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Desk Review

Argentina¹: FATF- inspired laws that regulate NPOs and Procedures related to FATF evaluations and NPOs

This short desk review is one of five such reviews performed in the context of a regional research program led by the International Center for Not-for-Profit Law (ICNL). Their purpose is to provide non-profit organizations (NPOs) and interested parties in the civil, government, academic, private, and other sectors with relevant data and analyses about anti-money laundering and counter terrorist-financing (AML/CTF) legal standards inspired by both the Financial Action Task Force (FATF) and the Financial Action Task Force of Latin America (GAFILAT), and about FATF evaluations related to those standards. ICNL hopes that these desk reviews will inform dialogues about the degree to which the laws and procedures in each country conform with both the right to freedom of association and FATF standards related to NPOs, as set forth in FATF's recently amended Recommendation 8 and its Interpretive Note (IN).

Introduction

The Argentine State has approved Law 25.246, Article 20 (18) of which provides that legal entities receiving donations or contributions from third parties are required to compile documents that positively prove their clients' identity and report any suspicious act or transaction.² The Financial Intelligence Unit (FIU), which is the main body responsible for both regulating as well as monitoring NPOs,³ has approved Resolution 30/2011⁴ regarding legal entities that receive donations or contributions from third parties, which requires NPOs to positively prove the identity of legal

¹ This research was made possible thanks to the generous support of the American people through the United States Agency for International Development (USAID). ICNL is responsible for the content of this research, which does not necessarily reflect the viewpoint of USAID or the United States' government.

² Law on Concealment and Laundering of Criminal Proceeds. Amendment to the Criminal Code. See Article 20 of the Law. <http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/62977/texact.htm>.

³ In keeping with the provisions of Law 25.426, the FIU is the entity charged with analyzing, handling, and transmitting information in order to prevent and deter money laundering and the financing of terrorism.

⁴ Financial Intelligence Unit. Concealment and Laundering of Criminal Proceeds. Resolution 30/2011. <http://servicios.infoleg.gob.ar/infolegInternet/anexos/175000-179999/178661/texact.htm>.



entities and individuals who provide donations or contributions.⁵ Under this regulation, NPOs are compelled to strengthen the procedure for identifying donors that have their domicile in countries that do not implement or insufficiently implement FATF recommendations.⁶ Due to its deficient ratings in its last mutual evaluation in 2010, Argentina was subject to a process of enhanced FATF and GAFILAT follow-up, from which it was removed in 2014. In 2017, Argentina served as Chair of FATF and GAFILAT. Argentina’s upcoming FATF/GAFILAT mutual evaluation is scheduled for 2021.⁷

Analysis of AML/CTF legislation from the point of view of freedom of association

The right to freedom of association is a fundamental human right. Article 22 of the International Covenant on Civil and Political Rights (ICCPR) expressly protects this right, as it states that “[e]veryone shall have the right to freedom of association with others [...] No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society...”⁸ The Inter-American Commission on Human Rights (IACHR) has explained that “the principle of legality also requires restrictions to be formulated previously, in an express, accurate, and restrictive manner to afford legal certainty to individuals.”⁹ While States are free to regulate NPO registration, oversight, and control, the right to associate freely without interference requires that States ensure that those legal requirements not impede, delay, or curtail either the creation or the functioning of such organizations.¹⁰ One of the duties of States stemming from freedom of association is to refrain from restricting the means of financing human rights organizations. States should allow and facilitate human rights organizations’ access to foreign funds in the context of international cooperation.¹¹ Similarly, penalties should be strictly proportionate to the legitimate aim pursued. Forced dissolution procedures should only be undertaken when there is a clear and imminent danger resulting in a

⁵ Article 13 of Resolution 30/2011.

⁶ Ibid., Article 17(g).

⁷ Financial Action Task Force (FATF). Global Assessment Calendar. [http://www.fatf-gafi.org/calendar/assessmentcalendar/?hf=10&b=110&s=asc\(document_lastmodifieddate\)&table=1](http://www.fatf-gafi.org/calendar/assessmentcalendar/?hf=10&b=110&s=asc(document_lastmodifieddate)&table=1).

