Financing of Terrorism through NPOs
Switzerland’s Approach to Tackle an Elusive Threat

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In the wake of the 9/11 attacks in the United States, global financial streams came under an increased scrutiny. This brought to light a relationship few would have expected: Non-profit organizations (NPOs) have an idiosyncratic risk profile that makes them susceptible to the misuse by terrorist organizations to tunnel funds and to finance their operations. International policymakers such as the Financial Action Task Force (FATF), also known by its French name “Groupe d’action financière” (GAFI), emanated Recommendations to address the issue. Although they usually represent soft-law, individual countries are eager to fulfil these global standards for a variety of reasons. Switzerland is both an international finance and technology hub and a country with a longstanding humanitarian tradition. In order to preserve the former, it seemingly had to restrict the latter: The Swiss law on associations is currently being revised in Parliament and tightened rules on associations are looming. In particular, internationally active Swiss associations will have to provide a member register to the authorities. In light of the Swiss humanitarian tradition and the fact that associations are constitutionally protected, such an indiscriminate measure poses many questions. In the present article, the authors discuss the problems the new measures could entail for the Swiss NPO-sector and propose more commensurate alternatives.

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I. Introduction

In a time not so long ago, financing of terrorism (TF) and the charitable work of non-profit organizations (NPOs) were perceived as belonging to galaxies situated far, far away from each other. These different worlds with their respective nexus of involved persons, rules, and governing bodies knew little of each other and seemingly spoke different languages. In an ever-shrinking world, however, it became evident that these two spheres would meet eventually. The clash of the worlds came in the aftermath of the 9/11 attacks, and the collision was intense. As financial streams came under increased scrutiny after the attacks, the realization that NPOs have a risk profile that makes them susceptible to the misuse by terrorist organizations started to dawn: NPOs are reliant on short-term volunteers, cash donations, and are active in some of the planet’s structurally weak areas.1 Put differently, NPOs amount to an ideal and unsuspicous vehicle for terrorists and their supporter to fund their operations.

In light of this finding, international bodies dedicated to combating terrorism financing (CTF) started implementing rules and recommendations on how to tackle this risk. The most important body in that respect is the Financial Action Task Force (FATF), founded by the G-7 in 1989, whose Recommendations are a central pillar of modern Anti-Money Laundering (AML) and CTF efforts.2 After a sobering review in the fourth FATF mutual evaluation round in 2016,3 Switzerland grudgingly started to address

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the most pressing issues and is currently in the process of further refining its AML/CFT framework. In this context, it is envisaged to amend the law of associations. In the present article, we will first elucidate the interconnection between NPOs and the financial streams that terrorists and their supporters take advantage of and analyze the TF risks for the NPO-sector (II.). Then, we will briefly present the main international regulations in the field (III.). In the ensuing section, we discuss the proposed amendments to the Swiss Civil Code (CC) in light of the risk analysis and propose alternative policy recommendations where it seems appropriate (IV.).

II. NPOs and Financing of Terrorism

1. Shadowboxing or Phantom Menace?

At the beginning of the 21st Century, it became evident that local and privately organized terrorist groups situated at the other end of the world have the ability to sow terror all over the globe. At an international level, this realization has led states and international organizations to investigate how such terrorist groups could finance their nefarious crimes. International conventions on fighting terrorism that, until then, played a rather negligible role, were boosted and global bodies such as the FATF quickly received a mandate to investigate streams of financial flows towards terrorist groups. With the vast majority of a terrorist organization’s funds deriving from illicit sources such as, e.g., extortion, contraband, fraud, etc., the analysis of financial flows, structures, and organization of terrorist groups brought to light a connection that few would have expected: The link to NPOs. Consistently with this finding, in October 2001, FATF published its so-called Nine Special Recommendations that deal with TF and, for the first time, included a Recommendation referring to NPOs.

In this Recommendation, the FATF held that NPOs were particularly vulnerable of being abused for TF, and that therefore countries should ensure that they cannot be misused: (i) by terrorist organizations

4 Reform of the Swiss Anti-Money Laundering Act (Systematic reference SR 955.0), 19.044. The controversially debated new duties for lawyers have slowed down the reform, which however was approved in early March; cf. the status of the reform under https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20190044.

