

POLICY BRIEF ON THE JUSTIFICATION TO DE-CLASSIFY NON-PROFIT ORGANISATIONS(NPOs) IN UGANDA FROM THE LIST OF ACCOUNTABLE PERSONS UNDER THE 2ND SCHEDULE TO THE AML-ACT 2013 (AS AMENDED)

*The FATF Recommendations and the
Ugandan AML/CFT requirements
for the NPO Sector*



SUBMITTED BY:



Our Ref:001/DPI/FATF/2021

May 20, 2021

The Executive Director
Financial Intelligence Authority (FIA)
Kampala, Uganda.

Dear Sir;

RE: POLICY BRIEF ON THE NEED TO DE-CLASSIFY NON-PROFIT ORGANISATIONS (NPO) FROM THE LIST OF ACCOUNTABLE/REPORTING ENTITIES UNDER THE 2ND SCHEDULE TO THE AML ACT.

Through intensive, evidence-based research, the Defenders' Protection Initiative (DPI) sought to ascertain the various Ugandan AML/CFT requirements applicable to the NPO Sector in the Country.

DPI, whereas cognizant of the fact that NPOs-particularly, the NGOs could be potential targets for facilitating money laundering and terrorism financing, seeks to propose a more robust alternative way that could achieve the same purpose of curbing the most prone NPOs than the current law that is extensively targeting all NPOs.

The proposals of DPI are anchored in its findings reached after scrutinizing Uganda's legal framework, recommendations from Uganda's Risk recommendations, and guidance to the Member States from the FATF on the use and application of Recommendation 8, not to stagnate the growth and developmental contribution of NPOs (in case NGOs) to the Country.

For the avoidance of doubt, NGO actors in Uganda do not object to the reality of the potentiality of NPOs-NGOs being abused; instead, it seeks to highlight the current mechanism, that is omnibus in the application, for what it is, i.e., adverse to the internationally acknowledged and recognized methodology that is guided by a National Risk Assessment agenda and designation of only those types of NPOs/NGOs identified by the risk assessment.

From the study undertaken, we recommend the following;

- a) Deleting Category 15 in the 2nd schedule to the AMLA from the list of accountable/reporting entities by invoking Section 139(2) (b) & Section 139 (3) (b) of the AMAL Act, and consistent with the National Risk Assessment (NRA Action Plan).
- b) In line with international best practices as recommended by FATF, any measure aimed at the prevention of Terrorism Financing (TF) abuse of the NPO sector should be:
 - i) Targeting only those NPOs that meet the FATF definition, based on a specific risk assessment, should identify which types of NPOs are exposed to TF abuse.
 - ii) Focused, proportionate, and justified in light of identified and documented TF risks across the NPO sector in the Country.
- c) The FIA should involve a significant sample of NPOs, operational Countrywide, in the risk assessment of the NPO sector.
- d) In complimenting the above, the FIA should reach out to financial institutions to sensitize them about the “de-risking” of NPOs.

We strongly believe that the adoption of the above recommendations and their implementation does not in any way dilute the power of oversight over the NPO/NGO sector in particular.

Instead, the FIA, equipped with findings from a comprehensively executed National Risk Assessment Study, can now zero down on a highly refined niche of NPOs that have been identified as susceptible to TF risks.

In this way, we further believe that the FIA limited resources would be rightly targeted at legitimately arrived at entities, freeing it from the now broad spectrum of focus almost across the entire NPO/NGO, which increases the potential of missing the actual specimen for the work of FIA.

But also, more fundamentally, we believe this would rebrand the current law, which has been criticized as crippling the work of the NGOs/NPOs, by keeping them in perpetual reporting responsibilities and constant mood of suspicion.

After all, the NGOs, for example, would continue the reporting obligations to the NGO Bureau and the Registrar of Companies annually.

We enclose a policy brief from our findings and the actual study for your further attention. We also seek an appointment with your good offices to further dialogue on this critical matter by this letter.

We remain available in solidarity with you for any cooperation from us in streamlining and bringing the above recommendations to fruition.

Yours sincerely,



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Yona Wanjala

Executive Director

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INTRODUCTION

The study findings are based on a critical analysis of three separate assessments, one undertaken by the government of Uganda under the FIA- released in March 2017, Uganda's first National Risk Assessment (hereinafter called the NRA) of the risk of Money Laundering, which the country is exposed, which also included an assessment of the Money Laundering Risk of the NPO sector. The second assessment included the 2016 Mutual Evaluation Report (MER) of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). The third assessment included a January 2021 study by Defenders Protection Initiative on the rationale of non-governmental organizations in Uganda being accountable persons as listed in the Anti-money Laundering Act, 2013 (As Amended). Additionally, the study examined the FATF recommendations-in, particular, Recommendation 8 and the attendant Interpretative Note (IN).

