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UN Human Rights Council Advisory Committee call for input for the study on Effects of Terrorism on the Enjoyment of All Human Rights, pursuant to the UN HRC resolution 34/8

**Submission by the European Center for Not-for-Profit Law (ECNL)
October 2017**

The European Center for Not-for-Profit Law (ECNL) respectfully submits its overview on:

- How the application of the counter-terrorism financing recommendations impact the freedom of association and the ability of civil society organizations (CSOs) to access and use financial resources.¹
- The effects of counter-terrorism measures on financial exclusion of the CSOs in the form of *bank de-risking*.

Introduction: the global counter-terrorism financing regime

1. The Financial Action Task Force ([FATF](#)) is an inter-governmental task force which has produced **40 recommendations** on how countries should comply with global anti-money laundering and counter-terrorist financing (AML/CTF) policies. The FATF assumes that if its standards are implemented effectively, financial systems and the broader economy will be better protected from threats of money laundering and terrorist financing. Over 190 [countries](#) have committed to implementing FATF 40 recommendations. One of the standards, [Recommendation 8](#) (R8), covers non-governmental organizations (NGOs), or non-profit organizations (NPOs)² in FATF terminology.³
2. FATF or its regional bodies conduct periodic [country mutual evaluations](#) and rate how effective countries are at implementing AML/CTF policies. These **evaluation processes** produce [ratings](#) that have real consequences, affecting country's bond ratings, access to financial markets, trade, and investment, or even listings as [high risk jurisdictions](#).⁴

¹ This submission also includes excerpts from ECNL background paper developed on request by the Council of Europe Expert Council on NGO Law

² FATF definition of NPO: "The term non-profit organization or NPO refers to a legal entity or organization that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of "good works". This definition shows that FATF defines the NPOs very narrowly. However, governments typically apply measures to all NPOs regardless of purpose and size. Such measures sometimes have a negative impact on the fundamental freedoms, restricting freedom of association and access to financial resources.

³ The terminology 'non-profit organizations' (NPOs) will be used in this submission to align with the FATF official language.

⁴ FATF sets the standards for national level implementation and its ability to place jurisdictions on its list of high risk jurisdictions gives it the high leverage in the financial political arena. In protection of country investments, ratings and financial stability, many governments have proven willing to compromise human rights and civic freedoms to adhere to the FATF standards.



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3. Until 2016, the general premise of FATF R8 was that governments needed to protect NPOs from terrorist financing abuse as it assumed that all NPOs are particularly vulnerable of being at risk. This gave wrong opening to governments to invoke CTF/AML standards as justification for constraints on human rights including freedom of association and access to financial resources. **Restrictions included: limited access to foreign funding, impeded domestic fundraising, burdensome reporting requirements, and otherwise over-regulated the sector in violation of international human rights law and contrary to the FATF standards.** (for examples see: [here](#)).
4. For the last 4 years, a global coalition of NPOs, to which ECNL is active member, [engaged](#) with FATF providing evidence of the misuse of FATF recommendations; in 2016 FATF substantially revised R8. FATF acknowledged that burdensome restrictions were imposed on NPOs without meaningfully contributing to CTF/AML goals and that not all NPOs are at risk. FATF revised the standards and it now requires countries to undertake risk assessment process to demonstrate whether and which NPOs are at risk of terrorist financing abuse. Based on those findings, countries should adopt measures that respond to the risk by targeting only those NPOs at risk and in a proportionate level to the risk.
5. This is a highly significant policy shift, and a vital step in preventing restrictions from misapplication of CTF/AML rules. However, this global policy shift is not in itself sufficient. There is a need for FATF to revise other policy documents (see below annex 1) to align them with the new standard. In addition, the evaluators who perform the assessment of the country compliance with FATF regulations, as well as governments across the globe still need to understand and adapt to the new rules to avoid negative impacts on NPOs' activities and rights.
6. FATF compliance is a highly complex and burdensome process, and many evaluators have little experience of the NPO sector. Whilst FATF provides some guidance on aspects of R8, it does not detail how countries should undertake risk assessments or 'engage' with NPOs in evaluations. Therefore, the role of FATF and FATF regional bodies that conduct evaluations and score countries against the FATF standards is crucial. FATF and its regional bodies are best positioned to clarify the rules, monitor implementations and try to limit possibly of restrictions that hamper NPOs legitimate activities in the name of AML/CTF.

The impact of mutual evaluations

7. The FATF reports from the mutual evaluations contain potentially damaging language for the sector (e.g., some reports call for enhanced oversight and control of the entire sector, stricter rules around fundraising by NPOs including cross-border funding, or



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stricter criteria for registering NPOs) that when applied without consideration of the local circumstances, have negative impact on exercising the freedom of association⁵.