⁸ Similarly, Article 16 of the American Convention on Human Rights (“the American Convention”) protects the right of association. The only acceptable restrictions to freedom of association are substantially identical to those provided for in the ICCPR. Argentina ratified the ICCPR in 1986 and the American Convention in 1984.

⁹ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas*; ¶ 165 (2011; “the Second Report”, available at <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>).

¹⁰ Ibid., ¶ 163.

¹¹ Ibid., ¶ 179.



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*flagrant violation of national law and used only when lesser measures would be insufficient.*¹²

Resolution UIF 30/2011¹³ regarding legal entities that receive grants or contributions from third parties and Law 25.246 contain provisions that are inconsistent with international standards on freedom of association. The most problematic provisions for NPOs include:

- a. Resolution UIF 30/2011 imposes extensive and costly requirements in terms of material and human resources on any NPO that receives grants above a minimum threshold amount, which could limit NPOs' ability to operate.

NPOs are subject to the aforementioned Resolution if they receive the equivalent of approximately US\$4,000 in one or more grants in a month.¹⁴ Where this amount is exceeded, NPOs are required to comply with a long list of requirements, including:

- Preparation of a manual of coordinated policies regarding oversight, prevention, auditing functions, the role that each employee must perform, and more;¹⁵
- Staff training programs;¹⁶ and,
- Designation of a compliance officer, who “must enjoy complete autonomy and independence in the performance of the roles and responsibilities he or she is assigned.”¹⁷

NPOs are also required to pay close attention should the grant or contribution involve individuals on the terrorist list¹⁸ and verify whether the grants or contributions involve countries or jurisdictions considered to be “tax havens” or identified by FATF as uncooperative.¹⁹ Each one of these requirements entails a cost for NPOs in producing documents and conducting research, training, and auditing. Furthermore, it compels NPOs to divert staff from their role of fulfilling the entity’s social mission to undertake other tasks; indeed, it can even alter the chain of authority within NPOs by creating a mandatory independent leadership position in the organization. These requirements are imposed not only on NPOs that manage large amounts of grant

¹² Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, ¶ 75, A-HRC-20-27 (May 21, 2012) [hereinafter, the “Report of the Special Rapporteur of May 2012”] http://freeassembly.net/wp-content/uploads/2013/10/A-HRC-20-27_en-annual-report-May-2012.pdf.

¹³ Financial Intelligence Unit. Concealment and Laundering of Criminal Proceeds. Resolution 30/2011. <http://servicios.infoleg.gob.ar/infolegInternet/anexos/175000-179999/178661/texact.htm>.

¹⁴ *Ibid.*, Article 2.

¹⁵ *Ibid.*, Article 4.

¹⁶ *Ibid.*, Article 9.

¹⁷ *Ibid.*, Article 6.

¹⁸ Identification Procedure. Article 17(h). Resolution 30/2011. The terrorist list mentioned in this provision is available at the following link: <https://sro.uif.gob.ar/lut/Vista/List-of-terrorist.aspx>.

¹⁹ *Ibid.*, Article 20(e).



money that may entail risks for the State, but also small NPOs that may spend as much in meeting the requirements as they receive in small, sporadic grants. For a significant percentage of the NPO sector, these requirements may hinder or limit their ability to operate to a degree disproportionate to the interests of the State, contrary to international standards on freedom of association.²⁰

- b. Law 25.246 establishes a system of monetary penalties for any non-compliance, regardless of whether it is minor, technical, or correctable, which could lead to disproportionate sanctions.

