HUMAN SECURITY COLLECTIVE AND
EUROPEAN CENTER FOR NOT-FOR-PROFIT LAW

AT THE INTERSECTION OF SECURITY AND REGULATION

UNDERSTANDING THE DRIVERS OF 'DE-RISKING' AND THE IMPACT ON CIVIL SOCIETY ORGANIZATIONS

ILLUSTRATED BY CASE STUDIES FROM BRAZIL, MEXICO AND IRELAND

At the Intersection of Security and Regulation:

Understanding the Drivers of 'De-Risking' and the Impact on Civil Society Organizations

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List of abbreviations

AC	Civil Association (Mexico)
ACAMS	Association of Certified Anti-Money Laundering Specialists
AML	Anti-Money Laundering
BACEN	Banco Central do Brasil (Central Bank of Brazil)
COAF	Council for Financial Activities Control (Brazil)
CDD	Customer Due Diligence
CFT	Countering the Financing of Terrorism
CLG	Company Limited by Guarantee
CLUNI	Registry of Civil Society Organizations (Mexico) [*Sistema de Información del Registro Federal de las OSC*]
CONDUSEF	National Commission to Protect and Defend Financial Services Users (Mexico) [*Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros*]
C&SN	Charity & Security Network
CSO	Civil Society Organization
CT	Counter Terrorism
DD	Due Diligence
DNFBP	Designated Non-Financial Business or Profession
EDD	Extended Due Diligence
ENCCLA	National Strategy Against Corruption and Money Laundering (Brazil) [*Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro*]
EU	European Union
FATF	Financial Action Task Force
FEBRABAN	Banking Association of Brazil [*Federação Brasileira de Bancos]*
FCA	Financial Conduct Authority (UK)
FI	Financial Institution
FIU	Financial Intelligence Unit
GAFILAT	Financial Action Task Force of Latin America
GDPR	General Data Protection Regulation (EU)
GPFI	Global Partnership for Financial Inclusion
HSC	Human Security Collective

IAP	Private Assistance Institutions (Mexico) [*Instituciones de Asistencia Privada del Distrito Federal*]
ICCPR	International Covenant on Civil and Political Rights
IMF	International Monetary Fund
INGO	International Non-Governmental Organization
KYC	Know Your Customer
KYCC	Know Your Customer's Customer
ML	Money Laundering
NGO	Non-Governmental Organization
NPO	Non-Profit Organization
NRA	National Risk Assessment
NRC	Norwegian Refugee Council
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OECD	The Organisation for Economic Co-operation and Development
OFAC	Office of Foreign Assets Control (US Treasury)
OSCIP	Civil Society Organization of Public Interest (Brazil) [*Organização da Sociedade Civil de Interesse Público*]
R8	Recommendation 8 (FATF)
RELEX	Working Party of Foreign Relations Counsellors (EU)
SDGs	Sustainable Development Goals
STR	Suspicious Transaction Report
TF	Terrorism Financing
UN	United Nations
UnidOSC	Civil Society platform (Mexico) [*Unidos Por los Derechos de las Organizaciones de la Sociedad Civil*]
UNSCR	United Nations Security Council Resolution
UNSGSA	United Nations Secretary-General's Special Advocate for Inclusive Finance for Development
WB	World Bank
WPP	Women Peacemakers Program
WWTF	Law on Anti-Money Laundering and Countering Terrorism Financing (The Netherlands) [*Wet ter voorkoming witwassen en terrorisme financiering*]

1. Executive Summary

Non-profit organizations (NPOs) around the world are impacted by issues of financial access – inordinate delays in cash transfers, onerous due-diligence requirements, inability to open bank accounts and arbitrary closure of bank accounts – collectively classed as 'de-risking' activities by financial institutions. This study examines the drivers of this de-risking, situating it at the intersection of frameworks for security and regulation. It looks at how global regulations on money laundering and terrorism financing, for instance, permeate policymaking, influencing institutions (perversely, at times) and negatively impacting humanitarian and development work. By delving into the practices and perspectives of relevant stakeholders – NPOs, financial institutions, governments, regulators and international organizations – the study unpicks the mechanisms of governance and accountability involved in and through the chain of decision-making, underscoring the policy incoherence that is manifest along the way. The three country contexts chosen for the research – Brazil, Mexico and Ireland – help amplify the complexity of the issue and the potential search for solutions. Ongoing remedial measures addressing the financial exclusion of NPOs are highlighted and potential remedies that could challenge the current practice of de-risking are explored in detail.

This study seeks to understand the phenomenon of de-risking as it stems from global anti-money laundering (AML) and countering the financing of terrorism (CFT) rules, examining these in relation to decisions made by governments, regulators and financial institutions leading to the de-risking of NPOs. The drivers behind both global and national decision-making are analyzed and placed in a political, regulatory and security context, taking into account the normalizing of the 'securitization' discourse post '9/11' and the internalization of this discourse by regulatory and other authorities leading to risk management and avoidance. Unpicking the mechanisms of governance and accountability inherent in the decision-making process enables a greater comprehension of this vexed issue, including magnifying the 'unintended consequences' of de-risking: the fact that it is undermining other international policy goals and concerns, such as economic development, financial inclusion, human rights protection and the creation of an 'enabling environment for civil society'.

Illustrated in and through the country case studies are the fact that non-profits are facing financial access difficulties on an unprecedented scale, and that they are not cognizant of the drivers behind these de-risking decisions taken by banks. Moreover, de-risking disproportionately affects smaller organizations who are unable to meet bank's extended due diligence requirements and have no recourse to remedy when de-risked. Financial institutions, on the other hand, fear reputational damage and hefty fines, and find it difficult to 'profile' NPOs whose activities appear more 'random' than their other commercial clients. This is compounded by the fact that they do not necessarily receive any regulatory guidance from Central Banks on how to deal with NPOs. Stakeholders interviewed were

unaware of the scale of the problem, with problem-solving often focussing on the practical without addressing the systemic, and with NPOs bearing the brunt.

Addressing these policy incoherencies, highlighted through the country case studies, requires the plugging of the ownership gap in terms of governance and accountability. Some of the remedy mechanisms suggested in the study include:

- Multi-stakeholder dialogue in search of policy-related and practical solutions, such as those already ongoing in some national contexts (the Netherlands, UK, US) as well as at the multi-lateral level (World Bank–ACAMS, EU-Relex). This would help raise awareness amongst all stakeholders – e.g., on the interpretation and implementation of AML/CFT rules; on banks' decision making with regards to NPOs; on banks' requirements from NPOs; around the diversity amongst NPOs in terms of mandate, operations and nature of work; on the challenges faced by governments and regulators in finding solutions within politically-determined frameworks underpinned by legal requirements – and enable collaboration on workable solutions
- Mechanisms for NPOs seeking redress and possible grounds for litigation, including challenging commercial risk-profile companies in light of data protection laws
- Financial and regulatory technology, to facilitate NPO transfers to areas of higher risk and help lower financial institutions' compliance costs in banking NPOs
- Government or philanthropic donors supporting smaller NPOs who are disproportionately affected by bank de-risking by subsidizing extended due diligence or bearing some of their risk
- Bridging the Financial Inclusion agenda with the AML-/CFT-(and sanctions)-driven regulatory agenda, which is leading to financial exclusion, and could prove complementary to the initiatives developed to address the de-risking of NPOs
- The Financial Action Task Force and member states clarifying the revised view of non-profits, implementing the Risk-Based Approach set out and issuing specific guidance on NPOs and de-risking in light of the revised Recommendation 8
- An interrelated discussion of the impact of AML/CFT rules, UN Security Council Resolutions and EU sanctions on NPOs in international fora such as the G-20 and G-7, including highlighting the negative impact of de-risking on the rollout of the Sustainable Development Goals as well as on attempts to prevent violent extremism when small, grassroots organizations in high-risk environments who address pull and push factors that may ultimately lead to terrorism are pushed out of regulated banking channels

These and other remedies, both practical and at the policy-level, are set out in the study, along with issues that require further research and exploration. And, as explained in the study, given the policy incoherencies that exist, financial institutions, regulatory-/standard-setting-bodies and governments have to all take ownership of an issue that, currently, NPOs are bearing the sole brunt of, in order to find comprehensive and systemic, not one-off, solutions.

2. Introduction

A number of studies conducted in the past two years in the US, UK and the Netherlands have revealed, through quantitative data as well as anecdotally, the impact of the de-risking of non-profit organizations (NPOs) by banks across the world.[1] The issue has, justifiably, garnered the attention not only of members of civil society affected by problems with their banks, but also of mainstream media[2] and of national and international policymakers who are increasingly concerned about the impact of the financial exclusion of non-profits on humanitarian, development and human rights work. The present study can be seen as complementary to the existing body of research, in that it endeavours to shed light on the issue of de-risking from a policy coherence perspective, and that the countries/contexts chosen for research – Brazil, Mexico and Ireland – present an opportunity for a broadening and deepening of the understanding of the issue.

De-risking is interpreted in the study as the practice of financial institutions delaying cash transfers to, exiting relationships with and closing the accounts of clients considered 'high risk'. It is a problem faced by numerous NPOs across the world irrespective of size, geographic area of activity and type of work. Due to these financial restrictions, already-embattled civil society organizations find it even harder to operate and fulfil their mandate.

Characterizing de-risking as a complex, perhaps even intractable, issue is not new. As a phenomenon, it is best understood when viewed from a multitude of angles and then seeing how these connect. This study limits itself to aiming to understand the drivers of de-risking that stem from global anti-money laundering (AML) and countering the financing of terrorism (CFT) rules. These rules were developed by the Financial Action Task Force (FATF), the global standard-setter for AML/CFT rules, which has been in existence since 1989 when it was established by the G7. Initially dealing with money laundering, rules regarding countering the financing of terrorism were developed and integrated in the FATF standards post '9/11' (2001).

[1] These include Charity & Security Network's 'Financial Access for US Nonprofits' (https://www.charityandsecurity.org/FinAccessReport), which provides empirical data on the financial access issues US non-profits are faced with, and 'Tightening the Purse Strings' by the Women Peacemakers Program and Duke Law International Human Rights Clinic (https://law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf), which looks at the effects of counter-terrorism finance measures on gender equality and security. Other relevant studies are: Global Center on Cooperative Security and Oxfam's 'Understanding Bank De-risking and its Effect on Financial Inclusion' (https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/rr-bank-de-risking-181115-en_0.pdf); Amnesty International UK's 'Study of the Co-operative Bank's Closure of Accounts of Not-for-Profit Organisations' (https://www.amnesty.org.uk/files/2017-04/Study%20into%20Co-op%20Bank%20Account%20Closures%20vFINAL.pdf?Jmkelh4z7XZslnDcuRiFAQNu0ZVp.Imk); and the Center for Global Development's 'Unintended Consequences of Anti-Money Laundering Policies for Poor Countries' (https://www.cgdev.org/publication/unintended-consequences-anti-money-laundering-policies-poor-countries)

[2] https://www.economist.com/news/international/21724803-charities-and-poor-migrants-are-among-hardest-hit-crackdown-financial-crime-means
http://www.theworldin.com/article/14581/edition2018oops

Almost 200 countries have endorsed the 40 FATF AML/CFT Recommendations, with countries being peer-reviewed for compliance and effectiveness every eight to nine years. The FATF peer-review- or country-evaluation-ratings influence a country's financial standing directly in terms of investments, trade and aid. Recommendation 8 (R8) of the FATF rules concerns NPOs as a category that could be at risk of being misused for terrorism financing (TF). The FATF revised R8 in 2016 to state that the entire non-profit sector was no longer 'particularly vulnerable' to terrorism financing abuse, and that countries would henceforth be evaluated on designing regulation and supervision only for those NPOs at risk and in a way that is proportionate to that risk.

This study examines the connection between the FATF country evaluations and subsequent (potential) amendments to national AML/CFT laws and regulations and, following on from this, the decisions made by governments, regulators and financial institutions leading to the de-risking of NPOs. Other drivers of de-risking such as economic and financial sanctions are mentioned where relevant but are not part of the study.

The drivers behind the decision-making leading to the de-risking of NPOs are analyzed and placed in a political, regulatory and security context, taking into account the interests and concerns of policymakers. Further, the consequences of the interpretation and implementation of the AML/CFT rules by policymakers, regulators and financial institutions for the work of NPOs are investigated.
Also presented in the study are the practices and perspectives of the relevant stakeholders – NPOs, financial institutions, governments, regulators and international organizations – in and through the chain of decision-making. These are illustrated against the backdrop of international developments that influence current AML/CFT thinking and policies. Global developments are analyzed within the context of three countries, Brazil, Mexico and Ireland. Brazil and Mexico were selected because of the interest of philanthropic foundations in the de-risking of their grantees in these countries, as well as because of the presence of civil society networks able to engage with governments and financial institutions in identifying solutions to mitigate the consequences of de-risking stemming particularly from, in this case, AML rules. Ireland was included because of the country's potential similarities in institutional terms and in de-risking-related developments to the UK (where a body of research already exists, enabling fruitful comparison), and the possibility of building upon the research team's earlier work with Irish civil society, the government and the charity regulator on the FATF evaluation of the country. Beside the collection and analysis of secondary data, interviews were conducted across the three countries with NPOs, philanthropic advisors and lawyers, banks, banking associations, charity regulators, and Ministries of Finance, Foreign Affairs and International Development.

Additional interviews were conducted with stakeholders in other countries as well as in international organizations. The study was also informed by a number of national and international multi-stakeholder roundtables on de-risking, organized as part of the

study or for other initiatives concerned with the financial exclusion of civil society, and which facilitated further data collection and the validation of previously-gathered information.

The majority of the interviewees preferred to remain anonymous and the study reflects this by only mentioning organizations or individuals when this was approved beforehand. A total of 40 NPOs, including advisers and lawyers for foundations, eight international banks and banking associations, three Central Banks, two charity regulators, 40 representatives from government, including Ministries of Finance, Foreign Affairs, Justice and Home Affairs, and various representatives from international government organizations across six countries were interviewed, in bilateral or roundtable settings.

Other than the aim of obtaining a better understanding of the drivers of de-risking and the chain of decision-making on the part of the stakeholders involved, the research team also wanted to highlight ongoing remedial measures that address the financial exclusion of NPOs as well as explore potential remedies that could challenge the practice of de-risking by banks.

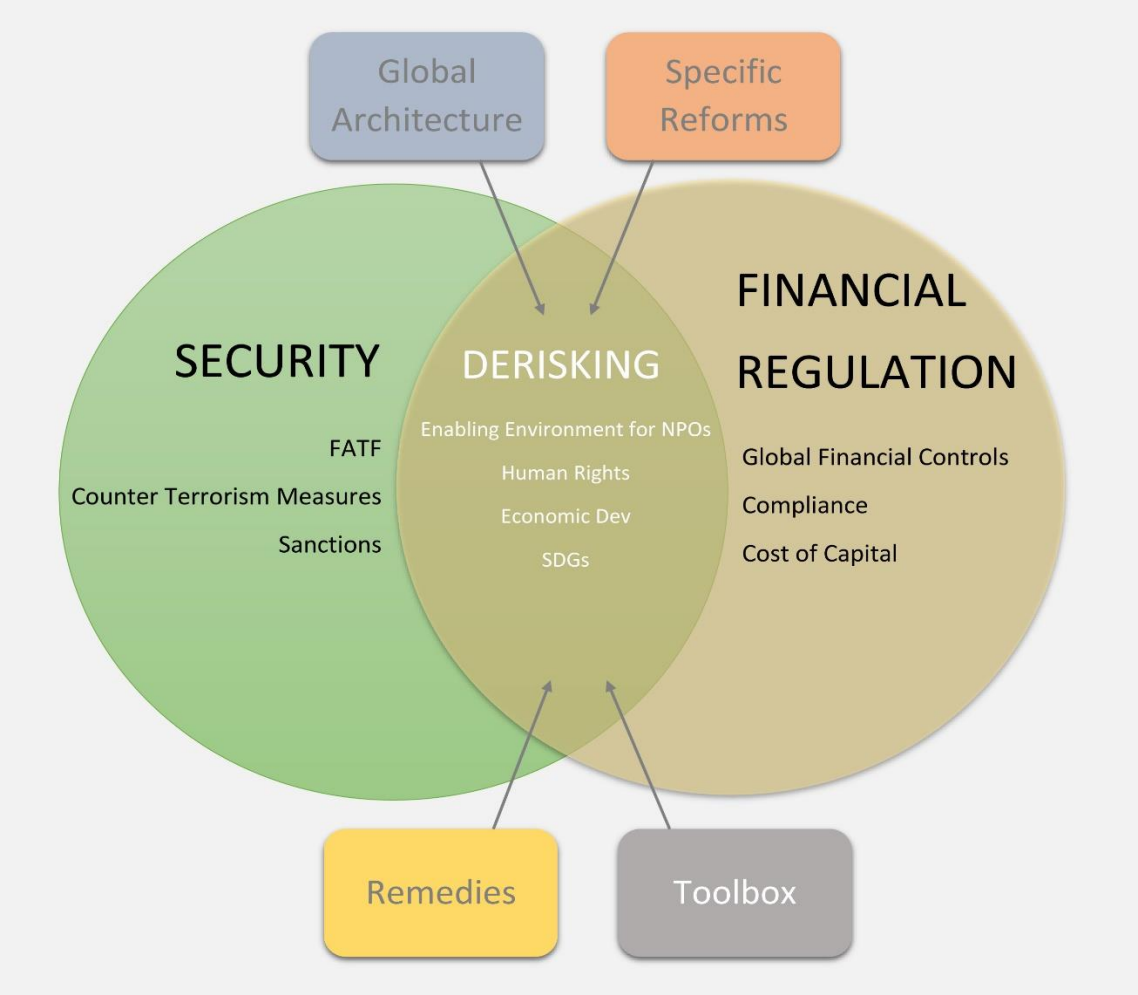
3. The broad context of de-risking: the political and regulatory landscape and international stakeholders

As the de-risking issue has gained more attention, there have been more and more attempts by different stakeholders and political commentators to explain the phenomenon. Inevitably, these explanations of de-risking emphasize those particular aspects of the political, legal and operational environment that are most relevant to the entities doing the analysis. Stripped of its nuance, this analysis has seen banks blaming regulation, regulators blaming banks, governments blaming terrorists and non-profits, non-profits blaming governments and banks, and so on. Apart from emphasizing how vexed and entrenched the problem of de-risking has become, the framing and analysis matters a great deal because it defines not just the problem but the parameters for the possible range of policy interventions or technical solutions.

Within the landscape of actors concerned with de-risking, the most powerful, like the G20, view the phenomenon primarily as a "financial stability" issue that – because of the impacts on correspondent banking, the arteries of the global financial system – could undermine economic development and trade financing. Others, like the World Bank, have widened the frame to encompass financial integrity and financial inclusion, reminding us that the banks are supposed to be good global citizens providing a public service, not simply protecting their profit margins at any cost. The architects of the regulatory framework, on the other hand, deny that the de-risking is caused by stringent money laundering or counter-terror-financing regulations, asserting instead that the banks are misinterpreting and/or misapplying the requirements, all the while lamenting the disappearance of clean money into "shadow banking" channels. Several of the UN Human Rights Council's Special Rapporteurs have called for non-profit-friendly reform of the anti-money laundering /countering the financing of terrorism (AML/CFT) regimes and suggested that arbitrary decision-making by the banks risks manifest breaches of non-discrimination laws And while some stakeholders are proposing public law remedies or mechanisms for redress, none have gained traction to date. Meanwhile, many non-profits situate the problems they are newly encountering with their banks squarely within the worldwide trend that is now widely known as the "shrinking space for civil society". For already squeezed civil society organizations in many parts of the world, banking restrictions are simply a logical extension of difficulties that they have long faced in respect to constraints on foreign funding and political activities, over-regulation via national non-profit laws, and increased attention from law enforcement agencies.

These incomplete approaches risk both underestimating the complexity of the problem and overestimating the viability of the various 'solutions' that have been proposed in response. In the course of our research and conversations with stakeholders from all sides of the de-risking debate it is clear that it is the intersection of

frameworks for security and regulation that has created the problem of de-risking, and that it is only by unpicking the mechanisms of governance and accountability involved that we can begin to approach the problem in anything like a comprehensive manner. In this section we offer a brief analysis of the way in which long-standing political concerns about financial crime and terrorism have collided with the demand for increased banking regulation to create legal, political and operational imperatives that result in de-risking, and the de-risking of non-profit organizations in particular.



A. The political: securing the financial system

In international relations theory, critical security studies and other social science disciplines, 'securitization' describes the process of transforming a subject into an issue of 'security'. Once politicized in this way, measures that were hitherto deemed excessive or otherwise unacceptable to policymakers may be adopted and normalized in ways that would not have been possible without the recourse to insecurity, real or imagined. While there is currently much debate about the impact, legitimacy and effectiveness of international policy responses to financial crime and terrorism, it is clear that they have transformed the way that the financial

system works in practice by making financial service providers to a large degree responsible for policing the activities of their customers.

This has happened through two distinct but interrelated processes. The first is the creation of an international architecture for the surveillance and control of customers and transactions, a process that dates back to the late 1980s and concerns about globalization and money laundering. The second is the creation of international enforcement mechanisms, such as economic and financial sanctions, to ensure that financial service providers comply with their obligations in respect to surveillance and control. This latter process took shape in the 1990s as a global order for combating financial crime was constructed, and was consolidated from the turn of the century as concerns about 'rogue states and terrorist groups' took centre stage.

The key stakeholders and standard-setting bodies involved in creating, maintaining and developing the international architecture for the surveillance and control of the financial system are discussed in more detail below. The Financial Action Task Force (FATF) is the most important international organization in respect to the issue of de-risking. It was created by the 'G7' countries in 1989 to devise an international framework to combat money laundering, a concern that was particularly acute at that time due to the rapid globalization of financial services and the prevalence of international drug trafficking, organized crime and a range of transnational methods for converting the proceeds into legitimate assets.[3]

In 1990, the FATF issued 40 Recommendations, encompassing a host of legal, regulatory and operational requirements designed to prevent, detect and prosecute the offences within the FATF's mandate. This included obligations on financial service providers and other designated businesses designed to break the veil of banking secrecy and conduct 'due diligence' to identify customers who may be involved in illegal activities; domestic obligations on states to develop mechanisms for investigating suspicious financial transactions and financial crime more broadly; and international obligations to lock those states into cooperating with one another on issues such as cross-border police and law enforcement investigations, and the freezing and confiscation of assets believed or proven to be the proceeds of crime. Although the FATF was only ever conceived as a temporary 'task force' designed to identify gaps and solutions vis-à-vis transnational organized crime, it became permanent as its recommendations were developed and disseminated.

In 2001, in the aftermath of Al-Qaeda's '9/11' attacks on the USA, the FATF's mandate was extended from combating money laundering and financial crime to combating the financing of terrorism. At a stroke the increasingly intricate system that had been developed to allow law enforcement agencies to 'follow the money' in order to prevent and detect money laundering was given a new rationale: to

[3] www.statewatch.org/analyses/no-171-fafp-report.pdf

prevent money ending up in the hands of terrorist organizations and their associates. To this end, nation-states and international organizations like the United Nations and European Union had already deployed so-called 'smart sanctions' against political elites alleged to support terrorism and other threats to peace and security, as well as terrorist organizations themselves.[4] Among the new roles for the FATF was ensuring that the 'due diligence' framework was extended to ensure that the sanctions regimes which proliferated after '9/11' were effectively implemented. The FATF also put non-profits firmly within the sights of AML/CFT laws, asserting that they were 'particularly vulnerable' to terrorist financing and requiring states to respond accordingly.

The FATF has been described as "the most powerful intergovernmental organisation you've never heard of".[5] 198 jurisdictions have now committed themselves at ministerial level to fully implementing the 40 FATF Recommendations by transposing them into national law and policy. In addition to setting these global standards, the FATF regularly assesses how well countries have implemented the requirements, using a 'carrot and stick' approach designed to ensure a high level of compliance. States that are positively assessed as having implemented the FATF's requirements are generally seen as a safe place for trade and investment, whereas those that do not comply risk public censure, blacklisting and ultimately, as governments and businesses avoid them, exclusion from the global financial system.[6] The emergence of the de-risking phenomenon, which is seen to affect entire countries and regions, suggests that this process is now happening as much by default as design.

While much has now been written about the impact of the FATF on national and international governance, what is relevant here is the transformative effect that the AML/CFT rationale has had on the global financial system as a whole. Once the preserve of private individuals and their banks accounts, global financial flows have become a source of political insecurity in their own right. In turn, the financial services that underpin those flows have become part of an international security apparatus designed to address the concerns about financial crime and terrorism at the heart of that insecurity.

The logic that underpins this transformation is totalizing; the entire AML/CFT framework is focused on eliminating points of failure, with little room for dissenting voices or concerns about issues such as human rights, accountability or redress. The proposition that any money bound for criminals or terrorists might 'slip through the net' is completely unacceptable to the architects of this framework. As George W. Bush, former President of the USA, put it in September 2001: "one dime of money into terrorist activity is one dime too much".[7] Yet the 'unintended consequences' of this approach, which include de-risking, are widely tolerated, if much maligned. Indeed it

[4] https://www.ecchr.eu/en/documents/publications/ecchr-publications/studies-and-reports/articles/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.html

[5] https://www.youtube.com/watch?v=Pj6TyN35GlE

[6] The FATF has publicly named 61 countries with such deficiencies. 49 of these countries have since made the necessary reforms and been de-listed.

[7] https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010924-4.html

is only the prospect of 'de-risking' pushing funds into unregulated financial channels that has gained any serious traction in security policy circles.

B. The regulatory: risk management and avoidance

That the construction of an international framework to counter financial crime and terrorism has created the conditions conducive to de-risking tells only half of the de-risking story. To complete the picture we must consider the way in which the financial services sector itself has internalized the AML/CFT regulations, applied them in practice, and developed its own mechanisms to avoid the risk of non-compliance. This landscape encompasses the wider regulation of the banking sector, including both statutory and 'self-regulation', and the internal compliance mechanisms that banks have developed or procured in order to avoid risk. It is through these processes that the security frameworks described above have been diffused and institutionalized throughout the financial system.

Three factors are particularly important. The first is the way in which the AML/CFT rules have been incorporated into the wider framework for banking regulation. This includes specific guidance and directives issued by central banks on how those rules should be applied in practice; frameworks for supervision by regulators and bank examiners; and enforcement actions. This latter category encompasses liability for breaches of sanctions regimes or failures to conduct proper 'due diligence', which has increasingly resulted in fines and threats of criminal prosecution, and even successful lawsuits brought by victims of terrorism claiming that 'due diligence' failures amounted to complicity.[8] It is not simply the risk of financial penalties, but the associated reputational costs that come with enforcement actions predicated on allegations of collusion with organized criminals or terrorist groups that are driving de-risking in this context.

The second factor is a product of the first, with banks reassessing their 'risk appetite' in the light of these enforcement actions, weighing the risk of falling foul of legal or regulatory regimes against the profit margin that may be made from 'risky' customers or transactions. In the case of non-profit organizations, these margins are extremely small relative to other (profit-driven) sectors. The rising cost of capital more broadly, engendered by regulatory responses to the global financial crisis including capital adequacy ratios, is also said to be part of this cost–benefit analysis. Of course, the decision to avoid non-profit organizations and other customers believed to present a regulatory risk on the grounds of profit is ultimately a decision about how, where and to whom to provide financial services, and ultimately the extent to which a bank wants to be a 'social' as well as a commercial enterprise. It is important to stress here that not all banks are behaving the same; a minority at least are clearly doing their best to help non-profits deal with the brave new world of hyper-transparency and excessive risk aversion. At the same time it is apparent that high net worth clients, who may also pose a high risk in the context

[8] https://business-humanrights.org/en/arab-bank-lawsuit-re-terrorist-attacks-in-israel

of stricter AML/CFT rules, do not appear to be anything like as adversely affected by the de-risking phenomenon.

The third factor is the internal compliance mechanisms developed by individual financial service providers to avoid the risk created by statutory regulation and penalties for non-compliance. This includes processes and models for assessing the risk posed by individuals and different business sectors, many of which rely on third-party tools including transaction monitoring, network analysis and commercial data-bases used to avoid entities and individuals designated as high-risk. What this means in practice is that commercial decisions to designate a customer as 'high-risk', to refuse to process a transaction or provide financial services, or impose additional compliance burdens, may not be based on any particular objective assessment of risk but rather the result of algorithmic decision-making or risk 'intelligence' provided by a wholly unaccountable external actor. This has fundamental implications for the affected parties, who are denied any opportunity to contest the assessment or seek redress. It also has major ramifications for those seeking solutions to the problem of de-risking.