The assessment finds that promoting the well-regulated Non-profit (NPO) sector is central to any effective and comprehensive Anti-Money Laundering and Counter-Terrorism Financing regime. However, failure to apply a risk-based approach (RBA) to prevent money laundering and terrorism financing can have unintended and unnecessary consequences that may interfere with the operation of legitimate NPOs.

While FATF has demonstrated a good understanding of non-profit organizations' role, by taking a position that AML/CFT laws and their enforcement should follow a risk-based approach (RBA) and not disrupt or discourage the work of legitimate NPOs¹, the current practice in Uganda falls short of the principle.

The Financial Action Task Force (FATF) - the inter-governmental body that sets international standards aimed at preventing global money laundering (ML) and terrorism financing (TF) - has tried to balance the need of limiting the Terrorism Financing (TF) abuse to which NPOs might be exposed, with the need of not disrupting or discouraging legitimate NPO activities. Since it adopted the IX Special Recommendations in 2001, the FATF has provided specific requirements concerning the NPO sector to prevent TF abuse, including by requiring countries to undertake domestic reviews to identify the features and types of NPOs that are at risk of being misused for terrorist financing by their activities or characteristics.

These requirements became more critical in the 2012 revision of the FATF Recommendation, which emphasized the importance of risk assessment and taking a risk-based approach (RBA) to implement the FATF recommendations. FATF also noted that when evaluating the effectiveness of AML/CFT systems, assessors need to take

into account whether AML/CFT measures were disrupting legitimate activities of Non-Profit Organizations. There was a broader change in 2016 when language in the international standard on AML/CFT that NGOs were 'particularly vulnerable' was removed. Instead, it was recognized that there is not an "inherent" vulnerability for NGOs to the financing of terrorism.

Below is a summary of the findings, with the overriding thread through this cobweb being that the trend that was adopted in Uganda's AML Act to incorporate NPOs-More so NGOs as accounting persons is not an internationally recommended recourse nor a best practice. As thus Uganda is advised to revise this.

This policy paper offers alternatives worth consideration by the FIA. These alternatives suggested are in tandem and seek to align Ugandan AML/CFT requirements applicable to the NPO sector with FATF recommendations without compromising the FIA's oversight role on the NPO sector in its quest to counter-terrorism financing and money laundering.

EXECUTIVE SUMMARY

- 1.1. The Ugandan Anti-Money Laundering Act (AMLA) includes "non-governmental organizations, churches and other charitable organizations" in the list of the accountable persons that are subject to the full range of AML/CFT requirements, including, *among other things*, customer due diligence (CDD) and reporting of suspicious transactions. This is not required by or consistent with the FATF Recommendations.

The AML/CFT requirements to which the Ugandan NPO sector is currently subject to are only meant to be applied, in the FATF Recommendations, to financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs), typically known as "reporting entities." The FATF requirements concerning the NPO sector are meant to prevent the industry from the abuse of terrorist financing (TF) by applying a risk-based approach (RBA) only to those NPOs that risk TF and not indiscriminately to the whole NPO sector. This RBA is premised by the identification of those NPOs that fall under the FATF definition of NPOs and, among those that do, by the identification of a subset of such NPOs that are more vulnerable to TF abuse, through an ad-hoc risk assessment. The FATF explicitly clarifies that not all NPOs are inherently high risk (and some may represent little or no risk at all)¹ and that measures for the NPO sector should be focused, proportionate and based on risk, and that should be applied without disrupting or discouraging legitimate NPO activities².

- 1.2. The 2016 Mutual Evaluation Report (MER)³ of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), which assesses Uganda's compliance with the FATF Recommendations and the effectiveness of the Uganda's AML/CFT framework,

¹ Criterion 8.1.

² FATF, 'Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT systems, Core Issue no. 2, Immediate Outcome 10.

³ [ESAAMLG - UGANDA MUTUAL EVALUATION REPORT 2016_0.pdf accessible at fia.go.ug](https://www.fia.go.ug/ESAAMLG-UGANDA-MUTUAL-EVALUATION-REPORT-2016-0.pdf)

recommends Uganda to exclude NPOs from the application of the AMLA and notes that "the current requirements regulating the NPO sector do not deal with TF or the TF risks associated with the NPO sector".