8. Recent illustrative examples from country evaluation reports (MERs) show how evaluations can have a negative reflection and impact on the freedom of association. The governments are required to follow up on the findings and recommendations from the MERs and report back to the FATF on improving the implementation of the standards. Many may simply take the literate wording of the MER findings and recommendations, and apply legislative often restrictive measures to the entire NPO sector, without taking into account a risk-based, targeted and proportionate approach. In that way, they restrict the exercise of the freedom of association. On the other hand, MERs typically do not offer nuanced language that would include more specific guidance on how governments should approach regulatory activities without hampering fundamental freedoms. For example:
 - I. **Hungarian MER, conducted and published by MONEYVAL (FATF-style regional body)**, included findings that there are doubts about the level of transparency of the NPO sector. It stated: *"Hungary should establish an effective mechanism to conduct outreach to the NPO sector concerning FT issues and monitoring of the NPOs posing a higher FT risk. Hungary should ensure an adequate level of NPO transparency and control over funds raised by NPOs. Hungary should undertake a formal review of the NPO sector to assess the potential vulnerability of the sector to terrorist activities and reassess this information periodically. It appears that no outreach activities have been conducted to the NPO sector concerning FT issues."* It is not clear how the evaluators came to the conclusion that the transparency of the funding is a problem in Hungary in the lack of assessment of the risk. In a follow up initiative the Government adopted a restrictive [law](#), targeting transparency of foreign funding organizations, by referring to the AML/CTF rules as one of the reasons for the legislation⁶. Several international bodies criticized the draft law as it limits fundamental rights and flow of capital and the EU announced an infringement procedure against the country.
 - II. **Cambodian MER, conducted and published by APG (FATF-style regional body)**, stated that Cambodia is to a certain extent promoting transparency,

⁵ As mutual country evaluations are an effective method of implementing the FATF standards, it is important that evaluators understand not only the standards themselves but also the context of the sector they are evaluating and fundamental freedoms and human rights they might be impacting. Evaluation teams that assess the country compliance with FATF standards in general do not include a specialist or expert on civil society nor human rights issues, rather financial, criminal law and/or judicial background specialists. Moreover, evaluators are not yet specifically trained on R8 or issues that might affect civil society, freedom of association or other fundamental freedoms, or on the effectiveness of measures under R8. However, this has a lasting impact on how the countries implement the FATF standards.

⁶ The draft Act states that "In line with the efforts of the international community..., this Act expands the control mechanisms related to money laundering and the financing of terrorism, ensures the transparency of foreign financing for organizations in the civil society...."



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integrity and public confidence in the NPO sector, by providing for NPO registration and reporting regime under the Law on Associations and NGOs. However, it also identified some shortcomings in the regulation and supervision of NPOs – namely, that *Cambodia does not have clear policies to promote transparency, integrity, and public confidence in the administration and management of all NPOs*. These wordings in the MER are very broad, with no specific details on which sections of regulative framework for which particular part of the sector are not sufficient, which again can lead to misinterpretation and misuse of the report to include restrictions related to registration or funding for the entire sector. In addition, the MER is positive about the recently adopted Law on Associations and Non-Governmental Organizations in terms of combating terrorism, whilst in the same time numerous national and [international](#) human rights [organizations](#) and the [media](#) criticised that law for being overly restrictive and hampering the work of civil society.

Issue of financial exclusion of NPOs: bank de-risking

9. The fact that NPOs were originally considered as particularly vulnerable led to another effect - financial exclusion of the civil society in the form of *bank de-risking*. De-risking is defined as the practice of financial institutions exiting relationships with and closing the accounts of clients considered *high risk*. There is plenty of [evidence](#) to show that NPOs are adversely impacted by de-risking. As the recently published United Kingdom [National Risk Assessment](#) emphasizes, many NPOs in the U.K. have experienced transaction delays or denials or account closures by their banks due to concerns around terrorist financing risk. The report states if this trend persists, de-risking may have the effect of pushing NPOs out of the official, regulated areas of activity and into higher risk ways of working, such as transacting through physical cash or unregulated transfers, increasing the risks in the sector (para 12.8).
10. The main reason for this is the extensive due-diligence procedures banks are now required to carry out on their clients to fulfil AML/CTF and mainly the FATF compliance requirements and the large fines they face if they misapply regulations. Many NPOs, especially those who work in or around conflict zones and in humanitarian actions, as well as in development countries, have been impacted by these stringent requirements. And this, coupled with the fact that NPOs are not banks' most profitable customers, has led banks to terminate or refuse the relationship with many NPOs. Together with a decline in global correspondent banking, this has led to NPOs around the world being unable to carry out their mandate, affecting aid and relief.
11. In addition, civil society is a vital partner for governments in delivering the Sustainable Development Goals (SDGs). Reduced access to the formal financial flows and funding for nonprofits hampers the 2030 Agenda. Additionally, the existence of civil society is critical for a health democracy and for development. The [CIVICUS Monitor](#) findings



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show a clear correlation between open civic space and human development, as well as showing that the more open civic space is, the less income inequality there is. Constraining this space through financial exclusion would therefore be contrary to the goals of progress and development.