The entities that provide the afore-mentioned compliance services are part of a burgeoning global compliance industry already said to be worth hundreds of billions of dollars annually. This industry has normalized de-risking, presenting it as part of a perfectly legitimate response to regulatory requirements. Lexis Nexis Risk Solutions promotes their services by saying that "De-risking is perfectly legitimate. That's exactly what we should be doing".[9] Straddled by the much-hyped 'fintech' and now 'regtech' sectors, the disruption caused by de-risking is no more than an opportunity for further 'disruptive' innovation. What is missing from contemporary accounts of de-risking, therefore, is not just a focus on the risk management tools provided by the industry, but a broader analysis that takes into account the political economy of the compliance sector. Such an analysis would make the evident link between the identification of risk and the generation of profits in the compliance sector. In this context, de-risking may be less the 'rational' result of cost–benefit analysis, and more the result of (highly politicized) processes predicated on the creation of 'suspect communities' in order to maintain an adequate supply of risk to be managed. This is not a good baseline for either the prevention of financial crime and terrorism, or the proportionate application of statutory regulation.

C. Institutional stakeholders

Looking at institutional stakeholders from the vantage point of AML/CFT rules and regulations will help map the key actors at national and global level responsible for the demand for increased due diligence, resulting oftentimes in the wholesale de-risking of NPOs.

International level

Key players here include the FATF and the UN, among others.

FATF and its Recommendations: FATF Recommendations include detailed custo-

[9] Lexis Nexis Head of Financial Crime: *Future Financial Crime Risks 2017*, https://risk.lexisnexis.co.uk/insights-resources/white-paper/future-financial-crime-risks-2017-wp-uk

mer due diligence (CDD) requirements that introduce 'Know Your Customer' (or KYC) obligations which must be implemented by all financial service providers. Some of these are straightforward measures such as verifying customers' identities and ensuring that people are not able to open anonymous or fictitious accounts.[10] Other requirements impose more onerous obli-gations, including the identification of any beneficial owners,[11] an assessment of the purpose and nature of the account holder's business, and the vetting of financial transactions above 15,000 EUR/USD to ensure that they are consistent with the institution's knowledge of the customer, their business relationships and the source of the funds. 'Enhanced Customer Due Diligence' (ECDD), requires financial institu-tions to go further still in the case of all non-resident customers, and for transactions with persons and companies in or from countries that have been evaluated by the FATF as having inadequate anti-money laundering and counter-terrorism sys-tems.[12] The scope of ECDD is widened significantly by its application to money sent to or from countries that are – or have been – subject to international sanctions or embargos; to countries which have significant levels of corruption or crime; and to countries that have designated terrorist organizations operating within their territories.

UN and Sanctions: The UN Security Council is central to discussions about de-risking as far as it relates to counter-terrorist financing regimes because it has been the driving force behind the establishment and proliferation of those regimes. Specifically, through the adoption of numerous legally-binding Resolutions, the fifteen-member Council has prohibited the funding of designated terrorist groups and their alleged supporters using its powers to impose international sanctions. [13]

The challenge for banks is not just to exclude designated individuals and entities from the financial system, but their associates and networks. With over 300 sanctions lists now in operation across the world, it is the difficulty in managing the risk that arises from potential association with designated parties that is central to de-risking and implicit in specific decisions to cut financial services to individuals, entities and even countries whose risk profile is associated with this kind of counter-terrorism regime.

The Security Council has addressed the issue of the liability of humanitarian actors working in or around areas controlled by terrorist groups, but has never debated the broader issue of de-risking or its relationship to counter-terrorism.

National Level

At the national level, it is the financial regulators who are tasked with ensuring that regulation is in place to maintain the integrity of the financial system. Central banks and other financial sector regulators will implement the monetary policy set, and regulate and supervise member banks. The strict global AML/CFT regime set up, amongst others, by the FATF, trickles down to the national level in the form of laws, rules

[10] Recommendation 10

[11] Beneficial ownership occurs where a person enjoys property rights even though the legal title of the property belongs to another person.

[12] (FATF 2012, 59–67)

[13] https://www.un.org/sc/suborg/en/sanctions/information

and regulations to enhance the integrity of the financial sector, coalescing with the overriding desire for financial stability in the wake of the 2007–08 financial crisis. Another institutional player of note at the national level are treasury departments or Ministries of Finance, who are in charge of government financial and fiscal policies. Often, the risk perceptions and priorities of the financial regulator and of government departments (treasury, justice, home, foreign affairs, develop-ment) differ, leading to policy incoherence.

As far as the high-street bank is concerned, regulatory pressures combined with commercial interests lead to risk management strategies with perverse outcomes. Irrespective of whether accounts are de-risked on a case-by-case basis as part of a wholesale cull of high-risk or low-profit accounts, banks are perfectly within their rights to do so as a private actor. As far as non-profits are concerned, banks do not occupy any public role in a legal sense (leaving aside ethical considerations of what role a bank actually plays). In the UK, the financial regulator the Financial Conduct Authority (FCA) has clarified that "the decision to accept or maintain a business relationship is ultimately a commercial one for the bank."
Institutional stakeholders such as the FATF, the Financial Stability Board, the World Bank, the IMF and others have spoken out about de-risking, with some pointing out that is not just a financial stability issue, but also a matter of both financial inclusion and financial integrity, as well as of growth and development.

Civil society writ large is an institutional stakeholder inasmuch as it is affected by the interpretation of and subsequent measures taken by governments to comply with the FATF's 40 AML/CFT Recommendations, especially Recommen-dation 8 which labels NPOs as being vulnerable to terrorism financing abuse. The unintended consequences and negative effects of the implementation of R8 in and through national laws, rules and regulations across the world have now been widely acknowledged by policymakers and the FATF itself, chief among which are the overregulation of NPOs and the financial access problems they face. A coalition of NPOs concerned about these consequences have critically and constructively engaged the FATF since 2013 with the aim of reflecting on-the-ground realities within countries, and challenging the earlier connotation of NPOs being at high risk for terrorism financing abuse. In June 2016, the FATF plenary endorsed the revision of R8, and though NPOs remain implicated in potential terrorism financing abuse, the onus now lies on governments to conduct a risk assessment of the sector to generate evidence on the nature of the risk relating to the vulnerabilities of and threats to the sector. Measures to prevent and mitigate terrorism financing abuse of the sector now have to be proportionate to the risk and proven to be effective.[14]

[14] For information on the Global NPO Coalition on the FATF, the nature of its engagement with the FATF and supporting documents and studies pivotal to the revision of R8, please refer to the Coalition's website: http://fatfplatform.org/

4. Policy incoherence and ownership gap: the fight against financial crime and de-risking

According to the FATF, the purpose of implementing AML/CFT measures is to protect the financial system from abuse. As noted above, however, many stakeholders tasked with implementing or obliged to comply with AML/CFT rules have interpreted them in such a way that risk avoidance has in practice emerged as the overriding concern. This in turn has produced various 'unintended consequences': impacts that were either not foreseen by policymakers, or impacts which might have been mitigated through policy but which were not because the concerns of affected stakeholders were not addressed when those policies were designed. De-risking now appears to have become so entrenched that it has come to undermine other international policy goals and concerns, such as economic development, financial inclusion, human rights protection and the creation of an 'enabling environment for civil society'.

One way of approaching this problem is through the lens of 'policy coherence'. Policy coherence is defined by the Organisation for Economic Cooperation and Development (OECD) as the systematic promotion of mutually reinforcing policy actions across government departments and agencies creating synergies towards achieving the agreed objectives.[15] From a development perspective, suggests the OECD, "policy coherence implies that, in pursuing domestic policy objectives… governments should, at a minimum, avoid negative consequences and spill overs which would adversely affect the development prospects of poor countries".

With the World Bank and International Monetary Fund having repeatedly stressed that the impacts of de-risking on the correspondent banking and non-profit sectors threatens financial inclusion, financial stability, growth and development goals, the policy coherence rationale provides a clear mandate for remedial action to address these and other 'unintended consequences'. This section considers the impact of the AML/CFT regime on these and other developmental and social policy goals to which the international community is committed, and the prospects for achieving policy coherence.

The UN Sustainable Development Goals

The 2030 Agenda for Sustainable Development commits all United Nations members to a set of universal, integrated and transformational goals and targets known collectively as the 'Sustainable Development Goals' (SDGs).[16] The aim of the 17 SDGs is, *inter alia*, to end poverty and hunger, to provide health and education for all, and to reduce inequality and protect the planet. As such they represent both a shared vision and collective responsibility for the world's nations.

15 https://www.tcd.ie/iiis/policycoherence/concept/what-is.php

16 http://www.un.org/sustainabledevelopment/sustainable-development-goals/

The 17 SDGs are underpinned by 169 specific targets designed to drive progress toward the overarching goals. 'Financial inclusion' – which is threatened and undermined by de-risking – features as a target for no less than eight of the 17 SDGs, including eradicating poverty (SDG1), ending hunger (SDG2), health and well-being (SDG3), gender equality (SDG5) and reduced inequality (SDG10). In December 2015, the UN General Assembly adopted a Resolution stressing the importance of financial inclusion as a key tool for implementing both the SDGs and the Addis Ababa agenda on financing-for-development agenda. [17]

Another of the key targets is policy coherence itself, part of SDG 17, which calls for a revitalization of the "global partnership for sustainable development". This partnership is premised on the idea that governments, the private sector and civil society must work together in pursuit of the shared objectives of the SDGs at all territorial levels: the global, regional, national and local.

The OECD suggests that there are three key challenges for the SDGs in terms of policy coherence. The first is the analysis and assessment of policy effects needed to inform decision-making, which in the context of de-risking is still largely fraught with political tensions and beset by conjecture and denial. The second is a political commitment and leadership on the part of governments, which in the context of de-risking is yet to materialize beyond those forums concerned with economic development and financial stability described above. The third is institutional coordination to resolve conflicts of interest or inconsistencies between priorities and policies, which is obviously only possible if the first two challenges are resolved.[18] As the OECD suggests, to avoid or overcome policy incoherence in order to successfully implement the SDGs, relevant stakeholders will therefore need to break out of their 'sectoral silos'.

The financial inclusion agenda

In September 2016, the FATF's Executive Secretary, David Lewis, explicitly linked the de-risking of correspondent banking services with financial exclusion for the first time,[19] stressing the adverse impacts of the "loss of access to banking services for particular regions and types of customers who are seen as being high-risk, including charities, money remitters, and in some cases, countries".[20]

Despite the obvious connection between the aspirations of the international community as regards financial *inclusion* on the one hand and concerns about financial *exclusion* engendered by de-risking on the other, those mechanisms that have been established to promote the former have had little of substance to say about the latter. This is surprising because many of the estimated 2 billion people who currently lack access to formal financial services live in the world's least developed

[17] https://www.unsgsa.org/resources/news/general-assembly-passes-resolution-financial-inclusion-susta/
[18] http://www.terveilm.ee/leht/wp-content/uploads/2017/08/Policy-Coherence-for-Sustainable-Development.pdf

[19] Victoria Falls, Republic of Zimbabwe, 2 September 2016 (Remarks by David Lewis FATF Executive Secretary), http://www.fatf-gafi.org/publications/fatfgeneral/documents/keynote-esaamlg-public-private-sector.html
[20] Ibid.

countries, a number of which are acutely affected by terrorism financing and money laundering risks.

The UN has long promoted financial inclusion, but the Secretary-General's Special Advocate for Inclusive Finance for Development, currently Queen Máxima of the Netherlands, who was appointed in 2009, has only engaged with the issue in passing. In a November 2015 speech to the Bank of International Settlements, for example, the Special Advocate described de-risking as a "setback in the quest for greater financial inclusion", and stressed that the problem was "of particular concern because of its potential impact on cross-border remittances [and] the ability of small firms to obtain export finance, or other entities to carry out development activities".[21]

The following year, at the same venue, the UN's Special Advocate raised the issue again, this time in the context of 'digital financial inclusion', suggesting that "fintech innovations" were being held back by "an overly stringent application of AML/CFT framework at the country level".[22] The fintech industry and its advocates have long been making the same point. In this context, financial inclusion has increasingly been linked to identity management and new technologies such as biometric and blockchain-based ID systems. Indeed, one of the targets of SDG16 is to provide a formal legal identity to the 2 billion people who have been estimated to lack such a status. What all of this is likely to mean in practice is the increasing alignment of the financial inclusion, fintech, identity management and AML/CFT compliance agendas. As the Special Advocate noted in her 2016 speech on digital financial inclusion, biometric SIM card registration enabled 5 million people in Pakistan to open new mobile accounts "in a safe integrated way".[23]

This agenda is rooted in the G20's Partnership for Financial Inclusion, for which the Special Advocate is a patron,[24] and a set of 'Principles for Innovative Financial Inclusion' adopted in 2010.[25] These include commitments to financial inclusion linked to and poverty alleviation based on market-based incentives for the delivery of financial access and the promotion of technological and institutional innovation as a means to expand financial system access and usage. The principles also call for the development of a policy and regulatory framework that is proportionate with the risks involved in such innovative products and services, and the implementation of an appropriate, flexible, risk-based AML/CFT regime. It was in this context that the FATF adopted its 2013 Guidance on Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion, and updated these guidelines in November 2017 in response

[21] http://www.bis.org/review/r151113c.htm . The same issues were reiterated – again only in passing – in the report of the Special Advocate for 2016. https://www.unsgsa.org/files/6214/7708/0597/UNSGSA_report_2016_copy.pdf

[22] https://www.unsgsa.org/resources/speeches/digital-financial-inclusion-financial-exclusion-and-de-riski/

[23] https://www.unsgsa.org/resources/speeches/digital-financial-inclusion-financial-exclusion-and-de-riski/

[24] https://www.gpfi.org/about-gpfi

[25] The principles were developed in by the Access Through Innovation Subgroup (ATISG) of the G20 Financial Inclusion Experts Group (FIEG). The Principles were endorsed at the Toronto Summit in May 2010, and underpin the G20 Financial Inclusion Action Plan. See further: https://www.gpfi.org/publications/principles-and-report-innovative-financial-inclusion.

to concerns about de-risking.[26]

The FATF has also intimated that the de-risking void could be filled by 'fintech' innovations.[27] While this may well be the case in the short-term, with the fintech and identity management industries now engaged in a race to 'include' as much as the world's population as possible, there is nothing integral to either contemporary financial innovation or ID systems that address the underlying causes of de-risking, and risk profiling and risk avoidance in particular.

Importantly, though these policies may seem coherent from a financial inclusion perspective, there is then no intrinsic reason to suspect that the search for risk across digital financial platforms will produce different outcomes than risk management in the traditional banking sector. On the contrary, there is already enough evidence to suggest that risk profiling, vetting and exclusion procedures may be even more stringent.[28] Much will depend on the indicators, proxies and models used to determine risk, and the calibration of the algorithms used to identify and de-risk suspect individuals and communities. But while further digitization and more extensive risk profiling promises increased surveillance,[29] it offers no guarantee of either proportionality or nuance.

Finally, in the same vein, while biometric ID systems are increasingly being held-up as a panacea to financial exclusion and a lack of access to government services, it is important to recognize that in development and humanitarian contexts, biometric registration drives do not guarantee inclusion. On the contrary, they may also engender social exclusion and even statelessness, as those identified as not being entitled to citizenship or government services are inevitably disenfranchised and excluded. Despite the risks in this respect, this is not something that the architects of the SDGs have apparently considered. And from a risk prevention angle, it should also be noted that biometrics are not fully watertight or secure in terms of identities, given the problems inherent in the different technologies.

Relief and development

As noted above, aid organizations have

[26] http://www.fatf-gafi.org/publications/financialinclusion/documents/financial-inclusion-cdd-2017.html

[27] Ref. Kuala Lumpur, 8 October 2014 (Remarks by FATF President Roger Wilkins at the 6th Annual International Conference on Financial Crime and Terrorism Financing), http://www.fatf-gafi.org/publications/fatfgeneral/documents/danger-illicit-markets-financial-exclusion.html

[28] On these challenges see further Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information*, Harvard University Press, Cambridge, MA, 2015; Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*, Penguin, London; Gry Hasselbalch and Pernille Tranberg, *Data Ethics - The New Competitive Advantage*, Publishare, Copenhagen, 2016. On the challenges of mass surveillance and coercive State policies, see further Bruce Schneier, *Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World*, Norton, New York, 2015.

[29] As Thompson Reuters, one of the market-leading providers of AML/CFT compliance services puts it: "Right now, the financial industry is fundamentally resourced for yesterday's KYC challenge, not tomorrow's. So, there is this ongoing monitoring, looking at all of the regulatory sites, doing daily screening, looking at adverse media for whether anybody that is a related party to their clients has been in the news or associated with bribery or corruption, or otherwise… **What we're going to see over the next five years is this profound change as people begin to look at digital sources/footprints for other pieces of information**" See: https://www.risk.net/risk-management/operational-risk/2439806/the-client-onboarding-challenge-getting-to-grips-with-2016s-aml-and-kyc-compliance-risks

been among the hardest hit by de-risking, particularly those providing relief to besieged populations in an around conflict zones. As *The Economist* puts it: "To many in the financial-services industry, and even more working for good causes in poor or war-torn countries, it has been the mother of all unintended consequences".[30]

From a 'policy coherence' perspective, the analysis is no less damning. When de-risking prevents aid from reaching its intended recipients, it undermines aid effectiveness – which over the past decade has become the mantra for international aid – and increases the cost of aid delivery at the very time when technology and innovation are supposed to be bringing such costs down. In the worst case scenarios (for example where aid has failed to reach people in Afghanistan, Pakistan, Syria and Somalia) people have died because the money was held up by formal banking channels. From a foreign policy perspective, where aid is increasingly and explicitly tied to security objectives, the exercise of 'soft power' and the much vaunted 'battle' for 'hearts-and-minds', de-risking is undermining all that too. And as many analysts have pointed out, when aid agencies are prevented from operating in high-risk countries or contexts that are considered fragile or vulnerable to criminal or terrorist activity, it leaves a void for others to fill, such as politically- or religiously-oriented social movements, and even designated terrorist organizations themselves.

It is the world's richest countries which provide the majority of the global humanitarian aid budget (though the overall humanitarian efforts of many poorer countries are frequently much greater), so it is again somewhat surprising that their governments have been largely silent on the impact of 'de-risking', deferring instead to the common positions and expressions of muted concern that have been agreed at the G20.

The EU and the UN, the organizations through which much of this aid is disbursed, have also held their counsel. One of the likely reasons for this is that the EU and UN's own humanitarian agencies have been largely unencumbered by de-risking because they are shielded by privileges and immunities that allow them to operate free of many (if not all) of the national laws in which AML/CFT rules are enshrined. A more likely reason still is the unwavering commitment to those rules by both the UN Security Council and the Council of the European Union, regardless of the 'collateral damage', preventing much-needed debate at the highest levels.

Nevertheless, UN bodies with a humanitarian remit have addressed some of the issues that are central to de-risking, without engaging with them in those terms. In 2013, the UN's Office for the Coordination of Humanitarian Affairs (OCHA) and the Norwegian Refugee Council (NRC) published a report examining the impact of counter-terrorism measures on the behaviour of donors of humanitarian aid.[31] The report was motivated by the impact of counter-terrorism clauses that

[30] http://www.theworldin.com/article/14581/edition2018oops

[31] Mackintosh, K. and Duplat, P. (2013) *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Norwegian Refugee

state and private donors were imposing on the NGOs they funded. In particular, the report was concerned that expansive counter-terrorism laws, including those on the 'blacklisting' of terrorist entities and 'material support' described above, were having an increasing impact on the funding, planning and delivery of humanitarian aid.

The NRC–OCHA report noted that humanitarian actors, who are driven by the principles of neutrality and impartiality, now find themselves caught between their core principles, which are embodied in international humanitarian law, and their obligations under counter-terrorism law, which prioritize the ostracization of terrorist organizations and with it the territories and communities under their control. In many respects, the report prefigured the debate that now surrounds de-risking, with banks similarly caught between their obligations to police the financial system on one hand, and the expectation that they facilitate financial inclusion on the other. This is not to equate banks with aid agencies, just to recognize that counter-terrorism has had analogous consequences in terms of risk aversion.

A more recent "Study on Humanitarian Impact of Syria-Related Unilateral Restrictive Measures" by the Office of the United Nations Resident Coordinator in Syria also focussed on the impact of US and EU sanctions on humanitarian action and the failure of the exemptions to those regimes which are supposed to allow the continued delivery of aid.[32] The study also lamented the "chilling effect" of the private sector's reluctance to support humanitarian activity in Syria.

Relative to humanitarian action, much less is known about the impact of de-risking on development organizations, which remains relatively unexplored and under-researched.[33] However, many analysts assume that the decline in correspondent banking relationships will inevitably have an adverse impact on economic development. Development organizations themselves have tended to emphasize the effect that the financial constraints associated with de-risking have on their partners in the countries they are working in.[34] This is widely seen as part of a broader trend known as the of shrinking or closing of civil society space.

Civil society space

Over the past decade or so, more and more actors from the non-profit and philanthropic communities have expressed concern about 'shrinking space', which is characterized by growing legal, political and operational constraints on civil society

Council and OCHA, available at: https://docs.unocha.org/sites/dms/Documents/CT_Study_Full_Report.pdf

[32] See https://theintercept.com/document/2016/09/28/humanitarian-impact-of-syria-related-unilateral-restrictive-measures/

[33] The line between relief (humanitarian aid) and development (livelihoods and economies) is increasingly blurred, with many programmes and organizations straddling these two fields. For analysis of the impact of de-risking on development see, e.g., http://www.efc.be/programmes_services/operating-environment/development-and-closing-space/

[34] *Brot für die Welt*, for example, has reported that its "Partner organisations cannot work anymore or are closed because activities they pursue become illegal, they lose their registration, or bank accounts are frozen. Senior staff members of partner organisations are criminalised, detained or threatened. These are just some examples of the challenges our partner organisations are facing". See: https://www.brot-fuer-die-welt.de/.../Analysis_68_The_impact_of_international_counterterrorism_on_CSOs.pdf

organisations (CSOs).[35] These constraints are recognized as problematic because they undermine the role and capacity of CSOs in areas such as service delivery, policy reform, democratization, anti-corruption, peace-building and the countering of violent extremism.

The vital role played by CSOs in respect to development is recognized by the international community in its work on aid effectiveness,[36] the Open Government Partnership,[37] and the SDGs. Western governments in particular have emphasized the importance of creating an 'enabling environment' for civil society and dedicated significant resources to this end. There was a concerted attempt to make the enabling environment a specific target for the SDGs and though this was ultimately rebuffed, civil society remains integral to the 'Global Partnership for Sustainable Development' envisaged by SDG17.[38]

A key indicator of progress towards this target is the commitment of increased financing to such partnerships. From a policy coherence perspective, however, restrictions on the ability of civil society to receive such funding engendered by de-risking obviously threaten progress in this area. It is also more broadly evident that limiting civil society's access to financial services and resources is creating a *disabling* rather than an *enabling* environment. Individually, the G7 states are, to varying degrees, all committed to the latter, but none have spoken out about the impact of de-risking and financial exclusion in this context.

Despite the reluctance of governments to consider the impact of AML/CFT regimes on the enabling environment they purportedly wish to construct, the way in which financial access hampers the operational and political space of CSOs is well-documented. What is perhaps less well understood is how issues related to financial access and exclusion play out on the ground in already repressive climates. 'Shrinking space' is seen as a multi-dimensional problem in which different kinds of policies affect civil society organizations in different ways. For those CSOs at the sharp-end of such restrictions, however, these dimensions frequently intersect with one another as states amplify their repression of specific groups and dissidents using the gamut of administrative measures now at their disposal.

The increased administrative burden placed on CSOs, restrictions on foreign funding, licensing regimes and enhanced law-enforcement oversight of the non-profit sector have already provided governments that wish to restrict the activities of civil society with new ammunition with which to target specific groups. On top of this, in many authoritarian and repressive states, the banking system effectively serves as an arm of the state, with financial institutions obliged to conduct surveillance on CSOs in order to enforce foreign-funding

[35] https://www.tni.org/files/publication-downloads/on_shrinking_space_2.pdf
[36] See for example the Accra (2008) and Busan (2011) declarations
[37] https://www.opengovpartnership.org/
[38] Target 17.17 of the SDGs commits states to promote "effective public, public–private and civil society partnerships".

restrictions, exclude organizations whose licenses have been removed, or report on those placed on unofficial or official blacklists. As banks have started demanding more and more information about the activities of both donors and recipients of funding for CSOs in the name of due diligence, so more and more of this information has found its way into the hands of the security services, allowing far greater scrutiny of the activities of civil society than was hitherto possible. This has allowed an unprecedented level of political policing by those states, resulting in crippling restrictions and controls on the activities of CSOs and flagrant attacks on activists and human rights defenders.[39] These obviously have significant human rights impacts and in some cases may even produce fatal consequences. In terms of policy coherence, it is also worth reflecting on grant-making policies that are oblivious to the consequences of de-risking on CSOs doing controversial, critical, political and rights-based work while at the same time expressing the importance of these CSOs to the human rights, peace and security agendas.

Human Rights and due process

If governments are reluctant to discuss the de-risking of non-profits and the financial exclusion of civil society in the context of the 'enabling environment' agenda, there is even less appetite to consider these issues in the context of international human rights law. This despite repeated criticism from the both the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, who report to the Human Rights Council.

Though not framed explicitly as a 'de-risking' issue, both Special Rapporteurs have stressed that financial exclusion falls squarely within their fundamental rights remit and asserted that the denial of access to financial services to civil society affects a range of human rights, including the right to freedom of association.[40]

Moreover, and unlike the architects of the AML/CFT framework, these UN mandate-holders do not view what is happening to civil society and non-profit organizations simply as 'collateral damage' or 'unintended consequences'. Instead it is seen squarely within the wider 'shrinking space' trend, with overly broad definitions of 'terrorism' enabling states "to target civil society, silence human rights defenders, bloggers and journalists, and criminalize peaceful activities in defence of minority, religious, labour and political rights".[41]

The previous Special Rapporteur on the rights to freedom of peaceful assembly and of association has stated explicitly that "the denial of banking facilities… without reasonable suspicion that the targeted organization or transaction constitutes

[39] E.g., Russia, India, Israel, Ethiopia, etc.

[40] (A/70/371, supra note 107, ¶¶ 42–43; Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Rep. of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai – Addendum – Mission to the United Kingdom of Great Britain and Northern Ireland, Human Rights Council, 23d Sess., ¶¶ 84–85, U.N. Doc. A/HRC/23/39/Add.1 (June 17, 2013)

[41] Emmerson, B. (2015) Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/70/371, 18 September 2015, p. 6.

support of terrorism or money-laundering on the basis of stereotypical assumptions relating to characteristics, such as religion or the predominant race of the organization's membership or beneficiaries, constitutes unjustified discrimination and is prohibited under international law". [42]

Despite the clarity of these legal obligations, recourse to public and private law remedies for organizations adversely or unjustly affected by de-risking decisions remains a largely unexplored terrain for those concerned with financial access restrictions in the non-profit sector.[43] These issues are considered further in Chapter 5.

Ownership Gap

In terms of policy coherence and challenges thrown up by de-risking, the two fundamental problems are prioritization and denial.

As long as the international community continues to prioritize robust AML/CFT rules over and above the consequences that they are having, and refuses to consider that risk aversion and avoidance may not be a consequence but the core feature of those rules, it is difficult to see traction beyond the limited approach to policy reform in the form of revised guidance. It also remains to be seen whether the huge amount of faith vested in financial innovation can alleviate the problems of de-risking; as noted above there are good reasons to be cautious about the evangelism that surrounds the 'fintech' industry.

While there is increasing recognition that de-risking is having an adverse impact on financial inclusion, humanitarian and development policies, the financial sector and the international community, with a few notable exceptions, remains fundamentally in denial of the impacts on civil society and fundamental rights. In this climate it is equally difficult to envisage remedial action that meaningfully addresses the acute problems this poses in respect to the 'enabling environment' agenda and the mainstreaming of human rights in accordance with international law. Ultimately, as long as there is no recognition there can be no ownership of these problems. In turn, there can be no mandate to develop the comprehensive solutions that are now clearly required. The longer this situation persists, the more deeply embedded in the intergovernmental order, national law and banking practice the core problems become.

While the technical and practical solutions being pursued under the auspices of the World Bank may offer relief to certain organizations, they are no substitute for the decisive action that could and should be taken by the G20 and G7 to assess the impact, legitimacy and effectiveness of the AML/CFT system as a whole, paving the way for financial crime rules which do no harm to legitimate non-profits. In this respect, the World Bank and the FATF are able to benefit from their engagement with

[42] Kiai, M. (2013) Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/23/39, 24 April 2013: para's 84–85.

