Recommendations to clarify application of AML policy to public benefit foundations and NPOs - April 14th 2022

We strongly believe in **the important fight by the European Union and international and national policy makers against money laundering and terrorism financing.** We have however observed that elements of the policy have created legal uncertainty in their application and have had unintended consequences on the NPO sector including the philanthropic and foundations' sector. We consider that the policy applied to fight money laundering and terrorism financing must be risk based, proportionate, fit for purpose and must take into account fundamental rights.

We would hence like to suggest that the new AML package and in particular the EC proposal for a Regulation on the 'Prevention of the use of the financial system for the purposes of money laundering or terrorist financing' EUR-Lex - 52021PC0420 - EN - EUR-Lex (europa.eu) should clarify that:

1. "BOs" of NPOs/philanthropic organisations/foundations are the ones directing the organisation

The current wording creates legal uncertainty since it is not clear how the "beneficial ownership" concept should be applied to public benefit legal entities such as limited liability companies, co-operatives, mutual societies, associations and foundations.

NPOs and public benefit foundations are set up to benefit the general public and not private interests.

Public benefit foundations are self-owned entities with their own governing bodies. The governing bodies act as stewards and are bound to the public benefit purpose of the organisation as defined in the statutes. They benefit the general public and are not set up to financially support for example family members or other private interests.

The definition of BO as currently drafted is therefore ill suited for public benefit foundations and NPOs.

A distinction between those cases where there is someone identifiable who "owns" the organisation or who ultimately benefits financially from the organisation versus cases where information on the ones 'directing or controlling' the organisation should be collected is needed.

One additional paragraph should hence be inserted as a final paragraph in Articles 42 and 43 of the draft Regulation to clarify that for public benefit organisations, be they legal entities, foundations, express trusts or express trust like entities or arrangements, the ones 'directing" the organization should be considered as the BO:

Article 42

….

In the case of corporate legal entities and legal entities, which are set up for public benefit purposes that benefit the general public, information on those directing the organization e.g. the senior management or board level.

Article 43

…..*In the case of express trusts or legal entities and legal arrangements similar to express trusts, which are set up for public benefit purposes that benefit the general public, information on those directing the organization e.g. the senior management or board level.*

2. "BOs" of NPOs/philanthropic organisations/foundations are not beneficiaries

Next to controlling persons, the draft AML Regulation in Article 43 adds 'beneficiaries' to the definition of BO. It must be explicitly clarified that it is **not the intention to collect information on all grant recipients/ scholarship recipients under the point "beneficiaries" for public benefit organisations.** The need for this clarification has become apparent during the implementation of the current 4/5th Directive, where a few EU countries have considered the obligation for NPOs and public benefit foundations to report on all their **grant or scholarship recipients as BO**. This appears to be disproportionate, lead to uncertainties and privacy rights concerns and as a deviation from the real purpose to fight money laundering and terrorism financing of terrorism. This is clearly not an appropriate interpretation with the intended rationale of the BO approach to fight money laundering and terrorism financing and creates unnecessary administrative burdens for both EU member states and public benefit organisations. According to their statutes, public benefit organisations benefit the general public and they generally list a class of beneficiaries/grant recipients (such as researchers in one field/artists of a specific field or people in need below a certain income level).

We therefore suggest the following amendments to Article 43 of the draft Regulation:

Article 43

Identification of beneficial owners for express trusts and similar legal entities or arrangements

1. *In case of express trusts, the beneficial owners shall be all the following natural persons:*
   (a) the settlor(s);
   (b) the trustee(s);
   (c) the protector(s), if any;

(d) the beneficiaries or where there is a class of beneficiaries, the individuals within that class that receive a benefit from the legal arrangement or entity, irrespective of any threshold, as well as the class of beneficiaries.
However, in the case of public benefit express trusts and in the case of pension schemes within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council and which provide for a class of beneficiaries, only the class of beneficiaries shall be the beneficiary;

(e) any other natural person exercising ultimate control over the express trust by means of direct or indirect ownership or by other means, including through a chain of control or ownership.

2. *In the case of legal entities and legal arrangements similar to express trusts, the beneficial owners shall be the natural persons holding equivalent or similar positions to those referred to under paragraph 1.*
However, in the case of public benefit legal entities and arrangement similar to express trusts, which provide for a class of beneficiaries, only the class of beneficiaries as described in the statutes shall be the beneficiary;
Member States shall notify to the Commission by [3 months from the date of application of this Regulation] a list of legal arrangements and of legal entities, similar to express trusts, where the beneficial owner(s) is identified in accordance with paragraph 1.

3. Clarify points related to obliged entities

Those crowdfunding platforms, which are exclusively set up and used for public benefit purposes should be excluded from the definition of 'Obliged entities' according to Article 3 of draft Regulation.

We hence suggest to add an article 6 of the draft Regulation:

- ***Exemptions for certain providers of crowdfunding platforms***

1. Member States may decide to exempt, in full or in part, providers of crowdfunding platforms used exclusively for public benefit purposes from the requirements set out in this Regulation on the basis of the proven low risk posed by the nature and, where appropriate, the scale of operations of such services.

2. For the purposes of paragraph 1, Member States shall carry out a risk assessment of crowdfunding actors assessing: (a) money laundering and terrorist financing vulnerabilities and mitigating factors of the gambling services; (b) the risks linked to the size of the transactions and payment methods used; (c) the geographical area in which the crowdfunding service is administered. When carrying out such risk assessments, Member States shall take into account the findings of the risk assessment drawn up by the

Commission pursuant to Article 7 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final].

3. *Member States shall establish risk-based monitoring activities or take other adequate measures to ensure that the exemptions granted pursuant to this Article are not abused.*

3. Allow cross-reference with company registers

Where NPOs are required to report on BO information (information on those directing the organisation) and include such information in BO registers this often creates duplication of reporting efforts since such information is already at the disposal of supervisory authorities or even respective company registers. We would therefore like to suggest that the new AML package adopts the possibility for NPOs to fulfil their obligation of reporting BO information by cross-referencing to the already reported information accessible at the supervisory authorities or company registers.

4. Fundamental rights must be taken into account

Where BO information is made accessible to the general public, concerns with regard to the unjust limitation of privacy rights and in some cases even security concerns arise from those individuals being listed as BO. These concerns arise in particular if the level of detail of obliged reported BO information includes personal data such as name and residing address, and is accessible to the general public - even if only granted upon request. Similar concerns were raised by the Council of Europe's the Venice Commission, which considers that the reporting obligations imposed on associations concerning the origin of their financing must be pursuing the legitimate aim of ensuring national security and prevention of disorder and crime under Article 11(2) ECHR and Article 22(2) ICCPR, since their aim is to **provide the state with the necessary information to fight against crime, including terrorism financing and money laundering.** We argue that in limiting the right to privacy of NPO's and potentially even individuals, a proportionate approach would be to only grant access to the name and residing address information to the **relevant authorities and not the general public.** We hence favour to only make accessible sensitive BO information to supervisory authorities.

5. No lowering of the percentage indicating ownership

We have noticed that the draft ECON and LIBE Committee reports ask to reduce the percentage threshold that indicated ownership of legal entities from 25% to 5% - however influential shareholding or shareholding with significant voting rights should be the basis for indicating "ownership".