



European Center for
Not-for-Profit Law



Submission in the context of the public consultation on four draft Regulatory Technical Standards

We welcome the opportunity to comment on the four draft Regulatory Technical Standards (RTS) that have been suggested by the European Banking Authority (EBA). We agree that these technical standards will be important to the EU's new AML/CFT regime and will shape how institutions and supervisors will comply with their AML/CFT obligations under the new AML/CFT package.

We, a coalition of (networks of) civil society organisations and public benefit foundations, take this opportunity to share input from the perspective of non-profit organisations (NPOs), in addition to responding to the questions in the online consultation form.

We appreciate that the EBA was guided by the principles of a proportionate, risk-based approach that can be applied effectively by financial institutions and their AML/CFT supervisors. In the spirit of the current efforts to simplify EU legislation and remove unnecessary red tape also in its implementation, we want to suggest taking this overarching principle into account when now drafting the RTSs. **We are concerned that elements of the proposed RTSs will lead to unintended consequences for the non-profit sector.** We would like to highlight the following concerns.

First, including the number of NPO clients and the number of philanthropic projects funded in the data sets that guide the assessment of the risk profile of obliged entities, gives the impression that having NPOs as clients creates a certain risk profile for obliged entities. It also labels philanthropic projects and online donations as high-risk activities without evidence or a proper risk assessment. **This approach is contrary to FATF Recommendation 8 and the methodology for assessing it, which clearly recognise that not all NPOs are vulnerable to TF/ ML abuse and that only (potentially small) subsets of the NPO sector are at risk.**

Second, although we welcome the fact that the current differences in the national transposition of the AMLD's customer due diligence requirements will be streamlined and clarified to the extent possible, **we are concerned that the proposed framework for customer due diligence poses a risk to financial inclusion.** An ESGB analysis of the Global Findex Database 2021 demonstrated that 13 million adults within the EU face financial exclusion. Moreover, restrictive interpretation and application of due diligence measures often lead to disproportionate administrative burdens for NPOs, including public-benefit foundations, as well as cases of derisking. Under the proposed framework, this is likely to be aggravated. **Therefore, we recommend allowing for more flexibility in the implementation of measures to facilitate a risk-based, proportionate and targeted approach.**

Lastly, we are particularly concerned about the impact of the new AML Regulation and the draft RTS on customer due diligence on public benefit crowdfunding platforms, which will be classified as obliged entities and face significant compliance burdens. Public benefit, donation-based crowdfunding platforms are often non-profit entities themselves who do not have the capacity and financial resources to be able to comply with these requirements. As [research](#) found no significant or consistent evidence that European donation-based crowdfunding platforms are misused for terrorism financing purposes, the compliance burden for public benefit crowdfunding platforms related to customer due diligence measures is therefore not proportionate to the level of risk. **We therefore recommend adding exemptions for donation-based crowdfunding platforms in the draft RTS on customer due diligence to simplify due diligence requirements, particularly regarding persons and entities who seek to donate through their platform.**

In the annex you can find more detailed feedback and recommendations, which we have also submitted through the online consultation form. We remain at your disposal to further discuss this input.

Kind regards,

Civil Society Europe

European Center for Not-for-Profit Law

European Fundraising Association

Human Security Collective

Philanthropy Europe Association

ANNEX

Draft RTS on the assessment of the inherent and residual risk profile of obliged entities under Article 40(2) of the AMLD

Article 40 of the AMLD requires supervisors to apply a risk-based approach to AML/CFT supervision. Under a risk-based approach, supervisors should adjust the frequency and intensity of supervision based on the ML/TF risk profile of each obliged entity in light of each entity's business model, operation and customer base.

The draft RTS should help assess and classify the inherent and residual risk profile of each obliged entity based on an automated scoring system. The danger with an automated scoring system is that it lacks an assessment of the individual case and national or organisational specificities since it will have to limit itself to common agreed criteria and data points, which have to be carefully selected not to create static categories of risk indicators.

- Assessing the quality of controls based on a two-step process seems more appropriate, whereby the control risks would be first assessed in an automated manner based on objective criteria and then manually adjusted based on professional judgment where necessary.
- We overall encourage an approach to limit data requests from obliged entities and stakeholders to those that are strictly necessary for ML/TF risk assessment purposes.

While the methodology laid out by the EBA to determine risk appears in line with international standards established by the Financial Action Task Force (FATF) – when ascertaining inherent risk, looking at controls and then coming to a residual risk assessment – we have clear concerns around the suggested single set of data points.