[43] There has been one lawsuit in the US, based on discrimination. The charity lost: https://www.charityandsecurity.org/node/1434

the Global NPO Coalition on the FATF[44] concerning the impact of AML/CFT rules on NPOs, including exclusion from banking services, in terms of identifying solutions that are both practical and policy oriented. A number of NPOs in countries such as the UK and the Netherlands have reached out to their banks and their Ministries of Finance, Foreign Affairs and International Development to address de-risking and find ways to ensure financial services for civil society. These local initiatives help place the issue of policy incoherence and lack of ownership on the agenda during stakeholder dialogues.

Following on from this broad initial sketch of the de-risking phenomenon, the next chapter presents ways in which the AML/CFT rules manifest themselves in the three case-study countries. The identified policy coherence and ownership gaps in the overall analysis of the previous chapters are highlighted.

[44] The Global NPO Coalition on FATF has been set up to ensure that civil society is effectively engaged in the debate on AML/CFT, with the aim of having a free and fully-enabled operating space for civil society. www.fatfplatform.org

5. Impact: Manifestations of AML/CFT rules on the regulatory environment in Brazil, Mexico and Ireland, and ways this impacts non-profit organizations

The choice for the country studies was based on the interest of stakeholders concerned with the de-risking of NPOs in countries outside of the US and UK where the issue has already been researched, and in contexts where NPOs face not only financial access problems as a consequence of (perceived) terrorism-financing risks but also face (perceived) risks relating to money laundering.

Brazil and Mexico were chosen as the research team had access to civil society networks already involved in advocacy relating to the potential pushback of civic space resulting from the interpretation of FATF AML/CFT rules at the national level and their transposition into the national context. Concerns had been raised that as a consequence of these rules, civil society organizations, especially those active on human rights, were encountering problems relating to financial access. The choice of Ireland as one of the countries to be studied resulted from the expectation that comparisons could be made with the de-risking phenomenon in the UK. Both countries have a charity regulator and a mix of NPOs that receive government and public funding for humanitarian, development and human-rights-related activities.

The research goal – to understand and analyze the perspectives of stakeholders relating to the AML/CFT rules and the decisions taken by Financial Institutions to de-risk NPOs – meant that access to these stakeholders was a condition that had to be met. In all three countries, the research team was able, through prior groundwork and existing contacts, to interview stakeholders in the chain of decision-making, especially those involved in de-risking decisions affecting NPOs.

In September 2016, the team organized a stakeholder roundtable on the upcoming Irish FATF evaluation along with the University of Dublin, during which a number of development and humanitarian organizations mentioned problems with money transfers relating to the perceived financing of terrorism. Contacts with government entities and NPOs made during the roundtable enabled access to additional relevant stakeholders and further information gathering for this de-risking study.

In Brazil and Mexico, anecdotal evidence surfaced of US-based philanthropic grantees, active on human rights, and on issues of good governance and freedom of association for civil society, seemingly affected by anti-money laundering legislation and being de-risked by banks. Two civil society networks affiliated with these grantees and philanthropists, UnidOSC in Mexico and Conectas in Brazil, showed keen interest in becoming involved in the study and supported the research team's access to relevant stakeholders.

While the contexts of the countries are quite different in terms of the size, type and geographical reach of non-profits, the team was less interested in portraying these differences but more in the commonalities

in the chain of decision-making leading to the de-risking of NPOs. Three research angles were pursued:

- The regulatory and legal framework, and general context for civil society work
- Anti-Money Laundering and Countering (the Financing of) Terrorism frameworks and the risks NPOs face
- NPOs' access to financial services

The networks in Mexico and Brazil involved in the study are primarily comprised of associations and foundations active on human rights and enabling civil society space. None of these organizations transfer funds out of the country but the majority receive financial support from the US or Europe and then transfer these funds to grantees within the country itself. UnidOSC and Conectas continue to be active on the issue of de-risking at country level, and at regional level with coalition partners from Argentina amongst others.[45]

For Ireland, a collaboration with an NPO network was not pursued. NPOs approached for the study were international organizations active in (perceived) high-risk countries working on issues ranging from humanitarian assistance to service delivery to supporting human rights defenders, and domestic voluntary and professional organizations supporting human rights and civil and political liberties inside as well as outside the country.

In all three countries, conversations with stakeholders from NPOs, the government, the regulatory bodies and FIs were complemented by roundtable dialogues involving both NPOs and government.[46]

A comprehensive overview of the case-study countries, including country profiles, is appended in Annexes 1,2 and 3. Highlighted in this chapter are specific country characteristics and the perspectives of different stakeholders with regard to the de-risking phenomenon relating to NPOs. Brief country profiles are followed by an examination of the commonalities between the countries studied. The problem of de-risking is then examined through the lens of FIs and regulatory authorities, finding that policy incoherence and gaps in the ownership of the problem complicate the identification of tangible solutions. The final part of the report shows a number of pathways for remedies both in general terms as well as for each of the case-study countries. These pathways can be pursued by NPOs, governments and regulators in dialogue with banks.

BRAZIL

The regulatory and legal framework and general context for civil society work

Civil society space in Brazil is relatively well protected, and it seems fairly easy to establish an NPO. In general, regulations do not seem to prevent or restrict their work, and they can obtain one or more of the

[45] The research team, as part of the Global NPO Coalition on FATF, helps build the capacities of organizations such as UnidOSC, Conectas and others across the world to take on the role as expert hubs trying to understand and mitigate the impact of the global AML/CFT framework on the financial and operational space of civil society. The regional Latin America hub that has been set up as part of this process has taken on the de-risking of NPOs as a key issue for engagement and advocacy at the national and regional levels.

[46] Multi-stakeholder roundtables organized in the Netherlands provided a 'check' on information already-gathered during the research process.

government designations granting them or their funders/donors a specific status or tax benefits, as well as access to public funding. NPOs that support apolitical causes such as sports, cultural expressions, education, health and children's rights are eligible for tax benefits, unlike those that support human-rights-related causes.

There are two main legal forms: Associations and Foundations. An association is a less regulated type of NPO, being self-governed and requiring a general assembly for democratic decision making. A foundation is more regulated, and requires approval for its bylaws and its operational and budget plans from the State prosecutor's office. Foundations also have to be more transparent and are accountable to a state entity. NPOs can be categorized as an association, a foundation or a public interest organization. Those that are registered and licensed as a Civil Society Organization of Public Interest (OSCIP) fall under the supervision of the Ministry of Justice and have to comply with their transparency and accountability requirements. They are also eligible for government funding. Around 8,000 of the 380,000 NPOs in the country are registered as OSCIPs.[47] Religious and faith-based organizations have very limited oversight and are registered as foundations or under a personal name. These are still largely part of the cash economy and are known to have been misused for money laundering purposes.

Brazil has been in a state of deep political, economic and social crisis after the "*Lava Jato*" scandal[48], one of the bigger corruption cases to hit the country, with ramifications felt throughout the Latin American continent. The case identified a number of large government-supported NGOs, or GONGOs, as being complicit in corruption, tax evasion and money laundering. The role of these GONGOs was widely exposed in the media and has affected the reputation of the entire NPO sector. In addition, support for human rights causes among the general public is limited, as some of these causes are perceived to be connected with the protection of the rights of criminals and those that profit from the hard work of others. This in spite of the criticism by human rights organizations and social justice movements of the current dominant political and economic discourse and policies, and their implication for the poor and for excluded minorities.

Notwithstanding the above, all stakeholders mentioned the need for civil society to be transparent and accountable, the need for professionalizing operations and to work further on internal governance issues. In a climate where distrust of NPOs is prevalent, it is widely felt that civil society needs to demonstrate its worth and value to (public) causes.

AML/CFT framework and risks

In Brazil, the biggest concern for state authorities is money laundering connected to the evasion of taxes. Brazil has been a member of the FATF as well as a member of the Financial Action Task Force of Latin America (GAFILAT) since 2000. It is not currently on the FATF list of countries that have been identified as having strategic

[47] As of 2014

[48] https://www.britannica.com/event/Petrobras-scandal

AML/CFT deficiencies. However, due to a number of serious shortcomings in addressing terrorism financing, it was placed under enhanced follow-up procedures by the FATF after its Mutual Evaluation Report was adopted in 2010. This report rated the country 'Non-Compliant' in fulfilling R8 criteria on non-profits, with the evaluators recommending enhanced oversight, and the registration and monitoring of NPOs.

Currently, there is no regulation in Brazil that singles out NPOs as a category vulnerable to fraud, tax evasion, corruption, money laundering or terrorism financing. NPOs are not obliged subjects (entities) under the AML/CFT regime. Brazil's money laundering legal framework has been updated three times since 1998, most recently by law number 12.683 in 2012, and facilitates the finding, freezing and forfeiture of illicit assets. The country has comprehensive Know Your Client (KYC) and Suspicious Transactions Report (STR) regulations as well as enhanced due diligence for politically-exposed persons.

A number of CT-/CFT-related laws and regulations have been developed in the past two years, some of which have been deemed infringements on civic space and civil society freedoms. Law number 2.016-F (2015) defines the terrorism act broadly, and provides an exception to ensure NPOs are not targeted when they organize protests. In theory, those seeking to use that law against civil society should face an insurmountable wall; practically speaking, however, there is fear that the law could be circumvented with obscure reasoning and used instrumentally by law enforcement to curb social movements.

Legislation and bylaws relating to financial services include specific ML/TF references and obligations, obliging credit and financial institutions to develop in-house policies/procedures. The Brazilian Central Bank (BACEN) published a series of norms establishing that all financial institutions under its regulation must: keep customer records updated; have internal controls in order to verify either the appropriate customer identification, or the compatibility between corresponding resource movement, or the economic activity and financial capacity of users of the national financial system; keep records of operations; inform the Central Bank of Brazil of suspicious situations; promote the training of its employees; and, implement internal procedures to detect suspicious operations.[49]

According to the Central Bank, KYC principles for all legal entities have to be applied more stringently due to the risk of money laundering (although not yet identified in its scope within the national risk assessment). The Central Bank sees the risk as being concentrated in smaller NPOs, especially those that have been used for illicit transactions in the past. They also point to church payments and fundraising as being problematic, given there is no oversight of religious organizations in the country. The growing money flows, including those from abroad, to and from evangelical churches for 'good causes' has

49 https://www.bcb.gov.br/ingles/fis/supervision/moneylaundering.asp

raised the regulator's concern. The mistrust of NPOs, especially those financed by government and implicated in corruption and fraud, has led to them being considered medium- to high-risk among certain banks, based on the filters banks use for on-boarding NPOs and for monitoring their transactions (again, not based on a national risk assessment).

Under Brazilian law, financial institutions are required to maintain the confidentiality of their active and passive operations as well as of services provided (law number 105/01). However, and in line with FATF requirements, the law also establishes that the confidentiality of those records may be lifted in order to investigate criminal activity, especially crimes linked to or involving terrorism or money laundering. In addition, the law establishes that financial institutions will not be in violation of their confidentiality obligations if they provide the relevant authorities with transactional or financial information in connection with criminal activities. There is no such legislation in place for the protection of the users of financial services or any dispute-resolution bodies for clients of financial institutions.

NPOs' access to financial services

No specific Know Your Customer and Due Diligence regulations have been issued by the Central Bank for NPOs, with regulations being uniform for all clients requiring Central Bank guidance and strict controls over exchange transactions. The details of KYC implementation are left to the banks. Large retail banks use commercial risk-profile databases provided by local and international companies such as 'World-Check' or 'Advice' for NPO on-boarding and for the monitoring of NPO transactions.

According to some stakeholders, there is a noticeable trend of FIs refusing to take on NPO clients. The reasons given include the difficulty in checking the status of and, therefore, the reliability and legitimacy of an NPO. According to FIs, it is very easy to create an NPO in Brazil. And opening an NPO account appears to be easier in a bigger city and on 'the high-street' than in a rural environment. NPOs in Brazil, it is believed, can always access a bank account with the help of a lawyer. In addition, it seems that the more income an NPO has, the more willing an FI is to serve the NPO, as with other commercial private entities. In general, FIs are not familiar with NPO activities and do not distinguish in their service delivery between NPOs and private companies.

Charitable giving faces issues with regard to 'boletos', the preferred cash payment method used in Brazil. The boleto (printed or an image) has a barcode, corresponding serial number, transaction amount, issuing bank code, customer information, description, and expiration date, with the transaction amount listed on the boleto being able to paid at any period before and up to the expiration date. Boletos are widely used for charitable donations in Brazil. FIs do not want to process these any longer in order to prevent fraud, claiming that the public is able to give to charitable causes via internet/mobile banking or can present themselves with an identification document to an FI in order to make a transfer. Charitable giving in the country is thus being made more difficult, especially given 40 per cent of it was previously done

through boletos. The big corruption scandals are leading to more controls being imposed by banks but there are no specific conditions for charitable giving under current Central Bank regulations.

The corruption scandals have led to a stronger regulatory environment within FIs, which warn that controls on clients will only increase in the future. Donations for NPOs fall under these controls, as there is no exemption for NPOs, with some FIs considering NPOs more in need of scrutiny because of the corruption scandals they have been implicated in (whereby public funds were laundered for private gain through NPOs). NPOs most controlled by FIs seem to be the ones regulated by the Ministry of Justice (OSCIPs), given their link with government and their possible access to government money.

A human rights re-granting fund with grants from the US and the EU has been grappling with onerous requirements from a large international bank concerning their funders and grantees. After a long on-boarding period (almost a year), the bank finally decided they had no commercial interest in the foundation. The fund currently holds accounts with two banks, one of which is a smooth relationship both for receiving funding from abroad as well as for sending funds to their grantees. The other bank has put a ceiling on the amount of domestic cash transfers, for which no reason was forthcoming. The fund transfers cash to non-registered groups through registered groups, the only way of guaranteeing financial support to grantees who are not officially registered. Until quite recently and because of the high-level corruption cases, the organization, which is registered as a foundation under Brazilian NPO law, was required to share their contracts with both funders and grantees with the Central Bank, but this is no longer needed.

MEXICO

The legal and regulatory framework and general context for civil society work

Mexico has a long tradition of charity that has expanded during the last 20 years to include the environmental and human rights fields. However, tax incentives are limited to only a few charitable purposes which can be defined as apolitical, despite the emergence of organizations in fields of public interest, which have influenced public policy and have had significant impact. In general, regulations on civil society do not seem to hinder NPO work.

There are two main legal organizational forms for NPOs in Mexico: Civil Associations (ACs) and Private Assistance Institutions (IAPs). According to the Civil Code, an AC is formed by two or more persons who associate to perform a common purpose which is not primarily economic in character. An IAP is created to perform charitable services with private assets according to the State Laws on Private Assistance. There are other social self-benefit organizations such as cooperatives, neighbourhood groups, labour unions, and chambers of commerce that are regulated by corresponding laws. IAPs are registered with and supervised by the Private Assistance Board, an official body. IAPs and ACs must register their bylaws with the Public Registry of Property and the Federal Taxpayers Registry.

The most important sources of income for NPOs are self-generated sources, private

funds, governmental subsidies and, to a lesser degree, international funding. To be eligible to receive government funds, an organization must be listed in the 'Registry of Civil Society Organizations' (CLUNI) created by the 2004 Federal Law for the Promotion of Activities Undertaken by Civil Society Organizations. Among other requirements, organizations must engage in charitable purposes, or in activities such as environmental protection, support for the creation and strengthening of civil society, human rights, education, health, consumer rights, or sports. NPOs can also apply and obtain approval from tax authorities on a case-by-case basis to be eligible for income tax exemption and to receive tax-deductible donations. However, some burdensome reporting requirements have a negative impact on NPO activity.

The transparency of NGOs in Mexico is an issue due to the corruption and tax evasion scandals associated with NPOs related to the government. Stakeholders view this issue as one of the drivers for the risk-averse attitude of banks and other financial institutions towards NPOs.

The presence of drug cartels and organized crime, with a significant influence on the country's governance, as well as on its economic and financial structure through money laundering schemes that support a large part of the formal economy, is a distinguishing feature in Mexico compared to Brazil and Ireland. There is some concern about NPOs receiving gifts from drug cartels for service delivery in poor communities with the aim of building legitimacy amongst these populations.

AML/CFT framework and risks

Mexico is a member of the Financial Action Task Force of Latin America (GAFILAT), an FATF-style regional body. Mexico is not currently on the FATF List of Countries that have been identified as having strategic AML deficiencies. However, the latest FATF Mutual Evaluation Report of 2018 rates the country as being Partially Compliant on R8, with recommendations including the need for outreach to NPOs on CFT in the context of Recommendations 1 and 8. The report also questions the merit of classifying the NPO sector as a Designated Non-Financial Business or Professional (DNFBP) entity in light of the risk-based approach to detecting terrorism financing in the sector.

NPOs are obliged subjects (entities), i.e., have reporting obligations, under the country's AML/CFT regime. Mexico's Federal Act for the Prevention and Identification of Operations Undertaken with Illegal Funds includes a catalogue of activities deemed vulnerable. Since 2013, it has classified donations as a "vulnerable activity". NPOs are required to register with the oversight body, provide information about transactions above a certain threshold, provide information about beneficial owners of transactions (including donors) and activities, keep a record of information for five years, etc. The information must be sent through a specific online portal for the prevention of operations with illicit resources.[50] There are steep administrative and criminal sanctions for non-compliance. Stakeholders view this law as a part of the country's international commitments and as a response to the

[50] Website: https://sppld.sat.gob.mx/pld/interiores/donativos.html

recommendations issued by the FATF during the 2008 Mutual Evaluation process.

Anti-money laundering legislation raises concerns among NPOs due to its regulatory impact as the legislation considers donations a "vulnerable activity" and presents challenges for organizations trying to comply with its obligations. One of the main concerns and obstacles has been the type of information that is required from NPOs. The recipient of the grant must report the amount received, the purpose of the donation, and the organization making the grant, along with delivering a copy of the identification of the legal representative. The latter has been especially complicated, with some organizations abroad not eager to deliver the information, considering it a violation of the right to privacy in some cases.

The 2016 National Risk Assessment looked at risks concerning obliged entities, including the receipt of donations, which was deemed to be low/medium risk. An issue with cash donations to charities run by 'Narcos', which have social goals at the local/community level, was detected in a few cases. There was no evidence found of terrorism financing. However, it is not clear whether the inclusion of donations as a vulnerable activity within the AML framework was based on the results of any domestic risk assessment conducted prior to 2016. For example, the GAFILAT AML/CFT typology risk reports as well as their guidance for model AML regulations do not include non-profit activities, donations or organizations as vulnerable to ML/TF. Such blanket inclusion of donations then as a vulnerable activity sends a signal to the financial sector (and others) that NPO operations are specifically vulnerable to AML/CFT, increasing their risk profile which was then determined, as of 2016, to be low/medium.

In addition, FATF AML Recommendations are explicitly targeted towards a narrowly-defined group of entities – a country's financial institutions, money transfer services, casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, accountants, trusts and company service providers, also known as Designated Non-Financial Businesses or Professionals (DNFBPs). NPOs at large are not included in this group, as there is no concrete evidence or research that shows that the non- profit sector is more vulnerable to ML abuse as a whole. In addition, such reporting obligations are not suitable for NPOs because the prescribed provisions are clearly designed for for-profit and professional entities (i.e., the majority of provisions deal with 'customers'). It is therefore unnecessary to include civil society at large in AML obligations as it clearly goes beyond what the FATF standards prescribe.

Moreover, the inclusion of all NPOs in AML or CFT legislation is contrary to the principle of the risk-based, targeted approach required by FATF Recommendations 1 and 8. Reporting obligations which make no distinction between various NPOs breach the requirement of FATF's Recommendation 1 which asks governments to: "*identify, assess, and understand the money laundering and terrorist financing risks for the country*" and "*based on that assessment...apply a risk-based approach (RBA) to ensure that measures to prevent or mitigate money*

laundering and terrorist financing are commensurate with the risks identified." Moreover, R8, which refers to NPOs specifically, is imbued with the risk-based approach, with the FATF requiring that institutions not view all NPOs as a risk. The inclusion of all NPOs in AML and CFT obligations is contrary to the principle of effectiveness under the new FATF evaluation methodology on AML and CFT compliance, also applied by GAFILAT.

The recently-published FATF Mutual Evaluation Report (January 2018) commends Mexico for having a good system for tackling money laundering and terrorism financing risks. However, with regard to NPOs, it questions the effectiveness of trying to determine terrorism financing risk by including NPOs in the DNFBPs category*: "The NPO sector is broadly supervised given its classification as a DNFBP, though risk-based, targeted monitoring of the sector has yet to be fully implemented. Authorities have identified higher risk entities for targeted outreach and monitoring through a 2017 risk assessment of the sector and are revising regulations to fully implement FATF revisions related to NPOs".* The evaluators recommend: "*…..that Mexico has yet to put in place a risk-based system for targeted monitoring of the NPO sector though authorities have taken the initial step of conducting a revised risk assessment and are reviewing NPO regulations to advise accordingly"*. In more specific terms the evaluation concludes that:

"At the time of the on-site (2017), authorities had not yet implemented a targeted approach to oversight of or outreach to the NPO sector consistent with recent changes for R. 8. However, authorities noted plans to revise the regulations for NPOs in light of these changes and have taken steps toward implementation, including conducting a revised sectoral risk assessment in February 2017 in order to identify those organizations that are most at risk. During this revised assessment, the FIU assessed approximately 13 000 of the 125 000 NPOs that fall under the FATF definition (using suspicious activity reports reporting on those entities), and identified a small sub-set of organizations that are most likely to be abused based on several factors in the FIU TF risk model, including the NPO's ability to conduct international wire transfers and the geographic location of the wire recipient. Authorities believe that the revised assessment will strengthen the country's ability to mitigate TF risk in the NPO sector by allowing them to further prioritize outreach and monitoring".[51]

As in the last Mutual Evaluation process conducted in 2008, the country received a Partially Compliant rating on R8 and has to improve on its outreach to NPOs concerning TF risk and develop regulations that are risk-based and in line with the revised R8. The ongoing sectoral risk assessment is considered to be a significant step in the right direction in terms of a targeted outreach to NPOs vulnerable to the risk of terrorism financing. A representative from UnidOSC (Unidos Por

[51] FATF MER Mexico, January 2018, http://www.fatf-gafi.org/countries/j-m/mexico/documents/mer-mexico-2018.html

Los De Las Organizaciones De La Sociedad Civil) has been invited by the FIU to provide comprehensive information and an analysis of the situation from an NPO viewpoint in order to help finalize the assessment.

There is no specific CT/CFT legislation in Mexico. Definitions of terrorism, international terrorism and funding of terrorism in the Federal Penal Code do not seem to impede the work of civil society organizations. There are numerous financial laws that impact data protection, including the Banking Law, the Law for the Transparency and Order of Financial Services, the Investment Funds Law, and the Law to Protect and Defend the Users of Financial Services. Data subjects have the right to object to the processing of their personal data for purposes beyond what is necessary for the origination and maintenance of the relationship with the data controller. Some financial service legislation and bylaws include specific reference and obligations to prevent ML/TF and oblige credit and financial institutions to develop policies/procedures, especially around Know Your Customer (KYC). Several private banks have AML/CFT and KYC policies or documents that set out a broader policy and compliance framework, but do not describe actual procedural aspects of risk assessment and management decisions concerning ways to deal with risks relating to NPOs and other customers in publicly-available documents.

There is a National Commission to Protect and Defend Financial Services Users (CONDUSEF) tasked with promoting, counselling, protecting and defending the rights and interests of the users of Financial Institutions, to arbitrate on differences in an impartial manner and to provide for equity in the relationship between them. The National Commission is vested with powers to act as a conciliator between FIs and its users, and to protect the interests of users. There is a detailed process in terms of submitting claims and the Commission can issue penalties and request remedial measures from the FI. Any claim that satisfies the requirements, by its sole filing, shall interrupt the prescription of any applicable legal actions, until the proceeding ends. It is not known whether the Commission has had to deal with any NPO de-risking cases.

NPOs' access to financial services

There are no specific rules, other than the AML Law, on NPOs and their access to financial services. The Central Bank is entitled to issue regulations for the purposes of monetary or exchange control, the sound development of the financial and payment systems, and the protection of the public interest.

Additionally, the National Banking and Securities Commission, an independent agency of the Secretariat of Finance and Public Credit, has the competence to supervise and regulate the entities that compose the Mexican financial system with the objective of pursuing its stability and establishing correct functioning, as well as of fostering the healthy development of the system and protecting public interest. The Commission's main interest is the protection of rights such as inclusion, non-discrimination, equal treatment and adequate policies for the growth and stability of the system as a whole. It looks out for the protection of users' interests through the supervision and regulation of

financial institutions and offers services to advise and support the defence of users´ rights. Again, it is not known whether the National Banking and Securities Commission has been confronted with cases of NPO de-risking.

Several private banks have AML/CFT and KYC policies or documents, along with published AML/CFT (*Wolfsberg*) questionnaires. These documents set out a broader policy and compliance framework but do not set out actual risk assessment/management procedures or internal bank instructions on dealing with NPO customers.

The 'Cajas de Ahorros', known as 'SCAP', are a specific type of entity regulated under the National Banking and Securities Commission, with significant differences in operation from a commercial FI. A SCAP is a society, with the persons or institutions comprising it receiving a certificate stating that they are a partner, allowing for participation in decision-making processes, especially in general assemblies, and providing for the right to be permanently informed about its financial status. SCAPs provide a financial inclusion option for communities and small non-profit organizations located away from financial centres, an option which was recommended by representatives from the Central Bank. Unfortunately, though, most SCAPs are not regulated, which in turn makes them highly vulnerable. Once a society is regulated it falls under the protection of the Institute for the Protection of Savings, which guarantees the savings of users but only for those financial institutions that comply with their criteria. NPOs, given their non-profit nature, can become part of a SCAP. There is already an example of an association of pilots creating a SCAP for their members and operating legally.

There is evidence of the de-risking of NPOs in Mexico. After sizeable fines on FIs in recent years in relation to transactions between Mexico and the US, a number of FIs have withdrawn from their correspondent banking relationships in the country. This has also led to suspicions about certain clients, and even though the number of NPOs implicated in money laundering may be scarce, several banks have put measures in place that require either additional information from/on NPOs or that unofficially close down services to NPOs altogether. The Central Bank has responded by creating 'SPID', a domestic electronic system which operates as a clearing house, enabling the transfer of US dollar payments. The system is also intended to impose enhanced AML obligations.[52] However, the AML burden of knowing what NPOs are doing and where the problematic areas are, etc. still falls on the FI.

For NPOs, it has become more difficult to transfer money, especially to rural areas and to smaller grantees. An FI representative noted that it was official policy within the bank to de-risk any NPO client falling below an annual threshold of USD 2 million. Smaller NPOs with existing accounts are obliged to have a minimum of USD 600 in their checking account at all times, thus dissuading them from holding

[52] https://www.swift.com/node/35121

an account. The bank representative emphasized the complex legal landscape the bank has had to navigate as a consequence of global AML/CFT rules and sanctions policies in the five jurisdictions where the bank has offices. The rise of compliance costs as a consequence of these rules and policies outweighs the FIs' risk appetite for NPOs and other less profitable customers. A possible strategy for NPOs, according to this banker, is to bundle together their accounts in order to arrive at a better negotiating position with the FI. This, however, puts a strain on NPO independence and is not a sustainable solution. Moreover, the NPO holding the bank account would take on the risk of the smaller grantees by acting as a shield, heightening its own risk and going against the objective of empowering small, grassroots and, especially, indigenous and women's organizations. A women's rights re-granting organization is against this type of solution. Their financial officers continue to comply with increased bank demands relating to information on grantees. Often they have to submit the same information over and over again. They estimate that in the past three or four years, work relating to bank requirements concerning grantees and cash transfers has increased almost hundred-fold.

An NPO supported by a number of governments, international NPOs and (bank) foundations abroad is facing increasing difficulties with their bank in transferring funds to rural community organizations with traditional communal land and property ownership structures. The NPO is taking on a number of responsibilities on behalf of these organizations, e.g., the procurement of agricultural input, which would otherwise be part of the capacity building of and empowerment of these grantees. The NPO is currently spending up to a full day on the simplest of requests for cash transfers even though they have been the bank's clients for many years – up until three years ago, the same bank transfer request would not take more than an hour. The bank has not given the NPO an explanation regarding these additional requirements other than stating that they have to comply with legal and regulatory requirements. The foundation has not filed a complaint with CONDUSEF as they prefer not to distort their relationship with the bank. The US government donor has been understanding of the problems of the bank and accepts the status quo, with the NPO procuring on behalf of the community organizations.

UNICEF funds a small foundation working with Mexican migrant returnees, especially children. This foundation had problems with an international bank, which required it to have USD 600 in its account at all times. In addition, the bank wanted proof of rental payments and of its registration as an NPO, along with proof of sources of funding, requiring the submission of funders' IDs. They have explained to the bank that a number of these requirements take time to fulfil but the bank has not reacted so far. Meanwhile, the account is non-operational. The foundation is currently banking with a smaller bank more conducive to their type of work.

