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EXPERT COUNCIL ON NGO LAW
CONF/EXP(2022)2

17 May 2022

EXPERT COUNCIL ON NGO LAW

NON-GOVERNMENTAL ORGANISATIONS AND THE IMPLEMENTATION OF MEASURES AGAINST MONEY LAUNDERING AND TERRORIST FINANCING

Thematic Study prepared by Jeremy McBride on behalf of the
Expert Council on NGO Law of the
Conference of INGOs of the Council of Europe*

**The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.*

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EXECUTIVE SUMMARY

This Study is concerned with the elaboration and oversight of the implementation of certain European and international requirements with respect to activities that might support or act as a cover for money laundering and terrorist financing insofar as this can have an adverse impact on the legitimate activities of NGOs in Council of Europe member States.

These requirements concern the laws and regulations applicable to certain non-profit organisations and the disclosure of beneficial ownership of all legal persons. They have been elaborated by the Financial Action Task Force ("FATF") and by the European Union ("the EU") in a Directive.

The requirements are being implemented through measures adopted by the member States under the supervision of FATF, the EU and the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism ("MONEYVAL").

The Study first clarifies the NGOs with which the requirements are supposed to be addressed before considering the process of evaluation undertaken by FATF and MONEYVAL, focusing in particular on the extent to which NGOs have any involvement in this process.
It then examines the scope of the requirements, the extent of the guidance provided for their implementation, the evaluation of the implementation of the requirements adopted by FATF and the various national measures of implementation in respect of the Directive.

The Study finds that the way in which the relevant requirements are being applied is leading, or will lead, to significant burdens for NGOs that are not at risk of being implicated in money laundering or terrorist financing and thus doing so without making any useful contribution to tackling such activities

This is seen to be a situation which stems in part from the fact that the requirements themselves have been developed and elaborated without really taking sufficient account of the diverse nature of NGOs and the need for improved guidance on implementation that deals much more specifically with the particular character of NGOs.

Although the evaluations prepared by FATF and MONEYVAL do include criticisms of the approach taken by member States when implementing FATF standards, this process could emphasise more that the measures adopted do not always respect the limits on applying the FATF standards to NGOs and could focus more on the use actually made of the implementing measures and their impact on NGOs.

It is noted that some of these problems now seem to be beginning to be recognised, with concern for the unintended consequences of implementing the requirements, which may sometimes be unintentional but can also be intentional.

There is seen to be a need for the misapplication of the requirements to be called out systematically and for effective pressure to rectify the measures concerned and the abuses which they facilitate.

It is considered unlikely that the difficulties being encountered through the implementation of the requirements will be overcome without a much more serious and ongoing engagement by the oversight bodies with NGOs, not only as regards the further elaboration of requirements – as has begun to occur - but also in the monitoring of their implementation.

A. INTRODUCTION

1. This Study is concerned with the elaboration and oversight of the implementation of certain European and international requirements with respect to activities that might support or act as a cover for money laundering and terrorist financing insofar as this can have an adverse impact on the legitimate activities of non-governmental organisations ("NGOs") in Council of Europe member States.

2. In particular, the Study addresses how these requirements and the evaluation of their implementation might better take account of the varying character of NGOs and the circumstances in which they operate.

3. While there is a reference to money laundering in the context of restrictions on fundraising by NGOs in Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organisations in Europe ("Recommendation CM/Rec(2007)14"),[1] there is no similar reference in it concerned with terrorist financing.

4. However, although Recommendation CM/Rec(2007)14 states that NGOs should be free to pursue their objectives, this is qualified by the stipulation that:

> both the objectives and the means employed are consistent with the requirements of a democratic society.[2]

5. Thus, both restrictions designed to prevent money laundering and ones directed to terrorist financing which have an impact on the right to freedom of association under Article 11 of the European Convention on Human Rights ("the European Convention") – which underpins the establishment and operation of most NGOs - could be regarded as necessary in a democratic society, so long as they are prescribed by law and proportionate in their effect.[3]

6. The requirements considered in this study have been elaborated by the Financial Action Task Force ("FATF") - an inter-governmental body established in 1989, which describes itself as a global money laundering and terrorist financing watchdog - in certain of its

[1] The Recommendation was adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers' Deputies. Thus, paragraph 50 provides that: "NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties".

[2] Paragraph 11.

[3] See, e.g. *Vinks and Ribicka v. Latvia*, no. 28926/10, 30 January 2010 and *Shorazova v. Malta*, no. 51853/19, 3 March 2022 as regards money laundering and *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 13 February 2003 and *Yefimov and Youth Human Rights Group v. Russia*, no. 12385/15, 7 December 2021 as regards terrorism.

Recommendations ("FATF Recommendations"),[4] as well as certain associated, non-binding documentation,[5] and by the European Union ("the EU") in a Directive.

7. The requirements are being implemented through measures adopted by the member States under the supervision of FATF, the EU and the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism ("MONEYVAL")[6].

8. The requirements of particular relevance for non-governmental organisations are: (a) FATF's Recommendations 8, 24 and 25 on, respectively, non-profit organisations ("Recommendation 8"), transparency and beneficial ownership of legal persons ("Recommendation 24") and transparency and beneficial ownership of legal arrangements ("Recommendation 25") (collectively "FATF standards");[7] and (b) Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC ("Directive 2015/849").

9. The evaluation of the implementation by Council of Europe member States of FATF Recommendations was carried out by FATF and MONEYVAL jointly in respect of the

[4] All the Recommendations are available at https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf. Aspects of them have been revised several times since they were first adopted in 1990, most recently in March 2022.

[5] Notably, in the present context, *Best Practices on Beneficial Ownership for Legal Persons* ("*Beneficial Ownership Best Practices*") (https://www.fatf-gafi.org/media/fatf/documents/Best-Practices-Beneficial-Ownership-Legal-Persons.pdf), *Best Practices Combating the Abuse of Non-Profit Organisations (Recommendation 8*) ("*NPO Best Practices*") (https://www.fatf-gafi.org/documents/documents/bpp-combating-abuse-npo.html https://www.fatf-gafi.org/documents/documents/bpp-combating-abuse-npo.html), *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* ("*FATF Methodology*") (https://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf), *Risk of Terrorist Abuse in Non-Profit Organisations* ("*Typologies Report*")(https://www.fatf-gafi.org/documents/documents/risk-terrorist-abuse-non-profits.html), *Terrorist Financing Risk Assessment Guidance* ("*Terrorist Financing Guidance*") (https://www.fatf-gafi.org/media/fatf/documents/reports/Terrorist-Financing-Risk-Assessment-Guidance.pdf) *and Transparency and Beneficial Ownership* ("*Transparency Guidance*")(https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf).

[6] MONEYVAL is a permanent monitoring body of the Council of Europe, established in 1997 and entrusted with the task of assessing compliance with the principal international standards to counter money laundering and the financing of terrorism and the effectiveness of their implementation, as well as with the task of making recommendations to national authorities in respect of necessary improvements to their systems. See further: https://www.coe.int/en/web/moneyval/moneyval-brief.

[7] These Recommendations need also to be considered in the light of Recommendation 1 on assessing risks and applying a risk-based approach to the measures being adopted, as well certain key goals or 'Immediate Outcomes' identified by FATF and used during mutual evaluations to assess the effectiveness of the efforts of a country/territory. Of particular relevance in the present context are Immediate Outcomes 1 (Risk, Policy and Coordination – Money laundering and terrorist financing risks are understood and, where appropriate, actions coordinated domestically to combat money laundering and the financing of terrorism and proliferation) and 10 (Terrorist financing preventive measures & financial sanctions – Terrorists, terrorist organisations and terrorist financiers are prevented from raising, moving and using funds, and from abusing the NPO sector).

Russian Federation,[8] by FATF in respect of nineteen other member States[9] and by MONEYVAL in respect of the remainder[10].

10. The Study first clarifies the NGOs with which the two sets of requirements are supposed to be addressed before considering the process of evaluation undertaken by FATF and MONEYVAL, focusing in particular on the extent to which NGOs have any involvement in this process.

11. It then examines the scope of Recommendation 8 and the approach of the two bodies to the evaluation of its implementation by member States.

12. Thereafter, it examines the scope of the requirements concerning disclosure of beneficial ownership of NGOs in Recommendations 24 and 25 and Directive 2015/849 and then the approach taken to the evaluation of their implementation by member States in respect of the Recommendations and various national measures of implementation in respect of the Directive.

13. In examining the approach to evaluation of the relevant requirements, the Study bases itself on the most recent mutual evaluation and follow-up reports for Council of Europe member States by FATF and MONEYVAL.[11]

14. The Study concludes with suggested changes to both the requirements and the process of evaluating their implementation.

B. THE NGOs CONCERNED

15. Recommendation 8 is solely concerned with terrorist financing abuse by what it terms non-profit organisations ("NPOs"), whereas the transparency and beneficial ownership requirements in Recommendations 24 and 25 and Directive 2015/849 are directed respectively to: "legal persons"; trusts and similar legal arrangements; and "obliged entities" and "legal entities" and "trusts and other types of legal arrangements".

[8] Although the Russian Federation ceased to be a member of the Council of Europe on 16 March 2022 (CM/Res(2022)2, the Study takes account of the evaluation made in respect of it prior to that date.

[9] Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

[10] Albania, Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Latvia, Liechtenstein, Lithuania, Malta, Republic of Moldova, Monaco, Montenegro, North Macedonia, Poland, Romania, San Marino, Serbia, Slovak Republic, Slovenia and Ukraine. In addition, through decisions of the Council of Europe's Committee of Ministers, MONEYVAL evaluates two non-member states of the Council of Europe (Israel and the Holy See) and several territories for whose international relations the United Kingdom is responsible (the United Kingdom Crown Dependencies of the Guernsey, the Isle of Man and Jersey; as well as the United Kingdom Overseas Territory of Gibraltar).

[11] The evaluation and follow-up reports for FATF are available at https://www.fatf-gafi.org/countries/ and those for MONEYVAL are available at https://www.coe.int/en/web/moneyval/jurisdictions. In the footnotes references to reports are abbreviated as follows F-ER, year for evaluation reports and F-FuR, year for follow-up reports in the case of FATF and M-5th ER for evaluation reports and M- FuR in the case of MONEYVAL.

1. The FATF Recommendations

16. The NPOs to which Recommendation 8 applies are defined in its Interpretive Note as covering any

> legal person or arrangement or organisation 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".[12]

17. This is elaborated as referring to entities which:

> play a vital role in the world economy and in many national economies and social systems. Their efforts complement the activity of the governmental and business sectors in providing essential services, comfort and hope to those in need around the world. The FATF recognises the vital importance of NPOs in providing these important charitable services, as well as the difficulty of providing assistance to those in need, often in high risk areas and conflict zones, and applauds the efforts of NPOs to meet such needs.

18. The definition was adopted on account of the variety of legal forms that NPOs can have, focusing on the activities and characteristics of an organisation which can put it at risk of terrorist financing abuse rather than the simple fact that it is operating on a non-profit basis. It is, therefore, essentially just a functional definition and is not directed to the non-profit sector in general.

19. Although it is a requirement for NGOs to be non-profit-making, European standards do not see them as being limited to entities which have objectives linked to the provision of charitable services and assistance to those in need.

20. Thus, this is evident from the following phrase in the preamble to Recommendation CM/Rec(2007):

> the contributions of NGOs are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of changes in law and public policy, the provision of assistance to those in need, the elaboration of technical and professional standards, the monitoring of compliance with existing obligations under national and international law, and on to the provision of a means of personal fulfilment and of pursuing, promoting and defending interests shared with others.

21. Similarly, the *Joint Guidelines on Freedom of Association* ("the Joint Guidelines") adopted by the European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR)[13] define an association – which is a form of NGO – as:

> an organized, independent, not-for-profit body based on the voluntary grouping of persons with a common interest, activity or purpose[14]

[12] Paragraph 1 of the Interpretive Note.
[13] CDL-AD(2014)046-e, adopted at the Venice Commission's 101st Plenary Session, 12-13 December 2014.
[14] Paragraph 7.

with it being underlined that:

> associations often play an important and positive role in achieving goals that are in the public interest, as has been recognized in international jurisprudence and in general comments and recommendations made by the UN treaty bodies, as well as in resolutions of the Human Rights Council and other international and regional documents. Associations work on a wide range of issues, including human rights (such as combating discrimination and racist hate speech, monitoring, assisting the work of national human rights institutions, promoting, recognizing and monitoring the implementation of the rights of children, preventing and combating domestic violence and violence against women, including eradicating female genital mutilation, and other gender based violence, as well as preventing, suppressing and punishing trafficking in persons, especially women and children); democratic reforms (such as promoting good governance and equal participation in political and public life, as well as securing remedies); security and international co-operation (such as facilitating conflict prevention, promoting reconciliation and peace, achieving the purposes and principles of the United Nations and contributing to the work of international organizations); and social, economic and development issues (such as achieving inclusion in education, bringing about improvements in living conditions, providing disaster relief and humanitarian assistance, promoting employment and contributing to health and development)[15].

22. Both Recommendation CM/Rec(2007)14 and the Joint Guidelines thus make it clear that, while NPOs may be NGOs, there will be many NGOs that do not come within the FATF's definition of NPOs.

23. As a result, the requirements in Recommendation 8 concerned with terrorist financing will not necessarily be relevant to the work of entities whose objectives are not linked to charitable services and assistance to those in need and that their application to them could indeed be inappropriate.

24. The term "legal person" in Recommendation 24 is capable of covering all NGOs with legal personality.

25. However, the requirements in that recommendation seen by FATF – as made clear in the Interpretive Note to Recommendation 24 - as being primarily concerned with companies and, to a lesser extent foundations, *Anstalten*, *Waqf* and limited liability partnerships.

26. Nonetheless, the Interpretive Note does not consider that other legal persons – such as NGOs with legal personality – are excluded from those requirements. Rather, it sees the need for countries to take into account in their implementing measures:

> the different forms and structures of those other legal persons, and the levels of money laundering and terrorist financing risks associated with each type of legal person, with a view to achieving appropriate levels of transparency.[16]

[15] Paragraph 9 (footnotes omitted).
[16] Paragraph 15.