5 SR 210.

6 Cf., e.g., Pieth Journal of International Criminal Justice 4 (2006), 1074 (1074 et seq.). Interestingly, while initially it was believed that financing of terrorism was a sub-character of money laundering (i.e., the concealment of money deriving from illicit sources), analysts quickly figured out that this was not necessarily the case, since no illicit source is actually needed to finance terrorism. Rather, also money from legitimate sources can be misused to finance terrorist organizations. One can thus speak of “reverse money laundering”, see Cassani SZW 2003, 293 (305); further Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (248).

7 Cf. FATF, Recommendation 8 (Footnote 2), passim.
posing as legitimate entities (so-called sham NPOs); (ii) to exploit legitimate entities as conduits for TF, including for the purpose of escaping asset freezing measures; and (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.\(^8\)

For many years, the FATF Recommendations were no pressing concern to the NPO sector as the people involved in NPOs deemed the financial sector as responsible to address the issue. Two factors contributed to the realization and acceptance that the two worlds actually were closely intertwined. First, countries took the FATF evaluation reports of their jurisdiction (so-called Mutual Evaluation Reports) more seriously over time, as their rating was often linked to international AML and sanction(s) lists. As the fear of the consequences of receiving a bad rating in these reports grew, the efforts of implementing the recommendations rose. This brought legislators to take a closer look at Recommendation 8 dealing with NPOs.\(^9\) In other words, factual regulation on NPOs began to loom. Second, due to attention-grabbing scandals, there was growing public awareness of the connection between NPOs (or NPO funds) and terrorist activity. Prominently, for example, the charity World Vision became embroiled in a scandal in 2016 whereby it was alleged that an operation manager in Gaza diverted several million USD to the local Hamas and thereby financed missile attacks on Israel.\(^10\) Similarly, when FATF analyzed more than 102 cases from member states where NPOs had some connection to terrorist activity,\(^11\) its report included the who is who of global terrorism such as Al Qaeda, Liberation Tigers of Tamil Eelam, ISIS, Jabhat al Nusra, Al Shabab, Hizbullah, Hamas, FARC, etc. just to name a few.\(^12\) The alleged involvement of NPOs ranged from the collection and diversion of funds and assets to the recruitment of fighters (e.g., via associations posing as legitimate charities or the distribution of radical scriptures in public).\(^13\)

Accordingly, the NPO sector was confronted with looming regulation and negative public perception. While the sector’s first reactions were characterized by disbelief and perplexity, it started to realize that a reciprocal understanding was needed. As a result, Recommendation 8 as well as its interpretive note were revised in June 2016.\(^14\) The FATF abandoned its view that all NPOs were particularly vulnerable

\(^8\) Cf. FATF, Recommendation 8 (Footnote 2), 3, 20 et seqq.

\(^9\) In the meantime, the Special Recommendation 8 concerning NPOs ceased to be a special recommendation and was incorporated in the general 40 FATF Recommendations in 2012.

\(^10\) World Vision conducted an audit into the alleged misuse of funds and found no evidence of diversion of funds and no material evidence that the manager was part of or working for Hamas. https://www.wvi.org/jerusalem-west-bank-gaza/mohammad-el-halabi-trial-overview. On the matter, also see Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (249).

\(^11\) Cf. FATF, Typologies Report (Footnote 1), 36 et seqq.

\(^12\) Cf. FATF, Typologies Report (Footnote 1), iv.

\(^13\) Cf. FATF, Typologies Report (Footnote 1), 36 et seqq.

\(^14\) For more detail on the public consultation process and the inputs by NPOs and the private sector, see http://www.fatf-gafi.org/publications/fatfgeneral/documents/plenary-outcomes-june-2016.html; for a closer
to abuse by terrorist organizations, recognized the heterogeneity of the sector, and held that self-regulatory measures as well as best practices began to show effect.¹⁵

