NPO COMMENTS ON 2021 EU AMLD package by: EFC/DAFNE, ECNL, HSC, CSE, EFA - November 8th 2021

We strongly believe in **the important fight by the European Union and international and national policy makers against money laundering and terrorism financing.** We have however observed that elements of policy developed with good intentions has had unintended consequences on the NPO sector including the philanthropic sector. **We consider that, based on FATF policy and international HR standards**, the policy applied to fight money laundering and terrorism financing must be risk based, proportionate, fit for purpose and must take into account our fundamental rights.

We welcome the opportunity to contribute as NPO coalition to the EC consultation on the July 22nd EU AML package with general reflections and specific recommendations for amendments with a view to improve current draft policy papers. Suggested amendments are highlighted in yellow in the text below. In occasions we suggested two alternative approaches. We would greatly appreciate the opportunity to discuss them with the EC in person in the coming weeks.

I. Executive Summary bullet points – we call on the EC to:

- Ensure that the 4 new legislative proposals do not add complexity but rather simplify and streamline and are in line with subsidiarity principle
    - Clarification is needed on when Member States, in accordance with a risk based approach can extend the scope of AML policy with regard to obliged entities – NPOs/Foundations are generally not obliged entities
    - Recommendation to exempt public benefit crowdfunding platforms from being obliged entities
- Consider excluding NPOs in line with a *risk-based* approach from BO policy – focus to be on private interest structures
- More clarity is needed on how BO policy applies to the NPO including philanthropy/foundation sector, need to define terms and avoid unintended consequences with regard to Beneficial Ownership definition
    - Need to define express trusts
    - Need for a clearer definition of BO ownership/benefits versus directing persons
    - Need to clarify BO concept with regard to beneficiaries/class of beneficiaries
- Allow cross-reference with company registers
- Take Fundamental rights into account
- Avoid un-intended consequences and cases of overregulation

II. General Reflections & Recommendations

1. Ensure that the new 4 legislative proposals do not add complexity but rather simplify and streamline

The proposal to transfer existing AML and CFT provisions from the previous Directive(s) to a regulation may certainly be worthwhile with the aim to ensure more consistent application of certain aspects of the EU policy. However, the division of the previous AML/CFT policy into four legislative proposals with additional mandates to craft EU level implementing rules, **may add complexity.** In dividing the previous policy in four elements, policy makers must ensure that the policy remains clear, user-friendly and does not create legal uncertainty in terms of its approach and application.

With the regards to the creation of the **European supervisory authority the issue of subsidiarity** needs to be taken into account. Currently, foundations and NPOs are not considered as obliged entities, hence they would not be covered by the newly created European supervisory authority.

2. Clarify points related to obliged entities

2.1. Clarification on when Member States, in accordance with a risk based approach can extend the scope of AML policy with regard to obliged entities

We welcome the fact that the new Regulation clarifies who obliged entities are. This makes clear that **NPOs/foundations are generally not obliged entities.** We also welcome that the proposal **puts clearer rules and some checks and balances in place for Member States to extend the list of obliged entities** since some Member States appear to have considered NPOs/public benefit foundations as obliged entities without having undertaken a risk based approach. The new Article 3 of the new draft Regulation now asks Member States to not only notify to the Commission their intention to extent the scope to entities in additional sectors, but to also provide for: *(a) a justification of the money laundering and terrorist financing risks underpinning such intention; (b) an assessment of the impact that such extension will have on the provision of services within the internal market; (c) the text of the national measures that the Member State intends to adopt. The Commission, having consulted the Authority for anti-money laundering and countering the financing of terrorism shall then issue a detailed opinion regarding whether the measure envisaged: (a) is adequate to address the risks identified, in particular with regard to whether the risks identified by the Member State concern the internal market; (b) may create obstacles to the free movement of services or capital or to the freedom of establishment of service operators within the internal market which are not proportionate to the money laundering and terrorist financing risks the measure aims to mitigate. The detailed opinion shall also indicate whether the Commission intends to propose action at Union level.*

We clearly welcome this cross-check element that will help ensure that Member States will only extent the scope where a proper risk assessment provides for justification and is in line with EU law. However, we suggest to clarify that also obstacles to the fundamental rights from the EU Charter should be specifically included here as suggested below:

Article 3.4.(b) of draft Regulation

(b) may create obstacles to the free movement of services or capital or to the freedom of establishment of service operators within the internal market or to the fundamental rights from the EU Charter, which are not proportionate to the money laundering and terrorist financing risks the measure aims to mitigate.