The Law and Resolution establish a system of monetary penalties for non-compliance with any of the obligations mentioned above or in the Law.²¹ The Law imposes a fine of one to ten times the total value of the assets or transaction on the person or individual responsible, provided that the act does not constitute a more serious crime. The penalty will likewise be applicable to the legal entity in which the individual works and on whose behalf he or she is to fulfill the requirements established by Law.²² In other words, if the officer that the NPO has designated as responsible to the FIU does not fulfill his or her obligations, both the officer and the NPO must pay the fines for failure to comply with their obligations. The Law also establishes fines that apply to legal entities for reckless or seriously negligent acts, which can vary from 20% to 60% of the value of the assets involved in the crime.²³ Were the executive or governing body of the legal entity to commit the crime in its capacity as such, the entity would be liable for a fine ranging from AR\$50,000 to \$500,000, which is approximately US\$2,800 to \$28,800.²⁴ The absence of exceptions in this sanctions regime for minor infractions—for example, late submissions of information or errors in the submission itself—or of non-monetary alternatives, such as warnings with the opportunity to correct the error, are inconsistent with the standard that sanctions should be strictly proportional to their legitimate aim.²⁵

- c. Resolution UIF 30E/2017 requires that financial entities exercise extensive oversight over NPOs regulated by law that, in practice, the NPOs are experiencing difficulties accessing bank accounts and processing transactions, which is restricting their access to legal sources of financing.

The recent Resolution 30E/2017 requires that financial entities and exchange bureaus identify, evaluate, and understand their risks with regard to all their clients, and based thereon, adopt measures to manage and mitigate such risks.²⁶ With regard to NPOs

²⁰ See *Second Report*, ¶ 163; See Report of the Special Rapporteur of May 2012, ¶ 75.

²¹ Chapter IV of Law 25.246; Article 29 of Resolution 30/2011.

²² Article 24(2) of Law 25.246.

²³ Article 23(2) of Law 25.246.

²⁴ Amount calculated using the November 2017 exchange rate. <https://www.oanda.com/currency/converter/>.

²⁵ See: *Report of the Special Rapporteur* of May 2012, ¶ 75.

²⁶ See <http://servicios.infoleg.gob.ar/infolegInternet/anexos/275000-279999/275996/norma.htm>.



and any entity regulated by law, financial entities are required to exercise due diligence using a risk-based approach.²⁷ According to an expert in Argentine NPO tax law,

“The FIU’s tremendous pressure on financial entities to adopt the mitigation measures and internal controls required to ensure acceptable risk levels has intensified the process of purging bank portfolios. In this context, NPOs have had local and foreign accounts closed, transactions slowed—given that in many cases enhanced due diligence is applied—and approval for opening new bank accounts denied, etc.”²⁸.

These practices, driven by strict implementation of Resolution 30E/2017, are detrimental to NPOs and are interfering with their right to request, receive, and use financing from legal sources.²⁹

Analysis of AML/CTF laws from the point of view of FATF standards

FATF is an inter-governmental body whose objectives are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing, and other threats related to the integrity of the international financial system.³⁰ To this end, FATF has developed 40 Recommendations for States committed to combatting these crimes. GAFILAT is a regional group³¹ that belongs to FATF's network. FATF's recommendations have undergone important revisions since 2014.³² In 2016, FATF revised Recommendation 8³³ and it's IN regarding NPOs, eliminating the statement that NPOs “are particularly vulnerable” to terrorist abuse and inserting new language urging States to apply a risk-based approach³⁴ and to respect their obligations under international human rights law.³⁵ According to the reformulated IN, countries must use the risk assessment process to identify a subset of NPOs at risk and then take actions or measures that are

²⁷ Ibid., Article 32.

²⁸ Comments by Dr. Pedro Gecik; for information on Dr. Gecik, See: <http://www.consejo.org.ar/Cv05/gecik.htm>.

²⁹ See *Second Report*, ¶ 179.

³⁰ FATF, *Who we are*, available at <http://www.fatf-gafi.org/about/whoweare/>.

³¹ GAFILAT, *La función* (our role), available at <http://www.gafilat.org/content/quienes/> (In Spanish).

³² See FATF, *Best Practices: Combatting the Abuse of Non-Profit Organizations* (Recommendation 8) [2015]. Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf> (English).

³³ Recommendation 8 requires that countries “review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse”.

Recommendation 8 and its IN can be found at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf.