The MER (para 203) explicitly notes that "NGO's, although not required by the FATF Recommendations, are listed as reporting entities" and, in the Recommended Actions (RA) under Immediate Outcome (IO) 10, which the country is expected to implement, recommends that "The country should no longer designate NPOs as DNFBPs (which is not an FATF requirement) and use some of the resources that subsequently become available to undertake a review of the TF risk in the NPO sector." However, Uganda has not implemented this recommendation. Uganda is yet to identify, among the NPOs that fall within the FATF definition, the specific subset that is exposed to TF abuse. The technical compliance analysis of FATF Recommendation 8 concludes that "the current requirements regulating the NPO sector do not deal with TF or the TF risks associated with the NPO sector".

- 1.3.** In March 2017, Uganda, published its first National Risk Assessment (herein after called the NRA) of the risk of ML which the country is exposed⁴, which included also an assessment of the ML risk of the NPO sector. The findings of this risk assessment for the NPO sector do not appear to justify the applicability of the full range of AML/CFT measures currently envisaged by the AMLA to the NPO sector. While the action plan attached to the NRA establishes that "The country should no longer designate NGOs as DNFBPs (which is not an FATF requirement)"⁵ this item was not implemented.

⁴ *Money Laundering and Terrorist Financing National Risk Assessment Report 1.pdf (fia.go.ug)*

⁵ *NRA of Uganda, Action Plan for the NPO sector (page 258).*

The assessment concludes that the ML threat of the sector is medium-low, whereby the ML vulnerability is medium-high, however it acknowledges that the risk of the sector *"is mostly driven by the lack of supervision and the near-absence of implementation of AML/CFT requirements, rather than by vulnerabilities inherent to the types or activities of the NGOs operating in the country"*⁶.

1.4. The NRA analyzed also the terrorist and TF risk, but Uganda-based NPOs are not indicated among the sources of TF.

The TF assessment concluded that the threat and vulnerability for Uganda are medium-high at national level. Although Uganda did not carry out a fully-fledged TF risk assessment of the NPO sector, NPOs were considered in the NRA for both the ML and the TF risk, and there is no indication of a particular exposure of the NPO sector to TF risk. Sectoral assessments of the TF risks carried out in the context of the NRA concluded that some financial products and the real estate sector present higher TF risks (but not the NPO sector).

1.5. The current approach envisaged in the legal framework of Uganda for the NPO sector increases the cost of compliance, subtracting resources that could be more usefully allocated for the benefit of the society, and this could have human rights implications.

In Uganda this has resulted in significant and burdensome costs by damaging the earned public trust, integrity, reputation and consequently interfering with the legitimate operation of NPOs at a critical time of need for their good works. Studies conducted in the European Union⁷ point to the increasing cost of compliance and to the difficulties of NPOs in accessing services of regulated financial institutions, due to de-risking factors. The current legal framework

⁶ NRA of Uganda, page xxxi of the Executive Summary.

⁷ See, for example, "Adding to the evidence: the impact of sanctions and restrictive measures on humanitarian action": [ct-survey-report-adding-to-the-evidence-march-2021 \(2\).pdf](#)

subjecting indiscriminately all NPOs to the full range of requirements envisaged by the AMLA in lieu of focused and proportionate measures in line with a risk-based approach, could potentially amount to a violation of human rights.

The European Commission for Democracy through Law, (better known as the Venice Commission, the Council of Europe's independent advisory body on constitutional matters, including on the protection of fundamental rights), has ruled in several cases that states shall refrain from imposing burdensome administrative requirements on NGOs and must always limit interference with the right to freedom of association based on necessity and proportionality requirements.⁸

1.6. Recommendations of the NGO Sector:

- 1.6.1.** Deleting Category 15 in the 2nd schedule to the AMLA from the list of accountable/reporting entities, by applying section 139(2) (b) & Section 139 (3) (b) of the said Act, and consistent with the NRA Action Plan.
- 1.6.2.** Any measure aimed at the prevention of TF abuse of the NPO sector should be:
 - i.** Targeting only those NPOs that meet the FATF definition, based on a specific risk assessment that should identify which types of NPOs are actually exposed to TF abuse.
 - ii.** Focused, proportionate and justified in light of identified and documented TF risks.
- 1.6.3.** The FIA should involve a significant sample of NPOs in the risk assessment of the NPO sector.
- 1.6.4.** The FIA should reach out to financial institutions to sensitize them about the "de-risking" of NPOs.