2.2. Recommendation to exempt public benefit crowdfunding platforms from being obliged entities

We call on the EC to exempt from 'Obliged entities' according to Article 3 of draft Regulation those crowdfunding platforms, which are exclusively set up and used for public benefit purposes.

We take note of the fact that the EC is maintaining: "*Crowdfunding platforms that are not licensed under Regulation (EU) 2020/1503 are currently left either unregulated or to diverging regulatory approaches, including in relation to rules and procedures to tackle anti-money laundering and terrorist financing risks. To bring consistency and ensure that there are* ***no uncontrolled risks in that environment, it is necessary that all crowdfunding platforms that are not licensed under Regulation (EU) 2020/1503 and thus are not subject to its safeguards are subject to Union AML/CFT rules in order to mitigate money laundering and terrorist financing risks***."

We consider however that it is important to distinguish and recognise the different role of public benefit purpose crowdfunding to help NPOs establish or increase donations and therefore, public benefit crowdfunding platforms should not be subjected to additional burdensome requirements of adding them to the list of obliged entities.

According to the recent 2018 Global Trends in Giving Report, across Europe 47% of people living in Europe donate to crowdfunding campaigns that benefit individuals or NPOs. The top five causes are start-up costs for a social enterprise, medical expenses, volunteer expenses, education costs, and disaster relief. Crowdfunding platforms usually act as non-profit facilitators that help facilitate the transfer of funds without the need to obtain a license or special permission. Some countries, including France, Finland, and Spain, have recently introduced legal frameworks to regulate it.

The provider of an online crowdfunding portal administering a donor database must strictly abide by national data protection legislation — in particular, by requesting each donor's approval to process his or her personal data. States have both positive and negative obligations to safeguard the right to freedom of association, including access to resources. Legislation can have an important role to remove existing

barriers, introduce basic legal guarantees and incentives for private giving. In principle, whenever new regulation on EU level or MS level calls for special treatment for public benefit fundraising activities, the EU and MS must assess whether the requirements are necessary and the least intrusive means possible. Authorities must ensure that these requirements comply with Article 12 of the EU Charter on Fundamental Rights and must be "necessary in a democratic society." To meet this standard, limitations must be proportionate and be the least intrusive means to achieve the desired objective. There is currently very little guidance about whether permitting such requirements in the fundraising context are the least intrusive means available. Even if a law or policy is not burdensome on its own, authorities should consider whether the combination of various laws and policies, including at the regional level, create a burdensome process.

Finally, the EU and fundraisers, together with relevant stakeholders, should assess whether self-regulatory mechanisms can complement or replace existing requirements. Around the globe, numerous national, regional, and international self-regulatory initiatives promote development and administration of common norms and standards of behaviour by and for fundraising NPOs. These self-regulatory initiatives often adopt codes of conduct, codes of ethics, or some other set of standards and principles to guide NPO own behaviour and practices. Self-regulation can serve multiple aims: it can be a tool to show good governance and transparent operation, increase public trust and bridge gaps in society through setting standards for CSOs' own behaviour. It is particularly common in the area of fundraising, including code of conducts/ethics, certification schemes and others.

We hence suggest to add an article 6 of the draft Regulation:

- ***Exemptions for certain providers of crowdfunding platforms***

1. Member States may decide to exempt, in full or in part, providers of crowdfunding platforms used exclusively for public benefit purposes from the requirements set out in this Regulation on the basis of the proven low risk posed by the nature and, where appropriate, the scale of operations of such services.

2. For the purposes of paragraph 1, Member States shall carry out a risk assessment of crowdfunding actors assessing: (a) money laundering and terrorist financing vulnerabilities and mitigating factors of the gambling services; (b) the risks linked to the size of the transactions and payment methods used; (c) the geographical area in which the crowdfunding service is administered. When carrying out such risk assessments, Member States shall take into account the findings of the risk assessment drawn up by the Commission pursuant to Article 7 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final].