12. At the moment, many NPOs as well as their (governmental and non-governmental) funders are dealing with the situation on a case-by-case basis, navigating the complex regulatory AML/CFT landscape. The larger NPOs sometimes manage to find solutions and ways around the system more easily than the smaller NPOs, who are often those advocating for human rights, freedoms, financial access, transparency and accountability of the state, minority rights, etc. In some cases, though, NPOs may become entirely excluded from the official financial system. There are modest steps in the way of finding solutions. For example, the World Bank's Financial Markets Integrity group along with ACAMS (the Association of Certified Anti Money Laundering Specialists) have been facilitating a set of multi-stakeholder dialogues on de-risking and NPOs.
13. Given the systemic nature of the issue and its global occurrence, what is needed is a cross-sectoral and multi-stakeholder approach (funders, NGOs, INGOs, international organizations, banks, regulators, governments) in order to develop mutual and sustainable responses to the financial exclusion. In addition, the focus has been largely on supporting financial access for humanitarian organizations, however, there is a need to include other nonprofits (developmental, human rights, anti-corruption organizations, etc) whose financial access also need to be guaranteed and should not be closed off as a consequence of increased AML/CTF risk-prevention demands. Therefore, there is a need to elaborate and monitor these developments further in order to ensure financial inclusion needed for human rights and freedoms protection as well as sustainable development.

Outreach and collaboration with NPOs

14. Whilst FATF measures call for outreach and collaboration with the NPOs those are not strongly stated nor fully implemented on a country level. As a result, NPOs are rarely aware of the processes (e.g., risk assessments, evaluations) and not engaged. There is no obligation of countries to consult the public or NPOs when implementing the FATF standards, as the FATF itself is not an inter-governmental or multilateral organization with clearly defined rules of procedure. Consequently, the public and NPOs usually do not have full understanding of some of the reasons why regulatory restrictive measures on freedom of association and funding are implemented.

Recommendations

15. Further explore within the study:



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- i. Ways in which misapplication of the FATF provisions restrict the freedoms, financial exclusion and foreign funding/investments into the civil society and negatively affecting development of the NPO sectors
- ii. The possibly to raise with the FATF the need for review of all of its policies and guidelines for governments, including its evaluation processes.
- iii. The importance of ensuring civil society participation in all policy processes (as also highlighted in the UN Human Rights Council [resolutions](#) on public participation), including FATF related processes on national level, and ways how this can be encouraged through the evaluations.
- iv. How can the UN bodies engage in the multi-stakeholder dialogue around financial exclusion of civil society and what measures can be taken to speed up reaching the solutions, as not to further hamper implementation of human rights and fundamental freedoms?

Annex 1

FATF standards in a nutshell

There are three key FATF documents that address specifically NPOs:

- [Recommendation 8](#): Non profit Organizations (R8),
- [Interpretive Note](#) to R8, and
- the [Best Practices](#) on Combating the Abuse of Non-Profit Organizations (Best Practice Paper).⁷

Therefore, it is highly important to ensure that these three documents are aligned and that governments, evaluators and NPOs, have the same understanding regarding the requirements and consequences.

FATF requires that the laws and regulations that govern NPOs are reviewed so that these organizations cannot be abused for the financing of terrorism. The revised 2016 R8 introduces a more targeted, risk-based approach towards combating terrorism in NPO sector. In order to comply with the revised R8, countries can no longer adopt broad regulations that affect all NPOs by claiming that the whole sector is at risk. Instead, countries must conduct an assessment to identify specific NPOs at risk and then take appropriate and proportionate action based on it. The revised FATF standard on NPOs aims to ensure that implementation is in line with a risk-based approach, with engagement of NPOs, and which does not disrupt or discourage legitimate non-profit activity.

⁷ Best Practice Paper purpose is to “*primarily assist countries in their implementation of Recommendation 8 on non-profit organizations, in line with Recommendation 1 and the risk-based approach, and consistent with countries’ obligations to respect freedom of association, assembly, expression, religion or belief, and international humanitarian law*”.



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The Interpretive Note as part of the FATF standard, must be read in conjunction with R8. It was also revised in 2016 together with the R8, to include more safeguards in the process. Specifically, it calls for governments to respect fundamental rights and humanitarian law, and to avoid overregulation of NPOs. In the same time it re-emphasizes the need for proportionate measures, instead of using a one-size-fits-all approach which may restrict civic space and fundamental freedoms. However, the Interpretive Note, lists possible measures countries could take regarding monitoring and oversight of NPOs, which resemble a “checklist” approach – countries may decide to simply subscribe to all listed measures without undergoing full risk based approach.

The Best Practices Paper provides governments with guidance on how to implement R8. The 2016 changes of the R8 and Interpretive Note are only partially reflected, as the document dates from 2015. This leads to contradictory and confusing language that may give rise to misinterpretation and further (un)intended restrictions