³⁴ European Center for Not-for Profit Law (ECNL). *A String of Successes in Changing Global Counter-Terrorism Policies that Impact Civic Space*. Available at: <http://www.icnl.org/research/resources/counterterrorism/ECNL-Briefer-Change-of-the-Global-CT-Policies-that-Impact-Civic-Space-July-2016.pdf>.

³⁵ See *IN*, ¶ 2.



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*effective, appropriate, and proportionate to the risk.*³⁶ Finally, the IN establishes that measures taken must not interrupt or discourage the legitimate charitable activities of NPOs.³⁷

- a. Neither Resolution 30/2011³⁸ nor Law 25.246 identifies a specific subset of NPOs that are at risk; rather, the same controls apply to all NPOs that receive donations exceeding a low threshold amount in a given month.

The AML/CFT provisions do not refer to identifying a subset of NPOs that are at risk of terrorism financing abuse. Resolution 30/2011 defines as regulated entities those “legal entities that receive grants or contributions from third parties for amounts exceeding AR\$70,000³⁹ or its equivalent in in-kind contributions [...]” The provision applies to the entire NPO sector; it does not define the content of the risk analysis, nor does it provide for differentiated application of oversight measures or sanctions according to any risk classification. In contrast to the requirement that financial entities base their assessments on individual evaluations of NPOs,⁴⁰ the State treats all NPOs regulated under the Law as if they entailed the same level of risk. Therefore, it cannot be concluded that oversight measures are appropriate and proportional according to the standards of Recommendation 8 and its IN.⁴¹

- b. Resolution 30/2011 provides for oversight measures and sanctions that may disrupt or discourage the legitimate charitable activities of NPOs.

As analyzed in the section above, Resolution 30/2011 establishes a series of controls, procedures, and information requirements that may limit NPOs ability to conduct their activities. The negative impact may be particularly serious for NPOs that do not receive large grants or have personnel to handle the significant administrative demands. Indeed, these kinds of bureaucratic requirements may discourage them from carrying out their legitimate charitable activities—the outcome that Recommendation 8 and its IN seek to avoid.⁴²

³⁶ Ibid., ¶ 5.

³⁷ Ibid., ¶ 4.

³⁸ Resolution 104/2016 was published by the FIU in order to amend several AML/CFT provisions. With regard to NPOs, the amendments made refer to the amounts of some fines provided for in Resolution 30/2011 in order to take into account inflation. However, such amendments did not affect the provisions analyzed in this report. <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=265014>.

³⁹ Equivalent to approximately US\$4,000 based on the November 2017 exchange rate.

<https://www.oanda.com/currency/converter/>.

⁴⁰ See Resolution UIF 30E/2017, Article 32.

⁴¹ See Interpretive Note (IN), ¶5.

⁴² Ibid., ¶4(d).



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Analysis of FATF evaluation and follow-up processes and NPO engagement

Recommendation 8 requires that countries “review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse.”⁴³ This evaluation of the NPO sector to identify the NPO subset vulnerable to terrorist financing abuse must be, in turn, covered in the country’s Mutual Evaluation performed by FATF/GAFILAT evaluators.⁴⁴ The IN for Recommendation 8 establishes that “developing cooperative relationships among the public and private sectors and with NPOs is critical to understanding NPOs’ risks and risk mitigation strategies, raising awareness, increasing effectiveness and fostering capabilities to combat terrorist financing abuse within NPOs.”⁴⁵ In addition to outreach and educational programs,⁴⁶ countries “should work with NPOs to develop and refine best practices to address terrorist financing risks and vulnerabilities and thus protect them from terrorist financing abuse.”⁴⁷ Dialogue between the government and NPOs can be encouraged: during the NPO sector risk assessment; while developing and implementing measures to mitigate risk and related guidelines; during a FATF country mutual evaluation; and whenever related issues arise.⁴⁸

- a. Did the State identify a subset of NPOs vulnerable to terrorist financing abuse and conduct a review of laws and regulations regarding this subset of NPOs? If so, did the NPO sector participate in this evaluation?