But the question remains: is the non-profit sector at risk of being misused by terrorist organizations and are regulatory aspirations tackling an invisible, yet very real threat or are regulators quixotically fighting windmills as the few cases hardly justify legislative intervention? Finding a definitive answer to this question heavily depends on the weighing of the arguments at hand. While it is evident that relative to the sector’s size and the number of involved stakeholders the identified incidents of TF are low, a potential high-risk environment of international NPOs is blatant.¹⁶ Often NPOs are operating in particularly dangerous and structurally weak areas of the world and many of their financial streams are heavily cash based.¹⁷ The workforce of NPOs is often made up of fluctuating volunteers, and their internal organization is quite lean, not leaving much place for compliance operations.¹⁸ Further, the number of unrecorded cases of financing may lie significantly above the identified cases.¹⁹ It follows that while the risk of TF through NPOs constitutes a “low-probability risk”,²⁰ the consequences of an effective occurrence (i.e., the materialization of the TF risk) can be devastating, not only in terms of human suffering and material damage caused but also for the NPO sector as a whole, since any contribution towards a more just and inclusive society could be halted.²¹

analysis of the nature of the 2016 revision cf. Brugger/Humbel AJP 2017, 739 (743 et seq.) and Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (259 et seq.).

¹⁵ Id.

¹⁶ Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (253).

¹⁷ The transfer of money via NPOs attracts little attention and thus potentially solves one major hurdle international terrorist organizations have to face, as besides NPOs only the Hawala-banking system (that also is in the regulators’ focus) and – quite simply – the smuggling of money are the only viable options at their disposal, cf. Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (251); Sieber/Vogel, Terrorismusfinanzierung, 2015, 14 et seq.

¹⁸ According to some estimates, the voluntary workforce in the NPO-sector hovers around 40 percent of the total, see Salamon Annals of Public and Cooperative Economics 81 (2010), 167 (187); Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (251) with further references. On the relative lack of an adequate compliance-culture within many NPOs, cf. Anheier, Managing non-profit organisations: Towards a new approach, Civil Society Working Paper, 2000, 5 et seqq.; Tonkiss/Passey Sociology 33 (1999), 257 et seqq.


²¹ In detail, Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (253 et seq.).
All of these elements demonstrate that any regulation of the NPO sector requires both a clear aim for the potential risks at hand and a particular understanding for the institutions involved as well as the environment in which they operate.

2. Risk-based Approach vs. Overregulation

An analysis into the historical genesis since 9/11 demonstrates two approaches to NPO-regulation on international level. The (also chronologically) first approach was the “one-size-fits-all”-model.\(^{22}\) It depicted NPOs as being particularly vulnerable to TF and requested legislators to analyze how NPOs could be protected from it. The second model is the so-called “risk-based approach”, which gained prevalence in international regulation efforts over the last years.\(^{23}\) While the risk-based approach maintains the aim of impeding the use of NPOs for terrorist means, it uses a more apposite method towards regulation. According to this approach, regulators should first identify, assess, and weigh risks.\(^{24}\) In a second step,

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\(^{22}\) On this paradigm shift, see Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (259).

\(^{23}\) The FATF placed the risk-based approach as its Recommendation 1.

\(^{24}\) Cf. FATF, Best Practices (Footnote 20), 10 et seqq. See the detailed assessment of the Swiss NPO-sector in Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (250 et seqq.).
they should take action and apply resources aimed at effectively mitigating the identified risks.25 Thereby, measures to prevent or mitigate TF must be commensurate with the detected risks. Where regulators identify higher risks, they should ensure that their AML/CFT regime adequately addresses such risks. Where regulators identify lower risks, they may decide to allow simplified measures under certain conditions.26

The risk-based approach helps to minimize the negative impacts of regulation on essential sectors. This especially holds true for the non-profit sector, who plays a vital role for bringing financial, medical, and human resources to the people who need them most. Wrongly targeted regulation or regulation that exceeds the necessary measures can harmfully slow-down or even outright halt necessary humanitarian aid. This is all the worse as the sector is notoriously known for having limited financial resources, a fluctuating work force and limited capacities to roll out enhanced compliance measures. Overregulation can also lead to the undesirable outcome that financial intermediaries deprive NPOs from opening a bank account or having access to financial funds (e.g., internal policies that no bank relation shall be held with NPOs operating in Iraq). Due to the excessive costs and reputational risks of maintaining such relationship, financial institutions rather terminate or restrict a business relationship than manage the risk in line with the risk-based approach, a phenomenon described as (financial) de-risking.27

III. International Regulation

1. Prevalence of Soft Law

Well into the Nineties, terrorism was predominantly state-sponsored or parastatal.28 Only once this phenomenon ebbed away, the international community began to address the issue of combating terrorism financing with the due gravity. After some tentative steps, such as the establishment of the so-called

