



Advisory



Project Management



Training



In- and Outsourcing

Know your Beneficiary – or How to Protect your NPO from Terrorism Abuse

The international fight against terrorism has led to cases of abuse and misuse of certain non-profit organisations (NPOs) to raise and move funds. These funds are then used by the terrorist organisation to meet its logistical needs, to encourage the recruitment of new members or to support terrorist operations by any other means. There are also situations in which terrorists create fake charities and engage in fraudulent fundraising. Not only does this facilitate terrorist activities, but it also has the effect of undermining the trust of donors and thus the reputation of the NPO.

The international recommendations as well as new requirements for association currently proposed in Switzerland are primarily aimed at protecting NPOs from operation for terrorist financing purposes and are risk-based.

Protecting NPOs from exploitation for terrorist financing purposes is therefore both an element of the global fight against terrorism and at the same time a necessary measure to preserve the integrity of NPOs and their donors.

Marc Blumenfeld, lic.iur., Rechtsanwalt, LL.M., TEP
Tennessee Soudain, Dr.iur.

February 2, 2021

I. NPO faced to the risks of terrorist financing abuse

The banks, amongst other financial intermediaries, are subject to anti-money-laundering and anti-terrorist financing regulations in Switzerland. Associations and other NPOs, by contrast, are not subject to these or similar due diligence requirements until this date. Several international institutions, such as the Financial Action Task Force (FATF) and the UN, have warned of these risks so that States can strengthen vigilance and secure the financial flows of NPOs. In line with these international efforts and recommendation, the Swiss Anti-Money Laundering Act ("AMLA") is currently being revised.

a) The terrorism abuse risks

According to the independent inter-governmental body, the FATF, the non-profits are vulnerable to being used for terrorist purposes for several reasons. They enjoy public confidence, have access to significant sources of funding and use a lot of cash. In addition, some associations have an international presence that provides a framework for domestic and international financial transactions, particularly in or near areas that are particularly vulnerable to terrorist activity.

Depending on their legal form and the country in which they are based, associations are often largely unsupervised by the public authorities and their creation may be a purely formal matter. Terrorist organizations have taken advantage of these characteristics to infiltrate the sector, divert funds and use the

operations of associations to conceal or support their own activities.

The current recommendations, both national and international, are aimed at ensuring that associations are not misused by terrorist organizations in order to (a) present themselves as legitimate entities, (b) exploit associations for terrorist financing purposes, including to avoid asset freezing measures, and (c) conceal or obscure the clandestine flow of funds intended for legitimate purposes but diverted to terrorist objectives.

b) International recommendations to states

These risks require states to take measures to (a) protect the non-profit sector from abuse: these measures should promote transparency and strengthen donors' confidence that charitable activities indeed benefit community and (b) identify and take effective measures against associations that are exploited by, or actively support, terrorist organisations.

When associations are suspected of being involved in activities supporting and financing terrorism, the priority of States should be to investigate and put an end to such activities, trying to avoid that the measures taken to that end have a negative impact on the innocent and legitimate beneficiaries of charitable activities.

However, NPOs should not be treated on equal terms with the banking and financial sector. It is necessary to take into account

their importance in the civil society: the importance of their charitable activities and the importance for them to obtain funds. This explains why the measures taken to protect associations must consider their specificity and not affect donations. On the other hand, greater vigilance with regard to the risks of terrorist misappropriation reassures and protects the donors.

II. Proposed new swiss obligations in a way to facilitate the identification of risky NPO's

Following the FATF recommendations, the Swiss financial federal department proposes to amend the AMLA in several areas. Concerning associations, the bill puts forward two main measures. Both are made to facilitate the access to information to the authorities. In that way in case of doubt, the relevant authorities could go ahead with investigations.

a) The proposed new obligations

- The draft law provides for **an obligation to register** in the commercial register for any association that primarily collects or distributes funds directly or indirectly abroad for charitable, religious, cultural, educational or social purposes (Proposed new Art. 61 sect. 2 Civil Code).
- Some associations can be exempted from the obligation to register. This may be the case if the associations

present a low risk of being exploited for money laundering or terrorist financing purposes. The risk is assessed on the basis of the amount of funds collected or distributed, the source or destination of these funds and their allocation (Proposed new Art. 61 sect. 2ter Civil Code).