⁸ See, for example CDL-AD (2018)004-e Romania – Joint Opinion on Draft Law No. 140/2017 on amending Governmental Ordinance No. 26/2000 on Associations and Foundations, §40.

2. THE UGANDAN AML/CFT REQUIREMENTS APPLICABLE TO THE NPO SECTOR: HOW CONSISTENT WITH THE FATF RECOMMENDATIONS

- 2.1. Point 15 of the second schedule to the AMLA includes "non-governmental organizations, churches and other charitable organizations" in the list of "accountable persons" that are subject to the various requirements established by the Act. These include, inter alia, regular and enhanced CD, risk assessment, record keeping, identification and reporting of suspicious transactions.
- 2.2. However, these requirements are only envisaged by the FATF for financial institutions (FIs) and designated non-financial businesses and professions⁹ (DNFBPs), which maintain business relationships with clients or conduct transactions for clients. They are not meant for NPOs, which are not indicated in the list of FIs and DNFBPs.
- 2.3. The FATF has established different requirements to prevent the risk of terrorist financing abuse of NPOs, which are embedded in Recommendation 8 and in its Interpretative Note (IN). As can be seen from the text of FATF Recommendation 8, its scope of application concerns exclusively the countering of the financing of terrorism (CFT) and not also (as the majority of the other FATF Recommendations) anti-money laundering (AML).

FATF Recommendation 8

⁹ These are: (a) Casinos – when customers engage in financial transactions⁶⁵ equal to or above USD/EUR 3 000.

(b) Real estate agents – when they are involved in transactions for a client concerning the buying and selling of real estate.

(c) Dealers in precious metals and dealers in precious stones – when they engage in any cash transaction with a customer equal to or above USD/EUR 15,000.

(d) Lawyers, notaries, other independent legal professionals and accountants when they prepare for, or carry out, transactions for their client concerning the following activities: buying and selling of real estate; managing of client money, securities or other assets; management of bank, savings or securities accounts; organization of contributions for the creation, operation or management of companies; creating, operating or management of legal persons or arrangements, and buying and selling of business entities.

(e) Trust and company service providers when they prepare for or carry out transactions for a client concerning the following activities: acting as a formation agent of legal persons; acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons; providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement.

"Countries should review the adequacy of laws and regulations that relate to non-profit organizations which the country has identified as being vulnerable **to terrorist financing abuse**. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organizations **to protect them from terrorist financing abuse**, including:

- a. by terrorist organizations posing as legitimate entities;
- b. by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and
- c. by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organizations."

- 2.4. Therefore, as far as the FATF is concerned, it is clear that the scope of application of the FATF Recommendations to the NPO sector is limited to CFT and does not include AML and AML-related requirements. This is not the case in Uganda, where NPOs are considered "accountable persons" and are subject to all requirements – not just those related to CFT but also those related to AML, which is not required by FATF. This is a first inconsistency between the AMLA and the FATF Recommendations concerning NPOs.
- 2.5. A second inconsistency that is notable is that point 15 of the Second Schedule includes different types of institutions beyond the FATF standard definition of "NPO". The FATF has defined an NPO as "a legal person or arrangement or organization that *primarily engages in raising or disbursing funds* for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of "good works".
- 2.6. The emphasis in the FATF Recommendation 8 is on those NPOs that are engaged in "raising" or "disbursing" funds for charitable purposes because it is the collection and the provision of funds that, inter alia, makes an NPO potentially exposed to the risk of TF abuse. However, the Second Schedule of the AMLA lists "non-governmental organizations, churches and other charitable organizations" without any reference to their *primarily engaging in raising or disbursing funds* for the purposes mentioned in the FATF definition of NPOs. As a result of this very far-catching definition, an institution that pursues charitable purposes without raising or disbursing funds would still be considered an "accountable person" pursuant to the AMLA, which goes far beyond the FATF standard.
- 2.7. We have mentioned that the FATF recommendations (and in particular FATF Recommendation 8) are relevant for the NPO sector only with regard to CFT

requirements and not to AML requirements. But even if we only consider CFT, the scope of the requirements envisaged for the NPO sector by FATF Recommendation 8 is more limited if compared to other requirements that are also aimed at CFT (*for example the requirement to report suspicious transactions, which also refers to TF and terrorism, envisaged by FATF Recommendation 20, or the CDD requirements envisaged by FATF Recommendation 10*) and focuses on preventing TF abuse of the NPO sector.