3. *Member States shall establish risk-based monitoring activities or take other adequate measures to ensure that the exemptions granted pursuant to this Article are not abused.*

3. Consider excluding NPOs in line with a *risk-based* approach from BO policy – focus to be on private interest structures

EU AML/CFT policy should follow international standards of the Financial Action Task Force (FATF) and should therefore be based on a *risk-based* approach and be in line with fundamental rights including the freedom of association and privacy rights. Since risk scenarios differ from country to country, an **EU-wide regime on some aspects, in particular beneficial ownership policy and its application to NPOs, may not be in line with the specific risk scenarios and existing litigation measures at national level**. Further, we are concerned about the EU revising its AML policy **before the 2021 Supranational Risk Assessment (SNRA) has been properly undertaken and published. The past SNRA of the year 2019 is outdated and new policy should only be drafted after the risk assessment has been properly done. We did not observe a clear indication for including the NPO sector into the EU BO policy during past EU SNRA.**

The 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 was not clearly assessed by FATF or the EC to what extent the NPO sector would be covered by the FATF policy on beneficial ownership/money laundering. FATF mentions in its 2014 R24 guidance and 2019 Best Practices paper that it is not in line with a current risk based approach to include **all** NPOs into the BO policy.

If the EC considers to **include all NPOs**, be they associations, foundations, limited liability companies (those that have a legal personality/are legal entities as well as those that are legal arrangements) into its AML policy and rules around beneficial ownership, a careful assessment has to be undertaken to review whether this approach with regard to NPOs and Money Laundering/Beneficial Ownership is **in fact risk based, proportionate and if measures are fit for purpose.** The design of some of the measures appear to be set up with the for-profit sector in mind and would hence at least need adaptation if applied to the NPO sector.

Below we have listed some arguments showing why the AML/CFT policy (in particular on BO) should focus on for-profit/private interest structures rather than structures that benefit the general public.

- **Rationale of AML BO policy**

The EU policy approach needs to start with the question as to **what purposes the collection (and potential publication) of BO data on NPOs serve**; 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 and unpack complex structures created to hide away those individuals who benefit from such structures, it needs to be analysed whether identifying the person who controls an NPO/sets up a public benefit trusts helps detecting ML/TF cases**. With collecting information on who governs NPOs (information which is openly available in many countries) not much is gained. Also information on public benefit trusts or public benefit trust like legal

entities or legal arrangements (settlor, trustee, beneficiaries or class of beneficiaries) not much is gained from the money laundering or terrorism financing perspective since such information is also in most cases publicly available via charity or other registers. **The case of NPOs differs significantly from for profit structure and private interest organisations where indeed private individuals receive financial benefits from a legal entity and where sometimes complex structures hide away from those who benefit financially or direct the organisations.**

To detect abuse cases within the NPO sector, domestic and foreign law enforcement agencies and/or tax authorities will in most cases easily get hold of BO information and will then want to request detailed financial information from the NPOs under suspicion. The respective fiscal and criminal laws provide for relevant rules to enable such investigations.

- **Lowered AML/CFT risks related to the NPO sector**

While national **risk assessments** regarding risks related to terrorism financing abuse have been carried out including NPO's **(the subset of NPOs covered by FATF Recommendation 8)**, such **risk assessments assessing money laundering** risks **systematically including NPO's do not yet exist.**

It is therefore not clear if there is sufficient evidence and analysis of money laundering and terrorism financing risks of the entire NPO sector to justify inclusion of the entire NPO sector into the BO policy.

In fact, the latest analyses at Member State- and EU level show that the AML and CFT risks related to public benefit organisations have been reduced. The last 2019 EC´s Supranational Risk Assessment (SNRA) report, overall lowered the risk assessment related to NPOs/philanthropic organisations. This assessment also corresponds to a series of country-level evaluations done by FATF (e.g. UK, Belgium, Norway, Spain, Latvia, Slovenia and Sweden).

It can therefore be argued that including the NPO sector as a whole into the beneficial ownership/money laundering policy is not in line with the risk-based approach that the international FATF has established in its Recommendation 1.

Moreover, there is no assessment of a lack of transparency rules with regard to the NPO sector as a whole that would create 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 Recommendation 24 than this **needs to be fully assessed and analysed.**

- **Tighter transparency and accountability rules are already in place**

If there is concern that a potential lack of transparency or accountability rules with regard to the NPO sector creates demonstrable ML/CF risks, we must first and most foremost carry out an assessment on existing transparency and accountability rules, including self-regulatory approaches (which NPOs need to

follow). Only after such an assessment can we demonstrate a potential lack of transparency and accountability rules within the NPO sector.