27. Moreover, the *Transparency Guidance* provides that "legal persons":

> can include non-profit organisations (NPOs) that can take a variety of forms which vary between jurisdictions, such as foundations, associations or cooperative societies.[17]

28. The requirements of Recommendation 25, which is concerned with trusts and similar arrangements might be thought to be more relevant for asset management arrangements for the benefit of family members, investment vehicles and pension funds than NGOs.

29. However, they could undoubtedly be also relevant for those NGOs – especially charities - that take this form. These will additionally be seen as NPOs for the purpose of Recommendation 8, insofar as they are engaged in raising or disbursing funds for charitable and similar purposes.

2. Directive 2015/849

30. The provisions in Directive 2015/849 concern "obliged entities", "legal entities" and "trusts and other types of legal arrangements".

31. Those relating to "obliged entities" entail obligations to identify and assess risks of money laundering and terrorist financing, customer due diligence and the reporting of suspicions.

32. However, the definition of obliged entities does not seem capable of covering most NGOs[18] and the obligations imposed by Directive 2015/849 are not, therefore, considered further in the Study.

33. On the other hand, the preamble refers to the need to identify any natural person who exercises ownership or control over a "legal entity" and specifies that

> Member States should ensure that the widest possible range of legal entities incorporated or created by any other mechanism is covered.[19]

[17] Paragraph 24.

[18] Thus, Article 2 defines them as covering "(1) credit institutions; (2) financial institutions; (3) the following natural or legal persons acting in the exercise of their professional activities; (a) auditors, external accountants and tax advisors; (b) notaries and other independent legal professionals, where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning the: (i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets; (iii) opening or management of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies, foundations, or similar structures; (c) trust or company service providers not already covered under point (a) or (b); (d) estate agents; (e) other persons trading in goods to the extent that payments are made or received in cash in an amount of EUR 10 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked;(f) providers of gambling services." Some NGOs could conceivably fall under Article 2(3)(e) but they are most likely going to be ones involved in charitable and related activities.

[19] Point 12.

34. This wider reach – which has the potential to embrace NGOs with legal personality – is reflected in Article 30 dealing with beneficial ownership information, the requirements of which it states Member States should ensure are applied to "corporate and other legal entities incorporated within their territory".

35. However, the European Commission's proposal for Directive 2015/849 did not refer at all to the possible impact of beneficial ownership requirements for NGOs or civil society, although it did include an impact assessment of the legislative proposals on Fundamental Rights.[20]

36. Indeed, the latter referred only to measures to fulfil the obligations under Article 8 the Charter of Fundamental Rights, to ensure protection of personal data, the absence of any impact on the right to an effective remedy and to a fair trial under Article 47 and the taking into account of respect for private life, the freedom to conduct a business and the prohibition of discrimination under respectively, Articles 7, 16 and 21.

37. Thus, no consideration would appear to have been given to any possible impact on the right to freedom of association under Article 12.[21]

38. A similar absence of consideration of the possible impact of the beneficial ownership requirements on NGOs can be seen in a proposal made by the European Commission to amend Directive 2015/849 in respect of those and other requirements in it ("the Proposal"),[22] which was ultimately adopted as Directive (EU) 2018/843 of the European Parliament and the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU ("Directive 2018/843").

39. Thus, the only NGOs that were mentioned as having taken part in the consultations with stakeholders were consumer organisations and the only provisions of the Charter of Fundamental Rights that were taken into account were those relating to the right to private and family life, the protection of personal data and the freedom to conduct a business in Articles 7, 8 and 16. [23] Thus, no consideration was again given to any possible impact on freedom of association.

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[20] *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing*, COM(2013) 45 final, 5 February 2013, p. 7.

[21] Note the recognition in *National Association of Teachers in Further and Higher Education v. United Kingdom* (dec.), no. 28910/95, 16 April 1998 that "there may be specific circumstances in which a legal requirement on an association to reveal the names of its members to a third party could give rise to an unjustified interference with the rights under Article 11 (Art. 11) or other provisions of the Convention". There was also no consideration of any such impact on the right to freedom of association of the then proposed Directive for NGOs in the Opinions of the European Economic and Social Committee (2013/c 271/05, 19 September 2013) or of the European Central Bank (2013/C 166/02, 12 June 2013).

[22] *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC*, COM(2016) 450 final, 5 July 2016.

[23] *Ibid*, at pp. 10-12.

40. Although there was a reference in the Proposal to civil society organisations, this was only in the context of a suggestion that the proposed amendments would allow greater scrutiny of information by them and not of any possibility of their activities being potentially impeded by the existing or the modified requirements.[24]

41. Directive 2018/843 did not modify the concept of "legal entity" in Directive 2015/849 or make any reference to NGOs or civil society.

42. There is nothing in either Directive 2015/849 or Directive 2018/843 comparable to the Interpretive Note to FATF Recommendation 24 that account should be taken in the measures implementing them of the different forms and structures of legal persons other than corporate and financial entities, such as NGOs.

43. Instead, apart from the reference to corporate entities and trusts, the only forms of legal entity mentioned in the definition of beneficial owner are "legal entities such as foundations, and legal arrangements similar to trusts".[25] This does not really seem an apt way of covering the different legal forms of NGOs, most of which are not foundations or similar to trusts.

44. The requirements of Directive 2015/849 relating to trusts and other types of legal arrangements, like that in Recommendation 25 relating to trusts and similar arrangements,[26] might be thought to be more relevant for asset management arrangements for the benefit of family members, investment vehicles and pension funds than NGOs. However, they could still be potentially applicable in the case of those NGOs – especially charities - that take this form.

45. Similarly to Recommendation 25, the beneficial owners of trusts and other types of legal arrangements are defined as covering the settlor, the trustee(s), the protector (if any), and any other natural person exercising ultimate effective control over the trust.

46. However, although the definition also extends to beneficiaries, rather than specify the "class of beneficiaries" it provides instead that the beneficial owner can be:

> where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates

which could lead to the conclusion that the principal concern here is with asset management rather than charitable work.[27]

[24] *Ibid*., at p. 11.

[25] Article 3(6)(c).

[26] This had been extended by Directive 2018/843 from just trusts to "other types of legal arrangements, such as inter alia, fiducie, certain types of Treuhand or fideicomiso where such arrangements have a structure or functions similar to trusts".

[27] This view is perhaps reinforced by the amendment referred to in the preceding footnote, as well as the additional requirement introduced by Directive 2018/843 for Member States to "identify the characteristics to determine where legal arrangements have a structure or functions similar to trusts with regard to such legal arrangements under their law".

3. Conclusion

47. Thus, the entities to which the provisions of Recommendations 8 and 25 apply are less extensive than those that will be subject to the requirements in Recommendation 24 and Directive 2015/849.

C. THE PROCESS OF EVALUATION

48. Both FATF and MONEYVAL have procedures governing the process of evaluation of compliance with FAF Recommendations, which are broadly similar.[28]

49. They undertake what are termed "mutual evaluations" of the countries/territories within their jurisdiction, i.e., by an assessment team of assessors drawn principally from other such countries/territories.

50. The assessors for a particular evaluation are drawn from the representatives of countries/territories, namely, persons who are deputy ministers in ministries of justice, diplomats, judges, legal advisers in ministries, members of parliament,[29] government legal advisers, law professors, officials in ministries concerned with finance, corruption, internal affairs and local government, public prosecutors and staff from regulatory or supervisory bodies.

51. It is not possible to establish what level of familiarity the assessors might have with: (a) the diverse nature of NGOs in terms of their size, activities and objectives; (b) the fact that many NGOs are not necessarily NPOs in the FATF understanding of this term; and (c) the difficulties that particular countries may create for the operation of NGOs notwithstanding the requirements of Article 11 of the European Convention and Recommendation CM/Rec(2007)14.

52. However, given the positions from which assessors are drawn and the expertise required of them,[30] it is unlikely that they will have much familiarity with such matters relating to NGOs.[31] In any event, their specific focus will be on the extent of compliance by a particular country/territory with FATF standards.

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[28] Currently, *Procedures for the FATF Fourth Round of AML/CFT Mutual* Evaluations ("*FATF Procedures*") and MONEYVAL's *Rules of Procedure for the 5th Round of Mutual Evaluations*, (MONEYVAL(2014)36REV13 ("*MONEYVAL Rules of Procedure*").

[29] Only FATF.

[30] The focus is on expertise of a legal, financial and law enforcement nature, as well as that concerning characteristics of the jurisdiction, such as the composition of the economy and financial sector, geographical factors and trading or cultural links; *FATF Procedures*, para. 15 and *MONEYVAL Rules of Procedure*, Rule 14.9, pp. 14-15.

[31] FATF indicates that its assessors are trained "how to critically analyse a country's technical compliance with the FATF Recommendations and how to assess whether the country's AML/CFT measures are effective"; https://www.fatf-gafi.org/faq/mutualevaluations/. However, there is no mention of understanding the diverse character of NGOs and how these do not necessarily fall within the FATF definition of NPOs.

53. There have been several rounds of these evaluations; four in the case of FATF and five in the case of MONEYVAL, although not all rounds have been completed in respect of every country/territory.

54. Following the completion of a mutual evaluation report, there may then be a regular or enhanced follow-up.[32]

55. The regular follow-up is the default mechanism whereas there will be resort to enhanced follow-up where: (a) there are certain shortcomings in the ratings in a mutual evaluation report for technical compliance with FATF Recommendations or in the level of effectiveness outcomes achieved; (b) a significant number of priority actions have not been addressed on a timely basis; or (c) there has been a lowering of compliance during the regular follow-up process.

56. Both follow-up procedures entail a reporting back by the country/territory concerned after a certain period, although the intervals differ. There will be follow-up reports by FATF and MONEYVAL on this reporting, in which the level of compliance will be assessed.

57. Mutual evaluation reports by FATF and MONEYVAL are based on: (a) a desk-based review of information provided by the country/territory concerned in responding to a template questionnaire, previous reports and other credible or reliable sources of information (which could be provided by NGOs but there is no indication whether this occurs since will not be any reference to such information in the reports); (b) an on-site visit; comments by the country/territory concerned on a draft and on a draft revised in the light of those comments; and (c) a quality and consistency review.[33]

58. However, in the case of MONEYVAL, the reference to the desk-based review gives an example of other credible or reliable sources of information as that coming from "other international organisations".[34]

59. The mutual evaluation reports do not refer to submissions from NGOs prior to an on-site visit and so it is not possible to judge the extent to which FATF and MONEYVAL assessors take these into account in the process of evaluation of compliance with FATF standards.

60. However, a note on the FATF website states that it now:

> compiles input from non-profit organisations (NPOs) and other civil society organisations on money laundering and terrorist financing risk and context.[35]

In order to be considered, such input must be provided "**no less than two months prior to the** indicated onsite date" Thus, NGOs are expected to check the FATF mutual evaluation calendar for upcoming assessments and onsite dates rather than being alerted

[32] Newer jurisdictions have had combined evaluation cycles.
[33] *FATF Procedures*, paras. 21-52.
[34] *MONEYVAL Rules of Procedure*, Rules 14-18, pp. 13-22.
[35] https://www.fatf-gafi.org/faq/mutualevaluations/.

to the impending occurrence of an evaluation, which would be more likely to facilitate the provision of input.

61. The meetings during an on-site visit will be with ministries, criminal justice and operational agencies, financial sector bodies and persons from supervisory or regulatory bodies, professionals involved in non-financial businesses and professions and

> other agencies or bodies that may be relevant (e.g., reputable academics relating to AML/CFT and civil societies.[36]

62. In respect of the last, the MONEYVAL Rules of Procedure specifically state that:

> [m]eetings with the private sector or other non-government representatives are an important part of the visit.[37]

63. Moreover, the FATF has stated that the assessment team speaks with

> representatives from civil society, particularly non-profit organisations which are covered by FATF Recommendation 8 and Immediate Outcome 10.[38]

Yet, it is difficult to see how that is really feasible when – as will be seen below in the analysis of the evaluation of measures adopted pursuant to the Recommendation[39] - member States do not use FATF's definition of NPOs in those measures.

64. There is no provision in the FATF or MONEYVAL documents for comment on draft mutual evaluation reports or consideration of submissions from NGOs in any part of the follow-up process. Indeed, FATF emphasises that the members of the evaluation teams are subject to strict confidentiality agreements and cannot

> discuss the evaluation with outside parties or disclose any information obtained by reason of their participation either during or after the assessment. [40]

65. No guidance is given in these documents or in the *FATF Methodology* as to need to take account of the right to freedom of association or the European and international standards applicable to NGOs when evaluating the appropriateness of measures taken by countries/territories to comply with the requirements of the FATF Recommendations.

66. However, MONEYVAL has stated in respect of NPOs that:

> It is to be stressed that the FATF recognises the importance of the non-profit sector and appreciates its efforts. The measures foreseen by the FATF concerning the NPO sector are therefore to be implemented whilst simultaneously protecting the values inherent to its purpose and activities and without disrupting them. The aim of setting out standards to protect the non-profit sector from

[36] *FATF Procedures*, para. 37 and Appendix 2 and *MONEYVAL Rules of Procedure*, Rules 15.4, p. 19 and Appendix 1.
[37] Rule 15.4, at page 19.
[38] https://www.fatf-gafi.org/faq/mutualevaluations/.
[39] See paras. 114, 116 and 121-125 below.
[40] https://www.fatf-gafi.org/faq/mutualevaluations/.

terrorist financing abuse is to cut terrorists from their sources of financing and create an environment which would not be susceptible to abuse. On the other hand, it further envisages to protect the sector itself, as potential risks the sector encounters could lead to losing its credibility and trust in the eyes of the public, which are key to its role in society.[41]

67. The European Commission has responsibility for ensuring that Member States transpose the provisions of directives into their legislation. In particular, it can open an infringement procedure where this is not done or has not been fully done by the prescribed deadline. In such cases, the issue of compliance with the transposition requirement is determined by the Court of Justice of the European Union.

68. In the case of Directive 2015/849, such procedures have been opened in respect of a number of Member States on account of their failure to transpose it fully.[42] There has, however, been no ruling by the Court of Justice in respect of these procedures.

69. The process of evaluation in respect of both FATF Standards and Directive 2015/849 is a technical exercise designed to establish the extent to which the relevant requirements have been implemented. In both cases, the primary concern will be with whether the implementing measures are sufficient and not with whether they are excessive and adversely affect other interests.

70. In the case of FATF and MONEYVAL, there is some, albeit limited, scope for NGO input, which would allow the attention of these bodies to be drawn to implementing measures that go beyond the requirements of FATF Standards.