25 Cf. FATF, Best Practices (Footnote 20), 14 et seqq.
26 See explicitly FATF, Best Practices (Footnote 20), 15.
Committee, the first noteworthy milestone was reached in 1999 with the *International Convention for the Suppression of the Financing of Terrorism*. Notwithstanding its ambitious name and lofty goal, the signatories were reluctant to commence a ratification process, mainly because the Convention included tightly knit information-exchange policies. Thus, on 9/11 only four states had ratified the convention, making it a paper tiger. Tragically, the attacks were a pivotal moment in the fight against TF: Almost immediately, the UN-Security Council passed Resolution 1373, in which the UN member states were exhorted to join the 1999 Convention. The UN was not the only international body to take action. In addition, the FATF, that had been established in 1989 to combat money-laundering, took on the issue.

Notwithstanding the newfound regulatory activism, the new measures mainly included rather abstract goals and non-binding recommendations, such as FATF’s *Nine Special Recommendations* published in October 2001. *Prima facie*, one could point at the inherent risk of non-binding agreements in an international setting. As implementing a more demanding regulatory framework implies higher costs for the country responsible for the implementation, the possibility of regulatory arbitrage persists. In such a situation, states find themselves in a *prisoner’s dilemma*: they are reluctant to implement a more demanding framework before other states do so, as the legal addressees will migrate to a less demanding jurisdiction, to the detriment of the sector concerned (be it the non-profit or the financial sector). As has been laid out above, however, the system of mutual evaluations in conjunction with the stipulation

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31 Especially art. 12 para. 2 of the Convention was problematic, see Bantekas in Ben Research Handbook on International Law and Terrorism, 121 (124); Bantekas American Journal of International Law 97 (2003), 315 (324 *et seq.*). Pieth Journal of International Criminal Justice 4 (2006), 1074 (1084), adds that the clauses were, in fact, standard for such international treaties.

32 A minimum of 22 ratifications would have been needed for the Convention to enter into force. On the day of the attacks, only Botswana, Sri Lanka, the UK and Uzbekistan had ratified the Convention.


34 Cf. supra II.1.

35 The first eight *Special Recommendations* heavily relied on the money laundering framework, see Bantekas in Ben Research Handbook on International Law and Terrorism, 121 (125 *et seq.*); Brugger/Humbel in Coninx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (256).

36 *E.g.*, under Recital 46 of EU Directive MiFID (2004/39/EC), member states decide to apply the (pre- and post-trade) transparency requirements to financial instruments other than shares. In the entire EU, only two countries (Italy and Sweden) decided to do so, as introducing new rules would have led to regulatory arbitrage and imperiled the domestic financial markets. In detail, see Humbel, Die Regelung der Vor- und Nachhandelstransparenz in der Europäischen Union und der Schweiz, 2019, 281 *et seq.*, on the prisoner’s dilemma in general Peterson, The Prisoner’s Dilemma, 2015, passim.
of black and grey lists has proven to be very effective in persuading states to tackle the threat of TF.\textsuperscript{37} Therefore, notwithstanding the fact that FATF Recommendations are not binding \textit{sensu stricto}, the role they currently play in the global fight against terrorism cannot be overstated: After initial reticence, most states are now willing to improve their regulatory framework to tackle the threat of TF.\textsuperscript{38} As we will see, this has led to a radical re-thinking of the traditionally liberal world of Swiss NPOs in general and associations in particular.

2. FATF’s Stance on NPOs
Since its revision in June 2016, Recommendation 8 entails a two-phased review process: First, FATF member states must conduct a risk analysis of their NPO sector.\textsuperscript{39} If, in the light of this analysis, there is a \textit{prima facie} need for protection of certain NPO categories (\textit{vulnerability}), the legal environment of these NPOs must be reviewed. This approach aims at ensuring the implementation of risk-adequate and proportionate measures to shield NPOs in need of protection – and only such NPOs – from potential abuses.

Recommendation 8 further provides a legally tangible risk-framework for NPOs by defining three categories: (i) NPOs who proactively promote terrorist financing, (ii) NPOs that are abused for this purpose and (iii) situations in which by NPOs are exploited by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.