We have concerns about several proposed data points, specifically:

- *Number of NPOs and number of NPOs with cross-border transactions to/from non-EEA countries*

The listing of NPOs as client base and hence a potential indicator for risk gives the impression that having NPOs as clients creates a certain risk profile for obliged entities. NPOs where they are legal entities should be included in the category of legal entities and customers. We strongly recommend to remove the category of number of NPOs and number of NPOs with cross-border transactions to/from non-EEA countries for the following reasons:

- > FATF Recommendation 8 and the methodology for assessing it clearly recognise that not all NPOs are vulnerable to TF/ ML abuse and that only (potentially small) subsets of the NPO sector are at risk. The listing of NPOs would also not take into account risk mitigation measures adopted by NPOs. This listing of NPOs does also not take into account risk mitigation measures adopted by NPOs. There are various recent examples moving towards this distinction, in particular the [US National Risk Assessment](#) and [UK National Risk Assessment](#) who both recognise the effect of mitigation measures taken by NPOs (page 25 and 127 respectively). Moreover, the [French National Risk Assessment](#) concluded in 2023 that the level of threat on ML and TF is broadly low for NPOs in France (page 66 and onwards).

Another recent good practice example is the [NPO industry baseline](#) which was developed in the Netherlands, after the Dutch Central Bank realised their AML/CFT supervisory approach was not risk-based enough, was leading to the derisking of

certain classes of customer, NPOs among them, and was not the most effective in keeping the financial sector free from financial crime. The NPO baseline lays out both risk enhancing and risk mitigating factors for NPO transactions. Banks are initially meant to see NPOs as neutral (as opposed to before, when the entire sector was seen as high-risk for TF) and would then apply a risk lens to do 'more if necessary, less if possible' in terms of due diligence. Initial monitoring reports have been extremely encouraging. Therefore, putting all NPOs as indicator for risk is contrary to current standards.

- > Moreover, singling out NPOs in this way will result in unintended consequences for the sector as a whole, including for obliged entities/financial service providers to not serve the NPO sector anymore (so called bank derisking). NPOs are a legal entity like any other, and there is already a criterion for this laid out in the Annex ('*Number of legal entities*'). There is no need to exceptionalise one particular legal entity in this way when the consequences of this for the sector are well documented. As laid out in a [research](#) conducted by Human Security Collective on FATF Recommendation 8, **regulation should be based on principle and be vehicle agnostic.**

The EU [Supranational Risk Assessment](#) flags the bank derisking that the sector is subject to (p.7). The FATF has also carried out extensive work on the [unintended consequences](#) of its framework for NPOs, which include financial exclusion and bank derisking, as has the [EBA](#). The singling out of NPOs in the list of indicators will only exacerbate this problem and is not in line with existing FATF standards.

- > FATF has also stated in different contexts that the sole fact of a cross-border transaction does not create higher risks. Analysis of past financing of terrorist incidents even point to local and low budget actions. Hence the reference to cross-border transactions to/from non-EEA countries could potentially be removed for any customer/legal entity.

Based on international standards and good practice, what the EBA is proposing is not risk-based or proportionate, will lead to undue focus on the sector when regulation should be vehicle agnostic, and will be repeating mistakes that have been made in the past two decades and more with the FATF framework leading to grave impact on the humanitarian, peacebuilding, rights and development work of NPOs and the communities we serve.

- *Total Number of projects funded for philanthropic purposes in the previous year*

We question the validity of this indicator for the assessment of the risk profile of crowdfunding platforms as obliged entities. Singling out projects for philanthropic purposes will lead to further derisking of NPOs and public benefit crowdfunding platforms. This labels philanthropic projects and online donations as high-risk activities without evidence or a proper risk assessment. The report [Following the Crowd: clarifying terrorism financing risk in European crowdfunding](#) (2021, Royal United Services Institute for Defence and Security Studies) found no significant or consistent evidence that European donation-based crowdfunding platforms are misused for terrorism financing purposes. Including this indicator without proof of abuse cases that justify it is contrary to existing standards, good practice and the principles of proportionality and effectiveness.

Draft RTS on the risk assessment for the purpose of selection of credit institutions, financial institutions and groups of credit and financial institutions for direct supervision under Article 12(7) of the AMLAR

We have no specific input on this RTS but would like to reiterate the concerns expressed on the data sets above as art. 2 also refers to Annex 1.

Draft RTS under Article 28(1) of the AMLR on Customer Due Diligence

Article 28(1) of the AMLR requires AMLA to harmonise customer due diligence requirements by specifying which information obliged entities must collect to perform standard customer due diligence (CDD), simplified due diligence (SDD) and enhanced due diligence (EDD).

The mandate interacts with other mandates in the AMLR, for example a mandate for AMLA to issue guidelines on the ML/TF risk factors obliged entities shall take into account and guidelines on ongoing monitoring of a business relationship and on the monitoring of the transactions carried out in the context of such relationship.