71. Insofar as the implementation of Directive 2015/849 is inconsistent with rights under the Charter of Fundamental Rights of the European Union, it would be possible to challenge the validity of the measures concerned either directly before the Court of Justice or indirectly upon a reference to it for a preliminary ruling by a national court.

D. RECOMMENDATION 8

72. Recommendation 8 is the only one of the FATF Recommendations specifically concerned with NPOs.[43]

73. This section looks first at the scope of the Recommendation and the official guidance as to what this entails. It then reviews how this is applied in evaluation and follow-up reports by FATF and MONEYVAL.

[41] At https://www.coe.int/en/web/moneyval/implementation/non-profit-organisations.

[42] See, e.g., the opening of such procedures against Austria, Belgium and the Netherlands; https://www.engage.hoganlovells.com/knowledgeservices/news/eu-commission-takes-formal-legal-action-against-three-member-states-over-lack-of-implementation-of-eu-aml-obligations.

[43] However, Recommendation 1 and Immediate Outcomes 1 and 10 are also relevant for them and thus they are considered in those parts of the mutual evaluation reports dealing with those requirements.

1. The Recommendation

74. The current version of Recommendation 8 provides that:

> Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse, including:
> (a) by terrorist organisations posing as legitimate entities;
> (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and
> (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

75. Prior to its revision in June 2016, following input from NPOs and private sector and public consultations,[44] the Recommendation had stated that all NPOs were "particularly vulnerable" to terrorist financing abuse and did not specify that countries should identify those NPOs in them that are vulnerable to such abuse or require the use of focused and proportionate measures to protect only those NPOs from being abused.

76. The Recommendation is to be applied in the light of its Interpretive Note which, as already indicated,[45] makes it clear that it is to be applied only in respect of certain types of NPOs, namely, those that primarily engage in raising or disbursing funds for charitable and related purposes.

77. This definition thus underlines that it is those activities and characteristics of an organisation which put it at risk of terrorist financing abuse and not the simple fact that it is operating on a non-profit basis.

78. The Interpretative Note provides details as to the measures to be taken to ensure that NPOs are not misused by terrorist organisations – whether by posing as legitimate entities, using legitimate entities as conduits for funding, to escape asset freezing measures general principles or to conceal or obscure the clandestine diversion of funds intended for legitimate purposes – and underlines that these are based on certain general principles, namely,

- A risk-based approach applying focused measures;
- Flexibility;
- Effective and proportionate measures commensurate to the risks identified;
- No disruption or discouragement of legitimate charitable activities;
- Effective and proportionate action against exploited NPOs and those supporting terrorism; and

[44] See https://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-npo-inr8.html.
[45] See para. 15 above, as well as para. 128 below.

- Development of cooperative relationships among the public and private sectors and with NPOs.[46]

79. It is also important to note that the Interpretive Note provides that measures implemented pursuant to the Recommendation should take place "

> in a manner which respects countries' obligations under the Charter of the United Nations and international human rights law.[47]

80. The need for the type of measures outlined in the Recommendation is said to arise from the standards and initiatives developed by the NPO sector to ensure accountability and transparency in their operations being insufficient to prevent misuse and exploitation as

> Well-planned deceptions by terrorists abusing the NPO sector are difficult to penetrate with the resources available to non-government actors, making state-based oversight and its capabilities a necessary element to detecting the most sophisticated terrorist threats to the NPO sector.[48]

81. The Interpretative Note underlines that:

> since not all NPOs are inherently high risk (and some may represent little or no risk at all countries should identify which subset of organisations fall within the FATF definition of NPO.[49]

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[46] Paragraph 4. This states in full: (a) A risk-based approach applying focused measures in dealing with identified threats of terrorist financing abuse to NPOs is essential given the diversity within individual national sectors, the differing degrees to which parts of each sector may be vulnerable to terrorist financing abuse, the need to ensure that legitimate charitable activity continues to flourish, and the limited resources and authorities available to combat terrorist financing in each country. (b) Flexibility in developing a national response to terrorist financing abuse of NPOs is essential, in order to allow it to evolve over time as it faces the changing nature of the terrorist financing threat. (c) Past and ongoing terrorist financing abuse of NPOs requires countries to adopt effective and proportionate measures, which should be commensurate to the risks identified through a risk-based approach. (d) Focused measures adopted by countries to protect NPOs from terrorist financing abuse should not disrupt or discourage legitimate charitable activities. Rather, such measures should promote accountability and engender greater confidence among NPOs, across the donor community and with the general public that charitable funds and services reach intended legitimate beneficiaries. Systems that promote achieving a high degree of accountability, integrity and public confidence in the management and functioning of NPOs are integral to ensuring they cannot be abused for terrorist financing. (e) Countries are required to identify and take effective and proportionate action against NPOs that either are exploited by, or knowingly supporting, terrorists or terrorist organisations taking into account the specifics of the case. Countries should aim to prevent and prosecute, as appropriate, terrorist financing and other forms of terrorist support. Where NPOs suspected of, or implicated in, terrorist financing or other forms of terrorist support are identified, the first priority of countries must be to investigate and halt such terrorist financing or support. Actions taken for this purpose should, to the extent reasonably possible, minimise negative impact on innocent and legitimate beneficiaries of charitable activity. However, this interest cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing or other forms of terrorist support provided by NPOs. (f) Developing cooperative relationships among the public and private sectors and with NPOs is critical to understanding NPOs' risks and risk mitigation strategies, raising awareness, increasing effectiveness and fostering capabilities to combat terrorist financing abuse within NPOs. Countries should encourage the development of academic research on, and information-sharing in, NPOs to address terrorist financing related issues.

[47] Paragraph 2.

[48] *NPO Best Practices*, para. 5.

[49] Paragraph 5.

82. In particular, it expects countries to identify features and types of NPOs likely to be at risk of terrorist financing abuse, as well as the nature of the threats posed by terrorist entities to those NPOs and how terrorist actors abuse them.[50]

83. In order, to understand the risk of terrorist financing and to respond appropriately through a risk-based approach, countries/territories must thus first:

> Undertake a domestic review of their entire NPO sector, or have the capacity to obtain timely information on its activities, size and other relevant features, and review the adequacy of laws and regulations that relate to the portion of the NPO sector that can be abused for the financing of terrorism.[51]

84. An example of an appropriate approach to such a review cited by FATF was one that:

- Did not take an overly broad interpretation of the FATF definition of NPO;
- Focused on those organisations at greatest risk; and
- Did not burden organisations not at risk with onerous reporting requirements for terrorist financing purposes.

The insight obtained from the sector review allowed the country to focus on charities as the starting point for its national risk assessment, having found that charities fell within the FATF definition and that, although these were the organisations at greatest risk, not all charities were at risk.[52]

85. Further guidance on the assessment of terrorist financing risks can be seen in the *Typologies Report* and the *Terrorist Financing Guidance*, both prepared by FATF.

86. The *Typologies Report* shows a correlation between the types of activities an NPO is engaged in and the risk of terrorist abuse and provides both risk indicators and terrorist abuse indicators.[53]

87. The *Terrorist Financing Guidance* underlines that the FATF definition of NPOs is purely functional, so that national definitions and laws may not coincide with it, particularly as NPOs tend to be classified by their legal form.[54] It also provides some insight as to how to identify the types and features of NPOs that may be vulnerable to terrorist financing and to assess the adequacy of measures.[55]

88. In the risk assessment, account should also be taken of measures that NPOs have implemented to mitigate the risk of terrorist financing abuse.[56]

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[50] Guidance in making this assessment is provided in, e.g., the FATF Report, *Risk of Terrorist Abuse in Non-Profit Organisations*, which sets out relevant indicators.
[51] *NPO Best Practices*, para. 11.
[52] *NPO Best Practices*, pp. 12-13; Canada was the country concerned.
[53] Chapters 2 and 6.
[54] Pages 44-45.
[55] Pages 45-50 and 61-62.
[56] Examples of these can be found in Annex 2 to *NPO Best Practices*.

89. The Interpretive Note, while recognising that there are a diverse range of approaches in identifying, preventing and combating terrorist financing abuse of NPOs, indicates that an effective approach should involve all of the following elements: (a) sustained outreach; (b) targeted risk-based supervision or monitoring; (c) effective investigation and information gathering; and (d) effective mechanisms for international cooperation.[57]

90. Examples of actions to be taken with respect to these four elements are given. Those relating to outreach are unlikely to be problematic for NPOs given their promotional and collaborative nature[58] and neither, in themselves, will those which concern international cooperation[59].

91. On the other hand, although the examples for supervision or monitoring and information gathering and investigation do not seem objectionable, the application of the measures concerned would need to take account of rights under the European Convention and the requirements of Recommendation CM/Rec(2007)14.[60]

92. As regards, targeted risk-based supervision or monitoring of NPOs, it is emphasised in the Interpretive Note that:

> A "one-size-fits-all" approach would be inconsistent with the proper implementation of a risk-based approach as stipulated under Recommendation 1 of the FATF Standards. In practice, countries should be able to demonstrate that risk-based measures apply to NPOs at risk of terrorist financing abuse. It is also possible that existing regulatory or other measures may already sufficiently address the current terrorist financing risk to the NPOs in a jurisdiction, although terrorist financing risks to the sector should be periodically reviewed. Appropriate authorities should monitor the compliance of NPOs with the requirements of this Recommendation, including the risk-based measures being applied to them. Appropriate authorities should be able to apply effective, proportionate and dissuasive sanctions for violations by NPOs or persons acting on behalf of these NPOs.2.[61]

93. Six examples are given in the Interpretive Note of measures that could be applied to NPOs, with a repetition of the caveat that their application should be "in whole or in part, depending on the risks identified", namely,

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[57] Paragraph 6.

[58] Namely, "(i) Countries should have clear policies to promote accountability, integrity and public confidence in the administration and management of NPOs. (ii) Countries should encourage and undertake outreach and educational programmes to raise and deepen awareness among NPOs as well as the donor community about the potential vulnerabilities of NPOs to terrorist financing abuse and terrorist financing risks, and the measures that NPOs can take to protect themselves against such abuse. (iii) Countries should work with NPOs to develop and refine best practices to address terrorist financing risks and vulnerabilities and thus protect them from terrorist financing abuse. (iv) Countries should encourage NPOs to conduct transactions via regulated financial channels, wherever feasible, keeping in mind the varying capacities of financial sectors in different countries and in different areas of urgent charitable and humanitarian concerns."

[59] Namely, "Consistent with Recommendations on international cooperation, countries should identify appropriate points of contact and procedures to respond to international requests for information regarding particular NPOs suspected of terrorist financing or involvement in other forms of terrorist support". However, this is subject to the concerns expressed below about the way in which the information shared has been gathered.

[60] In particular, Articles 6 and 8 of the former and Section VII (Accountability) of the latter.

[61] Paragraph 6(b); footnotes omitted.

(i) NPOs could be required to license or register. This information should be available to competent authorities and encouraged to be available to the public.

(ii) NPOs could be required to maintain information on: (1) the purpose and objectives of their stated activities; and (2) the identity of the person(s) who own, control or direct their activities, including senior officers, board members and trustees. This information could be publicly available either directly from the NPO or through appropriate authorities.

(iii) NPOs could be required to issue annual financial statements that provide detailed breakdowns of incomes and expenditures.

(iv) NPOs could be required to have appropriate controls in place to ensure that all funds are fully accounted for, and are spent in a manner that is consistent with the purpose and objectives of the NPO's stated activities.

(v) NPOs could be required to take reasonable measures to confirm the identity, credentials and good standing of beneficiaries and associate NPOs and that they are not involved with and/or using the charitable funds to support terrorists or terrorist organisations. However, NPOs should not be required to conduct customer due diligence. NPOs could be required to take reasonable measures to document the identity of their significant donors and to respect donor confidentiality. The ultimate objective of this requirement is to prevent charitable funds from being used to finance and support terrorists and terrorist organisations ...

(vi) NPOs could be required to maintain, for a period of at least five years, records of domestic and international transactions that are sufficiently detailed to verify that funds have been received and spent in a manner consistent with the purpose and objectives of the organisation, and could be required to make these available to competent authorities upon appropriate authority. This also applies to information mentioned in paragraphs (ii) and (iii) above. Where appropriate, records of charitable activities and financial operations by NPOs could also be made available to the public.[62]

94. In principle, the first should not generally be problematic for NPOs since registration is a prerequisite for obtaining legal personality in most Council of Europe member States[63] and official approval is also normally a prerequisite for obtaining charitable or public benefit status in them,[64] as well as being consistent with Recommendation CM/Rec(2007)14[65].

95. Similarly, the disclosure of the information required in the second example is not problematic.

96. Furthermore, the requirements in the third and fourth examples are consistent with Recommendation CM/Rec(2007)14.[66]

[62] *Ibid*.

[63] See J. McBride, *The Legal Space for Non-governmental Organisations in Europe*, (https://rm.coe.int/the-legal-space-ngo-text-a4-web-final/1680a4cd01), at pp. 17-20.

[64] *Ibid*., pp. 29-30.

[65] "59. The nature and beneficiaries of the activities undertaken by an NGO can be relevant considerations in deciding whether or not to grant it any form of public support. 60. The grant of public support can also be contingent on an NGO falling into a particular category or regime defined by law or having a particular legal form".

[66] "62. NGOs which have been granted any form of public support can be required each year to submit reports on their accounts and an overview of their activities to a designated supervising body. 63. NGOs which have been granted any form of public support can be required to make known the proportion of their funds used for fundraising and administration. … 65. NGOs which have been granted any form of public support can be required to have their accounts audited by an institution or person independent of their management."

97. However, the requirements in the fifth example could prove problematic, depending upon how they are applied.

98. In the first place, the need to confirm the identity, credentials and good standing of beneficiaries could become unduly burdensome and impede the pursuit of an NPO's objectives given the way in which "beneficiaries" are defined, namely, those natural persons, or groups of natural persons who receive charitable, humanitarian or other types of assistance through the assistance of the NPO".

99. Much would depend on the extent and level of detail that needs to be documented and the nature of the assistance being provided; some NPOs may have a specific relationship with particular individuals but others could be providing assistance to hundreds or thousands of persons through the provision of food and medical supplies.