IV. Switzerland’s Draft Proposal to Regulate Internationally Active Associations

In the fourth Mutual Evaluation Round, conducted by an on-site visit in early 2016, Switzerland was only rated “partially compliant” with Recommendation 8.\textsuperscript{40} While the FATF considered Swiss foundation law to offer sufficient measures to tackle TF threats, it noticed considerable shortcomings regarding NPOs in the form of associations. Notably, the FATF deemed that (i) Switzerland did not dispose of sufficient consolidated data on the number of associations collecting or distributing funds that present a

\textsuperscript{37} \textit{Cf. supra} II.1.

\textsuperscript{38} \textit{Brugger/Humbel} in Coninx/Ege/Mausbach \textit{Prävention und freiheitliche Rechtsordnung}, 245 (256), with further references and examples.

\textsuperscript{39} \textit{Brugger/Humbel} AJP 2017, 739 (743 et seqq.); \textit{Brugger/Humbel} in Coninx/Ege/Mausbach \textit{Prävention und freiheitliche Rechtsordnung}, 245 (257).

\textsuperscript{40} FATF, Mutual Evaluation Report (Footnote 3), 175; \textit{cf.} the analysis of this mutual evaluation in \textit{Brugger/Humbel} AJP 2017, 739 (747 et seqq.).
considerable TF risk (ii) this lack of data is also due to the fact that most (small) associations are not required to be entered in the commercial register, (iii) Swiss authorities did not conduct a sufficient outreach to the NPO sector concerning TF risks, and (iv) Swiss law does not provide for a “know your beneficiaries and associated NPOs” rule outside the obligations of due diligence carried out by financial intermediaries in business relationships with NPOs.41

In a follow-up report from January 2020, the FATF considered Switzerland to have made overall progress with regard to TF risks posed by NPO.42 In particular, it was noted that Switzerland (i) issued a new report identifying NPOs as possibly presenting an increased risk of TF, recommending extending to associations presenting an increased risk of TF the obligation to register in the commercial register, (ii) brought on the way a reform to implement the recommendation of this report and (iii) conducted a thorough outreach to the sector. These improvements allowed the rating of Recommendation 8 to be upgraded to “largely compliant”.43

2. Overview of Switzerland’s Draft Reform

In answer to the shortcomings in the fourth Mutual Evaluation Round, Switzerland initiated a reform of its AML legislation (Geldwäschereigesetz, GwG).44 While the reform mainly concerns AML duties in the financial sector, it also includes new provisions for NPOs in the form of associations under art. 60 et seqq. CC. NPOs in the form of charitable foundations are not dealt with in the current reform, since the FATF considered Swiss foundation law as being sufficiently robust to handle money laundering and TF threats.

The reform proposal covers three main aspects of association law: (i) an obligation for internationally active associations to register in the commercial register, (ii) an obligation for these associations to keep a register of its members, and (iii) an obligation for associations that are required to register with the commercial register to be represented by a person with residence in Switzerland having access to the member register (art. 69 para. 2 draft CC).

41 See FATF, Mutual Evaluation Report (Footnote 3), 171 et seq.; Brugger/Humbel AJP 2017, 739 (747 et seqq.).
43 FATF, Follow-up Report (Footnote 42), 7.
44 Cf. Footnote 4 above.
3. Necessary Distinction between National and International Associations?

a) Analysis

A core element of the proposed reform constitutes the obligation for associations to register in the commercial register. The wording of the draft proposal (art. 61 para. 2 let. 3 draft CC), however, only covers associations if they mainly collect or distribute, directly or indirectly, assets which are intended for charitable, religious, cultural, educational or social purposes abroad.45

Similar to FATF’s risk-based approach, the Swiss Constitution stipulates as an overarching principle that all state acts must be in public interest and respect the principle of proportionality.46 According to the latter, an act must be suitable and necessary in order to attain the intended goal. Among different potential measures that all are equally suitable to attain a regulatory goal, the least restrictive must be chosen.47 In its reform proposal, the Swiss legislator aims to tackle the risk of TF for internationally active associations.48 In view of the risk-based approach as well as the Swiss principle of proportionality, this scope raises questions as the proposed regulation only covers associations that are active abroad per its purpose.

