

Statewatch briefing on EU proposals to increase the financial transparency of charities and non-profit organisations

Ben Hayes, Statewatch, January 2010

Introduction

This briefing was prepared for several UK grant-making foundations in response to concerns about draft EU proposals, put forward in October 2009, for binding legal standards on increased financial transparency of non-profit organisations (NPOs).

The proposals appeared during the drafting of the 'Stockholm programme' on EU justice and home cooperation 2010-14. The final Stockholm text, adopted by the EU in December 2009, maintains the demand for increased financial transparency of NPOs but no longer calls for binding legal measures.

Statewatch is a non-profit-making voluntary group founded in 1991. It is comprised of lawyers, academics, journalists, researchers and community activists. Its European network of contributors is drawn from 17 countries. Statewatch encourages the publication of investigative journalism and critical research in Europe the fields of the state, justice and home affairs, civil liberties, accountability and openness. For more information see www.statewatch.org.

Background: Financial Action Task Force 'Special Recommendation 8' (SR8) 2002

The Financial Action Task Force (FATF) has strongly promoted the thesis that terrorist organisations use laundered money for their activities, and that charities are a potential conduit for terrorist organisations. On 11 October 2002 the FATF published [International Best Practices on Combating the Abuse of the Non-Profit Sector](#). These guidelines bore strong similarities to the [Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities](#) issued by the US Treasury in November 2002 (these guidelines were [updated in 2006](#)).

On 22 October 2002 the FATF issued nine [Special Recommendations on Terrorist Financing](#), including:

8) Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- *by terrorist organisations posing as legitimate entities;*
- *to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and*
- *to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.*

The FATF recommendations have been endorsed and adopted, either in whole or in part, by more than 180 jurisdictions, the United Nations, the IMF and the World Bank. [UN Security Council Resolution 1617](#) (July 2005) "strongly urges all Member States to implement the comprehensive international standards embodied in the FATF Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing".

About the FATF

The [Financial Action Task Force](#) was established by the G7 in 1989 to combat international money laundering. In 1990 it adopted 40 detailed 'counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation'. States were called upon to establish data retention regimes of at least five years for all transaction records (domestic as well as international) and 'disclosure regimes' for 'suspicious financial transactions'. These oblige participating states to ensure that the employees of credit and financial institutions:

cooperate fully with the authorities... by informing [them], on their own initiative, of any fact which might be an indication of money laundering [and] by furnishing those authorities, at their request, with all necessary information.

The FATF also demands the establishment of Financial Intelligence Units (FIUs) to process suspicious transactional reports and assist police investigations requiring financial information. The EU has incorporated all these recommendations into EU law through its [Money Laundering Directives](#) and [Decision on FIUs](#).

In the aftermath of '9/11', the FATF extended its remit from money laundering to the identification and freezing of 'terrorist assets', alternative remittance systems and non-profit organisations. Since then it has called repeatedly for the expansion of states' capacity to engage in the surveillance of the financial system and to enforce "financial sanctions" against alleged terrorists and their supporters (see latest [International Best Practices on Freezing of Terrorist Assets](#), FATF, 2009). The FATF also conducts compliance evaluations in the member states.

The FATF is based at but independent of the Organisation for Economic Cooperation and Development (OECD), an intergovernmental body created in the 1960s by 20 western nations with "a commitment to democratic government and the market economy". The FATF now has 34 member states. Unlike most intergovernmental bodies, the FATF is *not regulated* by international Treaty or Convention. As a result it is largely unaccountable. The organisation states that "The FATF is accountable to the Ministers of its membership" but in the absence of publicly agreed rules on decision-making, openness and transparency, the organisation cannot claim to be democratically accountable in any wider sense ([see FATF website](#)).

EU implementation of FATF SR8

Developing and implementing an EU strategy on the suppression of terrorist financing including the regulation of non-profit organisations was set as a strategic objective in the revised Action Plan accompanying the Council Conclusions on Combating Terrorism of March 2004. In 2005 the European Commission proposed a [draft Code of Conduct for Non-profit Organisations to prevent non profit organisations from being abused by terrorist's organisations](#). [In the same year the EU launched the European Transparency Initiative, largely in response to demands from civil society for a register of EU lobbyists and MEPs private interests – it resulted in the [EU lobbyists registers](#) with NGOs asked to sign-up as well].

The stated aim of the Commission's NPO terrorism code was to promote on a voluntary basis, transparency and accountability best practices within the non-profit sector. It also contained recommendations to the Member States for monitoring the use of the EU funding and the non-profit sector. The measure was [strongly criticised by NGOs](#).

On 1-2 December 2005 the EU Justice and Home Affairs Council adopted Conclusions endorsing the principles of the Commission's draft and encouraging the member states to implement it: <http://www.consilium.europa.eu/uedocs/cmsUpload/JHA,1-2.12.05.pdf> (pp 31-32).