100. Thus, it would be impractical to expect that all of the latter be individually documented.

101. Happily, this is recognised but only in a footnote stating that:

> This does not mean that NPOs are expected to identify each specific individual, as such a requirement would not always be possible and would, in some instances, impede the ability of NPOs to provide much needed services

However, given the importance of this qualification, it would be preferable for it to be given greater prominence in the Interpretive Note.

102. Moreover, this contrasts with the greater prominence accorded in the fifth example identified in the Interpretive Note to another important qualification, namely, that "NPOs should not be required to conduct customer due diligence", the requirements of which under Recommendation 10 – for financial institutions - are especially onerous.[67]

103. Furthermore, although the exclusion of customer due diligence and of the need to identify specific individuals is undoubtedly welcome, the way in which the Interpretive Note to

[67] "The CDD measures to be taken are as follows: (a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information. (b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer. (c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship. (d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds. Financial institutions should be required to apply each of the CDD measures under (a) to (d) above, but should determine the extent of such measures using a risk-based approach (RBA) in accordance with the Interpretive Notes to this Recommendation and to Recommendation 1. Financial institutions should be required to verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering and terrorist financing risks are effectively managed and where this is essential not to interrupt the normal conduct of business."

Recommendation 8 is formulated does not give countries/territories any real guidance as to what confirmatory measures can legitimately be expected of NPOs.

104. Secondly, a requirement for NPOs to take reasonable measures to document the identity of their significant donors and to respect donor confidentiality is, in principle, consistent with Recommendation CM/Rec(2007)14.[68]

105. However, there is no guidance as to whether any limits can be imposed on the duty to respect donor confidentiality, which will be relevant for measures adopted for the purpose of information gathering and investigation.

106. Thirdly, while donor confidentiality is acknowledged, there is no recognition of the right to respect for private life of those who are the beneficiaries of charitable and similar assistance in those cases where individuals are identified.

107. Whether the sixth example relating to record keeping in respect of transactions could be problematic for NPOs will undoubtedly turn on the way in which the need for these records to be "sufficiently detailed to verify that funds have been received and spent in a manner consistent with the purpose and objectives of the organisation" is understood.

108. If annual reports on activities and audited accounts are sufficient for this purpose then this is not something that should give rise to difficulties. However, there is again no real guidance as to what should be expected and thus no obvious limits as to what might be asked for, even if proportionality is meant to be observed in actions against NPOs.

109. The need for clear and proportionate limits is important given that the example envisages a requirement to make the records available to the competent authorities, namely, regulators, tax authorities, financial intelligence units, law enforcement, intelligence authorities, accrediting institutions.

110. The Interpretive Note does not recall that the enforced disclosure of records ought to be consistent with the right to respect for private life in Article 8 of the European Convention, as underlined in Recommendation CM/Rec(2007)14.[69]

111. Furthermore, the stipulation that the records of charitable activities and financial operations by NPOs could be made available to the public "where appropriate" gives no guidance at all and could lead to action entirely at odds with the right to respect for private life.

[68] "64. All reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality".

[69] "68. NGOs can be required to submit their books, records and activities to inspection by a supervising agency where there has been a failure to comply with reporting requirements or where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent. 69. NGOs should not be subject to search and seizure without objective grounds for taking such measures and appropriate judicial authorisation".

112. Fourthly, most of the examples related to effective information gathering and investigation – namely, those concerning cooperation, coordination and information sharing and investigative expertise and capability[70] – are unproblematic.

113. However, this is not the case with one example, namely, that which provides:

> (iii) Countries should ensure that full access to information on the administration and management of a particular NPO (including financial and programmatic information) may be obtained during the course of an investigation

114. This does not provide adequate guidance as to the basis on which access to the relevant information can be obtained since, as with other examples already discussed, there is no recognition of the relevance of the right to respect for private life and the safeguards which this requires to be observed where there is enforced disclosure of information held by NPOs.

115. It is clear that the Recommendation should be implemented in a manner consistent with human rights standards, including the right to freedom of association. There is also some useful guidance on implementing the Recommendation in a manner that would not affect all NGOs and not impose unnecessary requirements on those that are concerned by its provisions. However, on a number of points where implementation could adversely affect human rights, there is scope for strengthening the guidance given so that countries/territories have clear notice as to the limits on the measures that they adopt.

2. Evaluation

116. In conducting their evaluation and follow-up reports, FATF and MONEYVAL have regard to the extent of compliance by countries/territories with the different points elaborated in the Interpretive Note.[71]

117. There are a number of points of concern for NGOs in Council of Europe member States that emerge from these reports.

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[70] "(i) Countries should ensure effective cooperation, coordination and information sharing to the extent possible among all levels of appropriate authorities or organisations that hold relevant information on NPOs. (ii) Countries should have investigative expertise and capability to examine those NPOs suspected of either being exploited by, or actively supporting, terrorist activity or terrorist organisations. (iv) Countries should establish appropriate mechanisms to ensure that, when there is suspicion or reasonable grounds to suspect that a particular NPO: (1) is involved in terrorist financing abuse and/or is a front for fundraising by a terrorist organisation; (2) is being exploited as a conduit for terrorist financing, including for the purpose of escaping asset freezing measures, or other forms of terrorist support; or (3) is concealing or obscuring the clandestine diversion of funds intended for legitimate purposes, but redirected for the benefit of terrorists or terrorist organisations, that this information is promptly shared with relevant competent authorities, in order to take preventive or investigative action".

[71] These reports do not relate to the same period for every member State and, in some instances, the latest report was issued 10 or more years ago. As a result the following observations do not necessarily reflect the current position in the member States. Moreover, the structure of the reports has changed, reflecting the evolution in the Recommendation 8 and its Interpretive Note. However, they do illustrate the way in which Recommendation 8 is being implemented and how this is being evaluated.

118. Firstly, there has not always been any overall/comprehensive assessment by member States – or one that is up to date - of the risks relating to NPOs operating in member States (including a review aimed at identifying the nature of potential threats terrorist entities might pose to NPOs) or this was only partial or insufficient or was just undertaken after prompting by FATF or MONEYVAL.[72]

119. As a result, there is then no reflection by the member States concerned on either the subset of organisations that fall within the FATF definition of NPO or features and types of the NPOs which, by virtue of their activities or characteristics, are likely to be at risk of terrorist financing abuse.

120. However, where this has been done, the information relied upon is not always regarded as adequate[73] or its accuracy and comprehensiveness could not be confirmed[74].

121. Moreover, where there was a failure to fully identify the features, types of NPOs likely to be at risk of terrorist financing abuse, or the nature of threats posed to NPOs, it was observed in respect of one member State that a focus in this regard only on the issue of the migration crisis had prevented it from wholly reviewing the adequacy of measures related to the NPO sector to take proportionate and effective actions to address the risks.[75]

122. Nonetheless, beyond noting that some steps were being taken in that member State to deal with possible terrorist financing abuse in the form of a new registry for NPOs active in the field of international protection, migration and social integration, there was no reflection in the report as to the evidence supporting these NPOs actually being in the subset at particular risk or the suitability of the new registry for tackling the risk.

123. All these shortcomings point to all the guidance on risk assessment prepared by FATF having insufficient influence on a good number of member States.

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[72] See Albania (M-5th ER, pp. 31, 90-91, 147-148 and 161-162 and M-FuR, para.17); Austria (F-ER, 2016, pp. 34, 64-65, 111 and 128); Azerbaijan (M-4th ER, para. 616); Belgium (F-ER 2015, p. 168); Bosnia-Herzegovina (M-4th ER, paras. 1376-1379); Croatia (M-5th ER, pp. 46-47, 117-119, 216, 236-237), Cyprus (M-5th ER, pp. 28, 94and 207, one was reportedly awaiting updated information from the NPOs themselves); Czech Republic (M-5th ER, paras. 89 and 299 and p. 155 but see M-1st FuR, para.15); Denmark (F-2017 ER, pp. 30-31, 75-76, 139 and 159), Finland (F-ER 2019, p. 170); Georgia (M-5th ER, pp. 36-38, 102-103, 175, 196-197); Germany, (F-ER 2014, paras. 1099-1106); Hungary (M-5th ER, pp. 39, 83, 139-140 and 160 and M-1st FuR, para. 109), Iceland (F-ER 2018, pp. 34-35, 73, 121 and 133 but then F-2nd FuR, p. 4), Ireland (F-ER 2017, pp. 32-34, 127 and 145); Latvia (M-5th ER, pp. 37, 79-80, 135 and 153-154 but see M-FuR, paras. 22-25), Liechtenstein (M-4th ER, paras. 986-990); Luxembourg (F-ER 2010, para. 1084); Malta (M-5th ER, pp. 10-12,31-32, 78-79 and 135-136); Monaco (M-4th ER, paras. 1294-1296); Montenegro (M-4th ER, para. 1367); North Macedonia (M-4th ER, paras. 1342-1346); Poland (M-5th ER, pp. 37, 115-116, 222 and 241-242); Portugal (F-2017 ER, pp. 34-35, 76-78, 127 and 141); Romania (M-4th ER, paras. 1536-1539); Serbia (M-5th ER, pp. 89-90, 145 and 160 but see M-3rd FuR, para. 17); Slovak Republic (M-5th ER, pp. 33-34, 107-108, 167-168 and 188); Slovenia (M-5th ER, pp. 35-37, 87-88, 138-139 and 156 but see M-2nd FuR, paras. 24-25); Switzerland (F-ER 2016, pp. 36-38, 84-85, 153 and 172 but see F-FuR, 2020, p. 6); and Turkey (F-ER 2019, pp. 30-31, 95-97, 161 and 177-178). Although the need for a risk assessment was not always part of the methodology, the uptake of a useful tool has been somewhat slow.

[73] Andorra (M-5th ER, p. 155); Estonia (M-4th ER, para. 1045); and Italy (F-ER2016, p. 147).

[74] Greece (F-ER 2019, p. 169).

[75] Greece (F-ER 2019, p. 169).

124. Furthermore, in the case of a former member State rated by FATF as largely compliant with Recommendation 8,[76] it was recognised in the evaluation report that there was a contradiction between the low terrorist financing risk by that State for the NPO sector and the instruction to financial institutions and DNFBPs[77] to consider NPOs as high-risk clients and to monitor transactions related to charitable purposes.[78] The report did not, however, discuss this contradiction in the light of the widespread concern that the designation of NGOs as foreign agents and as extremist and terrorist organisations was unjustifiably being used to restrict activities that were consistent with European and international standards applicable to NGOs[79].

125. On the other hand, there was an unprecedented instance of concern being expressed about the absence of an appropriate relationship between measures adopted by one member State and the risk assessment undertaken by it when it was observed that:

> In June 2017, the "Law on the Transparency of Organisations Receiving Support from Abroad" entered into force, which requires organisations receiving at least 7.2 million forints (approximately EUR 24,000) from foreign sources to register as organisations "receiving support from abroad" and provides for the possible dissolution of an organisation as a penalty for noncompliance. The law, which refers in its preamble to both transparency and the fight against ML/FT, was not based on any risks identified in the above-mentioned risk assessment. In a letter in April 2017, MONEYVAL had expressed concern that the then draft law was not the result of the application of a risk-based approach. Once a possible upgrade to LC can be considered, the question of the proportionality within the meaning of R.8 will be assessed.[80]

However, this problem has not been addressed in subsequent follow-up reports.

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[76] Russian Federation (F-ER 2019, p. 263).

[77] I.e., Designated non-financial businesses and professions, namely, "a) Casinos. b) Real estate agents. c) Dealers in precious metals. d) Dealers in precious stones. e) Lawyers, notaries, other independent legal professionals and accountants – this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to 'internal' professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to AML/CFT measures. f) Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under these Recommendations, and which as a business, provide any of the following services to third parties: .acting as a formation agent of legal persons; acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons; providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement; acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement; acting as (or arranging for another person to act as) a nominee shareholder for another person"; *The FATF Recommendations*, p. 128 (footnote omitted).

[78] Russian Federation (F-ER 2019, paras. 104 and 368).

[79] See, e.g. the concerns expressed by the Council of Europe Commissioner for Human Rights (https://www.coe.int/en/web/commissioner/-/the-russian-federation-s-law-on-foreign-agents-contravenes-human-rights) and the Venice Commission's *Opinion on Federal Law No. 129-fz on amending certain legislative acts (Federal Law on Undesirable Activities of Foreign and International Non-governmental Organisations* (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)020-e).

[80] Hungary (M-1st FuR, para. 109.

126. Secondly, the range of entities considered by at least one member State as coming within the FATF definition seems unduly broad and yet there are at least two instance of this not being commented upon in the evaluation report.[81]

127. However, in the case of another member State, it was found that there had been no identification of NPOs falling within the FATF definition.[82]

128. Moreover, in respect of a third member State, the national NPO definition of NPOs was considered over-inclusive , while its definition of public benefit organisations did not cover all those within the FATF definition.[83]

129. Furthermore, for a fourth member State, the categories considered to be covered by the FATF definition were seen as "very general" since all associations and foundations were included in them.[84]

130. In addition, for a fifth member State, there was a detailed differentiation of the various types of NPOs in it but no real indication as to the extent to which a differential approach was taken to the treatment of those in those different types.[85]

131. A more appropriate approach in this respect can be seen in the evaluation report for just one member State, which applied the same accounting rules for commercial entities to "larger" non-profit associations but a simplified set of accounting rules to "smaller ones".[86] However, this was not highlighted as a good practice.

132. Thirdly, legislation relied upon to respond to the threat of terrorist financing can target the whole NGO sector without any specific attention to either those that might be potentially vulnerable for terrorist financing misuse or specific risks that might exist,[87] and this is also the case when changes are adopted in response to the Recommendation. [88] Moreover, where measures have been taken in relation to a subset of the NPO sector, their adequacy has not been reviewed.[89]

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[81] Albania M-5th ER, fn. 88; it is merely noted that the definition of NPOs is based on that in the Law on NPOs, namely, "associations, foundations and centres whose activity is conducted in an independent manner and without being influenced by the State", which is much wider than the focus of FATF's own definition) and Cyprus (M-5th ER, p. 208; the inclusion of ones with activities relating to human rights, research and development and issues relating to active citizens, animal welfare, discrimination, environment and immigration certainly does not seem to be ones to which the FATF definition is directed).

[82] Denmark (M-2017 ER, p. 159).

[83] Latvia (M-5th ER, pp. 153-154); its NPO definition encompassed trade unions and political parties).