- The associations that will have to register in the commercial register will then be required **to keep a list of members** in which the identities of each member are mentioned. This means either the first name and last name or the company name and address (Proposed new Art. 61a sect. 1 Civil Code).
- This list must be **accessible** at all times in Switzerland. The association must also keep the information relating to each member and any supporting documents for a period of ten years after the removal of the concerned member (Proposed new Art. 61a sect. 2 Civil Code).
- Finally, the association must be able to be **represented by a person domiciled in Switzerland**, and this person must have access to the list of members (Proposed new Art. 69 sect. 2 Civil Code).

b) More transparency without compromising NPO's specificities

The purpose of national measures to protect NPOs against exploitation for terrorist purposes should neither destabilise nor discourage charitable activities and donations. On the contrary, these measures are intended to promote the responsibility of these organisations and the sense of trust and confidence in them. Donors and the public in general need to be assured that the funds are in fact benefiting their legitimate recipients.

To this end, the new measures aim to identify as effectively as possible NPOs that are exploited by or supporting terrorist organisations. The registration of the organisation in the commercial register and the accessibility of a list of members provide the authorities with the necessary leverage to carry out further investigations. However, this does not lift the veil of anonymity of the donors nor does it give the associations structural obligations in itself. Rather, the associations are encouraged to be more vigilant in the conduct of their activities.

III. More than legal obligations: some practical measures which can help to manage the risks of terrorism financing

Swiss NPOs that finance projects or associations abroad are not liable for the ultimate use of funds if this use has been concealed and made without their knowledge. However, according to the *wilful blindness* principle, NPOs should not cultivate their una-

wareness to invoke their good faith and ignorance of a situation that a simple examination might have revealed.

a) Country risk

As the terrorist phenomenon is by nature mobile and broad it is advisable to be informed of combat zones and countries classified as being at risk, in order to measure the risk that is taken by wiring funds.

National or supranational authorities regularly update lists of countries more or less at risk, classified as low, moderate or significant. This does not mean that associations cannot or should not work with associations in high-risk countries. It does however mean that when the NPO sends funds to countries with a strong terrorist presence, the organisation must pay extra attention to the entities it finances.

b) Know your beneficiary

Good reputation is a subjective notion that is up to each and every one to judge, but it is possible to examine *a minima* the beneficiary organisation. The organisations that present the greatest risk are mainly those that:

- Have relations with combat zones, unless the association has a recognised medical assistance mission
- Send funds to combat zones without asking for proof of expenditure, without sending people there to check on the use of these funds, without asking for the identity of the

people who have benefited from their generosity

- Send remittances outside the authorised financial circuits
- Do not keep proper and transparent accounts

If on that basis increased risks are identified, it is advisable to perform a more thorough due diligence on the beneficiary person or organisation, including

- Formal identification of the individual beneficiary (e.g. Passport Copy, Utility Bill)
- Formal identification of a beneficiary organization (Public Registrations,

identification of directors and officers)

- Verification of local activities and reference letters

In the same spirit of reassuring the public as to the destination of NPO funds, it is important to improve the traceability of the funds by keeping track of money and resources, and so to regularly verify that these funds are used as they should be. To this end, reporting obligations should be agreed and the right to perform audits reserved. Publishing this information can also be a good way to ensure the association's diligence in conducting its activities.

**Alithis is an non-traditional legal,
compliance and regulatory services provider
specializing in trust and non-profit matters**

Alithis AG

Dufourstrasse 105
CH-8008 Zürich

welcome@alithis.ch

+41 44 520 40 20