The draft reform requests that assets need to be intended for distribution abroad (or have been collected abroad). As every activity of an association needs to be covered by its purpose (Vereinszweck), the draft reform connects the obligation to register in the commercial register to the formalistic criterion of a purpose that covers the distribution or collection of assets abroad.49 Under the risk-based approach, this raises questions. Associations who already aim at distributing funds abroad are, in general, already aware of their elevated risk and subject to more scrutiny by other involved actors. For example, tax

45 The proposed reform, however, delegates to the Swiss Federal Council the competence to issue an implementing ordinance, whereby it can exclude those associations from the obligation to register that are exposed to a low AML/TF risk due to the amount, destination, or intended purpose of the collected or distributed funds (art. 61 para. 2bis and 2ter draft CC).

46 Cf. art. 5 para. 2 Swiss Constitution, SR 101.


48 Cf. the Explanatory Notes to the proposed reform, Swiss Federal Journal (BBl) 2019 5531.

49 See the criticism on tying control to the formalistic criterion of the “purpose” in Brugger/Humbel in Coneinx/Ege/Mausbach Prävention und freiheitliche Rechtsordnung, 245 (266 et seq.).
authorities apply stricter prerequisites and surveillance when a tax-exempt association pursues its charitable purpose abroad.\textsuperscript{50} Additionally, when NPOs operate abroad, they typically need financial intermediaries to transfer funds in cross-border relationships.\textsuperscript{51} Since those financial intermediaries are already subject to their own strict AML/CTF regime,\textsuperscript{52} one can detect a \textit{factually} stronger surveillance for internationally active NPOs than their domestic counterparts. This holds especially true when it comes to high-tension areas. Finally, the greater public including sectorial self-regulation organizations such as ZEWO already employ a higher degree of attention when they deal with associations active abroad.\textsuperscript{53} This is a result of an improved information policy, a heightened sensibility to the topic due shortcomings in the past, and the conducted outreaches to the sector. However, the goal of Recommendation 8 is both CFT \textit{and} the protection of legitimate NPOs.\textsuperscript{54} Against this background, the proposed measure does not aim at the prevention of exploitation of \textit{all} legitimate NPOs in Switzerland but only of those who are \textit{purposefully} active abroad. Thus, it is questionable whether the proposed regulation is \textit{suitable} to prevent TF via Swiss NPOs.

As the proposed regulation does not cover associations whose assets were collected with the intention of solely distributing them in Switzerland, the reform creates a differentiated regime that might dilute the aim of protecting legitimate NPOs. First, the proposed regulation seems to ignore or downplay the possibility of domestic terrorism and the fact that also associations who collect funds in order to distribute them in Switzerland can potentially be misused for terrorist purposes or financing of operations.\textsuperscript{55}

\textsuperscript{50} See, \textit{e.g.}, the Circular no 12 of the Federal Tax Administration regarding the tax exemption of legal persons due to public, charitable or religious purposes dated 8.7.1994 (which is still used as a practical legal basis) that holds in II. 3.a that a charitable tax-exempt activity can also be pursued worldwide. However, those entities must provide specific evidence with suitable documentation (\textit{e.g.}, financial accounts, activity reports); further the Practice Notes of the Swiss Tax Conference on the tax exemption of legal persons due to public, charitable or religious purposes dated 18.1.2008, https://www.steuerkonferenz.ch/downloads/merkblatter/praxishinweise_steuerbefreiung_2008_d.pdf, 14 \textit{et seqq.}

\textsuperscript{51} See Footnote 17 above.

\textsuperscript{52} For a brief overview on the matter, see Zulauf/Kuhn, Finanzmarktrecht, 2\textsuperscript{nd} ed., 2021, 155 \textit{et seqq.}; in detail Nobel, Finanzmarktrecht, 4\textsuperscript{th} ed., 2019, 368 \textit{et seqq.}, 609 \textit{et seqq.}, 734 \textit{et seqq.} Furthermore cf. the Swiss Bankers Association (revised) Code of Conduct with regard to the Exercise of Due Diligence (CDB 20).

\textsuperscript{53} See, \textit{e.g.}, on the peculiarities of international development aid, https://zewo.ch/de/wirkungsmessung-in-der-entwicklungszusammenarbeit/.