[84] Poland (M-5th ER, pp. 241-242).

[85] Italy (F-ER 2016, pp. 145-146); the types were voluntary organisations, social cooperatives, NGOs and social utility NPOs.

[86] Belgium (F-ER, 2015, p. 168). However, all were required, regardless of size to identify their effective beneficiaries; *ibi*d, p. 169.

[87] Armenia (M-5th ER, p. 123).

[88] Albania (M-5th ER, p. 162 but *cf.* M-FuR, para. 18),

[89] Lithuania (M-5th ER, p. 160); Republic of Moldova (M-5th ER, p. 188); Poland (M-5th ER, p. 242); and Slovak Republic (M-5th ER, p. 188).

133. A rare instance of the explicit articulation of the expectation by FATF about the approach to be taken by a member State in relation to the targeted risk-based supervision and monitoring criterion can be seen in the following statement:

> This criterion is not meant to apply to all NPOs. The measures required vary according to the type of NPO concerned, and its activities and funding sources. There are general requirements applicable to each type of legal entity and, overall, the measures specified by this criterion cover "the NPOs which account for (i) a significant portion of the financial resources under the control of the sector; and (ii) a substantial share of the sector's international activities", as is required by R.8.[90]

134. Furthermore, there was the unique observation in the report for that member State that:

> It should also be noted that most of the associations of public interest appear to provide services (e.g., health care, education), rather than expressive activities (e.g., programmes focused on sports and recreation, arts and culture, interest representation, and advocacy which are identified as lower risk).[91]

This – together with the statement that *""service NPOs" are the most frequently abused by terrorist movements"* - was a reiteration of a point made in the *Typologies Report*.[92] However, this is not being emphasised systematically.

135. It remains to be seen whether the extensive restrictions affecting the operation of NGOs in purported fulfilment of the Recommendation that were more recently adopted by a member State will by closely scrutinised in its next evaluation.[93]

136. Fourthly, measures to deal with risks of terrorist financing are not always adopted with any collaboration with the NPO sector.[94]

137. There can also be a lack of, or insufficiently targeted, outreach to NPOs aimed at protecting them from terrorist financing abuse.[95]

138. Such shortcomings are, however, something that are regularly commented upon.

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[90] Spain (F-ER, 2014, p. 162), with further detail as to what is entailed on this and the following page.

[91] *Ibid*, p. 163.

[92] At para. 63.

[93] Turkey, whose last evaluation was in 2019. The measure was the Law on the Prevention on Financing of Proliferation of Weapons of Mass Destruction, No. 7262, which entered into force on 31 December 2020. Amongst its provisions are ones requiring authorisation to collect aid, regulating the giving of donations and the sending of aid abroad and barring certain persons from membership of NGO governing bodies. It was adopted without any risk assessment. See further on the impact of this law, https://www.tusev.org.tr/usrfiles/images/MaliEylemGorevGucuSivilToplumEN_26022021.pdf and https://www.amnesty.org/en/wp-content/uploads/2021/10/EUR4448642021ENGLISH.pdf.

[94] See, e.g., Albania (M-5th ER, p. 162).

[95] Bosnia-Herzegovina (M-4th ER, para. 1380); Croatia (M-5th ER, p. 238); Cyprus (M-5th ER, p. 209); Czech Republic (M-5th ER, p. 175); Denmark (F-2017 ER, pp. 160-161); Estonia (M-4th ER, paras. 1046-1047); Georgia (M-5th ER, p. 197); Germany (F-ER 2014, paras. 1107-1109); Greece (F-ER 2019, p. 171); Hungary (M- 1st FuR, para. 112), Iceland (F-ER 2019, p. 133);, Ireland (F-ER 2017, pp. 145-146); Latvia (M-5th ER, pp. 154-155); Liechtenstein (M-4th ER, paras. 991-993); Lithuania (M-5th ER, p. 160); Montenegro (M-4th ER, paras. 1369-1372); the Netherlands (F-ER 2011, paras. 1247-1249); Portugal (F-ER 2017, p. 141); Romania (M-4th ER, paras. 1540-1543); Slovak Republic (M-5th ER, p. 189); Slovenia (M-5th ER, p. 156); Switzerland (F-ER 2016, p. 172 but see F-FuR 2020, pp. 6-7) and Turkey (F-ER 2019, p. 179). *Cf*. Spain for which it was noted that the "authorities have produced a best practices paper, in cooperation with key NPO sector stakeholders, which is publicly available and has been disseminated to NPOs registries and groups. There has also been engagement with the sector on self-regulatory initiatives and on the implementation of the new obligations in RD 304/2014. Outreach is not always focused on TF, however wider terrorism risks associated with NPOs (principally radicalisation) are addressed through outreach to minority communities"; F-ER 2014, p. 162.

139. Fifthly, a one-size fits all approach can be applicable to supervision and monitoring of NPOs[96] despite this being clearly stated in the Interpretive Note as an inappropriate approach to implementation[97]. Moreover, this is not always seen to be risk-based[98] or sufficiently so[99].

140. Sixthly, there is generally no reflection in the reports as to whether the sanctions that might be imposed for non-compliance with the requirements implementing the Recommendation are proportionate in the sense of being excessive given the specific circumstances of NPOs, with the focus being more on their dissuasive character.[100]

141. Finally, there does not seem to be any general oversight of the actual use of the implementing measures, at least as regards the potential for this to have an adverse impact on the legitimate activities of NGOs.

142. The potential for such measures to be abused was highlighted by United Nations Special Rapporteurs on the promotion and protection of human rights while countering terrorism, the situation of human rights defenders and on the right to peaceful assembly and association in respect of the use of Serbia's Law on the Prevention of Money Laundering and the Financing of Terrorism.[101]

143. The Special Rapporteurs drew attention to the use of this legislation to obtain banking information and information of financial transactions of more than 50 NGOs, media associations and other NPOs, suggesting that they were being targeted for their work on human rights, investigation of war crimes, monitoring of the government's work and other forms of investigative journalism rather in response to any legitimate concerns about terrorist financing.

144. There was a prompt response by the FATF President to the issue raised by the Special Rapporteurs, underlining that there should not be any fishing expeditions in respect of the information being sought as this should be sought only on the basis of reasonable suspicion about terrorist financing and indicating that Recommendation 8 had been

[96] Croatia (M-5th ER, p. 238); Cyprus (M-5th ER, p. 209); Czech Republic, Latvia (M-5th ER, p. 155); Poland (M-5th ER, pp. 243-244; not sufficiently because of deficiencies in identifying features and types of NPOs at risk of terrorist financing abuse); and Portugal (F-ER 2017, p. 142).

[97] See para. 88 above.

[98] Albania (M-5th ER, pp. 162-163); Croatia (M-5th ER, p. 238); Denmark (F-2017 ER, pp. 161-164); Finland (F-ER 2019, pp. 172-173); Georgia (M-5th ER, p. 198); Greece (F-ER 2019, pp. 171-172); Hungary (M-5th ER, pp. 160-161); Iceland (F-ER 2019, pp. 133-134); Ireland (F-ER 2017, pp. 146-148 but one was in the initial stages of implementation); Latvia (M-5th ER, p. 155); Liechtenstein (M-4th ER, paras. 994-1007); Republic of Moldova (M-5th ER, p. 190); Romania (M-4th ER, paras. 1544-1547); Slovak Republic (M-5th ER, p. 189); and Turkey (F-ER 2019, p. 179).

[99] Slovenia (M-5th ER, pp. 157-158).

[100] However, with respect to Belgium, it was observed that the proportionate nature of sanctions applicable to NPOs was "not entirely established" (F-ER 2015,p. 169)

[101] https://www.ohchr.org/en/press-releases/2020/11/serbias-anti-terrorism-laws-being-misused-target-and-curb-work-ngos-un-human?LangID=E&NewsID=26492.

revised in the light of consultations with NPOs, as well as referring to the *Terrorist Financing Guidance*.[102]

145. It was also stated that MONEYVAL – which is responsible for evaluating Serbia – might decide at its Plenary to subject this issue to further follow-up by requesting the Serbia authorities to take specific action to rectify any shortcoming identified.

146. However, after the MONEYVAL Plenary meeting took note of the information about the correspondence with the Special Rapporteurs and heard the explanations and information provided by the Serbian authorities, only the following was decided:

> The Plenary recalls the specific limitations contained in the FATF Recommendations and Methodology with regard to the powers of the FIU to seek information from reporting entities so as to avoid indiscriminate requests without a link to a suspicion of money laundering (ML), terrorist financing (TF) or predicate offences. The Plenary meeting calls on all members to ensure that the FATF Recommendations are not intentionally or unintentionally used to suppress the legitimate activities of civil society. In this context, MONEYVAL emphasises the importance of involving NPOs in risk assessment activities on a voluntary basis, rather than through the exercise of formal FIU powers. Furthermore, MONEYVAL advises its members to ensure that public entities charged with the registration and/or the supervision of the NPO sector are involved in interactions related to national or sectoral risk assessments. Henceforth, MONEYVAL shall pay particular attention to such situations arising among its membership.[103]

147. Certainly, the issue raised by the Special Rapporteurs does not seem to be an isolated example, as is clear from: another situation raised above;[104] the difficulties increasingly being faced by NGOs in a number of member States;[105] and a concern recently raised about the alleged misuse of FATF standards by a non-member State through the terrorism designations of certain human rights and humanitarian organisations[106].

148. The proposal by MONEYVAL to pay attention to the use of implementation measures is undoubtedly well-intentioned but it is difficult to see how there can be any substantial examination as to possible misuses of the implementation measures without making provision for more significant NGO input to the evaluation process as opposed to the process of elaborating and developing FATF standards.

149. Although principal responsibility for proper implementation of FATF standards rests with Member States, it would be easier to hold them accountable for shortcomings and abuses if FATF and MONEYVAL made it clear that these were not only technically deficient for the purposes of implementation but were also contrary to the human rights obligations of the countries/territories concerned.

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[102] https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=35813.

[103] Meeting Report of the Plenary in April 2021, https://rm.coe.int/moneyval-2021-13-61st-plenary-meeting-report/1680a2e29c, at pp. 3-4.

[104] In this connection, see also para. 119 above.

[105] Recognised, e.g., in Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe, adopted on 28 November 2018 (https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808fd8b9).

[106] Israel; https://fatfplatform.org/news/global-coalition-letter-to-fatf-on-israeli-designation-of-6-npos-using/.

E. RECOMMENDATION 24

150. The focus of Recommendation 24 – which together with its Interpretive Note was amended in March 2022[107] - is on the transparency and beneficial ownership of legal persons, the aim being to assess the risks of them being misused for money laundering or terrorist financing.

151. This section looks first at the scope of the Recommendation and the official guidance as to what this entails. It then reviews how this is applied in evaluation and follow-up reports by FATF and MONEYVAL.

1. The Recommendation

152. This Recommendation is particularly concerned that countries should:

> ensure that there is adequate, accurate and up-to-date information on the beneficial ownership and control of legal persons that can be obtained or accessed rapidly and efficiently by competent authorities, through either a register of beneficial ownership or an alternative mechanism.

153. Although there is no qualification in the Recommendation as to the understanding of legal persons, the limited elaboration in it as to what is required to be done is – given the reference to "bearer shares", "bearer share warrants", "nominee shareholders and directors" and "DNFBPs"[108] – clearly focused on entities of a commercial and professional nature rather than NGOs, which are not specifically mentioned.

154. However, an NGO with legal personality would certainly fall within the concept of a legal person.

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[107] See https://www.fatf-gafi.org/publications/fatfrecommendations/documents/r24-statement-march-2022.html. The amendments concern matters such as: a risk-based approach for foreign legal person; a multipronged approach to the collection of beneficial ownership information; adequate, accurate and up-to-date information; access to information; and bearer shares and nominee arrangements. They do not deal with the concept of beneficial ownership itself. The amendments were adopted after consultation with stakeholders, including NPOs.

[108] I.e., Designated non-financial businesses and professions, namely, "a) Casinos. b) Real estate agents. c) Dealers in precious metals. d) Dealers in precious stones. e) Lawyers, notaries, other independent legal professionals and accountants – this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to 'internal' professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to AML/CFT measures. f) Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under these Recommendations, and which as a business, provide any of the following services to third parties: .acting as a formation agent of legal persons; acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons; providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement; acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement; acting as (or arranging for another person to act as) a nominee shareholder for another person"; *The FATF Recommendations*, p. 128 (footnote omitted).

155. Nonetheless, the focus on commercial and professional entities is seen also in the Interpretive Note, with 13 of its 17 paragraphs being devoted to the requirements to be expected of them.

156. These requirements are directed to four issues: basic information; beneficial ownership information; timely access to adequate, accurate and up-to-date information; and obstacles to transparency.

157. The basic information requirement entails maintaining company registers for all companies created in a country/territory that, at a minimum, hold information about its legal ownership and control structure.[109]

158. The beneficial ownership information requirement involves some form of registry – determined on the basis of risk, context and materiality – that enables efficient access to information on beneficial ownership.[110]

159. The timely access to adequate, accurate and up-to-date information requirement concerns the two preceding registries having information sufficient to identify the natural person(s) who are the beneficial owner(s) and the means and mechanisms through which they exercise beneficial ownership or control as well arrangements to ensure the accuracy of this information and its up-to-date character.[111]

160. Some examples are given of information aimed at identifying the natural person(s) who are the beneficial owner(s), namely, a person's full name, nationality(ies), full date and place of birth, residential address, national identification number and tax identification number or equivalent in the country of residence.[112]

161. The requirements related to obstacles to transparency relate to the issue and continued use of hearer shares and bearer share warrants and duties of disclosure or licensing requirements for nominee shareholders and directors.[113]

162. Two of the remaining paragraphs in the Interpretive Note deal with liability and sanctions for non-compliance with the requirements and international cooperation, with the other two being devoted to "Other legal persons".

163. Under the latter heading, the Interpretive Note refers first to certain specific forms of legal person, namely, foundations, *Anstalten*, *Waqf* and limited liability partnerships – and some of them might be the basis for establishing NGOs/NPOs.

[109] Paragraphs 3-6.
[110] Paragraphs 7 and 8.
[111] Paragraphs 9-11.
[112] In footnote 59.
[113] Paragraphs 12-13.