The transparency and accountability rules within the NPO sector are currently as follows: NPOs are generally **regulated under national laws and there often exists 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. According to our analysis (https://www.philanthropyadvocacy.eu/legal-environment-for-philanthropy-in-europe/) philanthropic organisations are generally required to register as part of establishment process and have to report annually to fiscal and legal supervisory or regulatory authorities, which are responsible for checking that the organisation 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 this information with the relevant legal or fiscal authorities.

A number of national level assessments in the context of FATF Recommendation 8 revealed that those NPOs which are considered more exposed to risks (service delivering NPOs, larger organisations with international outreach, humanitarian, etc.) are generally under tighter obligations and are more frequently checked by registration bodies, tax authorities, banks (obliged entities), public and private donors and auditors.

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 for NPOs** to be transparent and accountable and to ensure that no abuse takes place.

We would also like to highlight 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.

In addition, we argue that **reporting and disclosure requirements for the NPO sector must be proportionate considering international human rights and fundamental laws, in relation to the risks to be addressed with the AML/CFT framework.** The right to privacy and the freedom of association as fundamental rights must be fully taken into account. The obligation of NPO's to disclose financial data and sensitive private information (including BO/board member or CEO or donor identity) is a clear limitation of the right to privacy. Limiting this fundamental right must be carefully assessed and must adhere to the principles of proportionality and subsidiarity.. It is of utmost importance to find nuanced

solutions for the NPO sector that is proportionate to the fundamental right to privacy and freedom of association. A risk-based policy approach could be a way to justify a limitation to these rights. **We would further like to emphasise that unlike the private sector (business at large), the NPO sector is under international human rights protection. Regulators and standard setters are therefore obliged to apply a different approach to the NPO sector when shaping legislation.**

CONCLUSION:

Only if the EU SNRA and national risk assessments are carried out, and if these finalised assessments demonstrate that there exists a ML/CFT risk related to a potential lack of BO information with regard to NPOs, an application of EU BO policy to NPOs is to be considered to those NPOs found at risk. If however such an assessment does not demonstrate that an inclusion of NPOs (organisations that do not benefit private interests but the general public) is risk based, the EU regulation should consider applying their BO policy solely on organisations that are set-up for private interests.

See suggested wording for articles 42 and 43 of the suggested Regulation:

Article 42

Identification of Beneficial Owners for corporate and other legal entities

1. *In case of private interest corporate entities….*
2. *In case of private interest legal entities other than corporate entities, ….*

Article 43

Identification of beneficial owners for express trusts and similar legal entities or arrangements

1. *In case of private interest express trusts, the beneficial owners shall be all the following natural persons:….*
2. *In the case of private interest legal entities and private interest legal arrangements similar to express trusts, the beneficial owners shall be the natural persons holding equivalent or similar positions to those referred to under paragraph 1….*

Alternatively an explicit exemption of public benefit organisations could be considered after article 42 and 43 respectively as follows:

Article 42

Identification of Beneficial Owners for corporate and other legal entities

….5. The provisions of this Chapter shall not apply to:

(a) companies listed on a regulated market that is subject to disclosure requirements consistent with Union legislation or subject to equivalent international standards; and

(b) bodies governed by public law as defined under Article 2(1), point (4) of Directive 2014/24/EU of the European Parliament and of the Council35 .

(c) corporate and other legal entities which are set up for public benefit purposes that benefit the general public and the public interest

Article 43

Identification of beneficial owners for express trusts and similar legal entities or arrangements

…..

3. The provisions of this Chapter shall not apply to express trusts or legal entities and legal arrangements similar to express trusts, which are set up for public benefit purposes that benefit the general public

4. More clarity on how BO policy applies to the NPO including philanthropy/foundation sector, need to define terms and avoid unintended consequences

If the risk assessment so justifies and if the intention is hence to continue to include public benefit organisations into the coverage of EU BO policy, further amendments are necessary in order to clarify how the beneficial ownership (BO) policy is to be applied to the NPO including philanthropic sector to ensure legal certainty, avoid unintended consequences and overregulation. We would therefore like to recall some of our proposals in this regard, see below.

As stated earlier, NPOs can take **different legal forms such as associations, foundations, limited liability companies and trusts as well as legal arrangements.** The current distinction between corporate/legal entities/express trusts and trust like arrangements and lack of distinction between private interest and public benefit organisations creates too much legal uncertainty. It is not clear where public benefit legal entities such as limited liability companies, co-operatives, mutual societies, associations and foundations would fit under Article 42 or 43 of the Regulation. Mere clarification is hence highly recommended.