In response to the criticism levelled at the code, the European Commission was supposed to set up a "contact group" in March 2006 to discuss the implementation of this code with representatives of NPOs representing different sectors and Member States. In October 2007, the European Commission decided not to create this group, citing an administrative burden. Instead the Commission funded two studies:

- 1) [Study assessing the Extent of Abuse of on Profit Organisations for Financial Criminal Purposes at EU level](#), EFC, presented on 25 April 2008 (point 2)
- 2) [Study on Recent Public and Self-Regulatory initiatives improving Transparency and Accountability of non Profit Organisations in the European Union](#), European Centre for Non-Profit Law, presented on 12 February 2009

These studies were later cited in the [Report on the implementation of the revised Strategy on Terrorist Financing of the EU Counter-terrorism coordinator](#) dated 5 May 2009, which claimed:

The results of the studies indicate, inter alia, that there could be a better exchange of information and best practices between relevant stakeholders and authorities, for example via a "Centre of Excellence", and that some guidance could be useful in order to assist NPOs to comply with existing obligations. Umbrella organisations of non-profit organisations which participated in the meetings of 25 April 2008 and 12 February 2009 were invited to comment on the studies and on a possible way forward. Based on these studies and the input received, the Commission will further examine the right way to respond to the threat of potential abuse of non-profit organisations for terrorist financing purposes. The aim should be that all Member States are assessed as "compliant" with regard to Special Recommendation VIII of the FATF.

Studies on financial crime at the EU level and on the transparency of NGOs have thus been used by the EU to justify the implementation of FATF SR8 despite failing to provide supporting evidence that NGOs/charities have been abused/exploited by terrorists – on the contrary, the first report found that "current indications suggest limited abuse of foundations". Similarly, according to the UK Charities Commission (which cites the Home Office as a source): "[Actual instances of abuse have proved very rare](#)".

The Stockholm programme

The European Commission [Communication on the draft Stockholm programme](#) (the five year plan for EU justice and home affairs policy), dated 10 June 2009, then proposed:

The instruments for combating the financing of terrorism must be adapted to the new potential vulnerabilities of the financial system and to the new payment methods used by terrorists. We must have a mechanism that allows both adequate monitoring of financial flows and effective and transparent identification of people and groups likely to finance terrorism. Recommendations must be prepared for charitable organisations to increase their transparency and responsibility.

The proposals that caused so much concern were inserted into the [Swedish Presidency draft of the Stockholm programme](#) dated 16 October 2009, which read:

The European Council calls upon the Commission to:

- ***propose legal standards for charitable organisations to increase their transparency and responsibility so as to ensure compatibility with Special Recommendation (SR) VIII of the Financial Action Task Force (FATF),***
- *take into account new payment methods in the elaboration/update of Counter Terrorist Financing measures,*
- *examine the need for the Union to create possibilities to track terrorist financing,*
- *present measures to improve feedback to financial institutions regarding the outcome of their cooperation in the fight against terrorism financing.*

The exact origins of this proposal are unclear (Statewatch understands that it did not come from the Swedes, the UK or the European Commission). In response, a number of European Foundations led by CORDAID and EFC embarked on a successful lobbying campaign to have the proposals withdrawn (see EFC Briefing: [When cooperation works: Overcoming security concerns about NPOs at EU level](#)).

The [final version of the Stockholm Programme](#) reads:

The European Council calls upon the Commission to:

- *promote increased transparency and responsibility for charitable organisations with a view to ensuring compatibility with Special Recommendation (SR) VIII of the Financial Action Task Force (FATF)*

Despite the climb-down, the latest [EU counter-terrorism action plan, dated 26 November 2009](#), maintains the more aggressive language from the earlier draft:

Another important issue is to counter the financing of terrorism. Several priority fields of action on this have been proposed for the Stockholm Programme including increased transparency and responsibility of non-profit organisations to address the potential abuse of such organisations for terrorist financing purposes.

At a roundtable in the European Parliament on 8 December 2009 featuring EU Counter-terrorism Coordinator, Commission, Swedish presidency, concerned MEPs, donor organisations and NGOs, the idea of binding EU rules was strongly rejected by a majority of the participants.

Related concerns

Regardless of the measures enacted by member states or regulatory agencies, the legacy of EU measures designed to combat terror financing is the wholesale surveillance of the financial system by law enforcement agencies looking for suspicious financial transactions. In addition to the domestic disclosure regime, the EU has granted the USA direct access to the databases of SWIFT (the interbank transfer organisation) based in Brussels. This in turn has impacted upon individuals and charities sending money to conflict regions and threatens to engender a culture of fear on the part of Muslims. Examples of charities and NGOs having their assets frozen, trustees suspended or activities interrupted are said to be commonplace, but little or no empirical work has been done on this topic in Europe.

The ACLU has produced an excellent study on the situation in the USA (where the prosecution of Muslim charities has been extensive) showing that:

U.S. terrorism financing policies and practices are seriously undermining American Muslims' protected constitutional liberties and violating their fundamental human rights to freedom of religion, freedom of association, and freedom from discrimination.

The report further suggests

The government's actions have created a climate of fear that chills American Muslims' free and full exercise of their religion through charitable giving, or Zakat, one of the "five pillars" of Islam and a religious obligation for all observant Muslims.

See "[Blocking Faith, Freezing Charity](#)". A European study of this kind would be most welcome.