164. The Interpretive Note provides that in relation to these entities:

> countries should take similar measures and impose similar requirements, as those required for companies, taking into account their different forms and structures.[114]

165. As regards other types of legal persons, which are likely to cover not only those DNFBPs that are not companies but also the vast majority of NGOs that have legal personality, the Interpretive Note provides that:

> As regards other types of legal persons, countries should take into account the different forms and structures of those other legal persons, and the levels of money laundering and terrorist financing risks associated with each type of legal person, with a view to achieving appropriate levels of transparency. At a minimum, countries should ensure that similar types of basic information should be recorded and kept accurate and up-to-date by such legal persons, and that such information is accessible in a timely way by competent authorities. Countries should review the money laundering and terrorist financing risks associated with such other legal persons, and, based on the level of risk, determine the measures that should be taken to ensure that competent authorities have timely access to adequate, accurate and up-to-date beneficial ownership information for such legal persons.[115]

166. The Recommendation envisages the need for the adoption of liability and effective, proportionate and dissuasive sanctions for anyone failing to properly comply with all its requirements, as well as the widest possible international cooperation in relation to basic and beneficial ownership information.[116]

167. There is no specific definition in either the Recommendation or the Interpretive Note as to what is understood by beneficial ownership.

168. However, from the content of the Interpretive Note, it is evident that in the case of companies that the relevant information relates to shareholders (including situations in which the voting power of some shareholders is greater than that of others or in which named shareholders are holding them for others) and directors (including situations in which a named director is acting on behalf or under the instructions of someone else).

169. This could also be relevant for NGOs that take the form of companies, although there does not seem to be any existing legal arrangement whereby the members of such companies can be bound to act for someone who is not a member of it. In any event, there is no real guidance as to the information that should be required regarding the beneficial ownership of NGOs whose legal personality is based on other institutional forms.

170. A focus just on beneficial ownership information regarding commercial and professional entities is the approach seen in the guide produced by FATF to best practices in respect of such information, both in the text and the country practices that are highlighted.[117]

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[114] Paragraph 14.
[115] Paragraph 15.
[116] Paragraphs 16-17.
[117] *Beneficial Ownership Best Practices.*

171. Indeed, the only reference of specific relevance for NGOs concerns the use by civil society of a register holding data from the person of significant control rather than the provision of such information by such organisations.[118]

172. A focus on aspects relevant for corporate and professional entities can also be seen in the material devoted to the Recommendation in the *FATF Methodology*.[119]

173. Another FATF document does provide some elaboration as to the meaning of beneficial ownership, stating that:

> it extends beyond legal ownership and control to consider the notion of ultimate (actual) ownership and control. In other words, the FATF definition focuses on the natural (not legal) persons who actually own and take advantage of capital or assets of the legal person; as well as on those who really exert effective control over it (whether or not they occupy formal positions within that legal person), rather than just the (natural or legal) persons who are legally (on paper) entitled to do so[120]

and acknowledging legal persons can include NPOs[121].

174. However, apart from repeating the point in the Interpretive Note about the need for countries to review the money laundering and terrorist financing risks associated with the other types of legal person, to take into account their different forms and structures and, based on the level of risk, to determine measures that will achieve appropriate levels of transparency, the concrete guidance on implementing Recommendation 24 in respect of them is limited to stating that:

> At a minimum, these other types of legal persons should record and keep accurate and current similar types of basic information as required for companies, and the competent authorities should have timely access to such information. Additionally, competent authorities should have timely access to adequate, accurate and timely beneficial ownership information for these other types of legal person.[122]

175. There is no specific discussion regarding NPOs (or indeed NGOs) in the remainder of the document, which in the part concerned with Recommendation 24 refers only to commercial and professional organisations.

176. Nonetheless, without mentioning either NPOs or NGOs, there is one example of natural persons who could be considered as beneficial owners that could be appropriate for them, namely, natural persons who may exercise control through positions held within a legal person.[123]

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[118] *Ibid,* at p. 51.
[119] Pages 69-72.
[120] *Transparency Guidance*, para.15.
[121] *Ibid*., para. 24.
[122] *Ibid*., para. 26.
[123] *Ibid*, p. 16

177. Two illustrations are given for this example, namely, that:

> e) The natural person(s) responsible for strategic decisions that fundamentally affect the business practices or general direction of the legal person. Depending on the legal person and the country's laws, directors may or may not take an active role in exercising control over the affairs of the entity, but identification of the directors may still provide useful information. However, information on directors may be of limited value if a country allows for nominee directors acting on behalf of unidentified interests.
> f) The natural person(s) who exercises executive control over the daily or regular affairs of the legal person through a senior management position, such as a chief executive officer (CEO), chief financial officer (CFO), managing or executive director, or president. The natural person(s) who has significant authority over a legal person's financial relationships (including with financial institutions that hold accounts on behalf of a legal person) and the ongoing financial affairs of the legal person.[124]

178. A further example in the document of possible relevance for NPOs and NGOs would be:

> d) The natural person(s) who exerts control without ownership by participating in the financing of the enterprise, or because of close and intimate family relationships, historical or contractual association .[125]

since this could include donors.

179. However, an even wider scope for those understood to be beneficial owners might be inferred from the stipulation that:

> control may be presumed even if control is never actually exercised, such as using, enjoying or benefiting from the assets owned by the legal person[126]

since this could be construed as covering every individual whom the NPO or NGO works with or assists in some way.

180. Unfortunately, there is no attempt made to indicate whether any of these examples should actually be used by countries/territories when adopting requirements regarding beneficial ownership information that will be applicable to some or all NGOs and, if so, how exactly this should be done.[127]

181. As a result, not only are countries/territories not given adequate guidance for implementing a concept that prove burdensome for NGOs which are not at risk of involvement in money laundering or terrorist financing but also it will be difficult to judge whether the approach adopted by them is inappropriate.

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[124] *Ibid*.
[125] *Ibid*., p. 15.
[126] *Ibid*. p. 16; underlining used in the document itself.
[127] There is also no discussion as to the application of beneficial ownership requirements in *A Beneficial Ownership Implementation Toolkit* prepared by the Secretariat of the Global Forum on Transparency and Exchange of Information for Tax Purposes and the Inter-American Development Bank (2019) (https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf).

182. Access to the beneficial ownership information is to be by competent authorities, particularly law enforcement authorities and financial intelligence units.[128] In addition, it is suggested that countries should consider facilitating public access to beneficial ownership information. [129]

2. Evaluation

183. In their evaluation and follow-up reports relating to the issue of beneficial ownership, FATF and MONEYVAL consider the extent to which beneficial ownership information is available.[130]

184. However, they do not elaborate to any great extent on what that actually involves for legal persons that are NGOs.[131]

185. This seems to be a consequence of evaluation following the approach to measures of implementation which may impose generally applicable requirements rather than ones directed to particular forms of legal persons.

186. Nonetheless, the absence of any reflection on the approach to beneficial ownership requirements for NGOs can be seen even where a report refers, with apparent satisfaction, to beneficial ownership information being gathered in respect of associations.[132]

187. Similarly, another report refers, albeit without any comment, to one member State deeming members of the board of directors to be the beneficial owners of associations and this being the view taken of members of the boards of trustees of foundations.[133]

188. A somewhat different approach can, however, be seen in a comment on the fact that legislation defines beneficial owners of corporate entities with no business shares, such as associations, institutes and foundations, that:

> Although it is noted positively that the authorities provide further instructions in these articles on determination of beneficial ownership, some potential beneficial owners could be missed in application of these definitions. This relates in particular to natural persons who may exercise control through positions held within non-corporate legal persons, or natural persons who may control legal persons through other means, without providing funds.[134]

[128] Interpretive Note, para. 16.
[129] *Ibid*, para. 17.
[130] As for Recommendation 8, the reports on member States do not cover the same period. All the reports precede the revision of Recommendation 24. Generally the legislation evaluated does not cover that prompted by the adoption of Directive 2015/849.
[131] In certain reports, it was noted that requirements in general regarding beneficial ownership were absent or inadequate; Austria (F-ER 2016, p. 158) ; Azerbaijan (M-4th ER, paras. 1172-1177 but see M-FuR, para. 55); and Germany (F-ER 2014, paras. 106-1078).
[132] Croatia (m-5th ER, p. 277).
[133] Finland (f-ER 2019, p. 193).
[134] Slovenia (M-5th ER, p. 181).

189. Moreover, in the case of two member States, there was a reference to the adoption of legislation that would require the provision of beneficial ownership information that would become applicable to all persons or certainly those coming within the notion of an NGO, without specifying what that would entail.[135]

190. Furthermore, there is a suggestion in respect of another member State that beneficial owners in the case of NGOs will be more than the directors, members or founders of those that are associations, foundations or centres when it is observed in respect of one country that provisions in certain registers would be relevant if these were "actually" the beneficial owners.[136]

191. Similarly, in respect of a different member State, it was noted that the basic information recorded in register:

> pertains to legal ownership (which may coincide with beneficial ownership).[137]

192. However, in the case of yet another member State, it is unclear whether providing information about the directors of an association would be sufficient beneficial ownership information as such information has been discussed under the heading of basic information.[138]

193. Indeed, maintaining an accessible register of members has been discussed under the heading of basic information for some member States.[139]

194. Moreover, there was also a finding of inadequacy in the provision of beneficial ownership information in the case of associations and foundations where the founders are legal entities, without indicating what information should be provided.[140]

195. At the same time, the report for one member State refers to its definition of a beneficial owner as being "a natural person who has actual (real) control over the legal person or its transactions (business relationships), or one who benefits from those",[141] without indicating how that relates to NGOs. This is not surprising since, although they are

[135] Lithuania (M-5th ER, p. 178) and Malta (M-5th ER, p. 180; although it subsequently specifies that, in the case of associations, information would be required not only of their beneficial owners but also of "any other natural persons exercising ultimate and effective control over the association by means of indirect ownership or by other means including any person whose consent is to be obtained or whose direction is binding for material actions to be taken"; p. 182).
[136] Albania (M-5th ER, p. 183).
[137] Italy (F-ER 2016, p. 175). In the evaluation of Recommendation 8, it was reported that NPOs were required to maintain information on "the identity of person(s) who, own, control or direct their activities" (p. 147), without specifying what that means in practice.
[138] Andorra (M-5th ER, p. 177); Austria (F-ER 2016, p. 157); Czech Republic (M-5th ER, p. 198); Georgia (M-5th ER, p. 222); Italy (F-ER 2016, p.174); Poland (M-5th ER, p. 277); and Portugal (F-ER 2017, p. 162).
[139] Albania (M-5th ER, p. 182); Belgium (F-ER 2015, p. 195); and Hungary (M-5th ER, para. 312).
[140] Andorra (M-5th ER, p. 176).
[141] Armenia (M-5th ER, p. 144).

specifically listed amongst the different types of legal person, [142] there is no mention of NGOs in the substantive evaluation of compliance.

196. In the case of another member State, it was noted that beneficiaries may be seen as beneficial owners in the case of private foundations,[143] but there has been no suggestion that this would be relevant in the case of NGOs.

197. There are also other reports in which no specific discussion occurs regarding NGOs in the analysis of compliance with the beneficial ownership requirement, even though there is some mention of entities (e.g., associations) that would be so regarded as having that character.[144]

198. In some cases, these reports find shortcomings in compliance with the requirements of the Recommendation relating to NPOs/NGOs as regards: having an authorised person to act as their representative and to provide information to the authorities;[145] such a person being resident in the country;[146] the inability to apply sanctions for not being registered;[147] This does not, however, provide much assistance in determining the beneficial owners of these NPOs/NGOs.

199. Furthermore, there is no indication in the reports as to account being either taken by member States or expected by FATF and MONEYVAL as to the different forms and structures of NGOs in fulfilling the requirements regarding beneficial ownership

200. Moreover, the discussion of sanctions does not generally address whether these would be proportionate where applied to legal persons that are not corporate entities, such as NGOs.

201. Thus, there was no reflection, for example, of the possibility in one member State of imposing a fine of up to EUR 200,000 for failure to keep accurate and up-to-date beneficial ownership information,[148] even though this would be devastating for most NGOs.[149]

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[142] Armenia (M-5th ER, pp. 141-142).

[143] Austria (F-ER 2016, p. 158).

[144] Bosnia-Herzegovina (M-4th ER, ch. 5); Cyprus (M-5th ER, p. 225); Czech Republic (M-5th ER, p. 197); Denmark (F-2017 ER, p. 187); Estonia (M-4th ER, ch. 5); Georgia (M-5th ER, p. 221); Greece (F-ER 2019, para. 378); Latvia (M-5th ER, p. 182); Republic of Moldova (M-5th ER, p. 210); the Netherlands (F-ER 2011, paras. 1197-1231); Norway (F-ER 2014, pp. 114-116); San Marino (M-5th ER, pp. 143-144); Turkey (F-ER 2019, p. 203); and Ukraine (M-5th ER, pp. 178-181).

[145] Albania (M-5th, p. 184).

[146] Malta (M-5th ER, p. 183).

[147] Albania (M-5th ER, para. 185).

[148] Slovak Republic (M-5th ER, p. 210).

[149] *Cf.* the fines noted in respect of Slovenia: "Associations, foundations and institutes can be fined EUR 420, EUR 600, and EUR 2,000 to EUR 4,000 respectively for failure to report changes in registration data to competent authorities within 30 days (Art. 53(2) AA; Art. 35(2) FA; Art. 19, 25 BRA). Foundations can also be fined for failure to submit their regulations to the competent authority within three months (Art. 35(3) FA). Responsible persons of associations, foundations and institutes can be fined EUR 125, 200, and 200- 400 EUR respectively for these misdemeanours"; MM-5th ER, para. 252.

202. Where there is no reference at all to entities that are NGOs in the discussion of beneficial ownership information, this does not seem to be a factor expressly mentioned in the assessment of the compliance by the member States concerned with the Recommendation.[150]

203. Thus, there is a lack both of clarity and consistency in the practice of member States as regards the beneficial ownership of NGOs. Furthermore, there is no attempt either to remedy this in the evaluation of reports or to promote the need for account to be taken the different forms and structures of NGOs when making this concept applicable to them or when subjecting them to sanctions.

204. As regards access to beneficial ownership information, this is generally noted as being appropriate. However, there are some instances of the powers not being considered to be adequate.[151] In a few instances, the issue of access is seen as less significant on account of the limited information collected.[152]

205. In respect of one member State, it is noted that the police can have access to it only through a court order[153] but for another member State such an order is not required[154] and for a third they must use their general investigative powers[155].