- **Need to define express trusts**

The focus on "express" trusts as introduced in Article 43, which is a concept originating from a common law concept, is not known in many EU Member States and therefore **creates confusion and legal**

uncertainty. We advise to include a definition of the term "express" trust in the Regulation. Considering that the EC refers to the FATF definition of express trusts as provided for in the glossary for FATF Recommendation 25, this should be explicitly mentioned. We note however that in an EU context (in particular after the Brexit), the common law tradition of trusts is not very common and the use of such a term will create misunderstandings.

The draft regulation foresees in articles 42 and 43 that Member States shall send a **list of the types of corporate and other legal entities (Article 42),** and **express trust like legal entities and arrangements existing under their national laws (Article 43. 2.2)** with beneficial owner(s) identified in accordance with those paragraphs. There is concern that this approach will create legal uncertainty and ultimately also create a scattered rather than a uniform system.

Article 43.3 empowers the EC to adopt, by means of an implementing act, a list of legal arrangements and legal entities governed under the laws of Member States which should be subject to the same beneficial ownership transparency requirements as express trusts. This additional mandate to craft EU level implementing rules may add complexity and care needs to be taken that the policy remains clear, user-friendly and does not create legal uncertainty in terms of its approach and application.

- ***Need for a clearer definition of BO ownership/benefits versus directing persons***

NPOs and public benefit foundations are set up to benefit the general public and not private interests. Public benefit foundations are self-owned entities with their own governing bodies. The governing bodies act as stewards and are bound to the public benefit purpose of the organisation as defined in the statutes. They benefit the general public and are not set up to financially support for example family members or other private interests. The definition of BO as currently drafted is therefore ill suited for public benefit foundations and NPOs. A distinction between those cases where there is someone identifiable who owns the organisation or who ultimately benefits financially from the organisation versus cases where information on the ones 'directing' the organisation should be collected.

One additional paragraph should be inserted as a final paragraph in Articles 42 and 43 to clarify that for public benefit organisations, be they legal entities, foundations, express trusts or express trust like entities or arrangements, the ones 'directing" the organization should be considered as the BO:

Article 42

….

In the case of corporate legal entities and legal entities, which are set up for public benefit purposes that benefit the general public, information on those directing the organization e.g. the senior management or board level.

Article 43

> …..*In the case of express trusts or legal entities and legal arrangements similar to express trusts, which are set up for public benefit purposes that benefit the general public, information on those directing the organization e.g. the senior management or board level.*

- **Need to clarify BO concept with regard to beneficiaries/class of beneficiaries**

Next to controlling persons, the draft AML Regulation also adds 'beneficiaries' to the definition of BO. It must be explicitly clarified that it is **not the intention to collect information on all grant recipients/ scholarship recipients under the point "beneficiaries" for public benefit organisations.** The need for this clarification has become apparent during the implementation of the current 4/5th Directive, where a few EU countries have considered the obligation for NPOs and public benefit foundations to report on all their **grant or scholarship recipients as BO**. This appears to be disproportionate, lead to uncertainties and privacy rights concerns and as a deviation from the real purpose to fight money laundering and terrorism financing of terrorism. This is clearly not an appropriate interpretation with the intended rationale of the BO approach to fight money laundering and terrorism financing and creates unnecessary administrative burdens for both EU member states and public benefit organisations. According to their statutes, public benefit organisations benefit the general public and they generally list a class of beneficiaries/grant recipients (such as researchers in one field/artists of a specific field or people in need below a certain income level).

We therefore suggest the following amendments:

Article 43

Identification of beneficial owners for express trusts and similar legal entities or arrangements

1. *In case of express trusts, the beneficial owners shall be all the following natural persons:*
   (a) the settlor(s);
   (b) the trustee(s);
   (c) the protector(s), if any;
   (d) the beneficiaries or where there is a class of beneficiaries, the individuals within that class that receive a benefit from the legal arrangement or entity, irrespective of any threshold, as well as the class of beneficiaries.
   However, in the case of public benefit express trusts and in the case of pension schemes within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council and which provide for a class of beneficiaries, only the class of beneficiaries shall be the beneficiary;

(e) any other natural person exercising ultimate control over the express trust by means of direct or indirect ownership or by other means, including through a chain of control or ownership.