IRELAND

The legal and regulatory framework and general context for civil society work

The NPO sector in Ireland is regulated mainly by the legal framework on charitable organizations. These are organizations that must engage in solely charitable purposes for the public benefit if they seek to benefit from tax exemptions. A charity can take several legal forms, companies limited by guarantee (CLGs) being the most popular. CLGs are a public company with a separate legal personality to its members, whose liability is limited to the amount they undertake to contribute to the assets of a company. Another, historically preferred, structure for charitable organizations is the charitable trust, established by a deed of trust which places assets owned by the trustees in a trust for charitable purposes. Unlike CLGs, these trusts do not have a separate and distinct legal personality from their trustees. The third option is to establish unincorporated associations that have no separate legal identity from their members. They are usually established by rules or a constitution, and are no different from an unincorporated club in the Irish law.

The legal tax framework provides a number of significant tax exemptions for charities. Charities must apply separately to the Irish Revenue Commissioners for registration, and comply with their assessment procedure to obtain a tax exemption status. Separate from and additional to the provision for charities to be exempt from having to pay certain taxes, the tax code provides for recognized charities to benefit from tax relief on donations. Besides eligible charities, bodies set up for the promotion of the observance of the Universal Declaration of Human Rights or the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms are entitled to a favourable tax status.

Given the country's population, Ireland is a significant net contributor to development assistance, with a large development and humanitarian sector in relation to the country's size. Currently, Irish development aid focuses on reducing hunger and building resilience, inclusive and sustainable economic growth and better governance, human rights and accountability. More than 70 per cent of the charities derive their income from local, national and EU grants and contracts, representing more than 50 per cent of the sector's income. [53] [54]

In general, the charity legal framework does not impede NPO activities. However, there have been complaints over the Electoral Campaign Act, amended in 2001 to cover political activities by non-profit organizations, which seemingly impacts the operational space of civil society in Ireland. The amendment was motivated by fears of external influences on Irish politics. The legislation requires non-profits "engaged in political activities" to register with the Electoral Commission; forbids them from receiving funding from abroad; bans anonymous donations above EUR 100; and prevents them spending more than EUR

[53] https://www.wheel.ie/sites/default/files/Portrait%20of%20the%20Non-Profit%20Sector%202014_%20UpdateJun2014.pdf

[54] https://www.irishaid.ie/about-us/policy-for-international-development/

2,500 on political campaigns or activities. Recently, there has been an increased number of complaints submitted to the regulator against NPOs working on political issues. Some of these appear vexatious, designed to undermine the credibility and space of the NPO in question.
In addition, the current climate for NPOs in Ireland is less conducive due to the recent cases of fraud and corruption in which some Irish charitable organizations have been implicated. This has undermined the trust of the public and donors in charities.

The Irish public has become quite critical about charities in general – there is a perception that there are too many charities and that many are badly governed, except the most well-known (larger and faith-based) that have been in existence for a number of years and are dedicated to overseas causes of poverty alleviation. There seems to be a general agreement amongst NPOs as well as the Charities Regulator that due diligence on NPOs and good governance practices, along with transparency and accountability, are essential.

The Charities Regulator is the national statutory regulator for charitable organizations in Ireland. The key functions of the regulator are to establish and maintain a public register of charitable organizations operating in Ireland and ensure their compliance with the Charities Act. The Regulator also has the power to conduct statutory investigations into any organization believed to be non-compliant with the Charities Act. In 2016, Ireland had 12,000 charities of which 400 were de-registered for non-compliance with the Charities Act.

AML/CFT framework and risks

Ireland is a member of FATF, rated Partially Compliant on R8 in the FATF Mutual Evaluation Report published in 2017. The evaluation pointed out that there were no focused and proportionate measures applied to NPOs identified as being vulnerable to TF abuse, specifically relating to accountability and transparency in the sector.

The overall ML/TF risk for the NPO sector in the Irish National Risk Assessment was deemed medium–low, with no specific risk review carried out of the sector alone. Complying with the Charities Act is, in the opinion of the Charities Regulator, sufficient safeguard for NPOs from ML/TF abuse.

The 2017 FATF Country Evaluation of Ireland[55] considers that: "*Irish authorities do not see a significant TF risk related to international terrorism, particularly when compared to other European jurisdictions. But Irish authorities acknowledge that such risks do exist and that only small amounts (from both legitimate and illegitimate sources) are needed to support TF. There is also only a small number of returned foreign fighters (in the low double digits). While there is little evidence to show any coordinated approach to fundraising in support of terrorism, there are some areas of concern in relation to the collection of charitable funds within the community and*

[55] FATF MER Ireland, 2017, http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-ireland-2017.html

the use and transfer of funds by charities and NPOs to conflict zones, which the authorities will continue to monitor."

The evaluators further observed that while some steps have been taken in the NPO sector relating to TF, Ireland has not yet applied focused and proportionate measures to such NPOs identified as being vulnerable to TF abuse. There has also not been specific outreach to NPOs on TF issues or the concerted development of best practice. The evaluators noticed that decision-making regarding Irish Aid's principal development and humanitarian funding mechanisms for NGOs is based on criteria such as governance, financial management, financial control and risk management procedures. NGOs in receipt of these funding schemes are subject to rigorous financial and narrative reporting requirements on an annual basis, as well as intensive monitoring and evaluation procedures. Dóchas – the Irish Association of Non-Governmental Development Organisations – is also an important go-between for the network of charities and donors, mainly Irish Aid, and further promotes transparency and corporate governance in the sector. While these measures are important steps in the right direction, Ireland, according to the FATF evaluators, needs to step up its efforts to determine TF risks in the NPO sector based on outreach to the sector and best practices. The role of the Charities Regulator in this regard is pivotal.

AML/CFT law in Ireland is governed by The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. The Act transposes European Union Law on AML and CFT (the Third Money Laundering Directive and its Implementing Directive) into Irish Law.[56] CFT policy at the national level is formulated by the AMLSC (AML Steering Committee), which has set out an action plan to strengthen AML/CFT measures taking into account the National Risk Assessment findings. AML/CFT policies are also incorporated into overall anti-crime initiatives, such as the country's Policing Plan 2016, which has as its core objective the protecting of the public from terrorism in all its forms. Similarly, the strategic goal of the AGS (National Police Service) is combatting serious and organized crime, under which ML and proceeds-of-crime actions fall.

NPOs do not have specific AML/CFT obligations and are not considered to be reporting entities within AML legislation. In addition, there is no specific guidance on NPOs from the Central Bank – the Central Bank issues guidance on general AML/CFT risks for customers that have relations with and operate in sanctions and high risk jurisdictions. As soon as the Central Bank issues a directive on AML/CFT, other FIs need to apply it immediately, and this influences customer service. NPOs are not treated as a separate category.

All FI employees in Ireland, including those who never see a client, have to undergo an obligatory AML-/CFT-related training on an annual basis. In addition, FIs rely almost entirely on commercially-provided software to monitor customers, accounts

[56] The fourth or fifth EU AML/CFT directive will be transposed into national legislation and regulation in the 2018.

and transactions for suspicious activity. The overarching challenge is "to configure the algorithms of the software so that there is a reasonable balance between the number of 'alerts', requiring human intervention and analysis, and the number of 'false positives', which in essence waste human resources by alerting staff to innocuous accounts or transactions. The problems NPOs are encountering may in part be due to the fact that there is no 'profile' for what a 'normal' non-profit organisation account and activity should look like. Whereas banks have established effective models for almost every type of commercial business, this is not the case with non-profits, whose activities and transactions can appear completely random, and who, as a result, are constantly being flagged-up as suspicious".[57]

There is no legislation in place for the protection of users of financial services or the existence of dispute resolution bodies for FI clients. Currently a small NPO, registered as a CLG, who has had its bank account terminated has taken its case to the ombudsman. This is the first case on bank de-risking being handled by this body.

NPOs' access to financial services

The de-risking of NPOs is a symptom of a confluence of legal and financial rules and restrictions that is limiting civil society space in Ireland. And these requirements, including those driven by transparency and accountability requirements, and by AML-/CFT- and sanctions-related rules, are only increasing. The Central Bank and most government authorities are not aware of the issue of de-risking and have never have come across it during their inspections. However, other stakeholders note that de-risking by FIs is taking place, mostly affecting smaller organizations rather than larger INPOs. FIs find NPOs a difficult customer to 'risk profile' due to their diversity in terms of funding, client relations and regions of transactions.

FIs are also very concerned about liability for faulty transactions and have lost all their risk appetite for NPOs, believing in the need for stringent compliance given NPOs may act as a front for charitable activities while supporting terrorists. For compliance officers at an FI, reputational risk comes first, ahead of cost considerations. And, unlike private companies, it is more difficult 'to risk profile' an NPO, with FIs using 'World-Check' and other such commercial risk profile data providers to carry out Due Diligence and Extended Due Diligence on customers. FIs are, in practice, implementing a 'Know Your Client's Client' type of approach, as their biggest concern is that an NPO's partner or grantee could be a 'front organization', making it difficult to satisfy due diligence requirements. FIs are not prepared to take any risks in this regard. There is no recourse to remedy, especially for small organizations.

Some government stakeholders acknowledge policy incoherence, but claim they are not in a position to address it. The Ministry of Foreign Affairs underscores the issue of incoherence between policy that is subsidizing NPOs implementing projects targeted towards development, human rights and conflict transformation, and AML-/CFT-driven policy. However, it does

[57] Quote of an FI

not foresee a coherent policy process that would be supported by the government anytime soon. There seems to be little appetite to address the de-risking of NPOs as a foreign policy issue or even as a systemic issue that requires policy coherence.

All NPOs affected by de-risking seek and find their own solutions and, so far, there have not been joint discussions or any collective action taken. Problem solving is pragmatic and does not address systemic causes, with NPOs trying to find solutions to conduct money transfers, and often forced into being more creative and/or spending more resources on getting funds to partners (individuals or organizations). De-risking is pushing some international NPOs into unregulated areas where they try and make the best of the situation at great risk and even greater (financial) cost. It is a contradiction that in spite of the bigger international NPOs being audited on an almost-yearly basis for large donors or EU grants, they still encounter reduced FI risk appetite and continually have to conduct their own partner vetting. Due diligence is becoming an increased burden for NPOs, with large organizations having the capacity to fulfil FI and donor compliance requirements either in-house or by outsourcing their compliance requirements – something which smaller organizations cannot do. The idea of smaller organizations being shielded by larger ones who would take on the due diligence requirements for them and their partners is not seen as a feasible solution.

Commonalities of national contexts

Non-profits: Over the past five years, NPOs in all three countries have experienced more questions being raised by banks, both while on-boarding as a client and having transactions processed (domestic and overseas), than they think justified.

NPOs were unaware that, irrespective of their mission, mandate, size or geography of operations, the problems they were facing with banks were the same ones facing numerous other NPOs in their own country and across the world. Additionally, most NPOs are not cognizant of the systemic drivers behind decisions by banks to de-risk: national laws and regulations stemming from international rules such as the FATF AML/CFT Recommendations and the UN sanctions regime. They were surprised to learn that de-risking may be stemming from banks implementing guidance from Central Banks and regulators meant to prevent money laundering and terrorism financing.

In all three countries, recent scandals implicating non-profits and widely reported in the media have led to an environment where the call for greater accountability and transparency is considered justified by the sector itself. NPO representatives made an implicit connection between these scandals and the tighter rules imposed by banks. The type of media coverage differs by country, but a common feature in all three was that the entire sector was tainted with the same brush as a consequence of the bad behavior of a few. Organizations financed by public funds were, in particular, depicted as corruptible and fraudulent.

NPOs stressed there was no option for them but to accept the more stringent bank due-diligence requirements given the need to continue with their daily operational activities. They apply workarounds to deal with the more onerous requirements. If the

organization has sufficient resources, it spends more time on building relations with the account manager at the bank as well as submitting the necessary information that the bank requires time and time again. NPOs in all three countries saw an increase in workload for their financial staff, varying from 35 per cent to 100 per cent compared to five years ago.

Organizations open accounts at different banks to ensure better accessibility. Foreign- as well as domestically-funded international NPOs that have been active for many years, including those working on politically-sensitive topics such as environmental rights, seem less affected by de-risking. They strongly believe that being part of an international network with a robust reputation provides for some protection in their relations with the financial sector and with government. These organizations often have two or more bank accounts as a form of 'risk management'.

De-risking affects smaller civil society organizations more than larger NPOs. In Brazil and Mexico, traditional, community-based, LGBT, women's and indigenous organizations funded by human rights grants are experiencing the most trouble receiving cash or opening a bank account. In Ireland, two NPOs supported by voluntary contributions, working on solidarity campaigns or activities considered politically sensitive by the banks, had their accounts closed. Banks, as a general rule, do not explain the reasons for account closure, or the delays in on-boarding or money transfers. If they do proffer a reason for closure, it is often in-person, at the request of the NPO and very often referencing Central Bank documents.

Small organizations are not able to cope with banks' extended due diligence requirements. There is little or no recourse to remedy for them. Coupled with that is their lack of powers of negotiation: most NPOs deal with a front-desk bank employee and not with a bank account manager or staff at higher strategic levels. Potential strategies could involve NPOs coming together to negotiate with FIs on financial services, or for a large resource-rich NPOs to act as a shield for smaller NPOs: these suggestions, though, come with a knock-on effect on NPO independence. The strategy suggested in Brazil was for NPOs to hire a lawyer who would be able to sort their problems with banks: again this is outside the financial remit of small NPOs. Where public institutions such as an ombudsperson or a national consumer protection agency exist, the NPO may turn to them for redress. This rarely happens, with the notable exception being Ireland where a de-risked NPO has requested the ombudsperson for an investigation into its account closure. Another NPO decided not to submit a complaint to the National Consumers' Protection Agency in order not to imperil its relationships with the bank.

NPOs do, to some extent, understand that banks need to know their customers and the provenance of their funds to prevent complicity with financial crime. However, they cannot understand why NPOs are subject to more stringent rules than, say, high-net-worth clients and private sector customers. If the trigger for bank de-risking in their countries is NPO involvement in terrorism financing and money laundering, they wonder where the evidence is.

International NPOs and re-granting funds repeatedly mention the need for civil society to be transparent and accountable, and to work on internal governance and the professionalization of their operations, especially in a climate where distrust of NPOs due to recent scandals is still prevalent. These, typically larger, NPOs and especially international NPOs that operate internationally have the internal management, and the financial and risk procedures, in place which reduces their risk of being abused for terrorism financing. They can and do also use money transfer agencies for transactions. These money transfer agencies, such as Western Union, generally provide services that, though more costly, gets the money across. For smaller NPOs, such internal due diligence demands cannot be met and nor can they afford the transaction costs of the money transfer agencies.

NPOs find it difficult to accept that banks have "all of a sudden" become distrusting of them as a customer, particularly when they have had a bank account for years. That banks have lost their risk appetite for low profit and (perceived) high risk customers such as NPOs due to high compliance costs to prevent complicity with money laundering and terrorism financing is seen by NPOs as wrongful and illegitimate.

Most NPOs affected seek and find their own solutions for problems and issues with their FI, looking for one-off, "selfish solutions" without much joint discussion or collective action on de-risking. Solutions to get transfers going have been found but NPOs are having to spend more and more time and are having to be more creative on getting funds to partners (individuals or organizations).

Financial Institutions in all three countries have been very careful and to some extent even reluctant to talk about de-risking. They fear reputational damage and legal repercussions. However, de-risking practices do occur while on-boarding clients and monitoring transactions and this, the banks say, cannot be helped as the guidance from the Central Bank and other regulators to comply with international rules concerning money laundering, terrorism financing and sanctions becomes ever more stringent. Coupled with this are inspections from bank examiners. Banks believe that more and not less regulations are coming their way and that this will obviously impact their relation with all customers, including NPOs.

The legal and regulatory framework for Financial Institutions comes from the Central Bank, but does not contain additional specific guidance for NPOs, let alone guidance relating to FATF R8. Therefore, FIs conduct Know-Your-Customer and Due Diligence procedures on NPOs just like any other category of clients. However, due to a string of much-published corruption cases implicating NPOs, FIs use filters for on-boarding NPOs and for processing NPO transactions, especially given that the National Risk Assessments of Mexico and Ireland rated NPOs as medium–to–high risk. This further increases the occurrence of de-risking. One international bank admitted to having an internal policy for NPO de-risking, pushing smaller NPOs out by insisting on an annual threshold of USD 2 million. Due diligence on NPOs and other low-profit clients has also become

very costly. FIs take their AML/CFT obligations extremely seriously, regardless of the kinds of concerns about legitimacy and effectiveness that others might have.

FIs have lost their risk appetite for NPOs and some note that talking with the government would be to no avail as FIs are liable to their shareholders and not to the government or to taxpayers. The policy incoherence with FIs' Corporate Social Responsibility policy is evident here.

In general, FIs are not familiar with NPO work and with what is considered 'usual NPO activity'. They do not distinguish between NPOs and private companies in their service delivery or in terms of AML/CFT requirements. They indicated that they would like to have a better understanding of the risks associated with banking NPOs and the ways these risks are perceived in international AML and CFT recommendations.

The Ministries of Finance and Central Banks in the case countries are aware of and actively take part in the global discourse on de-risking, linking the topic primarily to the decline in correspondent banking.[58] They admitted to a lack of knowledge on the de-risking of NPOs by banks or correspondent banks and the ways that these decisions were being made based on AML/CFT imperatives and sanctions-related guidance coming from regulators. They agreed that action needed to be taken by all stakeholders to prevent the financial exclusion of NPOs.

There are no specific Central Bank regulations for NPOs based on the characteristics of the sector. In all three countries, the Central Bank was open to discussing the issue with NPOs. The expectation was that NPOs would need to take the first step in order to engage with the Central Bank. Regulators would like to see evidence of de-risking, with the Central Banks emphasizing that retail and commercial banks had not brought up the issue but admitting that this does not signify that the practice is non-existent.

The Central Banks in Mexico and Brazil stressed the importance of financial inclusion for financial stability. The financial inclusion agenda does not yet take into account NPOs and the key role they play in development in general as well as in the implementation of the SDGs more specifically. However, Central Bank representatives stressed the need of relating the SDGs to financial exclusion due to AML-/CFT-related restrictions, and discussing this with both NPOs and the financial sector. The idea of specific NPO guidance stemming from a sectoral risk assessment was considered but would require more discussion with regulators, particularly after the recommendation by FATF evaluators to Mexico and Ireland that they would benefit from a sectoral risk assessment in line with R8, which would determine the risk NPOs face of abuse for terrorism financing.

Neither government agencies in general (apart from a few involved in foreign or development policy), nor central banks, nor indeed NPO regulators apart from a few

[58] http://www.fsb.org/wp-content/uploads/P040717-4.pdf

exceptions were aware of the nature and frequency of the de-risking issue. FIs consider this to be a normal, commercial practice they are entitled to, driven by regulatory requirements. But who is ultimately responsible for the fact that financial transactions for social purposes are constrained and blocked, and who then can act responsibly to solve this problem? At present, no one owns de-risking as a problem that needs solving, and current one-off/individual problem-solving is practical, without addressing the systemic causes. Even when NPOs manage to reach an agreement with the FI, there are increased costs for significant compliance requirements. Although both FIs and NPOs are affected by AML/CFT rules and by sanctions regimes, it is the NPOs who are the ones bearing the brunt.

The analysis of the de-risking phenomenon from a global perspective and in the context of the three case-study countries corroborates the findings of other studies on de-risking and NPOs, e.g., The Charity & Security Network study on *Financial Access for U.S Nonprofits* and the WPP and Duke International Human Rights Clinic study on *Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security*. Two findings stand out: there is a policy coherence gap and an ownership gap in relation to the de-risking phenomenon.[59] Both need to be addressed nationally and internationally in order to identify tangible solutions that have to be pursued in a concerted effort by the stakeholders involved. The following chapter focuses on remedy mechanisms drawing from ongoing national and international initiatives and workstreams. In addition it will provide potential remedy mechanisms that could be explored at the national level.

[59] https://www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20(2).pdf and https://law.duke.edu/sites/default/files/humanrights/tighteningpursestrings.pdf

6. Remedy mechanisms

Stakeholders' dialogues and round-tables in search of policy-related and practical solutions

In the UK and the Netherlands, country-level stakeholders' dialogues are being convened by governments, NPOs or banking associations. The issues placed on the agenda differ but, in general, the aim is to identify solutions that will assist NPOs with cash transfers to high risk environments. While these dialogues in themselves are not a remedy for the de-risking phenomenon they provide an opportunity for participants to obtain:

- an understanding across sectors about the interpretation and implementation of AML/CFT rules and the UN and EU economic and financial sanctions;
- knowledge about banks' decision making with regards to NPOs;
- an understanding of banks' requirements from NPOs in order to conduct customer due diligence;
- awareness and understanding on the part of banks about the diversity amongst NPOs in terms of mandate, operations and nature of work; and
- knowledge about the challenges faced by governments and regulators in finding solutions within politically-determined frameworks underpinned by legal requirements. A deeper understanding of problems and practices across sectors can be a first step towards identifying solutions.

The country-level stakeholders' dialogues in the UK and the Netherlands could be used as a template by the case countries for working towards solutions in their own contexts. In all three countries, Brazil, Mexico and Ireland, the conditions are conducive for this type of dialogue, tabling various issues according to problems identified.

In the UK, large humanitarian organiza-tions, government authorities such as the Ministries of Finance, Foreign Affairs and Home, the Banking Association and the bank and charity regulators have agreed to facilitate cash transfers to high-risk countries or countries on sanctions lists, notably Syria. The NPOs involved in this 'Safe Corridor' initiative meet regularly with their banks' relationship managers to provide them with programming details on grants. A report on the impact of Brexit on future applications of UK sanctions by UK Finance signals four pathways to enable humanitarian transactions in sanctioned environments and is, in essence, a continuation and expansion of the current 'Safe Corridor' approach:

- Mutual humanitarian licensing recognition: Where governments have aligned foreign policy objectives to impose sanctions on a given country, consideration should be given to developing a framework that offers a degree of mutual recognition for humanitarian licenses issued by 'like-minded' competent authorities. Such a framework would offer greater confidence to both banks and international NPOs.

- Where possible governments, as part of their donor arrangements, consider offering conditional approval/ appropriate licences at the outset of projects they intend to fund: The UK government should explore incorporating the necessary licences 'up-front' as part of the funding agreements for projects operating in countries subject to sanctions.
- Pre-authorisation for project activities: In instances whereby an international NPO is operating in a highly complex sanctions environment, UK authorities should explore establishing a pre-authorisation framework at the outset of the project. As has been seen in the US context, this may include known engagement with a designated entity. For instance, where it is clear that if the international NPO is to operate they will require some interaction with a designated entity.
- General exemptions for certain mission critical activities: In rapidly changing conflict situations the window of opportunity to deliver aid is often time critical. Where there are immediate 'life and death' concerns competent authorities should consider the use of an emergency license or authorisation framework similar to those written into previous EU Regulations which allow for post execution authorisation.[60]

The authors of this report express the hope that these pathways can be accelerated under UK law. They stress coherence between security, regulatory and foreign policy objectives in relation to the provision of humanitarian assistance. This would indeed be a major step forward but would not address the challenges encountered by smaller NPOs.

Some banks in the UK, such as Barclays, have industry-specific teams, in this case a team that only looks after charity and public sector clients. There is an Extended Due Diligence process for charities (formulated now with the help of NPO input). But this applies only to larger charities, who are corporate banking clients. Small NPOs are clubbed with SMEs (small and medium enterprises) and do not have access to the same level of customer service, in effect creating a two-tier system for NPOs. From the banks' perspective, there is need for awareness-raising among NPOs, with more engagement and training and the provision of tools (possibly by the Charity Commission or another third party guarantor) to facilitate the banking relationship for smaller NPOs.

A multi-stakeholder working group on international NPO operations in high risk jurisdictions, comprising representatives from government, the banking sector, regulators and international NPOs, has also been established. The aim of the working group is to enhance dialogue between the UK government, international NPOs and financial institutions on the challenges and operating risks facing international NPOs in high-risk contexts, such as Syria and Somalia. Problems include difficulties in financial access for the delivery of essential humanitarian assistance, and development and peacebuilding activities. The working

[60] https://www.ukfinance.org.uk/wp-content/uploads/2017/12/UK-Finance-Briefing-Impact-of-Brexit-on-the-Future-Application-of-UK-Sanctions-FINAL.pdf

group will explore possible solutions. For example, participants will discuss how to balance and manage risk in such contexts, how to ensure compliance requirements placed on international NPOs are proportionate and meet the needs of the government, banks and international NPOs, as well as the steps that international NPOs can take to provide reassurance about the risk and due diligence measures they put in place when working in high risk contexts.

In the Netherlands, Human Security Collective[61] convenes and facilitates a stakeholders' roundtable with the aim of identifying solutions for the de-risking practices of banks. The Dutch Ministry of Finance considers this initiative as an enabler for efforts by EU RELEX in providing humanitarian aid to sanctioned and high-risk environments and for arriving at pragmatic solutions for NPOs affected by transfer delays and, to a minor extent, by bank account closures. A non-paper produced by the Ministry for discussion at RELEX sets forth similar options as the aforementioned UK Finance paper for EU member states to explore:

- Raising awareness amongst stake-holders through dialogue
- Creating safe payment channels,
- Collaborating on a workable and safe licensing system and
- Exploring ways for potential exemp-tions in the sanctions legal frame-work[62]

The Dutch Ministry of Finance has written the paper primarily for humanitarian agencies and from an EU-sanctions perspective. The Ministry acknowledges that a dialogue with smaller NPOs is needed as they require solutions different from those applicable to larger humanitarian and development NPOs. In addition, the conversation at the roundtable has to include AML/CFT rules as a driver for the de-risking of NPOs operating in high-risk and conflict areas not on the sanctions list.
The report by the Duke International Human Rights Clinic and WPP on the impact of counter-terrorism (financial) measures on women's human rights and peacebuilding organizations, as well as advocacy by WPP and the Dutch Gender, Peace, and Security Platform, Wo=Men, resulted in the commitment by the previous Dutch Minister of International Development and Trade to improve policies across relevant Ministries relating to the women, peace and security programmes with the aim of ensuring financial access for organizations sponsored by the Dutch government active on these issues.[63]

The Ministry of Foreign Affairs considers the roundtable an enabling mechanism to discuss solutions for financial restrictions impacting civil society space. It acknowledges the fact that financial restrictions on NPOs caused by international AML/CFT rules, oftentimes leading to de-risking, are amongst important drivers for civil-society pushback across the world, thereby affecting commitments made on SDGs, human rights and conflict transformation.

[61] http://www.hscollective.org
[62] Working paper Council of the European Union/RELEX, July 2017 (not for publication)
[63] http://www.womenpeacemakersprogram.org/assets/CMS/Reports/TTPS-DUKE-FINAL-PRINT-AP-WEB.pdf

Dutch banks taking part in the dialogue have expressed their interest in exploring possibilities to reduce/remove barriers for NPOs active in high-risk countries and conflict areas. They emphasize the need for including the Central Bank in the conversation. Banks are waiting for clearer guidance concerning NPOs and terrorism financing risks from the Central Bank, and guidance based on FATF R8 would be particularly welcome. A number of bankers stressed that impediments to providing services to NPOs are related less to the Dutch WWTF, which is the transposition of the FATF AML/CFT rules and the EU AML/CFT directives into national law, than to OFAC (Office of Foreign Assets Control of the US Department of the Treasury) sanctions rules.[64] They are critical of what, in their perception, is the position of distance taken by the regulator when it comes to residual risk relating to customers at risk, including NPOs.

Some bankers have requested for a so-called 'whitelist' of NPO customers from the government. The list would provide comfort to banks facilitating payment services for these NPOs into high-risk countries and conflict zones. This has led to controversy within the NPO sector between organizations which are household names in Dutch society and receive a large part of their funding from the government, and those that are less well-known and involved in, in the bankers' perception, the more unknown or more controversial activities such as human rights and conflict transformation. Some larger NPOs would not be against whitelisting if it would facilitate their financial relations with banks. Others, however, fear that NPOs not on a whitelist would be blacklisted by default.

As a result of the roundtable dialogues, conversations are being initiated in banks between compliance departments, corporate social responsibility teams, strategy departments and account managers. Bankers who spearhead agendas related to sustainable banking and banking with a respect for human rights are beginning to understand the incoherence of providing services to NPOs with whom they collaborate on such issues while at the same time having to de-risk these NPOs under the bank's risk policy. Bankers active on the 'Eerlijke Bankwijzer' (the Honest Bank barometer), which scores banks on six parameters including climate change, weapons and gender equality, and the Covenant on Banking and Human Rights, a public–private partnership to monitor the investments and production chains of private companies with regard to upholding human rights, may become focal points for the much-needed coherence on de-risking within banks.[65]

Central Banks in both Brazil and Mexico are open to discussing financial access for NPOs facing de-risking. Both countries have strong financial inclusion policies that may offer an avenue for exploring solutions ensuring financial access for NPOs. The potential of such an approach depends on NPOs seeking further engagement with the Central Bank, the Ministry of finance or the Financial Intelligence Unit in the country.