2.8. This is quite evident if one looks at the IN of FATF Recommendation 8 and at the FATF Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems (*hereinafter: The Methodology*). The FATF documents outline five types of measures that countries should take in regard to NPOs, i.e.

2.8.1. taking a risk-based approach (RBA to the NPO sector);

2.8.2. sustained outreach to the NPO sector concerning TF issues;

2.8.3. targeted risk-based supervision or monitoring of NPOs;

2.8.4. effective information gathering and investigation, and

2.8.5. effective capacity to respond international requests for information about NPO of concern: none of these measures requires the NPO sector to be subject to the full range of AML/CFT requirements as FIs and DNFBPs as it is currently the case in Uganda.

2.9. The goal of preventing NPOs from TF abuse, underlying the FATF Recommendations, is also confirmed in the Methodology's definition of Immediate Outcome 10: "Terrorists, terrorist organization and terrorist financiers are prevented from raising, moving and using funds, and from abusing the NPO sector". However, this needs to be done without disrupting or discouraging legitimate NPO activities, as highlighted in Core issue¹⁰ 2 to IO10.

2.10. Another important aspect to highlight is that the requirements of FATF recommendation 8 and the measures mentioned above *are not meant to apply indiscriminately to each NPO that meets the FATF definition of NPO*. The 2012 revision of the FATF Recommendations emphasized the importance of risk assessment and of taking a risk-based approach (RBA) in the implementation of the FATF recommendations. Recommendation 8 on NPO underwent another

¹⁰ Core issues to be considered in determining if the Outcome is being achieved, are factors established by the Methodology for assessing effectiveness.

important change in 2016 when it was clarified that not all NPOs are high risk and intended to be addressed by R.8, but only *a specific subset* of NPOs, which countries need to identify. The requirements envisaged by FATF Recommendation 8 apply only to this specific subset of NPOs, identified by the country as having a higher risk of TF abuse.

- 2.11. This is clearly specified in criterion 8.1. of the Methodology, which explains the scope and goal of the RBA:

Taking a risk-based approach – Criterion 8.1.

Countries should:

- a. identify which subset of organizations fall within the FATF definition of NPO, and use all relevant sources of information, in order to identify the features and types of NPOs which by virtue of their activities or characteristics, are likely to be at risk of terrorist financing abuse;
- b. identify the nature of threats posed by terrorist entities to the NPOs which are at risk as well as how terrorist actors abuse those NPOs;
- c. review the adequacy of measures, including laws and regulations, that relate to the subset of the NPO sector that may be abused for terrorism financing support in order to be able to take proportionate and effective actions to address the risks identified; and
- d. periodically reassess the sector by reviewing new information on the sector's potential vulnerabilities to terrorist activities to ensure effective implementation of measures.

- 2.12. It is therefore only those NPOs that

2.12.1. meet the FATF definition and,

2.12.2. have been identified as actually posing a higher risk of TF abuse that fall within the scope of FATF Recommendation 8. This is also specifically remarked in Core issue 2 to IO10, which, as previously mentioned, emphasizes the need to not disrupt or discourage legitimate NPO activities and to apply "focused and proportionate measures to such NPOs which the country has identified as being vulnerable to terrorist financing abuse, in line with the risk-based approach".

- 2.13. These focused and proportionate measures are envisaged in the "sustained outreach concerning terrorist financing issues" under criterion 8.2. of the Methodology:

Sustained outreach concerning terrorist financing issues – Criterion 8.2

Countries should:

- a. have clear policies to promote accountability, integrity, and public confidence in the administration and management of NPOs;
- b. encourage and undertake outreach and educational programmes to raise and deepen awareness among NPOs as well as the donor community about the potential vulnerabilities of NPOs to terrorist financing abuse and terrorist financing risks, and the measures that NPOs can take to protect themselves against such abuse;
- c. work with NPOs to develop and refine best practices to address terrorist financing risk and vulnerabilities and thus protect them from terrorist financing abuse; and
- d. encourage NPOs to conduct transactions via regulated financial channels, wherever feasible, keeping in mind the varying capacities of financial sectors in different countries and in different areas of urgent charitable and humanitarian concerns.

2.14. Finally, FATF Recommendation 8 requires countries should take steps to promote effective supervision or monitoring such that they are able to demonstrate that risk-based measures apply to NPOs at risk of terrorist financing abuse.