2. *In the case of legal entities and legal arrangements similar to express trusts, the beneficial owners shall be the natural persons holding equivalent or similar positions to those referred to under paragraph 1.*
   However, in the case of public benefit legal entities and arrangement similar to express trusts, which provide for a class of beneficiaries, only the class of beneficiaries as described in the statutes shall be the beneficiary;
   Member States shall notify to the Commission by [3 months from the date of application of this Regulation] a list of legal arrangements and of legal entities, similar to express trusts, where the beneficial owner(s) is identified in accordance with paragraph 1.

3. *The Commission is empowered to adopt, by means of an implementing act, a list of legal arrangements and legal entities governed under the laws of Member States which should be subject to the same beneficial ownership transparency requirements as express trusts. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 61(2) of this Regulation.*

4. Allow cross-reference with company registers

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. We would therefore like to suggest that the new AML package adopts the possibility for NPOs to fulfil their obligation of reporting BO information by cross-referencing to the already reported information accessible at the supervisory authorities or company registers.

5. Fundamental rights must be taken into account

Where BO information is made accessible to the general public, concerns with regard to the unjust limitation of privacy rights and in some cases even security concerns arise from those individuals being listed as BO. These concerns arise in particular if the level of detail of obliged reported BO information includes personal data such as 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 the Venice Commission, which considers that the reporting obligations imposed on associations concerning

the origin of their financing must be 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 pursuing the same objective. 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' disclosure.

We argue that in limiting the right to privacy of NPO's and potentially even individuals, a proportionate approach would be to only grant access to the name and residing address information to the **relevant authorities and not the general public.** We hence favour to only make accessible sensitive BO information to supervisory authorities.

Avoid un-intended consequences and cases of overregulation

The current EU AML and CFT policy has **unintended consequences for- and a chilling effect on the public benefit sector, negatively impacting the invaluable efforts of NPOs, including philanthropic actors,** in delivering aid and benefit to the public good. This negative impact on the NPO sector must be avoided and we must cooperate to create an enabling environment for the sector to be able to carry out its efforts for the public benefit. We would like to highlight the following examples of potential causes:

1. Disregard of a risk-based approach.

We have observed cases where national governments have crafted blanket legislation aimed at the entire NPO sector without having undertaken any, or any proper risk assessment of the NPO sector. Disregarding the risk-based approach is not in line with FATF Recommendation 8 or other FATF recommendations.

2. Misuse of FATF Standards and EU policy to justify regulation that violates fundamental human rights provisions.

The FATF Standards and mutual evaluations as well as EU policy have been misused by some governments to justify regulation that directly violates wider fundamental rights provisions. De-risking of NPOs, MVTS (money or value transfer service) providers or correspondent banking relationships; and financial exclusion. 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 the charitable/public benefit sector. Some banks/financial service providers are therefore refuse to continue serving the charitable/public benefit sector due to the potential risks (see list of resources at the end of the paper).

A recent research undertaken by Philanthropy Advocacy (DAFNE & EFC initiative) in 2020/2021 revealed that the fight against terrorism and financial crime led to the introduction of new laws/rules affecting the philanthropy/foundation sector (e.g. implementation of EU Anti Money Laundering Directive, and/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 to some extent be caused directly by bank de-risking policies.

A non-exhaustive list of the most common issues encountered by foundations:

- 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 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 have made administration more complicated (e.g. Czech Republic, Bulgarian, Finland, Poland, Portugal, Romania). We anticipate that philanthropy through crowdfunding will be hard hit by new obligations if crowdfunding platforms are included as obliged entities.

With regard to BO policy, the use of the term **"beneficial owner"** has had a 'chilling effect' as it gives the impression that board members of public benefit organisations would own or benefit personally from the organisation. Along with the previously discussed privacy and data concerns, the wording **"beneficial owner",** discourages qualified candidates to apply for pro bono positions within the boards of NPO and public benefit foundations.

The FATF has recognized the unintended consequences of AML/CFT policies and initiated a workstream in February 2021 to identify and mitigate these. The impact on the NPO sector was a large component of this workstream, which included four main areas:

- de-risking;
- financial exclusion;
- undue targeting of NPOs; and
- curtailment of human rights (with a focus on due process and procedural rights).

The FATF is due to address this in the coming months with changes to its policies, methodology and procedures. The EU should learn from this process and institute the appropriate safeguards for NPOs *ex ante*, so that legitimate charitable activity is not impacted, and policy changes for unintended consequences do not need to be considered further down the line.