[64] WWTF (Wet ter voorkoming witwassen en terrorisme financiering)

[65] https://eerlijkegeldwijzer.nl/bankwijzer/ and https://www.ser.nl/nl/actueel/nieuws/2010-2019/2016/20161028-imvo-convenant-banken.aspx

NPO platforms or networks like UnidOSC in Mexico and Conectas in Brazil, in their role as members of the expert hub on FATF[66], would be in a position to include the de-risking and financial access of NPOs as topical issues in their engagement with policymakers responsible for AML/CFT in their countries. Existing strategies such as the ENCLAA[67] and corresponding mechanisms in Brazil, which allow for yearly action plans on topics that address financial crime whereby a number of stakeholders, including from the NPO sector, are invited to provide input, seem to be a promising pathway in addressing the issue of financial access for NPOs.

In Ireland, the Ministries of Finance and Foreign Affairs, the Charity Regulator and the Central Bank have all expressed an interest in further exploring the de-risking phenomenon provided Dóchas (the Irish Association of Non-Governmental Development Organisations) is willing to take the issue forward. Dóchas and the Irish Council for Civil Liberties (defender of human rights and civil liberties in the national context) are evincing an interest in the de-risking phenomenon given that a number of their members are experiencing problems with banks, ranging from delays in transfers to high-risk and conflict areas to account closures. Workarounds have been found thus far to address the problems faced.
In the context of the study, two roundtables were organized with government representatives and NPOs where it became evident that the first step in initiating a potential stakeholder roundtable would have to be taken by NPO umbrella organizations. The challenge will be to invite banks to the dialogue as the Irish banks approached for interviews for this study were extremely cautious about providing their perspective on de-risking and would need some diligent encouragement to take part in a stakeholder dialogue.

Besides ongoing and potential national-level stakeholder dialogues, at the international level, the World Bank and ACAMS (Association of Certified Anti-Money Laundering Specialists) convened more than 100 participants from government (policy, regulatory and law-enforcement authorities), international organizations, financial institutions, and primarily US-based NPOs to discuss the phenomena of de-risking and how to address it.[68] Until then, most de-risking discussions had focused primarily on the challenges relating to correspondent banking and money service businesses, but the dialogue noted the significant difficulties humanitarian organizations and charities were experiencing with financial access. In recognition of the importance of supporting critical humanitarian and development work abroad, the World Bank

[66] A technical resource group of experts from countries/regions facing restrictions under the guise of CFT/AML regulation. The group will promote peer learning, share information and generate knowledge. It will also develop guidance, collect good practice and monitor threats. http://fatfplatform.org/announcement/aml-cft-expert-hub/

[67] The National Strategy for Fighting Corruption and Money Laundering, which involves more than 70 government bodies engaged in the fight against those crimes.

[68] *Stakeholder Dialogue on De-Risking: Supporting Financial Access for Humanitarian Organizations and Charities*, 2017. http://documents.worldbank.org/curated/en/538271487141265874/pdf/112804-WP-SupportingFinancialAccessforHumanitarianOrganizationsandCharities-PUBLIC-ABSTRACT-SENT.pdf

and ACAMS organized a second dialogue in January 2017 to promote the access of NPOs to financial services through practical steps by fostering the relationship between NPOs, financial institutions and government; improving the regulatory and policy environment; and developing tools to facilitate understanding and information-sharing. As a result, four workstreams were organized and have initiatives underway to:

- provide standardized guidance regarding information banks require to conduct due diligence on NPO customers, and develop options for specialized financial channels for humanitarian crises when traditional banking is unable to move funds;
- clarify regulatory requirements and risk guidance through revision of the Bank Examination Manual to implement FATF R8; provide training resources for banks and regulators regarding NPOs, and for NPOs on risk management and due diligence;
- explore technological solutions to facilitate NPO transfers to areas of higher risk and help lower financial institutions' compliance costs in banking NPOs (e.g., NPO KYC utility, e-credits, blockchain, etc.); and
- promote greater understanding of NPOs and broader financial access challenges though online resources and outreach.[69] [70]

The report by Charity & Security Network (C&SN) on *Financial Access for US Nonprofits* has provided the World Bank–ACAMS initiative with quantitative evidence in support of the pursuance of the workstreams.[71] C&SN has set up a Financial Access working group to disseminate information related to matters of financial access. So far, the group comprises mostly US-based NPOs also involved in the World Bank–ACAMS workstreams.

The World Bank approached Human Security Collective (HSC) and the Dutch Ministry of Finance to convene and co-organize an International Stakeholders' Dialogue on ensuring financial access for NPOs, to be held in the Netherlands, with the aim of connecting national stakeholder dialogues with the international and regional dialogues, and explore further coordination and collaboration. The meeting took place on February 15, 2018 in The Hague.[72] This international stakeholders' dialogue provided the opportunity to present the most recent studies on the de-risking of NPOs, and for an exchange of practices and perceptions of civil society, governments, international organizations and banks. Stakeholders were invited to identify solutions and pathways for mutual collaboration in and through roundtable dialogues. After the event, representatives from the World Bank and the FATF presented the dialogue's goals and outcomes both at the FATF plenary in Paris (21–23 February 2018) and

[69] *Ibid.*

[70] Background Paper, *International Stakeholder Dialogue: Ensuring Financial Services for Non-Profit Organizations* http://fatfplatform.org/wp-content/uploads/2018/02/Background-Paper-1.pdf

[71] https://www.charityandsecurity.org/system/files/FinancialAccessFullReport_2.21%20(2).pdf

[72] Report of event, *International Stakeholder Dialogue: Ensuring Financial Services for Non-Profit Organizations,* http://fatfplatform.org/wp-content/uploads/2018/02/Ensuring-Financial-Access-for-Non-profit-Organizations_Final-Report.pdf. Background Paper, http://fatfplatform.org/wp-content/uploads/2018/02/Background-Paper-1.pdf

at an EU RELEX meeting in Brussels. Both the FATF and the EU RELEX sanctions group will follow through on this. At the next FATF Private Sector Consultative Forum meeting in April 2018, the findings from The Hague will be shared in a session dedicated to de-risking. And ongoing work on EU sanctions seeks to mitigate the negative effects of sanctions and the AML/CFT regime on NPOs through tailor-made licensing as well as through exemptions for operations in high-risk contexts akin to the UN Security Council Resolution exemption for the provision of humanitarian aid to Somalia.[73] The sequence of these meetings can be considered a sort of campaign to place solutions for financial services for NPOs, currently de-risked from regulated channels because of AML/CFT rules, firmly on both global and local policymaking agendas. NPOs involved in the Global Coalition are drawing up a roadmap with concrete asks for the G-20 event at the end of the year. They are seeking support from (potential) government allies in the UK, the Netherlands, and Germany.

The stakeholders' dialogues, both at national and international levels, have the potential to identify solutions which will require the adaptation of current regulatory policies and rules (FATF) and sanctions regimes for NPOs that operate internationally. The AML/CFT and sanctions regulatory context is complex and, so far, international and national stakeholder roundtables have taken place within Nordic or Western contexts. An important next step is to explore the de-risking and NPO phenomenon in countries and contexts challenged by institutional, legal and regulatory deficiencies and by a political climate that is oppositional or even hostile to NPOs.

A number of these countries are active in the G-20 Global Partnership for Financial Inclusion (GPFI) or the Alliance of Financial Inclusion (AFI) that aims to ensure financial access in regulated financial institutions for over 2 billion people who currently have no access to these services. The GPFI works closely with the UN Special Advocate for Inclusive Finance for Development (UNSGSA), Queen Máxima of the Netherlands, in promoting private–private, public–private and multilateral cooperation and partnerships to unlock financial inclusion innovations in order to lift people out of poverty and empower them. Articulating the GPFI agenda and the ongoing stakeholders' initiatives on the de-risking of NPOs in relation to global AML/CFT rules by those at high-level governance and policymaking positions could be a step in the right direction, especially in addressing the de-risking challenges faced by NPOs active on development, peacebuilding and conflict transformation. Bridging the Financial Inclusion agenda with the AML-/CFT-(and sanctions)-driven regulatory agenda could prove complementary to the initiatives developed to address the de-risking of humanitarian NPOs.

The SDGs and the GPFI express a joint ambition to address poverty and empower the poor. NPOs active in the fields on development, peacebuilding and conflict

[73] https://www.un.org/sc/suborg/en/sanctions/751/resolutions

transformation working towards achieving the SDGs require enabling financial conditions for their work, particularly in high-risk contexts and environments of protracted conflict. In the first section of the report it was mentioned that the UNSGSA has only engaged on the issue of de-risking in passing, lumping the de-risking problem for entities carrying out development activities together with the potential impact of de-risking on cross-border remittances and the ability to obtain export finance.[74]

The need for ownership and policy coherence relating to the work of NPOs, if brought to the attention of high-level decision makers, could spur national- and global-level action to influence global rules through relevant policymaking bodies. For example, discussing the policies of financial inclusion and the impact of de-risking (leading to exclusion) at the Financial Stability Board or the FATF consultative forums (such as the FATF Private Consultative Forum) could help bring in national-level experience and different governmental sectors operating in various policy streams, including those that rarely have a chance for productive dialogue on the topic otherwise. Civil-society-friendly members of the G-20 could put the FATF to task to address the de-risking of NPOs within the AML/CFT framework through a recommendation under the Countering Terrorism Financing rules stating that the de-risking of NPOs and other sectors such as money transfer agencies, responsible for remittances transfers, and correspondent banks, poses a terrorism financing risk. The advantage of framing the phenomenon as such in the FATF AML/CFT recommendations would be to then allow FATF evaluators to address the issue with affected sectors in a systemic way during country evaluations.

Challenging the de-risking decisions of banks: redress and litigation

The question of what NPOs and other entities impacted by financial exclusion decisions can do to seek redress is among the most important but least explored elements of the de-risking phenomenon. As noted above, such decisions can have a significant impact on fundamental rights, risking manifest breaches of international law. Paradoxically, however, remedies for the affected parties, often subject to what appear to be arbitrary decisions and left without access to financial services, are very much on the margins of the de-risking debate.

This section considers the grounds for the de-risking decisions by financial service providers and the possibilities for challenging those decisions. It also examines the role played by the 'compliance industry', which provides risk profiling and other services to financial institutions in support of their due diligence and risk management obligations. These service providers are included because they can play a key role in a bank's decision-making process with respect to the provision or withdrawal of accounts and the facilitation of transactions. In sketching out the legal issues that arise with respect to de-risking, this section draws on UK and

[74] http://www.bis.org/review/r151113c.htm . The same issues were reiterated – again only in passing – in the report of the Special Advocate for 2016. https://www.unsgsa.org/files/6214/7708/0597/UNSGSA_report_2016_copy.pdf

EU law to exemplify the challenges that arise. [75]

In case of the arbitrary, rather than risk-based, decisions on termination of services to NPO clients, there are potential breaches of the country's non-discrimination (or equality) legislation as well as of EU regulation (in case of an EU country), if termination is based on indicators such as ethnicity, religion, nationality of a client, or similar. In addition, the UN Special Rapporteur on the rights to the freedom of peaceful assembly and association has also stated that unwarranted de-risking decisions could breach legal requirements in terms of upholding the freedom of association and expression.[76] More generally, the limitation on NPOs' use of bank accounts is in breach of their ability to utilize funding and resources.[77] The ability of NPOs to access funding and other resources from domestic, foreign and international sources is embedded in the right to freedom of association.[78] Art. 22 of the International Covenant on Civil and Political Rights (ICCPR) affirms that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

The Human Rights Committee (the UN body with competence of authoritative interpretation of the ICCPR) stated in communication No. 1274/2004 that this right "relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association [...]." Accordingly, fundraising activities are protected under article 22 of the Covenant[79] and undue restrictions on funding NPOs violate the right to freedom of association under Art. 22 of the ICCPR.[80] In addition, the former UN Special Rapporteur on the Rights to freedom of peaceful assembly and of association issued a report on sectoral equity requesting equal and fair treatment of NPOs, on a par with business organizations.[81] There is no compelling reason why NPOs should have to operate in a more restrictive environment than businesses, even when it comes to financial services, as both sectors contribute enormously to the overall well-being of a nation.

Currently, it seems that there is no concrete remedy or avenue through which to take up complaints upon the termination of financial services. Irrespective of whether bank services and accounts are de-risked on a case-by-case basis or as part of wholesale cuts, FIs act within their rights to

[75] Annexe 4, Remedies for non-profit organizations affected by de-risking.
[76] UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf
[77] Resources are defined broadly, including financial transfers (e.g., donations, grants, contracts, sponsorships), loan guarantees, in-kind donations, material resources, access to international assistance and similar (A/HRC/23/39, para 10)
[78] A/HRC/23/39, para 20
[79] A/HRC/23/39, para 16
[80] UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf
[81] www.un.org/en/ga/search/view_doc.asp?symbol=A/70/266

do so as a private actor. As far as NPOs are concerned, FIs are not performing a public function in a legal sense.[82] The relationship between an FI and its clients is governed by contract, usually through standard terms and conditions that a client accepts upon opening an account. Under the terms of most relationship contracts, FIs reserve the right to cancel such facilities provided with a certain amount of notice.[83]

As noted in practice in the country case studies and elsewhere, when FIs decide to terminate a service, NPOs receive a letter from the account provider stating that their account will be closed. In most cases, FIs do not even send a letter out, merely delaying or increasing requirements and administrative costs to an unbearable level. If there is a letter, it will often blandly state that the decision is due to "risk appetite", without going into any further details. By providing no reasons for the decision, the capacity of an affected NPO to respond and complain is limited. Without an opportunity to understand the basis for the decision, they will not be able to seek meaningful redress from the bank.[84] It is likely that NPOs will attempt to seek legal redress against FIs under a discrimination challenge.[85]

This remedial approach is specifically focused on the use by FIs of commercial risk-profiling data, compiled by companies whose business model is built on the potential to sell more risk profiles to their clients. This ever-growing business sector operates without any regulatory supervision thus far. While they offer time-saving services to facilitate Know Your Customer (and oftentimes Know Your Customer's Customer) and Extended Due Diligence processes for FIs and other sectors obliged to provide Suspicious Transaction Reports to national authorities or that want to conduct partner vetting under counter-terrorism obligations, the data upon which they compose their risk profiles is primarily open source, including data from social media outlets. In the UK, the use of such data provided by World-Check and used by banks for the purpose of terrorism financing screening has led to cases of the unfounded de-risking of Muslim citizens, including members of charities.[86]

It should be stressed that World-Check, owned by Thomson Reuters, is but one of a range of compliance service providers, meaning that the number of risk profiles circulating within and outside the formal banking sector is significantly higher than the 3 million known to be held by Thomson Reuters. These data repositories, now collectively rebranded as 'KYC (Know Your Customer) Utilities', are being promoted by institutions like the IMF as a solution to the problems associated with de-risking.[87]

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[82] https://www.opendemocracy.net/ben-hayes-lia-van-broekhoven-vanja-skoric/de-risking-and-non-profits-how-do-you-solve-problem-that-n

[83] For example, these terms allow one FI to close an account with two months' notice if "we reasonably consider it's necessary to comply with our regulatory and compliance controls, policies and procedures, and responsibilities." This is the procedure most NPOs are faced with.

[84] https://www.opendemocracy.net/ben-hayes-lia-van-broekhoven-vanja-skoric/de-risking-and-non-profits-how-do-you-solve-problem-that-n

[85] The study does not have permission to discuss specific cases.

[86] http://www.bbc.com/news/magazine-33677946

[87] Lagarde: "I would encourage banks to work collectively on reducing compliance costs and maintaining the financial lifeline for those who need it most. Innovative solutions like 'Know Your Customer' utilities to centralize

The way these 'utilities' work in practice has been explained by senior representatives of Thomson Reuters as follows:

> *"These industry utility and managed services solutions, like the one we operate, are able to go and collect that KYC information on behalf of the industry and organise it from public sources, from private sources and from the clients themselves. They do the work of pulling the KYC file together, including the screening of the officers, the directors and the beneficial owners, and essentially package up the information for the financial institution to then take its view on that client, and maybe even decide it needs to do more enhanced due diligence to really understand who they are. But the beauty of the industry utilities coming out is that you are contacting the client as an industry considerably less frequently. If the KYC record already exists in the utility, your time to onboard is going to reduce by 90% or more".*

This approach has extremely serious ramifications for those customers of banks added to the 'utility'. It implies that the information used by banks when making a decision on the risk posed by either an individual and an organizational account-holder – which, in the case of the latter might include information about staff, business partners and activities – has a legacy far beyond that unique decision.

In the context of decisions that result in 'de-risking' or financial exclusion, this threatens to engender a perverse kind of 'mutual recognition' of such decisions, in the sense that once information suggesting an individual or entity proposes a significant 'risk' enters the utility, the prospects of them ever obtaining financial services are greatly diminished. To the extent that these 'industry utilities' and 'managed services solutions' rely on information that may be inaccurate, biased or false – whether it relates to named individuals, organizations, groups, sectors, populations or places – the consequences for the data subjects may be devastating. The question that follows is: once the 'high risk' label has been applied, how can affected parties challenge that designation?

The growth of the compliance industry is both unheralded and without regulation. However, following the kinds of public revelations described above, groups and individuals have sought to challenge unwarranted and inaccurate risk-profiling allegations. Crucially, unlike the relationship between the bank and their customers, the relationship between compliance service providers and the subjects of the risk profiles is not subject to a contract. Indeed, one of the fundamental concerns with the exponential growth of this industry is that the individual has no knowledge that a profile has been created about them, let alone any formal relationship with the data controller behind the 'utility'.

Another avenue for redress in some countries might include institutions such as the financial services ombudsmen or similar bodies that address general financial services issues. For example, Mexico has a National Commission to Protect and Defend

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information on customer due diligence is one example" – https://www.imf.org/en/News/Articles/2016/07/15/13/4

5/SP071816-Relations-in-Banking-Making-It-Work-For-Everyone

Financial Services Users (CONDUSEF)[88] that seeks to promote and disseminate education and financial transparency so that the users of financial services can make informed decisions on the benefits, costs and risks of the products and services offered. The Commission looks to protect user interest by supervising and regulating financial institutions and offering services of advice and support, as well as defending the rights of users. However, no cases of NPO de-risking have been known to be brought before such a Commission, nor is it clear whether the Commission's current legal basis would allow it to investigate and act upon such complaints.

The Irish Ombudsman Office is involved in a process to address the case of the bank closure of an NPO in Ireland, with findings to be provided in due course. This case may develop into a precedent for other NPOs that have had their bank account terminated without the possibility of accessing alternative financial services. Notably, these are avenues of potential redress that should be explored further, as commissions or ombudsmen bodies have the competence to educate and mediate between FIs and clients, and to address civic and administration grievances. Such bodies should be included in multi-stakeholder dialogues on resolving de-risking issues.

Similarly, bodies such as the Data Protection Supervisory Authorities, the National Human Rights bodies and the Information Commissions currently do not have the competence to hear complaints on the denial of financial services. However, due to some overlapping interests and emerging topics such as data protection, access to information and fundamental-rights-protection, these bod-ies could, in the European context, be included in trying to find solutions for the financial exclusion of NPOs.

Financial Technology

In Chapter 4, financial technology was mentioned as an avenue that is currently being explored to address the de-risking of NPOs. The FATF and others have expectations that 'fintech innovations' could fill the de-risking void. The World Bank–ACAMS initiative is exploring techno-logical solutions such as an NPO KYC utility, e-credits and blockchain for facilitating the transfer of funds to NPOs in high-risk areas. The study acknowledges that these avenues merit further exploration, and that there are already a number of think tanks and research institutes that are investigating the security, risk and technology nexus pertaining to these fintech solutions set out. But these same researchers also warn against too-high expectations, as the search for risk across digital–financial platforms will produce different outcomes to risk management in the traditional banking sector.

[88] About CONDUSEF, http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1306247419696/7952708-1349746949810/8881014-1352768912684/FPD-Forum-Condusef-Luis-Alberto-Amado-Mexico.pdf

7. Conclusions and Recommendations

Looking to unpack the complex phenomenon that is the de-risking of NPOs by viewing it through a political and regulatory lens, this study provides a comprehensive and concise overview of global anti-money laundering and countering the financing of terrorism policies, the drivers behind the decision-making leading to financial institutions exiting relationships with NPOs. This phenomenon is best understood and appreciated by garnering the perspectives of different stakeholders, which the research aimed to do in and through the various interviews conducted. Overall, each of these stakeholders makes rational decisions based on their mandate as a public or private actor.

Other actors such as the G-20 view de-risking as a 'financial stability' issue because of the impact it has on correspondent banking which, in turn, undermines economic development and trade financing. And still others such as the World Bank frame it as a 'financing integrity' and 'financial inclusion' issue. Viewed from these perspectives, financial institutions are perceived to be "too big to fail", essential as they are seen to be for the global financial architecture or as private actors – good global citizens – providing a public service, and not simply protecting profit margins.

The architects of the regulatory framework have long been in denial that de-risking is caused by stringent AML/CFT regulations. This denial has changed into a recognition of sorts on the part of standard setters such as the FATF that concerted action has to be taken to further prevent banks from misinterpreting and/or misapplying these requirements. From the perspective of the prevention of financial crime, regulators and law enforcement officials are lamenting the disappearance of clean money into "shadow banking" channels. From the perspective of fundamental rights, several of the UN Special Rapporteurs, including the Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, have called for non-profit-friendly reform of the AML/CFT regimes and suggested that arbitrary decision-making by banks risks manifest breaches of non-discrimination laws. Overall, policymakers, regulators and banking supervisors claim that they are not aware of the de-risking issue, and that it is, in essence, a problem that primarily needs to be solved by the banks and NPOs themselves. They are, however, open to further discussion as they understand that the NPO sector is vital for humanitarian assistance as well as for addressing poverty and socio-economic inequality.

For banks, the de-risking of customers is the outcome of a calculation between the compliance costs related to a customer's risk profile and that customer's profitability. Banks often face difficulties in risk profiling NPOs and, without specific guidance from regulators, are left faced with high compliance costs against already low profit margins. In general, banks have limited knowledge about NPOs, and treat them as any other customer. Banks do not

make their decisions on whether to provide services to NPOs based on Recommendation 8 of the FATF. They do so based on ever-more stringent requirements from regulators to scrutinize customers for potential money laundering and terrorism financing risks. The study found that banks de-risk in an inconsistent way leading to difficulties in the way NPOs are able to develop and implement their programmes, with some banks willing to go the extra mile in providing financial services to partners of NPOs in high-risk areas, and others not even willing to consider it. There are banks with charity-specific teams but these are exceptions, relying on individual commitment and leadership. The study identified one large international bank with an internal policy to de-risk NPOs that fall below a USD 2 million threshold on an annual basis. Additionally, NPOs need to have a minimum of USD 600 in their account at all times to bank with them, demotivating many small NPOs from doing so.

NPOs in European countries and the US have only quite recently become aware of the systemic drivers behind decisions by financial institutions leading to on-boarding delays, delays in financial transactions or to banks exiting relationships with them altogether. Reports commissioned by the Charity & Security Network in the US, by WPP in the Netherlands, and, more recently, by Chatham House and the Humanitarian Forum in the UK, in addition to earlier reports from Demos and others have been important in this regard. In other countries across the world, NPOs have been equally if not more affected by de-risking but are much less aware let alone knowledgeable about its drivers and the political, security and regulatory dimensions underpinning it.

This study presents ways in which these political and security interests intersect with the regulatory mechanisms, leading to the increasing pressure on NPOs' access to financial services, particularly those working in high-risk environments or those who finance such work. The Brazil, Mexico and Ireland country studies provide a complementary perspective to the analysis from a global point of view.

Nuances at country level have be taken into consideration for a more in-depth understanding of the relationship between AML/CFT rules and the decisions by financial institutions that lead to de-risking. De-risking in Brazil and Mexico, not high-risk environments for the financing of terrorism, is the outcome of banks' Know-Your-Customer processes, with banks becoming risk averse when it comes to servicing non-profits given their implication in corruption and money-laundering practices, also widely known about in the public domain. Ireland is host to a number of NPOs that operate internationally, including those actively supporting human rights defenders in high-risk environments, also comprising countries on sanctions lists. Here, however, the most extreme form of de-risking – termination of bank services – has affected non-profits that are not or are hardly active outside of the country but that are in solidarity with citizens in what the banks perceive to be risky environments.

The study highlights a number of ongoing initiatives, both nationally and internationally, that seek to identify

tangible and practical solutions on the one hand, and policy solutions on the other. It complements these initiatives by presenting ways to challenge the de-risking decisions by banks in terms of remedial approaches to commercial risk profile aggregators such as World-Check, used widely by banks and others (donors, NPOs across the world) for KYC/ partner-vetting purposes.

To break the cycle of banks blaming regulation, regulators blaming banks, governments blaming terrorists and non-profits, and non-profits blaming governments and banks for de-risking, initiatives such as the international stakeholder roundtables led by the World Bank and ACAMS, national stakeholders' dialogues in the UK and the Netherlands, and policy-related work by the EU RELEX focused on the potential widening of sanctions exemptions for humanitarian and development aid, are all required and more. And when coordinated, these may lead to solutions for the financial restrictions that NPOs are currently experiencing across the world and that is impeding them from operating according to their mandate.

This study concludes with a number of recommendations, some of which build on the above-mentioned initiatives.

Practical solutions

National multi-stakeholder dialogue convened by government or NPOs or both, having as its shared goal the raising of awareness and cross-sectoral understanding, as well as the identifying of solutions for financial restrictions facing NPOs emanating from AML/CFT regulations, are important. In the case countries studied, mechanisms already exist (ENCCLA in Brazil) or could be established (in Mexico and Ireland) given the interest expressed by relevant stakeholders, including banks and regulators, in understanding the issue. The approaches developed by the UK (a cross-ministerial and NPO working group to understand the operational challenges facing NPOs working in high-risk areas, and a UK-Finance-convened platform to facilitate humanitarian transfers through 'safe corridors' to Syria and Somalia) and the Netherlands (an NPO- and Ministry-of-Finance-led roundtable with stakeholders to discuss various de-risking-related issues) could be used as approaches that could be of benefit to other countries. The issues that will be further discussed in the coming months in the Netherlands stakeholders' dialogue are the financial services challenges faced especially by smaller and more newly-established NPOs and what can be done by stakeholders to solve their specific problems, and the possibility of incorporating and ensuring that financial services for and the financial inclusion of NPOs is a relevant policy topic for the Central Bank and the Dutch Authority for Financial Markets (AMF).

National multi-stakeholder dialogue can feed into and add to international stakeholders' dialogue such as the World Bank–ACAMS initiative which aims to:

- provide standardized guidance regarding information banks require to conduct due diligence on NPO customers, and develop options for specialized financial channels for

humanitarian crises when traditional banking is unable to move funds;

- clarify regulatory requirements and risk guidance through revision of the Bank Examination Manual to implement FATF R8; provide training resources for banks and regulators regarding NPOs, and for NPOs on risk management due diligence;
- explore technological solutions to facilitate NPO transfers to areas of higher risk and help lower financial institutions' compliance costs in banking NPOs (e.g., NPO KYC utility, e-credits, blockchain, etc.); and
- promote greater understanding of NPOs and broader financial access challenges though online resources and outreachThis initiative has so far primarily convened stakeholders in the US but it may gain traction in a number of European countries, as was the case with the February 2018 international stakeholders' dialogue meeting convened by the Netherlands Ministry of Finance, Human Security Collective and the World Bank in The Hague.[89] However, it is crucial to initiate similar types of roundtables in parts of the world where NPOs are affected by financial restrictions as a consequence of AML/CFT rules.

Back donors/philanthropists and support for smaller NPOs

The existing body of research, including this one, as well as stakeholder meetings confirm that small NPOs are disproportionately affected by de-risking decisions compared to larger ones. Smaller NPOs, particularly those that financially support or are involved in what are perceived to be 'risky' activities, such as human rights or conflict transformation, are more easily de-risked than those NPOs which provide education- or health-related support. Compounding this is the fact that these NPOs often support or carry out their activities in high-risk environments. These double 'at-risk NPOs' require special attention, from government donors who support them or from philanthropists who support their human rights and peacebuilding causes. The connection between de-risking and the enabling space for civil society is perhaps most acute in this context. The financial supporters of these NPOs may be able to provide the banks with a certain degree of comfort by providing them with pre-audits on the NPOs they support. This is a type of partner vetting that already occurs in a donor–grantee relationship, and one which could be shared with the bank.