3. THE EMERGING ISSUES ON THE MUTUAL EVALUATION REPORT (MER) CONCERNING THE NPO SECTOR OF UGANDA

3.1. In the previous chapter we have seen that the current Ugandan AML/CFT framework that considers NPOs as accountable persons presents several inconsistencies with the FATF recommendations as it:

3.1.1. applies to the NPO sector indiscriminately, without identifying those specific NPOs that may be exposed to TF abuse;

3.1.2. requires the application of AML/CFT requirements envisaged by FATF for FIs and DNFBPs to the whole NPO sector, without any consideration of the actual risk of the NPO sector and

3.1.3. does not take an RBA to the NPO sector or a sustained outreach concerning TF issues for the NPO sector.

3.2. It is important to underline the findings of the MER of Uganda concerning these aspects. In 2016 Uganda underwent an assessment of technical compliance and of effectiveness of its AML/CFT framework against the FATF Recommendation, which was conducted by ESAAMLG. The report, which assessed also FATF Recommendation 8 and IO10 recommends Uganda to exclude NPOs from the application of the AMLA. In particular, the MER (para 203) explicitly notes that "NGO's, although not required by the FATF Recommendations, are listed as reporting entities". One of the Recommended Actions (RA) under Immediate Outcome (IO) 10, which Uganda, as a member of ESAAMLG, is required to implement, recommends that "The country should no longer designate NPOs as DNFBPs (which is not an FATF requirement) and use some of the resources that subsequently become available to undertake a review of the TF risk in the NPO sector." However, Uganda has not implemented this recommendation. Uganda is yet to identify, among the NPOs that fall within the FATF definition, the specific subset that is exposed to TF abuse.

3.3. This is emphasized in the overall conclusions concerning IO10, where it is stated (para 189) that "The authorities need to do more in order to identify and address the TF risks which exist in the sector and create a regime that only targets the NPOs that are at risk for being abused for TF (instead of the current regime which designates all NPOs as DNFBPs".

- 3.4. Finally, the technical compliance analysis of the Ugandan framework against FATF Recommendation 8 (which is rated "non-compliant") notes, in the weighting and conclusions section that "The current requirements regulating the NPO sector do not deal with TF or the TF risks associated with the NPO sector".
- 3.5. In conclusion, the MER of Uganda and the RAs that Uganda is required to implement to remedy the shortcomings identified in its AML/CFT framework by ESAAMLG.
- 3.5.1. do not support the current approach which sees NPOs included in the list of accountable persons; and
- 3.5.2. remark the lack of a specific assessment of the NPO sector for the TF risk and the consequent lack of an RBA and the adoption of measures that are commensurate to the risk identified.

4. THE EMERGING ISSUES FROM THE NATIONAL RISK ASSESSMENT OF UGANDA'S NPO SECTOR.

- 4.1. We have seen that the current AML/CFT framework that subjects the Uganda-based NPOs to the AMLA by considering them "accountable persons" is not in line with the FATF Recommendations and that it has been also criticized by the MER of Uganda, which, remarking that FTF does not require NPOs to be considered accountable persons, concludes that the existing requirements regulating the NPO sector are not justified by a risk analysis of that sector.
- 4.2. This finding is also confirmed by the national risk assessment (NRA) of the ML and terrorist financing risk that Uganda has carried out, using the World Bank methodology in 2016, and which has been published in 2017. The NRA has analysed ML threats and vulnerabilities, at national but also at sectoral level, by assessing the risks also of specific types of accountable persons, including the NPOs. Although not as articulate as the assessment of the ML risk, the NRA has also assessed the risk of TF, including at sectoral level. The findings of both the ML and TF risk assessment, including the specific risk assessment of the NPOs as accountable persons, do not identify any specific or particularly high risk that could justify the current approach of subjecting indiscriminately all NPOs to the AMLA and do not appear to justify the applicability of the full range of AML/CFT measures envisaged by the AMLA to the NPO sector.
- 4.3. In particular, the ML risk assessment of the NPO sector carried out in the context of the NRA concludes that the ML threat of the sector is "medium-low", whereby the ML vulnerability is "medium-high". The NRA specifically acknowledges that the risk of the sector *"is mostly driven by the lack of supervision and the near-absence of implementation of AML/CFT requirements, rather than by vulnerabilities inherent to the types or activities of the NGOs operating in the country"*¹¹.

¹¹ NRA of Uganda, page xxxi of the Executive Summary.