At the time of this desk review, no evidence was found that the State had identified a subset of NPOs vulnerable to terrorist financing abuse. To the contrary, Argentina has regulations in force whose one-size-fits-all approach groups together all not-for-profit organizations, which are required to fulfill the obligations listed in the Resolutions noted above. Thus, this desk review does not show that the State has collaborated with the NPO sector in identifying the subset of vulnerable NPOs, in keeping with the IN.⁴⁹

⁴³ See *The FATF Recommendations*, Recommendation 8, Pag. 11, available at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf.

⁴⁴ See Procedures for the FATF Fourth Round of AML/CTF Mutual Evaluations, ¶ 4, available at <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf>.

⁴⁵ See IN, ¶ 4 (f).

⁴⁶ *Ibid.*, ¶ 6 (a) (ii).

⁴⁷ *Ibid.*, ¶ 6 (a) (iii).

⁴⁸ See FATF, *Best Practices: Combatting the Abuse of Non-Profit Organizations* (Recommendation 8), ¶ 27.

⁴⁹ See IN, ¶ 6(a)(ii) and (iii).



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- b. Is there dialogue between the NPOs and state agencies to conduct follow-up on the findings of the NPO-sector risk assessment?

In May 2014, the FIU issued Resolution 473/2014,⁵⁰ which called for the implementation of the National Money Laundering and Financing of Terrorism Risk Assessment in Argentina and the system that will govern its execution. Following the change in government authorities that took place in 2015, no progress has been made in implementing this National Risk Assessment. This desk review did not turn up evidence that the schedule of meetings for any sector has been published nor did it obtain information on plans for the NPO-sector risk assessment. Furthermore, it did not show evidence of any dialogue between NPOs and government authorities to make headway in carrying out the National Risk Assessment. Therefore, there is no evidence that the State has collaborated with the NPO sector in preparing the follow-up on the findings of the risk assessment, in keeping with the IN.⁵¹

- c. Has the State facilitated the NPO sector's participation in the FATF mutual evaluation?

Argentina has yet to be evaluated within the framework of the fourth round of FATF mutual evaluations. The next joint FATF/GAFILAT evaluation is scheduled for 2021.

- d. Has the State facilitated post-evaluation dialogue, including NPO follow-up on the findings of the FATF evaluation report?

No evidence was found that the State has facilitated dialogue with the NPOs subsequent to the last round of FATF mutual evaluations.

⁵⁰ Resolution 473/2014 - FIU-National Money Laundering and Terrorist Financing Risk Assessment. http://economicas.com.ar/4680-resolucion-473-uif-evaluacion-nacional-de-riesgo-de-lavado-de-activos-y-de-financiaci3n-del-terrorismo?upm_export=print.

⁵¹ See IN, ¶ 6(a)(ii) and (iii).



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Conclusion

As the main conclusions of this desk review, we can highlight the following:

- The AML/CFT legal framework does not identify the NPO subsector that is at risk, which is inconsistent with the standard under Recommendation 8 and its IN.
- The AML/CFT measures taken by Argentina are restricting freedom of association; they are not being implemented in a manner that fulfills the country's obligations in keeping with international human rights law, as FATF urges in the IN to Recommendation 8.
- This desk review has not revealed dialogue of any kind undertaken between the State and the NPO sector or that there are any plans to undertake such dialogue.
- Bearing in mind Argentina's leadership role in FATF and GAFILAT, and the fact that it already has Resolution 473/2014 requiring a National Money Laundering and Financing of Terrorism Risk Assessment and establishing the system governing its execution, the country has the opportunity and incentive to carry out the deferred National Assessment. The implementation of this Assessment should be informed by dialogue with the NPO sector to identify the subsector at risk of abuse. This dialogue will contribute to identifying the most appropriate set of measures for protecting the sector from abuse, which, in turn, would have a positive effect on the outcomes of the next mutual evaluation.

It is our hope that this short desk review about FATF laws and procedures will be useful. Throughout the course of this project, ICNL will prepare other reports and research tools concerning AML/CTF and FATF issues for all five countries under study. For more information, please contact cguadamuz@icnl.org or jnieva@icnl.org.