While it is understandable that banks seek comfort, this requirement also needs to be reviewed critically from a data protection point of view as well from the standpoint of NPO autonomy, particularly for those NPOs that work on highly-sensitive issues and with partners whose lives may be endangered if the information shared falls into the wrong hands. The type of data-sharing envisaged would be akin to large and mid-sized NPOs sharing data on their partners (with regard to type and activities) with their account manager at the bank, the difference being that the back donor would have a stake in the risk attributed to the

[89] International Stakeholder Dialogue: Ensuring Financial Services for Non-Profit Organizations. Report: http://fatfplatform.org/wp-content/uploads/2018/02/Ensuring-Financial-Access-for-Non-profit-Organizations_Final-Report.pdf

partner as well as in the activities it is supporting.

Policy-related solutions

FATF and Member States

The changed assessment of risk associated with NPOs as embodied by the revised R8 has neither been implemented nor had a tangible impact on NPOs, as the pervasive view of the entire sector as high-risk persists. FATF and Member States needs to re-engage on the issue, especially with increasing reports being received of R8 being used to justify the overregulation of civil society and drive financial restrictions. Implementation of the Risk-Based Approach (RBA), currently the cornerstone for the implementation of the FATF AML/CFT Recommendations, has been problematic or perhaps even a 'fallacy', with banks in general operating with zero tolerance for risk. Banks feel compelled to err on the side of maximum due diligence: the current reality being one of 'risk-based assessment, and rule-based implementation'. Clarification on the changed policy concerning R8 and NPOs as well as guidance are needed in order to promote an understanding of the risk-based approach amongst regulatory bodies, thereby avoiding risk aversion by banks. FATF and Member States could take the lead on developing specific guidance on NPOs and de-risking based on the revised R8. The FATF should train evaluators to look into the potential de-risking attitudes of banks, and the FATF's effectiveness methodology during peer evaluations should reflect this, enabling evaluators to raise concerns about de-risking in their country assessment reports.

NPOs wanting to advocate for this approach may want to consider teaming up with money-remittance agencies, especially the smaller ones, who are equally affected by the de-risking decisions by banks. A number of these smaller money transfer agencies were servicing small NPOs on money transactions to high-risk areas until this was made impossible by the decline of the correspondent banking system.

While the FATF, in line with its mandate, would be able to develop specific guidance for those organizations that fall under its definition of an NPO, namely non-profit organizations involved in "good works" implementable by raising and disbursing funds, civil society organizations particularly affected by de-risking-related decisions, such as smaller and/or more-recently established ones, may not benefit from this policy change or guidance and may require other policy-related solutions.

Interrelated discussion of the impact of AML/CFT rules, UN Security Council Resolutions and EU sanctions on NPOs in international fora – working towards policy coherence

Awareness creation by and among policymakers on the interrelatedness of AML/CFT recommendations, financial sanctions, and the de-risking of NPOs by banks seems a natural way forward in finding more structural and policy-related solutions. A World Bank study commissioned by the G-20 in 2015 found that large banks mentioned both AML/CFT recommendations and sanctions almost equally (90 per cent and 95 per cent

respectively) as drivers for de-risking.[90] The focus was not on NPOs per se but on remittance agencies and correspondent banks, but given the impact on NPOs, the World Bank felt there was a need to focus on that sector as well. However, in view of the findings of this study and others it is important to note that, in terms of regulations, banks do not seem to distinguish in their service provision to customers: it is the stringent compliance requirements stemming from these global policies that lead to de-risking decisions irrespective of type of customer. High-net-worth customers, however, seem less vulnerable when it comes to the risk appetite of banks.

The recent efforts by the Global NPO Coalition on the FATF in conjunction with civil-society-friendly governments such as the UK and the Netherlands to place the de-risking of NPOs on the agenda of the G-20, and specifically of the G-20-led Global Partnership for Financial Inclusion, could lead to the required political support to bridge the still-existing gap between concerns on security and financial crimes on the one hand and regulatory requirements on the other. The supporters of the financial inclusion agenda aim to make formal banking accessible to over 2 billion people currently outside of these channels, a negative not only from a business and economic development perspective but also from a security perspective. Herein lies an evident connection with the achievement of the Sustainable Development Goals, which require non-profits, including smaller ones, and small and medium enterprises – which in some banks are placed in the same customer category as NPOs for compliance purposes – to support development, human rights and conflict transformation initiatives across the world, including and particularly in volatile and high-risk environments.

In a related vein, the current pushing out of small, grassroots organizations in high-risk environments from regulated banking channels undercuts attempts by UN counter terrorism entities, the UNDP and other UN entities to prevent violent extremism through integrated projects that address pull and push factors that may ultimately lead to terrorism. Engagement with the UN on this specific angle in order to seek solutions for de-risking may be an avenue worth pursuing for NPOs working on development and conflict transformation in fragile states and risky environments.

EU RELEX

At the European level, the current discussion in the RELEX group (the working party of EU foreign-relations counsellors) on ways to prevent the de-risking of NPOs by banks as a consequence of the interpretation of UN Security Council and European sanctions, triggered by an internal paper prepared by the Netherlands, intersects with the broader discussion of de-risking as a consequence of AML/CFT recommendations. To solve the de-risking of NPOs in a comprehensive way, such integrated discussion seems to be the way forward. The focus of this

90 https://remittanceprices.worldbank.org/en/survey-on-de-risking

particular discussion is on improving the cumbersome process of the licensing of humanitarian activities in high-risk environments through the greater use of blanket or general licenses and through paving the way for the UN Security Council to consider a standing exemption for humanitarian activities, thereby facilitating the way for changes to promote the greater use of humanitarian exemptions in EU sanctions. The RELEX group is open to connecting their discussions with the workstreams being developed by the World Bank–ACAMS-led initiative, including the special challenges that are faced by smaller humanitarian organizations active in high-risk environments. Under the next chair of the EU, Austria, NPOs active in the humanitarian space would be able to accelerate solutions, in particular to get a standing exemption or a widening of exemptions, akin to the one for Somalia, for humanitarian activities including in areas perceived to be at-risk from a terrorism financing perspective.

Challenges outside the US and Europe

Knowledge around de-risking decisions by banks have thus far been primarily developed by stakeholders in western countries and the focus has been on moneys sent and less on money flows coming into a country. Further research is needed on the de-risking of intermediate NPOs by banks in countries where domestic money flows from international or locally-generated funds to "at-risk groups" are delayed or made impossible because of the perceived risk profile of these groups. The de-risking examples from Brazil and Mexico illustrate the risk aversion of banks when cash transfers are required to be made by intermediate NPOs to partners and beneficiaries who seem to be risk-profiled by banks in terms of their ethnic background ("indigenous communities") or legal status (collective instead of individual ownership of assets). In these two countries, as well as in other countries outside Europe and the US, the disconnect between the stated policy position of the government, Central Bank and other regulators in terms of financial inclusion and the de-risking practices by banks need be further explored with an eye to identifying solutions to prevent grassroots organizations and smaller NPOs from being excluded from financial services.

Further research is needed in countries where terrorism financing is linked to moneys coming in through unregulated channels and funds raised domestically in order to understand the de-risking decisions taken by banks concerning NPOs, particularly in relation to solutions that may be proffered by western-style Financial Intelligence Units or similar bodies, and which may lead to financial restrictions for civil society writ large.

Challenging bank de-risking

Further exploration is also needed to see if NPOs financing activities and partners in high-risk areas faced with financial access difficulties could transfer funds through a public entity or a third-party guarantor such as a government body or a regional development bank. These entities would be able to facilitate funds into high-risk areas. Also willing would be special banks devoted to charities, such as the CAF bank in the UK, or a charity for NPOs or a government-sponsored bank for NPOs. However, the holding up or bouncing back of transfers due to KYC decisions in the correspondent

banking chain may debilitate this solution.

Currently, it seems that there is no concrete remedy to or avenue through which to take up complaints upon the termination of financial services. Irrespective of whether bank services and accounts are de-risked on a case-by-case basis or as part of wholesale cuts, FIs act within their rights to do so as a private actor. As far as NPOs are concerned, FIs are not performing a public function in a legal sense.

The role of public institutions, such as the Ombudsman in Ireland which is currently involved in a process of finding recourse for a domestic NPO that has been de-risked, or akin to the National Commission to Protect and Defend Financial Services Users (CONDUSEF) in Mexico or the Information Commissioner's Office (ICO), the independent authority in the UK set up to uphold information rights in the public interest, in promoting openness by public bodies and data privacy for individuals would need to be further explored for their merit as a mechanism to support NPOs or NPO employees or trustees who are de-risked and want to put forward a complaint.

On a more overarching note, it would be worthwhile, as laid out in detail in Annexe 4 of this study, to explore the legal avenue of establishing an oversight mechanism for providers of commercial risk profiles such as World-Check. The use of these commercial risk profiles by financial institutions and others involved in customer due diligence or partner vetting for the purposes of 'on-boarding customers' is widespread across the world and has led to de-risking of persons and entities, based almost entirely on open source data held by these providers.

Lastly, the emergence of new technologies that could potentially address the de-risking issue by increasing the efficiency of and reducing the compliance costs for financial institutions, such as Know Your Client Utilities, blockchain and other mobile money with an audit trail, would need to be investigated further and with due caution for their merit in supporting the broad gamut of NPOs affected by de-risking decisions.

ANNEXE 1: BRAZIL COUNTRY PROFILE

The findings are based on interviews with NPOs, NPO umbrella organizations, philanthropic lawyers, government entities, the Central Bank, banks and the banking association. In addition, information was gathered at two workshops conducted: one on FATF and national CFT laws and regulations, and the other on the de-risking of NPOs, both organized by Conectas. All the NPOs interviewed receive funds from philanthropic grantmakers overseas and the general public. Documents on NPO laws and regulations and ways these relate to national AML/CFT laws and regulations stemming from the FATF international rules were analyzed to provide background information on the operational space of civil society.

Framework for civil society work

Civil society space in Brazil is relatively well protected and it seems fairly easy to establish NPOs. In general, regulations do not seem to prevent or restrict NPO work. NPOs are eligible to obtain one or more government designations that grant specific status or tax benefits to the entity or its funders/donors, as well as access to public funding.

There are two main legal forms: Associations and Foundations. An association is a less regulated type of NPO, being self-governed and requiring a general assembly for democratic decision making. A foundation is more regulated, and requires approval for its bylaws and its operational and budget plans from the State prosecutor's office. Foundations also have to be more transparent and are accountable to a state entity. NPOs can be categorized as an association, a foundation or a public interest organization. Those that are registered and licensed as a public interest organizations (OSCIP) fall under the supervision of the Ministry of Justice and have to comply with their transparency and accountability requirements. They are also eligible for government funding. Around 8,000 of the 380,000 NPOs in the country are registered as OSCIP.[91] Public interest organizations that invest in education, sports, health and culture enjoy tax incentives. Human rights organizations cannot obtain such tax incentives.

Religious and faith-based organizations deserve a special mention as there are a number of them across the country, especially active on poverty alleviation and social justice initiatives. Some of them combine these social welfare activities with proselytizing. They have very limited oversight and are registered as foundations or under a personal name. These are still largely part of the cash economy and are known to have been misused for money laundering purposes. They are tax-exempt.

Brazil is in a state of a deep political, economic and social crisis triggered by the '*Lava Jato*' or 'Car Wash' scandal. Large NPOs, established by officials and politicians in order to enable sub-contracts for those working on large building and

[91] As of 2014. https://www.cof.org/content/brazil

other infrastructure or service-delivery projects, have suffered from being implicated in corruption and embezzlement scandals. This, coupled with sustained coverage in the media, has caused severe damage to the reputation of all NPOs. According to the IDIS (the Charity Finance Group in Brazil), 40 per cent of Brazilians do not trust NPOs. In addition, support for human rights causes among the general public is limited, as some of these causes are perceived to be connected with the protection of the rights of criminals and those that profit from the hard work of others.

The neoliberal economic policy of the current government has created an environment in which protest against increased poverty for large sections of the population as well as the country's growing socio-economic divide is considered by the public at large as an attack on the imperative of economic growth and the general development of the country. Notwithstanding the criticism by human rights organizations and social justice movements of the current dominant political and economic discourse and policies and their implications for the poor and excluded minorities, all stakeholders mentioned the need for civil society to be transparent and accountable, and work on issues of internal governance and the professionalization of its operations. In a climate where distrust of NPOs is still widespread, civil society needs to demonstrate its worth and value to (public) causes.

AML/CFT and CT framework and risks

In Brazil, the biggest concern for state authorities is money laundering connected to the evasion of taxes. Brazil has been a member of the FATF as well as a member of the Financial Action Task Force of Latin America (GAFILAT) since 2000. It is not currently on the FATF list of countries that have been identified as having strategic AML/CFT deficiencies. However, due to a number of serious shortcomings in addressing terrorism financing, it was placed under enhanced follow-up procedures by the FATF after its third Mutual Evaluation Report was adopted in 2010. This report rated the country 'Non-Compliant' in fulfilling R8 criteria on non-profits, with the evaluators recommending enhanced oversight, and the registration and monitoring of NPOs.

Currently, there is no regulation in Brazil that singles out NPOs as a category vulnerable to fraud, tax evasion, corruption, money laundering or terrorism financing. NPOs are not obliged subjects (entities) under the AML/CFT regime. Brazil's money laundering legal framework has been updated three times since 1998, most recently by law number 12.683 in 2012, and facilitates the finding, freezing and forfeiture of illicit assets. The country has comprehensive Know Your Client (KYC) and Suspicious Transactions Report (STR) regulations as well as enhanced due diligence for politically-exposed persons.

The Council for Control of Financial Activities (COAF), an administrative agency subordinate to the Brazilian Ministry of Treasury, is responsible for implementing the AML/CFT regime. COAF is the Brazilian Financial Intelligence Unit and a member of the Egmont Group, the international network of FIUs. The institutions and persons subject to the Brazilian Money

Laundering Act (BMLA) and COAF oversight (banks, financial institutions, stock exchanges, etc.) must comply with a series of record-keeping and reporting obligations, based on COAF resolution number 10 (2001), which also sets forth the procedures to be followed by non-financial legal entities providing cash-transfer services in Brazil or abroad. The legal entities must identify their customers and maintain records of all the transactions they perform. Suspicious activities and transactions are listed, but NPO transactions or donations are not singled out.

A number of CT-/CFT-related laws and regulations have been developed in the past two years, some of which have been deemed infringements on civic space and civil society freedoms. Law number 2.016-F (2015) defines the terrorism act broadly, and provides an exception to ensure NPOs are not targeted when they organize protests. In theory, those seeking to use that law against civil society should face an insurmountable wall; practically speaking, however, there is fear that the law could be circumvented with obscure reasoning and used instrumentally by law enforcement to curb social movements.

Most stakeholders insist that these legal restrictions are a consequence of the FATF pushing the government to invoke anti-terrorism measures and restrictions in order to comply with its requirements. As terrorism and the financing of terrorism is not an issue in the country, according to stakeholders, there is little sense in pushing for restrictive CT regulation. However, the Ministry of Finance and a number of academics warn that terrorist financing should not be confused with political issues and attempts to criminalize social protests. They indicate that the requirements by the FATF for a Terrorism Financing law is an international obligation that the government has currently largely complied with. The FATF continues to urge Brazil to adapt the period for the freezing of a terrorist suspect's assets which, under the current TF law, continues to fall short of international regulation.

The mistrust in what drives AML/CFT regulation is further compounded by the fact that Brazil has not yet conducted a risk assessment for the NPO sector. Currently, the Ministry of Justice is coordinating the National Strategy for Fighting Corruption and Money Laundering (ENCCLA), which involves more than 70 government bodies engaged in the fight against those crimes. The National Risk Assessment has been a part of the ENCCLA mandate in the last few years, and NPO-related aspects should also be included in this.

Financial services legislation and its bylaws include specific reference and obligations to prevent ML/FT, and oblige credit and financial institutions to develop in-house policies/procedures. The Brazilian Central Bank (BACEN) published a series of norms establishing that all financial institutions under its regulation must: keep customer records updated; have internal controls in order to verify either the appropriate customer identification, the compatibility between corresponding resource movement, or the economic activity and financial capacity of users of the national financial system; keep records of operations; inform the Central Bank of Brazil of suspicious situations; promote the

training of its employees; and, implement internal procedures to detect suspicious operations.[92]

The role of the Central Bank then is to assess the internal controls of each supervised institution in order to prevent illegal financial trades, money laundering and the funding of terrorism. The aim of the supervision is to verify the adequacy and quality of the procedures implemented in order to prevent the financial system from being used for illegal practices and to guarantee the observance of law and regulation in activities undertaken. Though supervision on the prevention of ML and the combating of TF are included in the Central Bank supervisor's manual, procedural details are not listed. It appears that the Central Bank is not interested in specifically regulating the NPO sector – their interest in anti-corruption is broad and NPOs are treated like any other sector prone to misuse. Private banks have AML/CFT policy documents that set out a broader compliance framework but do not describe actual risk assessment or risk management situations.

According to the Central Bank, KYC principles for all legal entities have to be applied more stringently due to the risk of money laundering (although not yet identified in its scope within the national risk assessment). The Central Bank sees the risk as being concentrated in smaller NPOs, especially those that have been used for illicit transactions in the past. They also point to church payments and fundraising as being problematic, given there is no oversight of religious organizations in the country. The growing money flows, including those from abroad, to and from evangelical churches for 'good causes' has raised the regulator's concern. The mistrust of NPOs, especially those financed by government and implicated in corruption and fraud, has led to them being considered medium- to high-risk among certain banks, based on the filters banks use for on-boarding NPOs and for monitoring their transactions (again, not based on a national risk assessment).

Under Brazilian law, financial institutions are required to maintain the confidentiality of their active and passive operations as well as of services provided (law number 105/01). However, and in line with FATF requirements, the law also establishes that the confidentiality of those records may be lifted in order to investigate criminal activity, especially crimes linked to or involving terrorism or money laundering. In addition, the law establishes that financial institutions will not be in violation of their confidentiality obligations if they provide the relevant authorities with transactional or financial information in connection with criminal activities or violations of administrative obligations. There is no such legislation in place for the protection of the users of financial services or any dispute-resolution bodies for clients of financial institutions.

NPOs' access to financial services

The Central Bank (BACEN) and the Brazilian Association of Banks (FEBRABAN) work closely together to improve the compliance

92 https://www.bcb.gov.br/ingles/fis/supervision/moneylaundering.asp

policies of financial institutions. A new resolution adopted in 2017 mandates that all FIs must maintain a compliance policy compatible with their business and ensure, in particular, the effective management of compliance risks. FIs are obliged to create exclusive and independent channels for reporting evidence of fraud and illicit acts. Banks and other financial institutions have to submit reports on the effectiveness of their compliance policy to the Central Bank. The new resolution does not list the sanctions applicable in case of non-compliance with the rules, but these will surely come. And because the resolution is applicable to companies with BACEN's authorization to operate, it is possible that these sanctions may even include suspension of this authorization.[93]

No specific Know Your Customer and Due Diligence regulations have been issued by the Central Bank for NPOs, with regulations being uniform for all clients requiring Central Bank guidance and strict controls over exchange transactions. The details of KYC implementation are left to the banks. Large retail banks use commercial risk profile databases provided by local and international companies such as World-Check for NPO on-boarding and for the monitoring of NPO transactions.

According to some stakeholders, there is a noticeable trend of FIs refusing to take on NPO clients. The reasons given include the difficulty in checking the status of and, therefore, the reliability and legitimacy of an NPO. According to FIs, it is very easy to create an NPO in Brazil. And opening an NPO account appears to be easier in a bigger city and on 'the high-street' than in a rural environment. NPOs in Brazil, it is believed, can always access a bank account with the help of a lawyer. In addition, it seems that the more income an NPO has, the more willing an FI is to serve the NPO, as with other commercial private entities. In general, FIs are not familiar with NPO activities and do not distinguish in their service delivery between NPOs and private companies.

Charitable giving faces issues with regard to 'boletos', the preferred cash payment method used in Brazil. The boleto (printed or an image) has a barcode, corresponding serial number, transaction amount, issuing bank code, customer information, description, and expiration date, with the transaction amount listed on the boleto able to paid at any period before and up to the expiration date. Boletos are widely used for charitable donations in Brazil. FIs do not want to process these any longer in order to prevent fraud, claiming that the public is able to give to charitable causes via internet/mobile banking or can present themselves with an identification document to an FI in order to make a transfer. Charitable giving in the country is thus being made more difficult, especially given 40 per cent of it was previously done through boletos. The big corruption scandals are leading to more controls being imposed by banks but there are no specific conditions for charitable giving under current Central Bank regulations.

The corruption scandals have led to a stronger regulatory environment within FIs, which warn that controls on clients will only

[93] https://www.tmf-group.com/en/news-insights/articles/2017/october/brazil-central-bank-rules/

increase in the future. Donations for NPOs fall under these controls, as there is no exemption for NPOs, with some FIs considering NPOs more in need of scrutiny because of the corruption scandals they have been implicated in (whereby public funds were laundered for private gain through NPOs). NPOs most controlled by FIs seem to be the ones regulated by the Ministry of Justice (OSCIP), given their link with government and their possible access to government money.

De-risking of NPOs

A local human rights defenders' foundation, supported by international donors from the US and Europe, had problems with the state bank which, after a long intake period, finally concluded that it had no commercial interest in them. The foundation's financial officer made an effort to explain their work various time during the onerous on-boarding process which lasted over six months, but to no avail. The organization was interested in opening an account with this bank as it was supposed to offer a favourable package for their type of foundation. No written response on the refusal to open an account was forthcoming. The foundation was able to find another bank to disburse local grants and has to sometimes use registered intermediaries to pay unregistered local grassroots partners in cash. The state bank had asked for detailed information about grantees in remote rural areas, which the organization refused to give. The cash payments have also caused problems with one of the foundation's grantmakers who was concerned about the lack of transparency in the re-granting system. The foundation has had problems with yet another bank, which put a ceiling on the amount of domestic cash transfers without providing any reason for doing so. Additionally, the organization has had problems with a donation from a philanthropic foundation in the US, with their bank requiring detailed information from the donor, including the names and addresses of the trustees.

A well-known non-governmental organization working to protect the environment, part of an international NPO, underscored the growing problems NPOs are facing in accessing financial services across the continent. While the environment in Brazil is largely conducive for international NPOs incorporating a local NPO or setting up a local branch, the situation in Colombia and Chile with regards to the de-risking of NPOs is, to their knowledge, worsening. The organization has bank accounts with four retail banks, a strategic choice to mitigate potential risks and benefit from the best services on offer. Opening different bank accounts, however, would be more difficult in the current climate where NPOs are looked at with suspicion in the wake of the 'Lava Jato' scandal. The organization does not accept government money, and is financed by the public (70 per cent of their income), foundations and philanthropists. According to them, the so-called Significant Well Established Entities (SWEES) in the NPO sector, e.g., the likes of Oxfam or Plan International Brazil, face no problems in accessing financial services, enjoying as they do the trust of the public and of financial institutions. This is not the case for NPOs not supported by the public or those who have received large sums of money from the government, most often governmental NGOs or GONGOs.

A foundation lawyer stressed that de-risking does occur but can be avoided if associations or foundations deal with banks more open to on-boarding non-profits. NPOs have to be cognizant that on-boarding requirements by banks have become more stringent in the current climate post the 'Lava Jato' scandal. Bank managers are nervous about KYC requirements as they relate to NPOs, not knowing exactly what type of customer they are dealing with. In general, head offices of banks will on-board NPOs if the organization can show provenance of funds received, type of activity and who the beneficiaries are. The lawyer underscored that, in his opinion, banks are over-asking when they wanted to see the personal data of trustees of foreign funders.

ABCR (The Brazilian Fundraisers Association) is an organization working on an enabling financial, fiscal and legal regime for charitable giving. They are in a running battle with banks on the 'boleto' issue: boletos being the preferred cash payment method used in Brazil. The boleto (printed or an image) has a barcode, corresponding serial number, transaction amount, issuing bank code, customer information, description, and expiration date, with the transaction amount listed on the boleto being able to paid at any period before and up to the expiration date. Boletos are widely used for charitable donations in Brazil. FIs do not want to process these any longer in order to prevent fraud, claiming that the public is able to give to charitable causes via internet/mobile banking or can present themselves with an identification document to an FI in order to make a transfer. Charitable giving in the country is thus being made more difficult, especially given 40 per cent of it was previously done through boletos. The big corruption scandals are leading to more controls being imposed by banks but there are no specific conditions for charitable giving under current Central Bank regulations. Negotiations with the Central Bank and the Association of Banks to retain the boleto system have failed so far. ABCR and others note that the ambition of the Central Bank to abolish boletos is part of a broader plan on the part of the regulator, with support from the financial sector, to digitalize the financial services sector and couple data obtained by banks on customers to other data sets of citizens in order to surveil and control the behaviour of citizens and other customers, including charities. In this way, government entities responsible for dealing with financial and other types of crime would be able to improve their monitoring and surveillance and, ultimately, the prosecution of perpetrators.

Recent corruption cases involving NPOs, a number of which are connected to 'Operation Lava Jato', have made banks more cautious about providing services to NPOs. Both the Central Bank and BACEN have issued stricter guidance on KYC and Due Diligence for the on-boarding of customers and for transaction monitoring, though there is no separate policy per se for NPOs. Banks, through their own risk analysis, are left to conclude that NPOs are high risk, preventing their on-boarding as customers and leading to onerous requests for information on funders and beneficiaries. All stakeholders spoken to stressed that the risk for terrorism financing through NPOs in Brazil is not existent, unlike the greater risks of fraud, corruption and money laundering.

While lawyers of and advisors to foundations stressed that all NPOs in the country are able to open a bank account, receive funding and transfer cash domestically and internationally, especially when they avail of legal support, a number of NPOs interviewed for the study were less optimistic given they were affected by the "erratic behaviour of banks".

Banks would like to see a repository for NPOs with some baseline data, which would guarantee that everyone in a business relationship with that NPO has access to the same accurate data about the NPO. The risk of providing financial or other services to the NPO would then only have to be determined once, with an approval given through a sealed mechanism, akin to a blockchain technology. In this way, the NPO's compliance to existing regulations would apply to all jurisdictions where it is involved in cash transactions.

Recommendations

- The Central Bank and the Security and Exchange Commission have a strong programme on financial inclusion called Financial Education Program Agenda BC+. However, the policy incoherence between the financial inclusion programme and the AML/CFT rules stemming from the FATF, which are undermining financial inclusion objectives, have not been adequately considered. The Central Bank's Department for the Promotion of Financial Citizenship, responsible for the coordination of financial inclusion and of impact assessment, is open to a dialogue with networks like Conectas about financial access problems facing NPOs.
- The committees under ENCCLA, the body in charge of the national risk assessment (NRA) on ML/TF, currently comprise governmental institutions. NPOs could be invited into the process for policy input and provided with the space for dialogue on matters related to the risk assessment and its follow-up activities. In view of the upcoming FATF evaluation in 2020, it would be prudent for ENCCLA and the Ministry of Finance to engage with NPOs on the NRA, preferably through a sectoral risk assessment which NPOs could provide input to.
- NPOs and experts from other countries could provide capacity building on ways to carry out an NPO NRA related to AML and CFT risks.
- Currently, donations are seen as payments, not as a special type of financial transaction. Some stakeholders argue that this should be changed, and would like to see the development of charity banking in the country. This would ensure that charities had a special position in terms of receiving donations and taxes, based on specific conditions. This has to be seen as part of a larger ambition expressed by organizations such as IDIS (Institute for the Development of Social Investment), ABCR (The Brazilian Fundraisers Association) and others to further develop philanthropic and charitable giving in Brazil, including for causes that are politically sensitive, such as human rights, environmental rights and rights for ethnic minorities.
- FIs would like to have a better understanding of the risks associated with banking NPOs and are open to discussing this with NPOs, the Central Bank and the Banking Association as part of a stakeholder roundtable.

ANNEXE 2: MEXICO COUNTRY PROFILE

This country profile is based on interviews with NPOs active in the sphere of development and human rights, and with banks as well as with the central bank. A workshop with members of Unidos Por Los De Las Organizaciones De La Sociedad Civil, UnidOSC, a platform comprising non-profit organizations, foundations, academics and researchers with a collective interest in protecting the operational space of civil society through engaging with policymakers and politicians on laws, regulations and policies in the areas of tax, NPO licensing and registration, and AML/CFT, provided additional information. The NPOs interviewed for the study all receive grants from abroad, mostly from the US and Europe. Documents on NPO laws and regulations and ways these relate to national AML/CFT laws and regulations stemming from the FATF international rules were analyzed to provide background information on the operational space of civil society.

The framework for civil society work

Mexico has a long tradition of charity that has expanded during the last 20 years to include the environmental and human rights fields. However, tax incentives are limited to only a few charitable purposes which can be defined as apolitical, despite the emergence of organizations in fields of public interest, which have influenced public policy and have had significant impact. In general, regulations on civil society do not seem to hinder NPO work.