- 4.4. The table below summarizes the overall ML risk in Uganda, as a combination of threat and vulnerability for each of the sectors analysed by the NRA:

OVERALL MONEY LAUNDERING RISK IN THE JURISDICTION						
Overall threat	M	M	M	MH	<input type="checkbox"/> Money Remitters <input type="checkbox"/> Casinos <input type="checkbox"/> Dealers in precious metals & gems	<input type="checkbox"/> Forex Bureaus <input type="checkbox"/> Real Estate <input type="checkbox"/> Lawyers
	MH	M	M	OFTs	MH	Banking
	M	ML	M	M	Insurance	MH
	ML	ML	ML	<input type="checkbox"/> Securities <input type="checkbox"/> Accountants	NGOs	M
	L	L	ML	ML	M	M
		L	ML	M	MH	H
Overall Vulnerability						

- 4.5. The NRA analyzed also the terrorism and TF risks, concluding that the threat and vulnerability for Uganda are medium-high at national level. However, Uganda-based NPOs are not indicated among the sources of TF of the terrorist organizations that are identified by the NRA as a threat to Uganda. Although Uganda did not carry out a fully-fledged TF risk assessment of the NPO sector consistent with FATF Recommendation 8 (which, as explained earlier, requires first the identification of the NPOs that meet the FATF definition and then, out of these, the identification of those that may be exposed to TF abuse), NPOs were considered in the NRA for both the ML and the TF risk, and there is no indication of a particular exposure of the NPO sector to TF risk. Sectoral assessments of the TF risks carried out in the context of the NRA concluded

that some financial products and the real estate sector present higher TF risks, but not the NPO sector.

- 4.6. Consistent with the risks identified for the NPO sector, the action plan attached to the NRA establishes that "The country should no longer designate NGOs as DNFBPs (which is not an FATF requirement)"¹². However, this action item was not implemented.
- 4.7. Although the terrorism and TF threat to the NPO sector are country-specific, it is interesting to note – in terms of international trends - that the Supra-National Risk Assessment of the ML and TF risk carried out by the European Commission (EC) for European Union countries has seen significant changes - between its first assessment carried out in 2017 and the second one, carried out in 2019 - in the assessment of the NPO sector. This sector was one of the very few were, between 2017 and 2019 there was a decrease in the risk, for both ML and TF. While in 2017 the assessment of the threat and vulnerabilities for ML and for TF was deemed to be "significant" for NPOs not receiving institutional funding, in 2019 the ML threat and vulnerability of the NPO sector decreased to "moderately significant". While the TF threat remained "significant", the TF vulnerabilities decreased to "moderately significant".
- 4.8. In conclusion, not only is the current AML/CFT framework concerning the NPO sector not consistent with the FATF, as also acknowledged by the 2016 MER of Uganda, but it is also not supported by the findings of the 2017 NRA which, in fact, called for no longer designating NPOs as accountable persons under the AMLA.

¹² NRA of Uganda, Action Plan for the NPO sector at page 258.

5. THE IMPLICATION FOR FINANCIAL INCLUSIONS AND THE COSTS OF COMPLIANCE ON THE WORK OF THE NPO SECTOR

- 5.1. Financial inclusion for NGOs has been a long-standing concern. Measures to address AML/CFT have sometimes overshot and led to organizations being unable to access needed funds. The increasing cost of compliance has resulted in many banks de-risking types of customers considered or perceived to pose a higher and not-sustainable risk. This e-risking has not spared the NPO sector. It is interesting to note that one of the risk factors identified by the EC affecting the NPO risk derives from FI's de-risking of NPOs, which result in their having to utilize fewer formal channels: "Risks also increase when no formal banking channels are available for NPO money transfers. As was made clear earlier, informal money transfers are generally only used because banks are becoming increasingly unwilling to provide financial services to NPOs (a trend known as bank de-risking) and because correspondent banking is declining. The risk, therefore, stems to some extent from financial exclusion."¹³
- 5.2. Recent research undertaken by Philanthropy Advocacy (DAFNE & EFC initiative) in 2020/2021 revealed that the fight against terrorism and financial crime has led to the introduction of new laws/rules affecting the philanthropy/foundation sector (e.g., the implementation of EU Anti Money Laundering Directive, or in reaction to recommendations of Financial Action Task Force standards/mutual evaluations) in Europe.
- 5.3. A study by VOICE¹⁴ and published in March 2021 on the impact of sanctions and the cost of compliance, which included a survey of NGOs¹⁵, found that NGOs "are constantly 'walking on thin ice' with banks and in spite of the efforts to engage banks in discussions, the banks simply 'do not care'. This forces NGOs to find work-arounds which include resorting to less transparent means, like informal money-transfer systems. This greater risk-taking undermines their financial integrity. Financial integrity policy thus becomes counter-productive