206. There is no reference to the public having access to beneficial ownership information, although this will be possible where this does not differ from the basic information on entities that should be gathered.

F. RECOMMENDATION 25

207. Like Recommendation 24, Recommendation 25 is directed to preventing the misuse of certain legal arrangements for money laundering or terrorist financing. Again, this section looks first at the scope of the Recommendation and the official guidance as to what this entails. It then reviews how this is applied in evaluation and follow-up reports by FATF and MONEYVAL.

1. The Recommendation

208. Thus, Recommendation 25 also requires adequate, accurate and timely information in respect of trusts and similar arrangements.

[150] See, e.g., Iceland (F-ER 2019, p.163); Ireland (F-ER 2017, p. 172); Switzerland (F-ER 2016, p. 205); and United Kingdom (F-ER 2018, p. 215).
[151] E.g., Armenia (M-5th ER, p. 145) and Ireland (F-ER 2017, p. 171).
[152] E.g., Latvia (M-5th ER, p. 184).
[153] Cyprus (M-5th ER, p. 228).
[154] Iceland (F-ER 2019, p. 161).
[155] Denmark (F-2017 ER, p. 191).

209. In particular, the information required will include, as the Interpretive Note elaborates, that relating to:

> the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust.[156]

210. However, in contrast to the Interpretive Note for Recommendation 8,[157] there is no stipulation that the reference to "beneficiaries" does not mean that each specific individual should be identified.

211. The Interpretive Note sets out similar arrangements to those for Recommendation 24 with respect to arrangements for gathering this information, access to it by competent authorities, its retention and updating, international cooperation and liability and sanctions, as well as for the disclosure to financial institutions and DNFBPs by trustees of their status when forming business relationships or carrying out transactions above USD/EUR 15,000.

212. There is no mention of a risk assessment approach in the Interpretive Note,[158] but another FATF document does specify that a comprehensive risk assessment of legal arrangements should be undertaken, with countries being:

> recommended to identify typologies which indicate higher risks by reviewing cases where trusts and other legal arrangements are being misused for criminal purposes. When assessing the risks associated with different types of legal arrangements, countries could consider assessing the risks of specific jurisdictions, and types of service providers.[159]

213. The latter document shows some awareness that the entities affected by the requirements could be NPOs rather than professional entities.[160] However, there is no specific guidance in it or the Interpretive Note as to the applicability of the requirements where the trust or other legal arrangement is an NGO.[161]

214. Access to this beneficial ownership information is to be by competent authorities, particularly law enforcement authorities.[162]

215. Overall, there is a lack of clarity as to how the requirements of this Recommendation are meant to apply to NGOs that take the form of a trust or other legal arrangements.

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[156] Paragraph 1.
[157] See para. 97 above.
[158] This is currently being updated.
[159] *Transparency Guidance*, para. 58.
[160] See the reference to retention of information by "non-professional trustees" in paragraph 63 and to the registration of charities in paragraph 66.
[161] In *A Beneficial Ownership Implementation Toolkit* (*op. cit*., fn. 112), there is a reference to some practice of exempting non-professional trustees from licensing requirements, p. 34.
[162] Interpretive Note, para. 4. In addition, consideration should be given to facilitating access to it by financial institutions and DNFBPs undertaking requirements in respect of customer due diligence

2. Evaluation

216. In the evaluation and follow-up reports by FATF and MONEYVAL, there is no specific reference to NGOs or NPOs in the form of a trust. Again, this reflects the fact that this does not tend to be something especially addressed in the measures being evaluated.

217. The only issue likely to be of any practical relevance for such NGOs or NPOs is the observation that the requirements of the Recommendation do not apply to non-professional trustees.[163] This is likely to be the situation of those responsible for the government of an NGO that takes the form of a trust or other legal arrangement.

218. Although, there is some emphasis on identifying beneficiaries but this seems to be only in the context of asset management arrangements for the benefit of family members, investment vehicles and pension funds.[164]

219. The issue of access by competent authorities to beneficial ownership information is not generally seen as problematic. However, in the case of one member State, access by the police requires a court order[165] and for four others they need to rely on their general powers of investigation[166].

G. DIRECTIVE 2015/849

220. The aim of the Directive 2015/849 is to continue the alignment of European Union law with FATF Recommendations, taking account particularly of the revisions to them in 2012.[167] this section looks first at the scope of the Directive and then at some national measures purporting to implement it.

1. The Directive

221. The Directive includes the following requirements with respect to beneficial ownership information in Article 30(1):

> Member States shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held.
> Member States shall ensure that those entities are required to provide, in addition to information about their legal owner, information on the beneficial owner to obliged entities when the obliged entities are taking due diligence measures in accordance with Chapter II

[163] Andorra (M-5th ER, pp. 181-182 and M-FuR, pp. 13-14 but seen as partly remedied in M-2nd FuR, pp. 6-7); Belgium (F-ER 2015, pp. 198-199); and Ireland (F-ER 2017 p. 174).
[164] Cyprus (M-5th ER, pp. 230-232). See also para. 28 above.
[165] Cyprus (M-5th ER, p. 229).
[166] Hungary (M-5th ER, p. 188); Italy (F-ER 2016, p. 179); Spain (F-ER 2014, p. 190); and Sweden (F- ER 2017, p. 180).
[167] Point 4 of the Preamble.

and Article 31(1)[168]

> Member States shall ensure that this Article applies to trusts and other types of legal arrangements, such as inter alia, fiducie, certain types of Treuhand or fideicomiso where such arrangements have a structure or functions similar to trusts. Member States shall identify the characteristics to determine where legal arrangements have a structure or functions similar to trusts with regard to such legal arrangements governed under their law.
> Member States shall require that trustees of any express trust administered in that Member State obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust. That information shall include the identity of:
> (a) the settlor;
> (b) the trustee(s);
> (c) the protector (if any);
> (d) the beneficiaries or class of beneficiaries; and
> (e) any other natural person exercising effective control over the trust.

222. These provisions entail Member States establishing an obligation for corporate and other legal entities and trusts to take reasonable measures to seek to confirm the identity of their beneficial owners.[169]

223. For the purpose of holding beneficial ownership information, a central register must be established.[170]

224. Access to beneficial ownership information should be possible by competent authorities and financial intelligence units. This access should be "without any restriction" in the case of legal entities[171] and it should be "timely and unrestricted" in the case of trusts[172].

225. In addition, access to this information by obliged entities[173] must be allowed in the case of legal entities[174] and may be allowed in the case of trusts[175] when the obliged entities are dealing with legal entities or trusts as customers.

226. As a result, this access requirement would become applicable to beneficial ownership information when NGOs are dealing with their bank, accountants, auditors, tax advisers, lawyers and estate agents or with other persons trading goods where payments in excess of EUR 10,000 are made or received in cash.

[168] As amended by Directive 2018/843.
[169] Judgment of the EFTA Court in Case E-10/19, 21 December 2020. The case was only concerned with legal entities but its reasoning is equally applicable to trusts. The obligation was seen as involving a requirement for underlying documentation when the circumstances of a situation presented a legal entity with doubts as to the accuracy of the information received but does not extend to requiring a legal entity to bring legal proceedings against its owning entity to obtain information on a beneficial owner.
[170] Articles 30(3) and 31(4).
[171] Article 30(5)(a).
[172] Article 31(4).
[173] As to the meaning of these, see para. 32 above.
[174] Articles 30(1) and 30(5).
[175] Article 31(4).

227. Furthermore, Directive 2015/849 requires access to beneficial ownership information to be allowed to "any member of the general public" in the case of legal entities[176] and by any natural or legal person that can demonstrate a legitimate interest in the case of a trust or similar legal arrangement.[177]

228. There is provision for Member States to provide, in exceptional circumstances laid down in law, for an exemption – in whole or in part - from access by obliged entities to beneficial ownership information where this would expose the beneficial owner to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable. Such exemptions are to be provided on a case-by-case basis.[178] This could be important for NGOs which are not popular and are the object of harassment, violence or intimidation.

229. Although as has been seen, its aim was to cover the widest possible range of legal entities, the Directive 2015/849 does not really explain what the concept of beneficial ownership means in respect of all of them.

230. Instead it provides a general definition of a beneficial owner as being:

> any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted[179]

and then gives some elaboration in respect of corporate entities, trusts[180] and legal entities such as foundations and legal arrangements similar to trusts.

231. Those specifically included in this elaboration are not illustrative but the minimum natural persons to be registered, with others being added if they satisfy the ultimate control test.

232. In the case of corporate entities, the principal test of beneficial ownership relates to the percentage of share ownership and voting rights or control through other means. However, where a natural person cannot be identified in this way after exhausting all possible means and provided there is no ground for suspicion or where there is any doubt that the person(s) identified are the beneficial owner(s), then the beneficial owner(s) are the natural person(s) who hold the position of senior managing official(s).[181]

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[176] Article 30(5)(c) as amended by Directive 2018/843; previously there had been a requirement for natural or legal persons to demonstrate a legitimate interest. The latter also introduced an additional possibility of access for "any natural or legal person that files a written request in relation to a trust or similar legal arrangement which holds or owns a controlling interest in any corporate or other legal entity other than those referred to in Article 30(1), through direct or indirect ownership, including through bearer shareholdings, or through control via other means".

[177] Article 31(4) as amended by Directive 2018/843.

[178] Article 30(9) as amended by Directive 2018/843. Exemptions are only to be granted upon a detailed evaluation of the exceptional nature of the circumstances

[179] Article 3(6).

[180] As to which, see para. 42 above.

[181] Article 3(6)(ii).

233. In the case of NGOs taking a corporate form, it seems improbable that there would be any individual shareholder who could exercise control over it where it is in substance a membership organisation since every member would have a single share.

234. However, there is no guidance as to how control could be exercised over such an NGO by other means. The only way in which the possibility of such control being exercised would be through the risk assessment that Member States are expected to undertake under Articles 7 and 8.

235. While there might be instances of a particular donor having a preponderant influence over an NGO, this is unlikely to be so in most cases. In any event, the risk assessment would need to identify something like the percentage of financing contributed by a donor that demonstrates that ultimate control could be being exercised by the natural persons involved in running it.

236. Moreover, it seems improbable that any risk assessment could point to the beneficiaries of the activities of NGOs as being able to exercise control over it.

237. Although entities such as foundations and legal arrangements similar to trusts are not likely to be the legal form adopted by most NGOs,[182] the provision dealing with them for beneficial ownership purposes is the only one that can be relied upon when trying to determine who ought to be treated as their beneficial owners where they do not take a corporate form or are not trusts.

238. For legal entities such as foundations and legal arrangements similar to trusts, the beneficial owner(s) are stated in the Directive to be the natural person(s) who hold "equivalent or similar positions" to those referred to in respect of trusts.[183]

239. This means that, in the case of NGOs that are not corporate entities or trusts, there would be a need to identify persons playing a similar role to that of settlor, trustee, protector, beneficiaries or the class of persons in whose main interest it was set up or operates and other natural persons exercising ultimate control.

240. While the concept of protector does not seem at all applicable to NGOs, persons who found an NGO or serve on its board could be seen as fulfilling a similar role to, respectively, the settlor and trustees of a trust.

241. Moreover, as with corporate entities, the natural persons running a donor could potentially exercise ultimate control over an NGO but, as just noted, that could only be reasonably concluded after having undertaken a risk assessment.

242. However, while it has been suggested, in connection with NGOs that are corporate entities, that it is improbable for beneficiaries and those for whom an NGO is established

[182] See para. 44 above.
[183] Article 3(6)(c).

to exercise control over it, the way in which the Directive is framed does not make this category of potential beneficial owner subject to any control test since they are the minimum natural persons to be regarded as the beneficial owners of trusts and thus also for "legal entities such as foundations, and legal arrangements similar to trusts"[184].

243. The requirements to identify the beneficial owners of trusts and of other entities such as foundations and legal arrangements similar to trusts are not to be interpreted as obliging anyone to prove the non-existence of indirect ownership or ultimate control by a natural person.[185] Thus, where no such person as referred to in Article 31 in respect of these entities exists, the obligation to identify that person also cannot exist. However, this would not preclude the possibility that, in certain situations, the provision of underlying documentation might be required in order to substantiate an assertion that no such person exists.

244. As a result, the overwhelming majority of NGOs with legal personality are going to be forced to expend considerable energy in determining who are their beneficial owners despite having no connection with either money laundering or terrorist financing.

245. The extent of the information required in respect of persons considered to be beneficial owners is not generally indicated.

246. Nonetheless, insofar as the information can be accessed by a member of the general public, that access must extend to at least the name, the month and year of birth, the nationality and the country of residence of the person concerned, as well as the nature and extent of the beneficial interest held.[186] However, Member States may, under conditions determined by national law, provide for access to additional information enabling the identification of the beneficial owner, which shall include at least the date of birth or contact details in accordance with data protection rules.

247. Access to beneficial ownership information in respect of legal entities must be in accordance with data protection rules[187] and may be subject to online registration and to payment of a fee which does not exceed the administrative costs involved including those of maintaining and developing the register.[188]

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[184] *Ibid.* Something further underlined following the amendment of this provision by Directive 2018/843 that inserted "all the following persons" before the list of those who were defined as beneficial owners for trusts.

[185] Judgment of the EFTA Court in Case E-10/19, 22 December 2020.

[186] Article 30(5).

[187] Articles 30(5) and 41. The EFTA Court has ruled that it is for national courts to ascertain to what extent the information on beneficial ownership processed is in line with the principle of data minimisation in point (c) of Article 51 of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data by being adequate, relevant and limited to what is necessary to identify the beneficial owner and, if needed, to confirm the identity of the beneficial owner; Case E-10/19, 22 December 2020.

[188] Article 30(5), as amended by Directive 2018/843. An amendment by the latter has made it clear that access by competent authorities and financial intelligence is to be free of charge, even though that seemed implicit in the specification that their access is "without restriction.

248. This is unlikely to be a sufficient safeguard against abusive use of personal information relating to the members of NGOs and those involved in the running of those providing them with the funds to operate.