There are two main legal organizational forms for NPOs in Mexico: Civil Associations (ACs) and Private Assistance Institutions (IAPs). According to the Civil Code, an AC is formed by two or more persons who associate to perform a common purpose which is not primarily economic in character. An IAP is created to perform charitable services with private assets according to the State Laws on Private Assistance. There are other social self-benefit organizations such as cooperatives, neighbourhood groups, labour unions, and chambers of commerce that are regulated by corresponding laws. IAPs are registered with and supervised by the Private Assistance Board, an official body. IAPs and ACs must register their bylaws with the Public Registry of Property and the Federal Taxpayers Registry.

The most important sources of income for NPOs are self-generated sources, private funds, governmental subsidies and, to a lesser degree, international funding. To be eligible to receive government funds, an organization must be listed in the 'Registry of Civil Society Organizations' (CLUNI) created by the 2004 Federal Law for the Promotion of Activities Undertaken by Civil Society Organizations. Among other requirements, organizations must engage in charitable purposes, or in activities such as environmental protection, support for the creation and strengthening of civil society, human rights, education, health, consumer rights, or sports. NPOs can also apply and obtain approval from tax authorities on a case-by-case basis to be eligible for income tax exemption and to receive tax-deductible donations. However,

some burdensome reporting requirements have a negative impact on NPO activity.

The transparency of NGOs in Mexico is an issue due to the corruption and tax-evasion scandals associated with government-related NPOs. Stakeholders view this issue as one of the drivers for the risk-averse attitude of banks and other financial institutions towards NPOs.

AML/CFT and CT framework and risks

Mexico is a member of the Financial Action Task Force of Latin America (GAFILAT), an FATF-style regional body. Mexico is not currently on the FATF List of Countries that have been identified as having strategic AML deficiencies. However, the latest FATF Mutual Evaluation Report of 2018 rates the country as being Partially Compliant on R8, with recommendations including the need for outreach to NPOs on CFT in the context of Recommendations 1 and 8. The report also questions the merit of classifying the NPO sector as a Designated Non-Financial Business or Professional (DNFBP) entity in light of the risk-based approach to detecting terrorism financing in the sector.

NPOs are obliged subjects (entities) under the country's AML/CFT regime, i.e., they have to report suspicious activities concerning money laundering and terrorism financing to the Financial Intelligence Unit. The FIU of the Ministry of Finance and Public Credit (SHCP) is a central governmental unit responsible for receiving, analyzing and disseminating information concerning suspect ML/TF transactions. Moreover, the FIU is responsible for the implementation of mechanisms to prevent, detect and deter criminal activities established in the Federal Criminal Code, such as transactions involving resources that are illegally obtained, and national and international terrorism and its funding.

Mexico's Federal Act for the Prevention and Identification of Operations Undertaken with Illegal Funds includes a catalogue of activities deemed vulnerable, i.e., activities whose very nature makes them susceptible to being used as a means for the commission of ML/TF. Since 2013, it has classified donations as a "vulnerable activity". NPOs are required to register with the oversight body, provide information about transactions above a certain threshold, provide information about beneficial owners of transactions (including donors) and activities, keep a record of information for 5 years, etc. The receipt of grants by NPOs has two thresholds, the first concerns the identification and compilation of information about the grantmaker, but does not force NPOs to report this information to the government unless the grant surpasses the limit set at 1,605 days of minimum wage for Mexico City, which equals to 121,161 pesos (around USD 6,400); the second threshold is 3,210 days of minimum wage which corresponds to 242,322 pesos (around USD 13,000) which, once surpassed, obliges organizations to deliver the requested information to the corresponding authorities. The information must be sent through a specific online portal for the prevention of operations with illicit resources.[94] There are steep administrative and criminal sanctions for non-compliance. Stakeholders view this law

[94] Website: https://sppld.sat.gob.mx/pld/interiores/donativos.html

as a part of the country's international commitments and as a response to the recommendations issued by the FATF during the earlier 2008 Mutual Evaluation.

Anti-money laundering legislation raises concerns among NPOs due to its regulatory impact as the legislation considers donations a "vulnerable activity" and presents challenges for organizations trying to comply with its obligations. One of the main concerns and obstacles has been the type of information that is required from NPOs. The recipient of the grant must report the amount received, the purpose of the donation, and the organization making the grant, along with delivering a copy of the identification of the legal representative. The latter has been especially complicated, with some organizations abroad not eager to deliver the information, considering it a violation of the right to privacy in some cases.

The 2016 National Risk Assessment looked at risks concerning obliged entities, including the receipt of donations, which was deemed to be Low/Medium risk. An issue with cash donations to charities run by 'Narcos', which have social goals at the local/community level, was detected in a few cases. The government's National Risk Assessment mentions the lack of evidence for terrorism financing, recognizing the non-existence of this type of risk as related to NPOs. However, it is not clear whether the insertion of donations as a vulnerable activity within the AML framework was based on the results of any domestic risk assessment conducted prior to 2016. For example, the GAFILAT AML/CFT typology risk reports as well as their guidance for model AML regulations do not include non-profit activities, donations or organizations as vulnerable to ML/TF. Such blanket inclusion of donations then as a vulnerable activity sends a signal to the financial sector (and others) that NPO operations are specifically vulnerable to AML/CFT, increasing their risk profile which is then determined, as of 2016, to be low/medium.

In addition, FATF AML Recommendations (namely Recommendations 10, 11, 20, 22, 23) are explicitly targeted towards a narrowly-defined group of entities – a country's financial institutions, money transfer services, casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, accountants, trusts and company service providers, also known as Designated Non-Financial Businesses or Professionals (DNFBPs). NPOs at large are not included in this group, as there is no concrete evidence or research that shows that the non-profit sector is more vulnerable to ML abuse as a whole. In addition, such reporting obligations are not suitable for NPOs because the prescribed provisions are clearly designed for for-profit and professional entities (i.e., the majority of provisions deal with 'customers'). It is therefore unnecessary to include civil society at large in AML obligations as it clearly goes beyond what the FATF standards prescribe.

Moreover, the inclusion of all NPOs in AML or CFT legislation is contrary to the principle of the risk-based, targeted approach required by FATF Recommendations 1 and 8. Reporting obligations which make no distinction between various NPOs breach the requirement of FATF's Recommendation 1 which asks governments to: "*identify, assess, and*

understand the money laundering and terrorist financing risks for the country" and "*based on that assessment...apply a risk-based approach (RBA) to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified*." Moreover, R8, which refers to NPOs specifically, is imbued with the risk-based approach, with the FATF requiring that institutions not view all NPOs as a risk.

The inclusion of all NPOs in AML and CFT obligations is contrary as well to the principle of effectiveness under the new FATF evaluation methodology on AML and CFT compliance, also applied by GAFILAT. The methodology, in force since 2014, includes an effectiveness assessment, in addition to the assessment of the technical compatibility of a country's legal framework. The effectiveness assessment looks at whether a risk-based approach and targeted measures have been applied to the NPO sector, as well as at the non-obstruction of legitimate activities of the sector. Therefore, the inclusion of AML/CFT obligations for all NPOs without a targeted, proportionate approach or with no prior risk assessment of the NPO sector will decrease the likelihood of a positive evaluation for the country with regards to R8 on non-profits. This has already been shown to be the case in reports for evaluations undertaken by the FATF during 2014, 2015 and 2016.

The recently-published FATF Country Evaluation (January 2018) commends Mexico for having a good system for tackling money laundering and terrorism financing risks. However, with regard to NPOs, it questions the effectiveness of trying to determine terrorism financing risk by including NPOs in the DNFBPs category*: "The NPO sector is broadly supervised given its classification as a DNFBP, though risk-based, targeted monitoring of the sector has yet to be fully implemented. Authorities have identified higher risk entities for targeted outreach and monitoring through a 2017 risk assessment of the sector and are revising regulations to fully implement FATF revisions related to NPOs".* The evaluators state: "…..*that Mexico has yet to put in place a risk-based system for targeted monitoring of the NPO sector though authorities have taken the initial step of conducting a revised risk assessment and are reviewing NPO regulations to advise accordingly"*. In more specific terms the evaluation concludes that:

"At the time of the on-site (2017), authorities had not yet implemented a targeted approach to oversight of or outreach to the NPO sector consistent with recent changes for R. 8. However, authorities noted plans to revise the regulations for NPOs in light of these changes and have taken steps toward implementation, including conducting a revised sectoral risk assessment in February 2017 in order to identify those organizations that are most at risk. During this revised assessment, the FIU assessed approximately 13 000 of the 125 000 NPOs that fall under the FATF definition (using suspicious activity reports reporting on those entities), and identified a small sub-set of organizations that are most likely to be abused based on several factors in the FIU TF risk model, including the NPO's ability to conduct international wire transfers and the geographic location of the wire recipient. Authorities believe that the

revised assessment will strengthen the country's ability to mitigate TF risk in the NPO sector by allowing them to further prioritize outreach and monitoring".[95]

As in 2008, the country received a Partially Compliant rating on R8 and has to improve on its outreach to NPOs concerning TF risk and develop regulations that are risk-based and in line with the revised R8. The ongoing sectoral risk assessment is considered to be a significant step in the right direction in terms of a targeted outreach to NPOs vulnerable to the risk of terrorism financing. A representative from UnidOSC (Unidos Por Los De Las Organizaciones De La Sociedad Civil) has been invited by the FIU to provide comprehensive information and an analysis of the situation from an NPO viewpoint in order to help finalize the assessment.

There is no specific CT/CFT legislation in Mexico. The 2014 amendments to the Federal Penal Code, the Federal Criminal Procedure Code, the Organized Crime Law, the Federal Fiscal Code, the Asset Forfeiture Law, and Constitutional Implementing Legislation were all aimed at strengthened Mexico's legal framework to address acts of terrorism and sanctioning the freezing or forfeiture of terrorist assets based on domestic and international intelligence sources. Definitions of terrorism, international terrorism and funding of terrorism in the Federal Penal Code do not seem to impede the work of civil society organizations.

There are numerous financial laws that impact data protection, including the Banking Law, the Law for the Transparency and Order of Financial Services, the Investment Funds Law, and the Law to Protect and Defend Financial Services Users. Data protection can be stripped away in a number of pre-defined situations, including when there is a suspicion of criminal/terrorist activity. The possibility for the international sharing of data upon prior consent is also allowed for. Additionally, the AML law provides that the disclosure of information in official investigations does not violate any legal, professional, tax, bank, fiduciary or other privilege. Data subjects have the right to object to the processing of their personal data for purposes beyond what is necessary for the origination and maintenance of the relationship with the data controller.

Some financial service legislation and bylaws include specific reference and obligations to prevent ML/TF and oblige credit and financial institutions to develop policies/procedures, especially around Know Your Customer (KYC). Several private banks have AML/CFT and KYC policies or documents that set out a broader policy and compliance framework, but do not describe actual procedural aspects of risk assessment and management decisions concerning ways to deal with risks relating to NPOs and other customers in publicly-available documents.

There is a National Commission to Protect and Defend Financial Services Users with the purpose of promoting, counselling, protecting and defending the rights and interests of the users of Financial

[95] FATF MER Mexico, January 2018, http://www.fatf-gafi.org/countries/j-m/mexico/documents/mer-mexico-2018.html

Institutions, to arbitrate on differences in an impartial manner and to provide for equity in the relationship between them. The National Commission is vested with powers to act as a conciliator between FIs and its users, with the purpose of protecting the interests of users. There is a detailed process in terms of submitting claims and the Commission can issue penalties and request remedial measures from the FI. Any claim that satisfies the requirements, by its sole filing, shall interrupt the prescription of any applicable legal actions, until the proceeding ends. It is not known whether the Commission has had to deal with any NPO de-risking cases.

NPOs' access to financial services

There are no specific rules, other than the AML Law, on NPOs and their access to financial services. The Central Bank is entitled to issue regulations for the purposes of monetary or exchange control, the sound development of the financial and payment systems, and the protection of the public interest.

Additionally, the National Banking and Securities Commission, an independent agency of the Secretariat of Finance and Public Credit, has the competence to supervise and regulate the entities that comprise the Mexican financial system with the objective of pursuing its stability and establishing correct functioning, as well as of fostering the healthy development of the system and protecting public interest. The Commission's main interest is the protection of rights such as inclusion, non-discrimination, equal treatment and adequate policies for the growth and stability of the system as a whole. It looks out for the protection of users' interests through the supervision and regulation of financial institutions and offers services to advice and support the defense of users´ rights. Again, it is not known whether the National Banking and Securities Commission has been confronted with cases of NPO de-risking.

Several private banks have AML/CFT, and KYC policies or documents, along with published AML/CFT (Wolfsberg) questionnaires. These documents set out a broader policy and compliance framework but do not describe actual risk assessment/management or internal bank instructions on dealing with NPO customers.

The 'Cajas de Ahorros', known as 'SCAP', are a specific type of entity regulated under the National Banking and Securities Commission, with significant differences in operation from a commercial FI. A SCAP is a society, with the persons or institutions comprising it receiving a certificate stating that they are a partner, allowing for participation in decision-making processes, especially in general assemblies, and providing for the right to be permanently informed about its financial status. SCAPs provide a financial inclusion option for communities and small non-profit organizations located away from financial centres, an option which was recommended by representatives from the Central Bank. Unfortunately, only SCAPs with over 1,900,000 pesos in savings are subject to regulation, which in turn makes most entities highly vulnerable. Once a society is regulated it falls under the protection of the Institute for the Protection of Savings, which guarantees the savings of users but only for those financial

institutions that comply with their criteria. NPOs, given their non-profit nature, can become part of a SCAP. There is already an example of an association of pilots creating a SCAP for their members and operating legally.

There is evidence of the de-risking of NPOs in Mexico. After sizeable fines on FIs in recent years in relation to transactions between Mexico and the US, a number of FIs have withdrawn from their correspondent banking relationships in the country. This has also led to suspicions about certain clients, and even though the number of NPOs implicated in money laundering may be scarce, several banks have put measures in place that require either additional information from/on NPOs or that unofficially close down services to NPOs altogether. The Central Bank has responded by creating 'SPID', a domestic electronic system which operates as a clearing house, enabling the transfer of US dollar payments. The system is also intended to impose enhanced AML obligations.[96] However, the AML burden of knowing what NPOs are doing and where the problematic areas are, etc. still falls on the FI.

For NPOs, it has become more difficult to transfer money, especially to rural areas and to smaller grantees. An FI representative noted that it was official policy within the bank to de-risk any NPO client falling below an annual threshold of USD 2 million. Smaller NPOs with existing accounts are obliged to have a minimum of USD 600 in their checking account at all times, thus dissuading them from holding an account. The bank representative emphasized the complex legal landscape the bank has had to navigate as a consequence of global AML/CFT rules and sanctions policies in the five jurisdictions where the bank has offices. The rise of compliance costs as a consequence of these rules and policies outweighs the FIs' risk appetite for NPOs and other less profitable customers. A possible strategy for NPOs, according to this banker, is to bundle together their accounts in order to arrive at a better negotiating position with the FI. This, however, puts a strain on NPO independence and is not a sustainable solution. Moreover, the NPO holding the bank account would take on the risk of the smaller grantees by acting as a shield, heightening its own risk and going against the objective of empowering small, grassroots and especially indigenous and women's organizations.

Financial inclusion at all levels and for all institutions is an important issue for the government. However, it is focused more on natural persons and does not take the issue of the de-risking of smaller clients (such as NPOs) into account. Representatives from the Central Bank commented that small NPOs in general would only require access to the most basic checking account for their activities, which should not be problematic for local banks to provide. Banking with the Cajas de Ahorros could be an option for NPOs if de-risked by banks.

De-risking of NPOs

A mid-sized NPO working on women's empowerment in disenfranchised

[96] https://www.swift.com/node/35121

neigbourhoods experienced a lack of understanding on the part of their local bank on how NPOs operate and the ways in which the organization was aiming to empower women and communities. They tried to open an account in a larger bank, but never got a formal explanation on the refusal. Another large bank notified them that they were not accepting any new clients. They eventually succeeded in opening an account with a small, newer bank.

An NPO registered as an AC has experienced operational problems with all of their three large, international banks. The NPO receives millions of US dollars in grants from governments, foundations and international NPOs in the US and Europe. And while it does not experience problems with receiving grants from outside the country, it faces enormous challenges with domestic cash transfers. Up until five years ago, it took the organization half a day or so to deal with transactions within Mexico, now it can take up to one week to enable similar transactions to their grantees. All three banks ask incrementally more, as well as repeated, questions about the organization's grantees. To the NPO, it feels as though the banks need to be assured of a certain level of comfort before each transaction is carried out. The designated finance person at the NPO suspects that AML rules from the regulators as well as the high-profile corruption cases and the problems with money laundering and drug cartels, facilitated in part by banks, have made the banks over-cautious in their approach.

The organization's small-scale partners and beneficiaries are 'ejidos', organized farmers' legal entities within Mexican Agricultural Law. Bank are unwilling to offer these ejidos an account in which to receive funds, a necessity in order to receive tax deductions for this type of development-related work. To enable project implementation, the NPO has then had to conduct banking activities and purchase agricultural equipment and resources for the ejidos, making project activities much more expensive and ultimately less transparent, not to mention also discriminatory towards entities like the ejidos. Banks do not explain the rationale behind their decisions not to bank ejidos. It is worthwhile mentioning that the NPO receives a sizeable grant for work with the ejidos from an international banking foundation. The bank itself with whom the NPO holds an account seems unable to help in solving the problem with transferring funds to the ejidos. The NPO noted they could lodge a complaint with the National Commission to Protect and Defend Financial Services Users, but did not want to risk distorting their relationship with the bank.

Another NPO, a sub-granter in the field of human rights and women's empowerment, has experienced problems transferring funds to their beneficiaries. Discrimination on the part of the bank was noted, in terms of onerous information requirements to prove that sub-grantees were "bankable", when the transfers were intended for indigenous groups. The finance staff of the NPO estimate that in the past three or four years, work relating to bank requirements concerning grantees and cash transfers has increased almost hundred-fold.

UNICEF funds a small foundation, a member of an US–Mexican network of foundations, working with Mexican migrant returnees,

especially children. This foundation had problems with an international bank, which required it to have USD 600 in its account at all times. In addition, the bank wanted proof of rental payments and of its registration as an NPO, along with proof of sources of funding, requiring the submission of funders' IDs. They have explained to the bank that a number of these requirements take time to fulfil but the bank has not reacted so far. Meanwhile, the account is non-operational. The foundation is currently banking with a smaller bank more conducive to their type of work.

The overall picture is that NPOs in Mexico working on development and human rights are able to access financial services though they need to make a greater effort during the on-boarding process and in getting money transactions across to their partners within the country than they did five years ago. The NPOs interviewed for the study generally do not experience difficulty with receiving grants from outside the country, with the notable exception of one small NPO. This NPO has experienced problems with a large international bank that has ceased to operate their e-account and insists on obtaining the IDs of their US and other funders. This is the same bank, the only one among all the banks in Mexico and Brazil interviewed for the study, that admits to having a de-risking policy in place for NPOs whose compliance costs in terms of the extended due diligence and KYC procedures of the bank are considered too high. NPOs and other clients having less than USD 2 million in their accounts are de-risked as a rule because of high compliance costs for the bank across five jurisdictions, as well as their (perceived) high risk and attendant low profit margins.

NPOs that re-grant to women, indigenous and farmers' groups are flagging up the onerous requirements by their banks when transferring grants, such as the submitting of private information on every member of the group. This is considered unjustified in light of the purpose of development- and human-rights-related work, which has a strong element of empowerment and requires careful handling of the personal data of beneficiaries. The current practice of NPOs being forced by the bank to take on the responsibility for the ultimate beneficiaries of the grant in terms of risk is not only a financial and administrative burden for the NPO but counterproductive to the financial inclusion ambition of the Mexican government and its Central Bank.

Recommendations

- Since the 2016 National Risk Assessment put NPOs at low/medium risk, it is not clear what the basis was for including "donations" as a vulnerable activity and therefore, for including NPOs in the AML legal framework as obliged entities. The government might consider amending the AML law to reflect the latest risk assessment for donations and NPOs. However, if there is a need to monitor and conduct additional oversight of NPO transactions in light of combating ML, this could be done by introducing oversight and reporting requirements in the basic NPO legislation or with less burdensome requirements than currently in place. There should be a continuous dialogue on regulations and policy aspects that allow NPOs to continue fulfilling their obligation while remaining compatible with their activities. Improving the language of the reporting forms in order to correspond more closely with NPO

activities, is one example. Additional proposals include: eliminating the requirement for information that violates the right to privacy of the individual who is the legal representative of the donor; applying a proportionality criteria to sanctions (which is currently not the case) where there is a lack of compliance on information delivery; eliminating the requirement for reports when donations do not exceed the established limits, etc.

- 'Cajas de ahorro' seem to be less restricted in their financial work and could be explored as a way to avoid de-risking, especially in rural areas. These cajas offer limited services to clients but would suffice for local community groups that take part in projects supported financially by re-granting or intermediate NPOs.
- Public entities such as the National Banking Commission and the National Commission to Protect and Defend Financial Services Users must be integrated into the dialogue on de-risking in order to mitigate the financial restrictions NPOs face. These entities might also be the platform where customers seek potential redressal for their grievances on de-risking issues. Much would depend on these entities themselves or on a change of legislation as to whether they would/could use their competence to provide recommendations to or even sanction FIs that are discriminating against NPOs.
- There is clear interest within the Financial Intelligence Unit to receive advice from NPOs in order to improve the current NRA with regard to NPOs. This could help with further dialogue on the legitimacy of placing NPOs in the obliged entities category, having to report suspicious money laundering transactions to designated authorities. The FATF AML/CFT Recommendations do not consider NPOs to be obliged entities and an amendment to the existing law might help correct the perception that NPOs are connected to financial crime and considered high-to-medium risk for this type of criminal activity.
- The Central Bank has a strong financial inclusion policy relating to individuals and is very active in the Global Partnership for Financial Inclusion and the UN Secretary General's campaign on financial inclusion. They would be interested in learning about the de-risking experiences of NPOs and, in particular, the way that these practices lead to a situation whereby the socio-economically deprived, and indigenous and rural communities are becoming unbankable.
- UnidOSC and their current strategic work on enabling civil society space, which includes addressing financial restrictions for NPOs, is well placed to take on a leadership role on raising further awareness on the relationship between the FATF AML/CFT rules and de-risking, engaging government, regulators and banks as stakeholders to identify solutions for NPOs having difficulties accessing financial services.

ANNEXE 3: IRELAND COUNTRY PROFILE

This country profile is based on interviews with NPOs, banks, Ministries, the Charities Regulator and academics. Two roundtables were organized to validate information obtained in the interviews; one hosted by the Irish Council for Civil Liberties and the other by the Ministry of Finance. In addition to the in-person interviews, these roundtable meetings were useful to capture the practices of and perceptions on de-risking in an interactive setting. The relevant stakeholders included representatives of NPOs active both within the country and in international development, the Ministries of International Development, Finance and Foreign Affairs, and the Charities Regulator. Documents on NPO laws and regulations and ways these relate to national AML/CFT laws and regulations stemming from the FATF international rules were analyzed to provide background information on the operational space of civil society.

Framework for civil society work

The NPO sector in Ireland is regulated mainly by the legal framework on charitable organizations. These are organizations that must engage in solely charitable purposes for the public benefit if they seek to benefit from tax exemptions. A charity can take several legal forms, companies limited by guarantee (CLGs) being the most popular. CLGs are a public company with a separate legal personality to its members, whose liability is limited to the amount they undertake to contribute to the assets of a company. Another, historically preferred, structure for charitable organizations is the charitable trust, established by a deed of trust which places assets owned by the trustees in a trust for charitable purposes. Unlike CLGs, these trusts do not have a separate and distinct legal personality from their trustees. The third option is to establish unincorporated associations that have no separate legal identity from their members. They are usually established by rules or a constitution, and are no different from an unincorporated club in the Irish law.

The legal tax framework provides a number of significant tax exemptions for charities. Charities must apply separately to the Irish Revenue Commissioners for registration, and comply with their assessment procedure to obtain a tax exemption status. Separate from and additional to the provision for charities to be exempt from having to pay certain taxes, the tax code provides for recognized charities to benefit from tax relief on donations. Besides eligible charities, bodies set up for the promotion of the observance of the Universal Declaration of Human Rights or the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms are entitled to a favourable tax status.

Given the country's population, Ireland is a significant net contributor to development assistance, with a large development and humanitarian sector in relation to the country's size. Currently, Irish development aid focuses on reducing hunger and building resilience, inclusive and sustainable economic growth and better governance, human rights and

accountability. More than 70 per cent of the charities derive their income from local, national and EU grants and contracts, representing more than 50 per cent of the sector's income. [97] [98]

In general, the charity legal framework does not impede NPO activities. However, there have been complaints over the Electoral Campaign Act, amended in 2001 to cover political activities by non-profit organizations, which seemingly impacts the operational space of civil society in Ireland. The amendment was motivated by fears of external influences on Irish politics. The legislation requires non-profits "engaged in political activities" to register with the Electoral Commission; forbids them from receiving funding from abroad; bans anonymous donations above EUR 100; and prevents them spending more than EUR 2,500 on political campaigns or activities. Recently, there has been an increased number of complaints submitted to the regulator against NPOs working on political issues. Some of these appear vexatious, designed to undermine the credibility and space of the NPO in question.

In addition, the current climate for NPOs in Ireland is less conducive due to the recent cases of fraud and corruption in which some Irish charitable organizations have been implicated. This has undermined the trust of the public and donors in charities. The Irish public has become quite critical about charities in general – there is a perception that there are too many charities and that many are badly governed, except the most well-known (larger and faith-based) that have been in existence for a number of years and are dedicated to overseas causes of poverty alleviation. There seems to be a general agreement amongst NPOs as well as the Charities Regulator that due diligence on NPOs and good governance practices, along with transparency and accountability, are essential.

The Charities Regulator is the national statutory regulator for charitable organizations in Ireland. The key functions of the regulator are to establish and maintain a public register of charitable organizations operating in Ireland and ensure their compliance with the Charities Act. The Regulator also has the power to conduct statutory investigations into any organization believed to be non-compliant with the Charities Act. In 2016, Ireland had 12,000 charities of which 400 were de-registered for non-compliance with the Charities Act.

AML/CFT and CT framework and risks

Ireland is a member of FATF and was rated Partially Compliant on R8 in the FATF Mutual Evaluation Report published in 2017. The evaluation pointed out that there were no focused and proportionate measures applied to NPOs identified as being vulnerable to TF abuse, specifically relating to accountability and transparency in the sector. The overall ML/TF risk for the NPO sector in the Irish National Risk Assessment was deemed medium–low, with no specific risk review carried out of the sector alone. Complying with the Charities Act is, in the opinion of the

[97] https://www.wheel.ie/sites/default/files/Portrait%20of%20the%20Non-Profit%20Sector%202014_%20UpdateJun2014.pdf

[98] https://www.irishaid.ie/about-us/policy-for-international-development/

Charities Regulator, sufficient safeguard for NPOs from ML/TF abuse.

The 2017 FATF Country Evaluation of Ireland[99] considers that: "*Irish authorities do not see a significant TF risk related to international terrorism, particularly when compared to other European jurisdictions. But Irish authorities acknowledge that such risks do exist and that only small amounts (from both legitimate and illegitimate sources) are needed to support TF. There is also only a small number of returned foreign fighters (in the low double digits). While there is little evidence to show any coordinated approach to fundraising in support of terrorism, there are some areas of concern in relation to the collection of charitable funds within the community and the use and transfer of funds by charities and NPOs to conflict zones, which the authorities will continue to monitor.*"

The evaluators further observed that while some steps have been taken in the NPO sector relating to TF, Ireland has not yet applied focused and proportionate measures to such NPOs identified as being vulnerable to TF abuse. There has also not been specific outreach to NPOs on TF issues or the concerted development of best practice. The evaluators noticed that decision-making regarding Irish Aid's principal development and humanitarian funding mechanisms for NGOs is based on criteria such as governance, financial management, financial control and risk management procedures. NGOs in receipt of these funding schemes are subject to rigorous financial and narrative reporting requirements on an annual basis, as well as intensive monitoring and evaluation procedures. Dóchas – the Irish Association of Non-Governmental Development Organisations – is also an important go-between for the network of charities and donors, mainly Irish Aid, and further promotes transparency and corporate governance in the sector. While these measures are important steps in the right direction, Ireland, according to the FATF evaluators, needs to step up its efforts to determine TF risks in the NPO sector based on outreach to the sector and best practices. The role of the Charities Regulator in this regard is pivotal.

