate potential risks. We are pleased to see that increasing evidence and the outcomes of the National and Supranational Risk Assessments 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 of or preventing criminal behaviour in our societies.

We are however witnessing that the implementation of the EU AML and CFT policy has had **unintended consequences and a chilling effect on the important work of NPOs** including philanthropy in delivering aid and benefit to the public good. We have seen for example overly tight reporting requirements, barriers to cross-border philanthropy, banks not serving parts of the sector or , unjustified freezing of bank accounts happening **The recent EP resolution of July**, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0204_EN.html also calls on EC under point 4 to *"ensure that the implementation of AML/CTF provisions do not lead to national legislation imposing excessive barriers to the activities of civil society organisations"*.

We share the concern that the national implementation of the 4/5th AMLD also with a view of how it applies to NPOs has not been consistent and sometimes overly rigid and have called for clarification and **more EU-level guidance** in this regard in the past. We consider that clear guidance from the EU level could facilitate a more consistent implementation at national level, while **employing a risk-based approach towards the NPO sector, without imposing general measures that may restrict or hamper the legitimate public benefit activities of organisations within the EU or beyond. We believe that such guidance and clarification could be either be done** via moving towards a regulation approach or as guidance/clarification to the existing directive. We trust that more guidance can contribute to the overall aim to provide conditions for legitimate actors to fulfil their missions and execute their mandates.



Overall we think that with regard to the NPO sector, the EU has taken a different policy approach than the international standard setter, the Financial Action Task Force (FATF), with FATF focusing on specific risks related to parts of the NPO sector around the abuse for terrorism financing but not including all NPOs in its FATF policy on beneficial ownership/money laundering. The EU has however decided to include all NPOs into its AML policy and rules around beneficial ownership. Experts have expressed concern about whether the EU approach with regards to NPOs and Money Laundering/Beneficial Ownership is actually risk based, proportionate and if measures are fit for purpose. We call on the European Commission to cross-check that it fully applies the risk based approach in its existing and future AML/CFT policy.

Any new policy proposals should be prepared in **consultation** with relevant stakeholders, including NPOs and the philanthropy sector. It is also of crucial importance that any new policy options would follow the full procedure laid down in [Better Regulation](#) rules, including the appropriate impact assessment.

Avoid chilling effect on legitimate non-profit organisations

Our sector needs an enabling environment to do its public benefit work. We are worried that some policies concerning combating money laundering and terrorism financing have already had a chilling effect on legitimate philanthropic and other public benefit/non-profit organisations, be they legally organised as foundations, associations, limited liability companies or other forms.

Some countries have clearly “over-implemented” the 4/5th EU Money laundering Directive by including NPOs as “**obliged entities**” (which is not required by the Directive) and hence put them under burdensome strict reporting requirements, without clearly identified risks. In addition, there is concern about how the obligation to report on “**beneficial owners**” is applied to the NPO sector, a sector that benefits the general public and explicitly not private interests. The wording of the 4/5th Money Laundering Directive suggests to require to list as BOs: decision makers/those in control of public benefit foundations. The term beneficial owner is not always correctly understood at national levels and has a chilling effect as it gives the impression that board members would own or benefit personally from the organisation. The wording “**beneficial owner**”, along with the privacy and data concerns is discouraging qualified potential candidates to run for positions in NPO and public benefit foundation Boards. Some 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.

Overall banks and other financial service providers put tighter **due diligence measures** on NPO sector, which makes it more difficult for philanthropy and NPOs to operate cross-border to respond to societal needs. It is becoming **more difficult to get access to formal banking services** since banks are de-risking/excluding also parts of our sector.



Taking risk based approach

Based on international standards, any EU level policy must follow a **risk-based and proportionate approach**¹, taking into account the latest findings from the EU SNRA, **fundamental rights and the principle of subsidiarity**.

Assessments reduce risk related to the NPO sector – suggesting that only some parts are at higher risk

The latest analyses at national and EU level show, that the AML and CFT risk related to public benefit organisations has been reduced. The last EC's Supranational Risk Assessment (SNRA) [report](#), overall lowered the risk assessment 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). The EU SNRA assessment concluded that only specific types of NPOs or NPO activity are actually considered more exposed to risks for AML/CFT (service delivering NPOs, larger organisations with international outreach, humanitarian, etc.). Some experts suggest that including all NPOs into the beneficial ownership/money laundering policy would hence not be in line with a risk based approach that the international FATF has established in its Recommendation 1. For future SNRA we recommend a review of the methodology with regard to NPOs to better take into account the specificities of the sector or to rather take an activities based approach for the SNRA and follow up policy.

Risk mitigation measures in place

EU and national level assessments revealed that those NPOs which are considered more exposed to risks (service delivering NPOs, larger organisations with international outreach, humanitarian, etc.) are regularly under tighter obligations and are more frequently checked by supervising authorities, tax authorities, banks (obliged entities), public and private donors and auditors, and in some cases public/humanitarian agencies.

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

Overall, there is a strong 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 in general not those legal entities engaging in activities, which are particularly likely to be used for money laundering or terrorist financing.

Taking a proportionate and effective approach

Measures put in place must be suitable and effective to address potential risks and they must be proportionate. Efforts should first be undertaken to provide more guidance to ensure

¹ See also recent EESC philanthropy opinion asking that national and EU security measures are risk-based, proportionate and evidence-based: <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/european-philanthropy-untapped-potential-exploratory-opinion-request-romanian-presidency>



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 creation of a separate register for collecting information of NPOs beneficial owners/those that guide the organisations, (which is in most EU 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. Other measures such as connecting data from existing company law/association/foundation registers should be considered.

Taking into account fundamental rights and the Role NPOs play

According to the AML directive itself, NPOs have an important watchdog role and that measures that would restrict their civic space would restrict their ability to perform this role. While considering different policy options, we recall that the European Commission should carefully assess and weigh in the fundamental rights component. According to the 2018 EU Agency for Fundamental Rights (FRA)'s report, the rights to freedom of association, freedom of peaceful assembly (Article 12 of the EU Charter of Fundamental Rights), and freedom of expression and information (Article 11 of the Charter) are of particular importance in this context. The FRA particularly points out that 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 for instance, in the area of counter-terrorism or anti-money laundering.**² Particular attention should also be paid in this context to the protection of privacy enshrined in Article 8 of the Charter, namely when it comes to Beneficial Ownership (BO) registers and what type of information is collected and accessible to the public. The implementation of the Anti-Money laundering Directive revealed that 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 administration. The June 2020 European Court of Justice (CJEU) **judgment** declared that the Hungarian transparency law runs contrary to Member States obligations of the free movement of capital laid down in Article 63 TFEU and to Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union ('the Charter'), on the right to respect for private and family life, the right to the protection of personal data and the right to freedom of association.

Any new EU 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 thorough impact assessments, including [fundamental rights check lists](#). 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 policy-making.

² EU Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, 2017, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challenges-facing-civil-society_en.pdf