2. National measures of implementation

249. Member states of the Council of Europe who are also Member States of the European Union have been adopting legislation to give effect to Directive 2015/849.[189]

250. Their approach has differed considerably in the way in which this legislation concerns NGOs.[190]

251. In some instances, there is no specific reference to them at all in the legislation, which simply makes the requirements in Directive 2015/849 applicable to any corporate or legal entity incorporated in it and "includes a company and any other body corporate so incorporated".[191]

252. Another approach is to make the requirement to register information about beneficial owners apply to companies but not to NGOs taking the form of associations, trusts, foundations and other similar forms of legal entity unless these are "international".[192]

253. Yet another approach is to make such a requirement specifically applicable to all forms of NGO[193] or to foundations and associations[194] or to make it clear that associations or other forms of NGO are legal persons for the purpose of that requirement.[195]

254. The definition of beneficial owners relies in some cases on just that in Directive 2015/849[196] but in some cases a different formulation is employed.

255. Thus, in one, beneficial owners are said to be: (a) their directors; (b) the persons entitled to represent them or who are in charge of their day-to-day management; (c) the individuals, or where they have not been designated, the category of individuals in whose

[189] See para. 68 above as regards the opening of infringement procedures for this sometimes being considered by the European Commission to be insufficient.
[190] The approaches outlined below are illustrative of those being taken rather than a comprehensive analysis of them.
[191] E.g., Ireland.
[192] Belgium.
[193] Finland, the Netherlands and Sweden. This is also the approach in Albania's Law No. 112/2020 "On the register of beneficial owners", which applies to "Non-profit organisations – foundations, associations, centers, branches of foreign NGOs".
[194] Malta.
[195] Cyprus and Latvia.
[196] E.g., Ireland.

interest they have been created or operate; and (iv) any other individual exercising by other means the ultimate control of the international association or foundation.[197]

256. Another approach is to specify that a beneficial owner is a person owning more than 25% of the shares in the entity or a person holding more than 25% of the voting rights in it (directly or indirectly) or a person exercising actual control on other grounds, with the last being recognised as what would be potentially relevant for associations.[198]

257. However, in this case, it has also been clarified that an association operating in accordance with the spirit and the letter of the law would not have a determinable ultimate beneficial owner except where: (a) there was a single person (whether or not a member) who ultimately and effectively controls the activity of the association beyond the framework stipulated by law; (b) members have entered into contracts causing a third person to gain indirect control over it; (c) members are pursuing a goal other than one specified in its statute; or (d) the association effectively lacks active members and is operated only by a board of directors, in which case the members of the board are the ultimate beneficial owners. [199]

258. Yet another approach is to provide that a beneficial owner can be someone who benefits from someone else acting on their behalf.[200]

259. The information required is always: the name, date of birth, nationality, residential address and national identification number or equivalent.

260. However, in some instances, it may also extend to when the person became a beneficial owner[201], the way of exercising control in the case of an association[202] and the role of the person in relation to the association[203].

261. In some instances, there is provision for seeking exemption from the registration requirement on the basis of the disproportionate risk ground recognised in Directive 2015/849,[204] as well as this being automatically granted for specified categories of entities[205].

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[197] Belgium. In the Albanian law, the beneficial owner is said to be "the founder or the legal representative or the individual who exerts the ultimate effective control on the administration and supervision of an NGO". This definition is now used in Law No. 9917 "On Prevention of Money Laundering and Financing of Terrorism" , following an amendment adopted on 2 December 2021 with a view to aligning it with Directive 2015/849.

[198] Latvia.

[199] https://www.financelatvia.eu/wp-content/uploads/2018/09/Ultimate-beneficial-owner-of-an-association.pdf. A similar approach is taken by Finland.

[200] Sweden.

[201] Belgium.

[202] Latvia.

[203] Malta.

[204] Belgium. As to this ground, see para. 219 above.

[205] E.g., Malta (including pious foundations and ecclesiastical entities in the form of foundations,, associations under the Condominium Act and trade unions and employers' associations); the Netherlands (including associations with limited legal capacity and without commercial activities); and Sweden (including non-profit associations which do not have beneficial owners).

262. The relevant registers are publicly accessible but this may only be to the minimum extent required by Directive 2015/849[206] and be subject to showing a public interest in access[207].

263. Failure to register or failure to keep the information up to date can sometimes lead to significant penalties for those subject to these registration requirements[208] but in other cases they are more modest[209].

264. There have been two requests by the Luxembourg District Court for preliminary rulings from the Court of Justice of the European Union relating to access to any member of the public to the beneficial owners register, as required by Directive 2015/849.

265. In an opinion by the Advocate General on the joined requests,[210] it was stated that, while such access did not constitute a disproportionate interference with the rights to private life and data protection under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, the possibility of making accessible to members of the public data other those provided for in the Directive could constitute a serious interference with those rights and so was invalid.

266. In addition, it was considered by the Advocate General that, in relation to the exceptional circumstances derogation relating to inclusion in the register, account must be taken not only of the risks specified in the Directive – fraud, kidnapping, etc. – but also all disproportionate risks of fundamental rights' infringement as provided for by the Charter. As a result, national judges must ensure that derogations are authorised in a case of a disproportionate risk of infringement of the beneficial owner's fundamental rights.

267. Moreover, "exceptional circumstances" were to be understood as meaning circumstances out of the ordinary, giving rise to a disproportionate risk of infringement of fundamental rights and, in particular, risks to the person's rights to life, integrity and security.

268. Generally the national measures of implementation treat NGOs like all other legal entities as regards the disclosure of beneficial ownership information.

269. Certainly, there seems to be little effort in most of these measures to take account of the specifics of NGOs and, in particular, to consider the relevance and impact of the requirements being placed upon them.

270. Moreover, the legal challenges to the Directive and implementing measures have so far only come from corporate entities and have not explored the burden being placed on NGOs, one that runs counter to the notion of the enabling environment which should be established for them.

[206] Belgium; as to the minimum, see para. 237 above..
[207] Ireland and Malta, notwithstanding the change effected by Directive 2018/843; see fn. 174.
[208] E.g., up to 50,000 EUR in the case of Belgium; up to 5,000 EUR in Ireland
[209] E.g., 500 EUR in Malta.
[210] Joined cases C-37/20 *Luxembourg Business Registers* and C-601/20 *Sovim*, 20 January 2022.

H. CONCLUSION

271. Raising concerns about the application to NGOs of requirements relating to money laundering and terrorist financing does not, of course, mean that action to deal with these activities is not considered legitimate.

272. However, the way in which the relevant requirements are being applied is leading, or will lead, to significant burdens for NGOs that are not at risk of being implicated in money laundering or terrorist financing and thus doing so without making any useful contribution to tackling such activities.

273. This is a situation which stems in part from the fact that the requirements themselves have been developed and elaborated without really taking sufficient account of the diverse nature of NGOs, with just FATF's Recommendation 8 being directed to those whose particular focus is identified.

274. The FATF has certainly been showing some readiness to engage with NGOs in this regard as the difficulties being faced by them has become apparent.[211]

275. The most recent manifestation of this – offering in 2017 the Global NPO Coalition on FATF four seats on FATF's Private Sector Consultative Forum[212] – could provide an opportunity to shape FATF standards in a way that shows a better understanding of the NGO world. In this connection, the revised Recommendations 8 and 24 and their Interpretive Notes[213] are certainly steps in the right direction.

276. However, there remains some scope for improving the guidance on implementation so that this deals much more specifically with the particular character of NGOs when implementing FATF Standards so that member States do not then resort to a "one-size-fits-all" approach, which imposes unnecessary burdens for no actual benefit in tackling money laundering and terrorist financing.

277. A similar comment is applicable to the framing of the beneficial ownership requirement in Directive 2015/849, which does not address in a particularly helpful way what this requirement should entail for NGOs that are legal entities.

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[211] This began in 2013; see https://www.fatf-gafi.org/publications/fatfgeneral/documents/consultationanddialoguewithnon-profitorganisations.html. For an account of some constraints on the effectiveness of this engagement, see https://www.civicus.org/images/Interview-FATF.pdf.

[212] Previously only two transparency NPOs were members of the Forum. The first opportunity to take part in it was in 2019. However, there has not been one since then because of the risks associated with COVID-19. For the Global NPO Coalition's account of the 2019 Forum, see https://fatfplatform.org/news/npo-consultation-at-the-fatf-private-sector-consultative-forum/. FATF also conducts ad hoc thematic meetings and briefings (offline and online) with NPO representatives to gain information on the topics of standard implementation, standard development and education.

[213] See paras. 75, 144 and 150 above.

278. Thus, there is a need for a thorough-going review of FATF standards and related guidance in order to ensure that they take into account the adverse impact that their implementation, well-intentioned or otherwise, could have on NGOs in general and not just on the NPOs coming within the FATF definition. Such a review could only be effective if it is undertaken in partnership with NGOs.

279. It would also be appropriate for the European Commission to undertake a similar review of the impact of Directive 2015/849 on NGOs.

280. However, although the requirements relating to terrorist financing and money laundering could be revised so that they take better into account the specificity and diversity of NGOs and the potential adverse impact on them, the main source of the difficulties being created for NGOs is the manner in which these requirements are being implemented.

281. The principal responsibility for implementation lies, of course, with member States, who clearly need to respond to the problems being posed by the measures that they have adopted.

282. However, oversight of implementation can be an opportunity to show that there has been a misapplication of the requirements and that there is a need for this to be rectified.

283. Certainly, evaluations prepared by FATF and MONEYVAL do include some criticisms of the approach taken by member States when implementing FATF standards.

284. Nonetheless, the evaluation process could be used to emphasise more that the measures adopted do not always respect the limits on applying the FATF standards to NGOs and could focus more on the use actually made of the implementing measures and their impact on NGOs

285. The emphasis on the importance of risk assessment seen in the FATF standards is appropriate. However, this is not being taken sufficiently seriously by all member States, a shortcoming especially evident in the fact that the implementation of the requirements with respect to NGOs tends to be universal, disregarding their nature and size.

286. It is good that some of these problems now seem to be beginning to be recognised by FATF as among the "unintended consequences" of its standards.

287. Thus, a stocktaking of such consequences that dealt with "Undue Targeting of NPOs" noted that

> there continue to be countries that incorrectly implement the Standards and justify restrictive legal measures to NPOs in the name of "FATF compliance", both unintentionally and, in some cases, intentionally. The constraints reported to have been applied to NPOs and examined include: (1) intrusive supervision of NPOs; (2) restrictions on NPOs' access to funding and bank accounts; and (3) forced dissolution, de-registration or expulsion of NPOs. Within each of these categories are a variety

of restrictions, burdens and requirements that impede the ability of NPOs to operate and pursue their missions effectively, to access resources, and in some cases, to continue their operations.[214]

288. It is also important to see the consequences resulting from the supposed implementation of FATF Standards being described as not just unintentional but also intentional.

289. In this connection, it should be noted that no reference is ever made in evaluation reports to the legislation and other measures restricting the ability of NGOs in some member States to operate and even exist, as disclosed particularly in the judgments of the European Court, the annual reports of the Secretary General of the Council of Europe and the work of the Council of Europe Commissioner for Human Rights.

290. Specific reference to this material is not, of course, essential. Nonetheless, it would be desirable for it still to be taken into account since such restrictions ought to be part of the context in which measures purporting to implement FATF standards are being evaluated.

291. Moreover, this will not be of any benefit unless the misapplication of the FATF standards is both called out systematically in the evaluation of measures and their application by member States and there is effective pressure to rectify the measures and the abuses which they facilitate.

292. In particular, it needs to be underlined that not only are most NGOs not NPOs within the FATF definition but also that those NGOs that do fall within that definition should not automatically be regarded as a high risk for involvement in money laundering and terrorist financing. Implementation of FATF standards will necessarily be abusive – whether intended or otherwise – in the absence of a genuine and transparent risk assessment exercise.

293. NGOs do not seem to have had any significant input into the process of evaluating the implementation of FATF Standards despite being affected by them. It is welcome, therefore, that FATF has now drawn attention to such a possibility, even if this remains rather limited.[215] It would be desirable for MONEYVAL to follow FATF's lead as regards encouraging NGO input, even though are instances of this occurring in the course of evaluations conducted by it.

294. In addition, it would be desirable for such input to occur not only before evaluation reports are prepared but also afterwards, particularly in plenary meetings and follow-up activities, as well as the provision of technical assistance.

295. In this connection, it would be useful if FATF and MONEYVAL took into account in their scoping exercise any measures which, when implemented, could impact negatively on

[214] https://www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf. See also ECNL's *Unintended consequences of AML/CTF regulation: the challenges of banking non-profit organisations; https://ecnl.org/sites/default/files/2022-02/Unintended%20consequences%20of%20AML-CTF%20regulation%20the%20challenges%20of%20banking%20non-profit%20organisations_0.pdf*/

[215] See para. 60 above.

NPOs. This could be facilitated by some arrangement whereby these bodies could be "alerted" by NPOs as to existing and potential problems.

296. This would only be really useful if they then made sure that their evaluators were aware of these aspects and that they were appropriately trained to take them into account when making assessments.

297. In addition, assessment procedures ought to be amended so that there is more effective engagement with NPO representatives during on-site visits and that recommendations concerned with any adverse impact on NPOs and NGOs are properly pursued in the follow-up processes.

298. The adverse impact on NGOs does not appear to have been a factor leading the European Commission to open infringement procedures relating to Directive 2015/849. Indeed, the impact on NGOs was not even a consideration in the framing of this Directive.

299. Nonetheless, there is a need for the European Commission to be alert to the possibility that excessive demands relating to the beneficial ownership of NGOs could impede their ability to operate and be inconsistent with rights in the Charter of Fundamental Rights of the European Union.

300. Although both FATF and European Union requirements relating to money laundering and terrorist financing are supposed to respect human rights, there continues – notwithstanding the developments discussed - to be inadequacies in the standard-setting and insufficient consideration of the appropriate application of these requirements to entities that are a manifestation of the right to freedom of association.

301. Certainly, it is unlikely that the difficulties encountered in the implementation of the various requirements will be overcome without a much more serious and ongoing engagement by the oversight bodies with NGOs, not only as regards the further elaboration of requirements and related implementation guidance – as has begun to occur - but also in the monitoring of their implementation.

302. This will undoubtedly have implications, in particular, for the resources made available to FATF and MONEYVAL for their work. However, without such engagement the operation of many NGOs will continue to be subject to unjustifiable burdens and restrictions without this making any useful contribution to tackling money laundering and terrorist financing.