AML/CFT law in Ireland is governed by The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. The Act transposes European Union Law on AML and CFT (the Third Money Laundering Directive and its Implementing Directive) into Irish Law.[100] CFT policy at the national level is formulated by the AMLSC (AML Steering Committee), which has set out an action plan to strengthen AML/CFT measures taking into account the National Risk Assessment findings. AML/CFT policies are also incorporated into overall anti-crime initiatives, such as the country's Policing Plan 2016, which has as its core objective the protecting of the public from terrorism in all its forms. Similarly, the strategic goal of the AGS (National Police Service) is combatting serious and organized crime, under which ML and proceeds-of-crime actions fall.

[99] FATF MER Ireland, 2017, http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-ireland-2017.html

[100] The fourth or fifth EU AML/CFT directive will be transposed to national legislation and regulation in the 2018.

NPOs do not have specific AML/CFT obligations and are not considered to be reporting entities within AML legislation. In addition, there is no specific guidance on NPOs from the Central Bank – the Central Bank issues guidance on general AML/CFT risks for customers that have relations with and operate in sanctions and high risk jurisdictions. As soon as the Central Bank issues a directive on AML/CFT, other FIs need to apply it immediately, and this influences customer service. NPOs are not treated as a separate category.

All FI employees in Ireland, including those who never see a client, have to undergo an obligatory AML-/CFT-related training on an annual basis. In addition, FIs rely almost entirely on commercially-provided software to monitor customers, accounts and transactions for suspicious activity. The overarching challenge is "*to configure the algorithms of the software so that there is a reasonable balance between the number of 'alerts', requiring human intervention and analysis, and the number of 'false positives', which in essence waste human resources by alerting staff to innocuous accounts or transactions. The problems NPOs are encountering may in part be due to the fact that there is no 'profile' for what a 'normal' non-profit organisation account and activity should look like. Whereas banks have established effective models for almost every type of commercial business, this is not the case with non-profits, whose activities and transactions can appear completely random, and who, as a result, are constantly being flagged-up as suspicious*".[101]

There is no legislation in place for the protection of users of financial services or the existence of dispute resolution bodies for FI clients. Currently a small NPO, registered as a CLG, who has had its bank account terminated has taken its case to the ombudsman. This is the first case on bank de-risking being handled by this body.

NPOs' access to financial services

The de-risking of NPOs is a symptom of a confluence of legal and financial rules and restrictions that is limiting civil society space in Ireland. And these requirements, including those driven by transparency and accountability requirements, and by AML-/CFT- and sanctions-related rules, are only increasing. The Central Bank and most government authorities are not aware of the issue of de-risking and have never have come across it during their inspections. However, other stakeholders note that FI de-risking is taking place, mostly affecting smaller organizations rather than larger INPOs. FIs find NPOs a difficult customer to 'risk profile' due to their diversity in terms of funding, client relations and regions of transactions.

FIs are also very concerned about liability for faulty transactions and have lost all their risk appetite for NPOs, believing in the need for stringent compliance given NPOs may act as a front for charitable activities while supporting terrorists. For compliance officers at an FI, reputational risk comes first, ahead of cost considerations. And, unlike private companies, it is more difficult 'to risk profile' an NPO, with FIs using 'World-Check' and other such commercial risk profile data-providers to carry out Due

[101] Quote of an FI employee

Diligence and Extended Due Diligence on customers. FIs are, in practice, implementing a 'Know Your Client's Client' type of approach, as their biggest concern is that an NPO's partner or grantee could be a 'front organization', making it difficult to satisfy due diligence requirements. FIs not prepared to take any risks in this regard. There is no access to remedy, especially for small organizations.

Some government stakeholders acknowledge policy incoherence, but claim they are not in a position to address it. The Ministry of Foreign Affairs underscores the issue of policy incoherence between policy that is subsidizing NPOs implementing projects targeted towards development, human rights and conflict transformation, and AML-/CFT-driven policy. However, it does not foresee a coherent policy process that would be supported by the government anytime soon. There seems to be little appetite to address the de-risking of NPOs as a foreign policy issue or even as a systemic issue that requires policy coherence.

All NPOs affected by de-risking seek and find their own solutions and, so far, there have not been joint discussions or any collective action taken. NPOs try and find solutions to conduct money transfers, but are forced into being more creative and spending more resources on getting funds to partners (individuals or organizations). De-risking is pushing some international NPOs into unregulated areas where they try and make the best of the situation at great risk and even greater (financial) cost. It is a contradiction that in spite of the bigger international NPOs being audited on an almost-yearly basis for large donors or EU grants, they still encounter reduced FI risk appetite and continually have to conduct their own partner vetting.

Due diligence is becoming an increased burden for NPOs, with large organizations having the capacity to fulfil FI and donor compliance requirements either in-house or by outsourcing their compliance requirements – something which smaller organizations cannot do. The idea of smaller organizations being shielded by larger ones who would take on the due diligence requirements for them and their partners is not seen as a feasible solution. Problem solving is pragmatic and does not address systemic causes.

Two small organizations, not registered as charities, have had their bank accounts closed. One was told that the US sanctions regime relating to the relevant country was the reason behind the account closure. The US has extra-territorial authority to fine FIs in breach of the sanctions regime. Though the EU and Irish government recognize that this is illegal, they did not want to take responsibility for a due judicial process. The NPO tried all the other FIs but none would take them on so they put their remaining funds into the post office and could only transfer funds via a postal order: *"We live in a cash-only context where we have to pay our bills with cash".* The loss of their bank account completely undermined their membership and donation system. The other NPO got a letter from the bank, without any prior warning or reasoning, saying that their account would be closed. They were told, at a meeting with representatives from the bank's corporate division, that things had changed "since ISIS", given the NPO was providing support

to high-risk and sensitive areas. The bank also said that they have to observe rules laid out by the Ministry of Finance, the Irish Central Bank and the US.

A large international NPO faced a number of serious challenges relating to bank transfer delays and onerous requirements when it came to the vetting of partners and complying with the bank's demands on partners, donors, etc. A few years ago, they were asked by the bank to sign a waiver, an indemnity type of document that stated that penalties for faulty transactions were to be shared between the NPO and the bank. The bank made it clear that they had no risk appetite for the NPO's work and that addressing the issue with the government would be to no avail, as the bank was liable to its shareholders and not to the government (taxpayers).

Other NPOs have experienced delays in transfers. For transfer of funds to high-risk and sanctioned countries, humanitarian agencies with head offices in the US or with USD accounts must have an OFAC license. OFAC provides these licenses to US humanitarian agencies but not to non-US (based) ones. This gives US-based organizations with OFAC licenses a 'competitive' advantage.

Before on-boarding an NPO, some banks ask for due diligence documents not only of the NPO, but also of their partner organizations and the board members of these partner organizations. Some NPOs provide their FI with all the information on partners they require for their internal due diligence: source of funding, partners (director, staff, board), type of programmes. They also provide regular updates for transactions to be approved by the bank. They seem not to take into consideration or are not sufficiently aware of the privacy and data protection implications for their partners.

Some larger NPOs that operate on government funding in sanctioned or high-risk countries have to comply with a rigorous partner vetting procedure prior to receiving these grants. In their view, this procedure should give banks sufficient comfort to facilitate cash transfers to conflict zones.

De-risking of NPOs

The de-risking of NPOs in Ireland occurs across the board. However, it is not per se related to the type of activity or area of operation of the organization. A human rights organization stressed that they hardly experience any problems with their overseas work on human rights defenders and are able to transfer cash in support of these defenders, including to conflict zones. The picture that arises from the study is one of arbitrary decisions by banks. The termination of bank accounts in the case of the two NPOs mentioned may have been politically motivated. One of these NPOs makes small cash transfers, from a solidarity point of view, to a country on the economic sanctions list (which allows EUR but not USD cash transfers) and the other invests small funds in support of a factory in a (perceived) high-risk area with a Muslim majority. Large humanitarian and development organizations in Ireland funded primarily by the government experience delays in cash transfers to partners in conflict zones even though they have undergone a due diligence process on their partners and on the type of operation

prior to receiving government grants. These organizations comply with the onerous demands by FIs to provide them with the 'comfort' needed to carry out cash transactions. However, when these transactions do not go through or are delayed beyond reason, as is often the case with transfers to places like Syria, then some organizations opt to transfer money through money transfer agencies or in cash via money mules.

Apart from the Ministry responsible for grantmaking for international development, other relevant government entities, the Central Bank, the Charities Regulator and NPO umbrella organizations seem to be insufficiently aware of the de-risking challenges facing NPOs and the ways these stem from international AML/CFT rules such as those of the FATF.

Recommendations

- One option would be to offer large, humanitarian agencies a standardized process for certification which would ensure a high level of compliance with CFT, sanctions, ML, tax evasion, and anti-corruption requirements. This financial standard-setting, akin to an ISO standard, would give FIs the comfort they require to carry out fund transfers, etc. However, this option does not solve the issue for small organizations or those that do not fall in the humanitarian category.
- Another factor that might allay the concerns of FIs would be an explicit government endorsement of a particular organization or project, i.e., if a donor such as Irish Aid was to state explicitly that they have conducted their own due diligence and are satisfied that the programme, project, partners etc. are all *bona fide*. The same could apply where a donor audits an NPO and declares them well-governed and thus low risk. Again, such an option does not solve the issue for smaller organizations. Currently, Irish Aid includes additional funds in their grants to enable grantees to finance the ever-increasing due diligence requirements.
- Umbrella or membership organizations such as the Irish Council for Civil Liberties and Dóchas can benefit from more awareness-raising and capacity building on ways to address de-risking through national and international stakeholder roundtables and concomitant workstreams such as the World Bank–ACAMS multi-stakeholder dialogue.
- Multi-stakeholder models developed in the UK and the Netherlands may be helpful for the Irish context given the hesitance on the part of some Ministries to address de-risking as a policy incoherence issue requiring a joint approach by the Ministry of Finance, Foreign Affairs/Irish Aid, the Central Bank and the Charities Regulator in order to find pathways to solutions.
- Dóchas and Irish Aid may benefit from engaging with current developments in the EU–RELEX sanctions working group, which has placed the finding of solutions for NPOs' financial access issues firmly on its agenda. The non-paper produced by the Dutch in this regard as well as the findings of the February 15, 2018 International

Stakeholders' Dialogue meeting in The Hague on 'Ensuring Financial Services for NPOs'[102], convened by the Dutch Ministry of Finance and Human Security Collective with support from the World Bank and ACAMS, may provide input for traction at the national level to at least address the challenges faced by NPOs, large and small, active on humanitarian and other activities in sanctioned- and high-risk countries.

[102] http://fatfplatform.org/announcement/international-stakeholder-dialogue-ensuring-financial-services-non-profit-organizations/

Annexe 4: Remedies for non-profit organisations affected by de-risking

The question of what non-profit organizations and other entities impacted by financial exclusion decisions can do to seek redress is among the most important but least explored elements of the de-risking phenomenon. As noted above, such decisions can have a significant fundamental rights impact that risks manifest breaches of international law. Paradoxically, however, remedies for affected parties are on the margins of the debate as to what should be done when NPOs are subject to what often appear to be arbitrary decisions and/or left without access to financial services.

This section considers the grounds for de-risking decisions by financial service providers and the possibility for challenging those decisions. It also examines the role played by the 'compliance industry', which provides risk profiling and other services to financial institutions in support of their due diligence and risk management obligations. These service providers are included because they can play a key role in decision-making by banks in respect to the provision or withdrawal of accounts and the facilitation of transactions. In sketching out the legal issues that arise with respect to de-risking, this section draws on UK and EU law to exemplify the challenges that arise.

Challenging de-risking decisions by the banks

Because banks operate as private actors, there is no public law remedy available against the bank, such as a judicial review of the decision to close a particular account. The relationship between the bank and their customers is governed by contract which is usually written into the standard terms and conditions that customers accept when they open an account. These terms typically reserve banks the right to cancel banking facilities with nothing more than a period of notice.[103]

Although accounts can be closed without notice where a customer "seriously and persistently" breaches the terms and conditions, non-profit accounts are typically closed on notice. HSBC's terms and conditions, for example, state that the bank can close accounts with two months' notice where it considers it "necessary to comply with our regulatory and compliance controls, policies and procedures, and responsibilities".[104]

What tends to happen in practice is that an organization receives a letter from their bank stating their account is to be closed. Such letters usually blandly state that the decision is due to changes in the bank's 'risk appetite', with no further detail provided. The bank is under no obligation to provide any further details and the absence of

[103] See for example the current HSBC terms and conditions which state that the bank can close an account down either with or without notice: https://www.hsbc.co.uk/1/PA_esf-ca-app-content/content/pws/content/personal/pdfs/personal-banking-terms-and-conditions-and-charges.pdf

[104] Ibid.

specific reasons for the account closure obviously limits the capacity of an affected organization to respond or make representations to the bank about its decision.

In the UK, the Financial Conduct Authority (FCA) has clarified that "the decision to accept or maintain a business relationship is ultimately a commercial one for the bank".[105] This has been reiterated by the Financial Ombudsman Service, which has a mandate to consider complaints about services provided by institutions regulated by the FSA. As the Ombudsman's own guidance states, under the heading "is a firm entitled to close a customer's account – even without the customer's agreement?": "The general answer is – yes, the firm is entitled to do this. Like most other commercial organisations, banks and building societies are under no obligation to continue doing business with someone if they do not consider it appropriate to do so".[106]

While the Ombudsman's office may still accept complaints related to account closures, for example as regards whether the affected party was given sufficient notice,[107] the actual decision to close the account is likely to fall outside of the purview of the Ombudsman. The Ombudsman has further stated that banks "should not decide to close an account for an improper reason – for instance, because of unfair bias or unlawful discrimination",[108] but as noted above, since no reasons whatsoever are provided to the account holder, such a claim will be very difficult to pursue.

EU law effectively places a duty on service providers to ensure that they do not discriminate in making commercial or operational decisions, either directly or indirectly, and the FCA is clearly attune to the potential for such discrimination in respect to de-risking.[109] In practice this problem is most acute when banks make decisions not on the basis of an identified risk but rather, on the basis of the perceived risk that an NPO's association with a particular group or country gives rise to. This kind of generic risk management – which puts the cause before the risk – effectively taints entire groups as unworthy of financial services, irrespective of the actual risk they present.

Although there has been little in the way of systematic research into the reasons for account closures, banks certainly appear to be targeting non-profits on the basis of their association with particular locations or political causes (for example groups working on issues relating to Palestinian human rights or self-determination). In doing so, they have apparently made a decision to refuse services based on either the political viewpoint of a group, or the nationality of the organization's service

[105] https://www.fca.org.uk/firms/money-laundering/derisking-managing-risk
[106] http://www.financial-ombudsman.org.uk/publications/ombudsman-news/48/banking-closing-accounts.htm
[107] Financial Conduct Authority, Final Notice to the Co-operative Bank plc, 10 August 2015, [online] Available at: https://www.fca.org.uk/publication/final-notices/the-co-operative-bank-plc-2015.pdf
[108] http://www.financial-ombudsman.org.uk/publications/ombudsman-news/48/banking-closing-accounts.htm
[109] See, 'Access to Financial Services in the UK' as part of its Occasional Paper series (OP17); see further *Drivers & Impacts of Derisking*, John Howell & Co Ltd, as commissioned by the FCA. Report available here: https://www.fca.org.uk/publication/research/drivers-impacts-of-derisking.pdf

orientation, and not on the basis of a specific financial crime risk. While such decisions may amount to discriminatory treatment, the banks are yet to be held to account by either regulators or the courts because of the difficulties and costs faced by non-profits in respect to bringing such claims.

The 'risk-based approach', which was adopted by the FATF and gradually incorporated into national and EU AML/CFT laws, also requires banks to take decisions on the basis of individual assessments rather than blanket decisions.[110] As the FCA states: "the risk-based approach does not mean that banks should deal generically with whole categories of customers or potential customers. Instead, we expect banks to recognise that the risk associated with different business relationships in a single broad category varies, and to manage that risk appropriately".[111] However, the reality is that banks have faced little or no accountability for taking this exact approach. Without meaningful resistance or push back, the banks will inevitably continue these practices because the risk of overlooking a financial risk is at present seen to outweigh any damages they may face for a discriminatory 'generic' risk management decision.

Challenging risk profiling

In practice, financial institutions have effectively outsourced a significant part of the due diligence process to a burgeoning AML/CFT compliance industry. Indeed, because customer and transactional due diligence obligations have become so onerous, the FATF Recommendations tacitly encourage banks to rely on these third party service providers to perform customer due diligence on their behalf.[112] These companies perform functions such as screening customers to identify individuals and entities included in national and international sanctions lists, and conducting enhanced due diligence investigations on higher risk customers. They also offer a range of other compliance services such as screening and identifying suspicious transactions, reducing the risk exposure of financial institutions and fraud detection. [113]

The global AML/CFT compliance market is already said to be worth upwards of a 100 billion dollars annually. These revenues are a core part of the 'costs of compliance' seen to be one of the driving forces behind de-risking decisions. According to the British Banking Association, by 2015 its members were already collectively spending at least GBP 5 billion annually on core financial crime compliance.[114] These figures have seen security and defence conglomerates like BAE systems make a concerted entry into the market through acquisitions and mergers.

One of the AML/CFT compliance market

[110] The need for firms to take such a risk-based approach was first introduced by EU AMLD3; it has become an explicit requirement within EU AMLD4

[111] https://www.fca.org.uk/firms/money-laundering/derisking-managing-risk

[112] See FATF Recommendation 17

[113] See the range of services discussed in this article: http://www.risk.net/operational-risk-and-regulation/advertisement/2439806/the-client-onboarding-challenge-getting-to-grips-with-2016-s-aml-and-kyc-compliance-risks

[114] https://www.bba.org.uk/policy/bba-consultation-responses/bba-response-to-cutting-red-tape-review-effectiveness-of-the-uks-aml-regime/

leaders is World-Check. Founded in 2000 and bought in 2011 by Thomson Reuters for USD 530 million, World-Check provides services to more than 4,500 institutions, including 49 of the world's top 50 banks and 200 law enforcement and regulatory agencies.[115] World-Check started out consolidating the names from the multitude of national and international sanctions lists so that their clients would not break the law by inadvertently providing financial services to blacklisted entities. World-Check and its competitors then went further; collecting and adding to their databases the names of people identified in the media or online as potentially associated in some way with terrorism. In 2008, World-Check's database was reported to contain approximately 750,000 names; by 2017 it had surpassed 3 million – higher by an order of magnitude than the number of people who have been convicted of actual offences within the FATF mandate.[116]

The fundamental rights implications for those added to the World-Check database are substantial. In February 2016, VICE news published an exposé of World-Check's files which showed that the Executive Director of the Council on American–Islamic Relations, Nihad Awad; former UK Liberal Democrat candidate Maajid Nawaz, who founded counter-extremism think tank Quilliam; former World Bank and Bank of England advisor Mohamed Iqbal Asaria CBE; the UK Palestine Solidarity Campaign; the Cordoba Foundation; and "a number of other major British non-profits" had all been given a 'terrorism' risk designation in the database. It also showed that World-Check was widely reliant upon unsubstantiated or discredited online media reports.[117]

Banks who subscribe to World-Check's databases are subject to confidentiality and non-disclosure clauses, meaning that the overwhelming majority of people affected by its profiling – who may ultimately be subject to complete financial blackout – will have no idea why they have been refused a bank account or had a transaction blocked. Numerous reports have suggested that the inclusion of civil society organizations in World-Check's databases has fundamentally affected their ability to access financial services.[118]

Moreover, because the database is used by intergovernmental organizations, donors and international NPOs, the inclusion of organizations or their employees can result in specific actors being rendered ineligible for funding or pending grants being blocked or withdrawn. As one former World-Check board member put it: "If someone had a [terrorism] hit on World-Check, that's really

[115] 'Thomson Reuters World-Check: KYC, AML, CFT and PEP Due Diligence', *Thomson Reuters website*, available at: http://www.world-check.com/.

[116] https://www.vice.com/en_uk/article/pak7wb/exclusive-secret-blacklist-marking-innocents-as-terrorists-continues-to-grow

[117] Shabibi, N & Bryant, B (2016) 'VICE News Reveals the Terrorism Blacklist Secretly Wielding Power Over the Lives of Millions', *VICE News*, 4 February 2016, available at: https://news.vice.com/article/vice-news-reveals-the-terrorism-blacklist-secretly-wielding-power-over-the-lives-of-millions.

[118] See for example: Mackintosh, K. & Duplat, P. (2013) *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, OCHA/NRC, p. 110, available at: https://www.google.com/search?q=See+Mackintosh+and+Duplat%2C+Study+of+the+Impact&ie=utf-8&oe=utf-8&client=firefox-b-ab; Hayes, 2012: 62; and Metcalfe-Hough, Keatinge & Pantuliano, 2015: 14.

end of story...you can't do business with them anyway".[119] It has also emerged that state agencies use these databases for a range of other activities, including policing and spying.[120]

It should be stressed that World-Check is but one of a range of compliance service providers, meaning that the number of risk profiles circulating within and outside the formal banking sector is going to be significantly higher than the 3 million known to be held by Thomson-Reuters. This data is now being collectively rebranded as 'KYC [know your customer] utilities' that are being promoted by institutions like the IMF as a solution to problems associated with de-risking.[121]

The way these 'utilities' work in practice has been explained by senior representatives of Thomson Reuters as follows:

> *"These industry utility and managed services solutions, like the one we operate, are able to go and collect that KYC information on behalf of the industry and organise it from public sources, from private sources and from the clients themselves. They do the work of pulling the KYC file together, including the screening of the officers, the directors and the beneficial owners, and essentially package up the information for the financial institution to then take its view on that client, and maybe even decide it needs to do more enhanced due diligence to really understand who they are. But the beauty of the industry utilities coming out is that you are contacting the client as an industry considerably less frequently. If the KYC record already exists in the utility, your time to onboard is going to reduce by 90% or more".*

This approach has extremely serious ramifications for those customers of banks who are added to the 'utility'. It implies that the information used by banks to take decisions about the risk posed by individual and organizational account-holders – which may include information about staff, business partners and activities – has a legacy far beyond that individual decision.
In the context of decisions that result in 'de-risking' or financial exclusion, this threatens to engender a perverse kind of 'mutual recognition' of such decisions, in the sense that once information suggesting an individual or entity proposes a significant 'risk' enters the utility, the prospects of them ever obtaining financial services are greatly diminished. To the extent that these 'industry utilities' and 'managed services solutions' rely on information that may be inaccurate, biased or false – whether it relates to named individuals, organizations, groups, sectors, populations or places – the consequences for the data subjects may be devastating. The question that follows is: once the 'high risk' label has been applied, how can affected parties challenge that designation?

[119] VICE News, 4 February 2016.
[120] See, https://news.vice.com/article/exclusive-uk-government-and-police-are-getting-information-from-shadowy-terrorism-database
[121] Lagarde: "I would encourage banks to work collectively on reducing compliance costs and maintaining the financial lifeline for those who need it most. Innovative solutions like "Know Your Customer" utilities to centralize information on customer due diligence is one example" - https://www.imf.org/en/News/Articles/2016/07/15/13/45/SP071816-Relations-in-Banking-Making-It-Work-For-Everyone

The growth of the compliance industry is both unheralded and without regulation. However, following the kinds of public revelations described above, groups and individuals have sought to challenge unwarranted and inaccurate risk profiling allegations. Crucially, unlike the relationship between the bank and their customers, the relationship between compliance service providers and the subjects of the risk profiles is not subject to a contract. Indeed, one of the fundamental concerns with the exponential growth of this industry is that the individual has no knowledge that a profile has been created about them, let alone any formal relationship with the data controller behind the 'utility'.

European data protection laws, which have served as a model for the gradual spread of such laws around the world, regulate the processing of personal data and grant rights to data subjects vis-à-vis data controllers and processors. These laws are based on a set of core principles and parameters as to how data should be used, that in effect serve as a charter of rights over the use and control of data. It is these laws that have provided the basis for a growing number of legal challenges related to de-risking decisions. The core data protection principles include:

- Personal data shall be processed fairly and lawfully
- Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purpose
- Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed
- Personal data shall be accurate and, where necessary, kept up to date
- Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes
- Personal data shall be processed in accordance with the rights of data subjects
- Personal data shall not be transferred to a country or territory unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data

Data protection laws also create a hierarchy of data, providing that some information is by its nature deserving of a higher level of protection. So-called 'sensitive' personal data includes racial or ethnic origin; political opinions; religious beliefs or other beliefs of a similar nature; trade union membership; physical or mental health or condition; sexual life; the commission or alleged commission by the data subject of any offence; or any proceedings for any offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings. The presumption is that, because information about these matters could be used in a discriminatory way, and is likely to be of a private nature, it needs to be treated with greater care than other personal data.

Entities processing personal data in the European Union must comply with the new EU General Data Protection Regulation

('GDPR') by 25 May 2018. The GDPR updates the previous EC data protection Directive, which was adopted in 1995, and strengthens the position of individual data subjects by strengthening some of the rights that currently exist and creating some new ones. These are:

- The right to be informed about data processing
- The right of access to data
- The right to rectification
- The right to erasure
- The right to restrict processing
- The right to data portability
- The right to object
- Rights in relation to automated decision making and profiling

As noted above, individuals and organizations profiled in KYC 'utilities' and databases operated by entities such as World-Check may be placed in particularly damaging categories such as 'terrorism' in order to indicate that they may present a risk of terrorist financing and, as such, are not suitable for financial services. These profiles frequently contain sensitive personal data about political activities, religious beliefs or alleged criminal offences. Since one of the primary purposes of the database is to warn businesses from engaging with those in the database due to purported involvement in terrorism or other financial crime, it could be argued that the profiles themselves are of an inherently sensitive nature.

World-Check, which is operated by a company established in the EU, suggests that the list complies with data protection law because of: (i) the limited purpose for which the data is processed, (ii) because the systems are necessary to detect crime, and (iii) because the information is sourced from publicly available sources. However, none of these factors constitute exemptions to existing data protection laws or the forthcoming GDPR. Furthermore, where sensitive personal data is being processed without the consent of data subject or one of the other 'conditions for processing' being met, data controllers face serious difficulties in satisfying the requirements of EU data protection law.

In order to seek redress, affected individuals need to know whether they are included in the database of a particular compliance service provider. To do this they can make what are called 'subject access requests', which oblige data controllers to disclose whether they hold personal data related to the applicant, and, unless exemptions apply, to provide them with a copy of the information.[122] Individuals who are subject to a contravention of data protection law are entitled to seek compensation from the data controller.[123]

In February 2016, it was widely reported that the Finsbury Park Mosque had sued World-Check and after issuing proceedings, had successfully agreed to settle the claim for a reported £10,000 plus costs.[124]

[122] See further: http://fatfplatform.org/worldcheck-data-protectionde-risking/

[123] In accordance with the EU Charter of Fundamental Rights, individuals are entitled to seek compensation for distress they suffer as a result of a contravention of data protection law, whether or not this amounts to demonstrable damage.

[124] Statement of settlement available here: https://inforrm.files.wordpress.com/2017/02/finsbury-park-mosque-statement-in-open-court.pdf. See also https://www.theguardian.com/uk-

Similarly, the Palestine Solidarity Campaign also sued World-Check and reported a resolution between the parties out of court. Less reported about these cases was the cause of action in the claim related to actions for defamation.

Such defamatory allegations arose as a result of placing the profile subject in the category of 'terrorism'. As the Courts have recognized, there is little more damaging than a false allegation of involvement in terrorism-related activity. Given the reports of profiles being created on the basis of dubious sources, it is easy to see how such serious allegations could be proven unfounded.

The power of such actions lies in its ability to make amends for damages to reputation. A successful damages claim can vindicate concerns about false statements whilst providing a basis to publically diffuse harmful and untrue allegations. However, the difficulty with such claims for defamation is that they are inherently complex, expensive and time consuming. This may make such claims beyond the purview – or expense – of most non-profits and individuals.

The need for remedial action

It is certain that both banks and compliance service providers will face further lawsuits, particularly in the context of the strengthened position of individual data subjects under the GDPR. Regardless of how this litigation plays out, there is a clear need for government action on two fronts.

The first relates to de-risking decisions by banks. It is simply untenable for these institutions to hide behind commercial privilege in respect to the closure of bank accounts. At the very minimum, affected parties should be provided with some indication of the factors giving rise to a decision to close an account on risk management grounds. Without such reasoning, there is a significant risk of manifest breaches of fundamental rights and non-discrimination law, and every likelihood that this kind of decision-making will continue unchecked.

The second relates to the compliance industry and the abject lack of regulation that has allowed private companies to develop sprawling databases containing highly sensitive personal data that can have a tremendous effect on people's fundamental rights and access to financial services. The GDPR provides for regulators to issue codes of conduct for specific data processing sectors and activities and clear limitations and guidance are needed for those entities engaged in financial risk profiling.

news/2017/feb/01/finsbury-park-mosque-wins-apology-and-damages-from-reuters

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