We welcome the fact that the current differences in the national transposition of the AMLD's CDD requirements will be streamlined and clarified to the extent possible. At the same time, we are concerned that the proposed framework poses a risk to financial inclusion and does not reflect the financial inclusion priority set by the new FATF Presidency. Although progress in financial access has been made in the past years, still more than 13 million adults (4% of the adult population) face financial exclusion in the EU, according to an ESBG analysis of the Global Findex Database 2021. Specific communities are particularly impacted, including stateless people, refugees, asylees, homeless people, Roma and Sinti communities. Furthermore, while FATF R.8 states that AML/CFT measures should not unduly disrupt or discourage legitimate activities of non-profit organisations (NPOs), restrictive interpretation and application often leads to disproportionate administrative burdens for NPOs, including public-benefit foundations, as well as cases of derisking, as also acknowledged in the EU [Supranational Risk Assessment](#). FATF are updating their [guidance on AML/CFT Measures and Financial inclusion](#) and have committed to launch a workstream to reconceptualise risks related to this topic, taking into account how AML/CFT measures are also a risk to financial inclusion. This proposed RTS will only reinforce these risks.

More specifically, we would like to express the following concerns and recommendations:

- Art. 3, art. 4 and Annex 1 (a): We recommend that the information on the place of birth consists of the city and/or the country name. Many identity documents (or acceptable alternative documents) include either the city or the country name; therefore, this requirement could lead to increased cases of derisking. Additionally, birth registration data cannot always be obtained due to a host of conditions many in the world are living under, and come to the EU from, including conflict, war, forced displacement, forced dispossession, regime change, apartheid, occupation, genocide, blockades, and gender apartheid. Furthermore, we want to bring to your attention that registration of nationality and place of birth can be discriminatory in nature and can lead to financial exclusion. This includes registration of dual nationality as current practice has shown.

- On legal entities: Many NPOs across the world function as unincorporated associations; for example a voluntary group, resident initiative, cultural group, community trust, or an animal welfare group. Because of their nature and/or the high compliance burden associated with registering as a legal entity they opt to remain unregistered. Budgets of such groups are typically low (<10,000 EUR). Individuals associated with these groups open a bank account or use their personal bank account to accommodate money flows. This could potentially lead to derisking. Therefore, we recommend providing guidance to obliged entities that in such case, risk-based due diligence measures should be applied and these should not lead to derisking.
- Art. 5: We recommend providing stronger guidance in this article to ensure criteria are applied in a way that takes into account the reason why a legitimate customer may be unable to provide standard documentation (as stated in recital 7). Furthermore, we recommend specifying in art. 5 (2) that the document should contain country and/or city of birth (not necessarily the city; see above). Lastly, we recommend adding statelessness and refugee or subsidiary protection status to nationality, in line with art. 22 (1) AMLR. We recommend specifying in Annex 1 (a) (iii) that the attribute “other” can be documented instead of “nationality” to ensure obliged entities include statelessness and refugee or subsidiary protection status in their ICT systems and dropdown menu in application forms, which is currently often lacking.
- Art. 13 and 14: we recommend adding a provision to ensure synergy with art. 59 (2) AMLR to avoid obliged entities require information on individual beneficiaries when NPOs and foundations similar to express trusts or constituted as express trusts and similar legal arrangements do not need to list individual beneficiaries as BOs based on art. 59 (2) AMLR. NPOs and foundations similar to express trusts or constituted as express trusts and similar legal arrangements while not being required to list individual beneficiaries (since they benefit the general public) could add a description of the class of beneficiaries and its characteristics, as described in their statutes. Only in the case of private interest trusts (family trusts), individual beneficiaries would need to be listed.
- Art. 16 (a) and (b) require obliged entities to obtain information from their clients on the value and benefits expected from occasional transactions or business relationships (point a) and the anticipated number, size, volume and frequency of incoming and outgoing transactions (point b). First of all, it is unclear how value and benefit (point a) should be interpreted for non-profit organisations, especially since volume of incoming and outgoing transactions is mentioned in point b. Furthermore, value and benefit as well as anticipated number, size, volume and frequency are extremely difficult to estimate as results of fundraising efforts are not known in advance. Moreover, unexpected circumstances (e.g. natural disasters, war or conflict) may prompt organisations to respond and launch an appeal, leading to a much higher number and frequency of incoming transactions. Such unexpected circumstances may also lead to unforeseen destination of funds (point d). It is unclear what potential consequences could be of such deviations. Lastly, it will be very difficult for persons or entities who launch a fundraising appeal through crowdfunding platforms (and who will now also be subject to CDD measures) to anticipate the number, size, volume and frequency of incoming transactions. Many of them may be launching an appeal for the first time and do not know what response to expect. Therefore, we recommend to:
 - > add an exemption for value and benefit for NPOs in point b;
 - > remove the reference to the anticipated number and frequency of transactions; and

- > add guidance for obliged entities that deviations from any of these estimations should not lead to determination of a higher level of risk if the customer can provide legitimate reasons for the deviations

Related to section 4, we would like to point out that it is unclear what the concept of “the person on whose behalf or for the benefit of whom a transaction or activity is being conducted” would mean in the context of non-profit organisations and crowdfunding platforms.