¹³ EU Supranational Risk Assessment – NPO sector, 2019, at 230. Accessible at [supranational risk assessment of the money laundering and terrorist financing risks affecting the union - annex.pdf \(europa.eu\)](https://ec.europa.eu/euipo/amlcft/docs/supranational_risk_assessment_of_the_money_laundering_and_terrorist_financing_risks_affecting_the_union_-_annex.pdf).

¹⁴ VOICE - "Voluntary Organizations in Cooperation in Emergencies" is an NGO network promoting effective humanitarian aid worldwide since 1992. VOICE is the main NGO interlocutor with the European Union on emergency aid and disaster risk reduction.

¹⁵ "Adding to the evidence: the impact of sanctions and restrictive measures on humanitarian action": [ct-survey-report-adding-to-the-evidence-march-2021 \(2\).pdf](https://ec.europa.eu/euipo/amlcft/docs/adding-to-the-evidence-march-2021-2.pdf)

for protecting NGOs from terrorism financing abuse, as it leads to the exclusion of NGOs from the banking sector¹⁶."

- 5.4. Moreover, AML/CFT compliance has also a significant cost for the NPO sector, which is particularly burdensome considering that the sector relies on donations. In Uganda this has resulted in significant and burdensome costs by damaging the earned public trust, integrity, reputation and consequently interfering with the legitimist operation of NPOs at a critical time of need for their good works. The above-mentioned survey of VOICE gives some indications on the costs involved in complying with sanctions and CT restrictive measures, based on estimates provided by the NGOs that participated to the survey. The estimates varied widely (ranges from €45,000 to €300,000 per year).

6. POTENTIAL HUMAN RIGHTS IMPLICATIONS?

- 6.1. Last but not least, the current legal framework subjecting indiscriminately all NPOs to the full range of requirements envisaged by the AMLA in lieu of focused and proportionate measures in line with a risk-based approach, could potentially amount to a violation of human rights. The European Commission for Democracy through Law, (better known as the Venice Commission, the Council of Europe's independent advisory body on constitutional matters, including on the protection of fundamental rights), has ruled in several cases that "reporting requirements, regardless of whether NGOs have been granted a form of public support or not, should be appropriate to the size of the association and the scope of its operations and should be facilitated to the extent possible through information technology tools. Associations should not be required to submit more reports and information than other legal entities. States shall refrain from imposing burdensome administrative requirements on NGOs and must always limit interference with the right to freedom of association based on necessity and proportionality requirements."¹⁷

¹⁶ *ibid.*

¹⁷ See, for example CDL-AD (2018)004-e Romania – Joint Opinion on Draft Law No. 140/2017 on amending Governmental Ordinance No. 26/2000 on Associations and Foundations, §40. "In addition, all reporting should at the same time ensure respect for the rights of members, founders, donors, beneficiaries and staff, as well as the right of the association to protect legitimate business confidentiality. Obligations to report should be tempered by other obligations relating to the right to security of beneficiaries and to respect for their private lives and confidentiality; any interference with respect for private life and confidentiality should observe the principles of necessity and proportionality."

7. CONCLUSIONS AND RECOMMENDATIONS

7.1. Based on the above-mentioned findings of our analysis concerning the FATF Recommendations and other sources, the Defenders Protection Initiative, in collaboration with the NPO Working Group on FATF in Uganda, recommends:

7.1.1. Deleting category 15 in the 2nd schedule to the AMLA from the list of accountable/reporting entities, by applying section 139(2)(b) & section 139(3)(b) of the said Act, and consistent with the NRA Action Plan.

7.1.2. Any measure aimed at the prevention of TF abuse of the NPO sector should be:

- i. Targeting only those NPOs that meet the FATF definition, based on a specific risk assessment that should identify which types of NPOs are actually exposed to TF abuse.
- ii. Focused, proportionate and justified in light of identified and documented TF risks
 - a) The FIA should involve a significant sample of NPOs in the risk assessment of the NPO sector.
 - b) The FIA should reach out to financial institutions to sensitize them about the "de-risking" of NPOs.

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