Art. 25-27 introduce several new requirements for enhanced due diligence, several of which are not apt to the nature of NPOs and/or disproportionately burdensome (or even impossible to fulfil) and can lead to derisking or blocking of transfers. We are particularly concerned about the following:

- Art. 25 (1) requires obliged entities to obtain information on the intended nature of the business relationship which enable them to verify the legitimacy of the destination of funds. This may include information from authorities and other obliged entities. It is unclear what it is meant by information from authorities. This can be very problematic or even impossible for NPOs to obtain, especially for NPOs that provide humanitarian assistance in conflict areas and NPOs that conduct or support human rights work in countries with authoritarian regimes (including those that were forced to relocate from their country of origin due to government repression). This requirement could lead to refusal of an obliged entities to onboard an NPO as client. We recommend including an exemption for non-profit organisations.
- Art. 26 (1) (a) on proof of income of BOs. The concept of beneficial owners does not fit the non-profit sector which explicitly does not serve private interests but public interests. For many NPOs (including public benefit foundations) as well as other types of foundations, board members are considered BOs. They often serve on a voluntary basis. Their sources of wealth or income do not stem from the NPO and are not relevant to assess the level of risk associated with the organisation. Moreover, this requirement could lead to discrimination based on income: e.g. persons who represent excluded groups may no longer be considered for a board member position to avoid high-risk classification. For some public-benefit organisations (those similar to express trusts or constituted as express trusts and similar legal arrangements), there is cumulative listing of BOs, irrespective of whether those individuals exercise control over the organisation and/or own assets or have rights on assets. This list includes the beneficiaries; it is impossible for such NPOs to provide information on their income and wealth. The same can apply to founders if they are no longer connected to the organisation. Therefore, we recommend including an exemption for non-profit organisations.
- In the same vein, art. 27 (c) requires obliged entities to obtain information to assess whether transactions are consistent with the business relationship. According to point c, this should include information which enables them to assess the legitimacy of the parties involved in the transaction, including any intermediaries. This is also very difficult for NPOs, particularly those who work with partners in other parts of the world. Partners can include very small organisations or unregistered groups whose legitimacy may be difficult to assess by obliged entities. We recommend including an exemption for non-profit organisations.

Furthermore, we would like to highlight the consequences of this RTS for donation-based crowdfunding platforms. Under the AMLR, crowdfunding platforms will for the first time be considered obliged entities. No distinction is made in this regard between for-profit and non-profit entities, and it does not matter

whether crowdfunding platforms focus on private interests or public benefits. Public benefit crowdfunding platforms are often non-profit entities themselves who do not have the capacity and financial resources to be able to comply with these requirements. This new framework therefore threatens their viability, or at the very least forces them to increase their commission fees. This will limit the fundraising options available to civil society organisations. Moreover, the research [Following the Crowd: clarifying terrorism financing risk in European crowdfunding](#) (2021, Royal United Services Institute for Defence and Security Studies) found no significant or consistent evidence that European donation-based crowdfunding platforms are misused for terrorism financing purposes. The compliance burden for public benefit crowdfunding platforms related to customer due diligence measures is therefore not proportionate to the level of risk.

The AMLR provides that the obligation to conduct customer due diligence also applies to natural or legal persons who make donations, although the extent of this obligation is not yet clear. While it seems reasonable to expect that making a donation is characterised as “carrying out an occasional transaction” (hence, the 10,000 EUR threshold would apply), this will depend on the criteria for identifying occasional transactions and business relationships, which will be developed by AMLA. Moreover, even if donations can be characterised as occasional transactions, AMLA could determine that crowdfunding platforms are required to conduct customer due diligence for donations above a lower threshold, meaning a to be determined value below 10,000 EUR (Art. 19 (9) (a) AMLR). Therefore, crowdfunding platforms may be required to apply customer due diligence measures on persons or entities that make (small) donations through their platform. If that is the case, the numerous requirements will be extremely challenging for non-profit, donation-based crowdfunding platforms. This includes e.g. the provisions related to specification of nationalities (art. 4), verification of the customer in a non-face-to-face context (art. 6) and all provisions related to beneficial ownership (art. 9-12) in case a company donates through their platform. We propose to add exemptions for donation-based crowdfunding platforms in these articles to apply due diligence measures on persons or entities who seek funding through their platform to simplify due diligence requirements: to avoid misuse of donation-based crowdfunding platforms for illicit money flows, it would be sufficient to apply due diligence towards persons and entities seeking funding.