\textsuperscript{54} See FATF, Best Practices (Footnote 20), 4 \textit{et seqq.}

\textsuperscript{55} The risk of domestic terrorism is not negligible and often aggravated by the relatively low costs of an attack. For instance, the Madrid bombings of 2004 were financed by an already existing narcotics-dealing network and other acts of micro-criminality, costing around EUR 50’000 (Rollis/Wyler/Rosen, International Terrorism and Transnational Crime, Congressional Research Service 2010, 19 \textit{et seqq.}). The bombers that attacked London on 7.7.2005 financed their plot by using funds from overdrawn bank accounts, credit cards and a defaulted personal loan (less than GBP 8’000 in total), \textit{cf. Report of the Official Account of the Bombings in London on 7th July 2005, HC 1087, 23). Further see FATF, Typologies Report (Footnote 1), 29; UN Office on Drugs and
For instance, the radical network within the An’Nur Mosque in the Canton of Zurich operated both in Switzerland and abroad.\(^{56}\) Second, the new proposal shall only cover associations who “mainly” (hauptsächlich) collect or distribute assets abroad. This does not only give rise to questions where limits of preponderance are set but also leaves a potential legal backdoor to organizations who intentionally set up sham associations in order to pursue terrorist linked activity. For example, it suffices to stipulate a mixed purpose with prepondering distributions in Switzerland as a primary goal in order to be excluded from the scope of application of the obligation to register with the commercial register. In other words, the proposed wording leaves room for maneuver if terrorist organizations wanted to set up a Swiss sham association. Thus, the regulation proposal covers solely those associations who are purposefully and visibly active abroad. It also seems questionable that according to the wording of the proposed art. 61 para. 2 let. 3 draft CC, the obligation to register solely applies when assets (Vermögenswerte) are collected or distributed abroad. An association providing, e.g., logistical support or other services abroad is not encompassed by the new rules.\(^{57}\) Against this background, the scope of the proposed obligation to register in the commercial register seems too narrow.

Moreover, it is doubtful that the measure, i.e., the registration with the commercial register, is appropriate in itself. By entering internationally active associations in the commercial register, the Swiss legislator also intends to subject them to accounting duties as well as to the obligation to designate auditors.\(^{58}\) While this measure will certainly allow a greater transparency as more data will be available, it will not necessarily help preventing terrorist financing as only those associations need to register who are purposefully and visibly active abroad.

By imposing stricter requirements on internationally active associations compared to their domestic counterparts, Switzerland risks to make the work of international charitable NPOs more cumbersome. It must be borne in mind that Switzerland has a long tradition in hosting internationally active charities and that the freedom of association is a constitutional right.\(^{59}\) It is also in this light that any measure regulating associations must be limited to what is necessary to tackle effectively the risk of TF. By

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\(^{56}\) See the detailed investigative report in Häsler Sansano/Baumgartner/Schoop/Lemcke, Neue Zürcher Zeitung dated 8.8.2020, https://www.nzz.ch/zuerich/islamismus-schweiz-wie-in-winterthur-ein-is-netzwerk-entstand-d.1569548, that shows how terrorist networks such as the An’Nur can be both active domestically and internationally.

\(^{57}\) According to the Explanatory Notes to the proposed reform, contributions in kind and services may be qualified as assets distributed abroad, provided they are financed with the funds of the association, cf. BBl 2019 5530.

\(^{58}\) Cf. Explanatory Notes to the proposed reform, BBl 2019 5492.

\(^{59}\) Cf. art. 23 of the Swiss Constitution, on the matter see Errass in St. Galler Kommentar BV, 3rd ed., 2014, art. 23 at no 6 et seq.; Schiess Rütimann in Basler Kommentar BV, 1st ed., 2015, art. 23 at no 6 et seq. 
forcing *all* associations that want to be active abroad to register in the commercial register without taking into consideration their effective risk-profile, the Swiss legislator would regulate according to the outdated “one size-fits-all” model, not applying the risk-based approach. Considering the fact that the duty to register entails the obligation to keep a member register containing sensitive personal data,\(^{60}\) bookkeeping and audit duties, acting as an internationally active association becomes radically more difficult and expensive. While such augmented bureaucratic duties can be justified if a specific risk is targeted, they are not if they are applied to *all* internationally active associations indiscriminately.

**b) Proposals**

Instead of the seemingly inapt criteria suggested by the Swiss legislator, a new regulation of NPOs could also try to better monitor or control *any* money collecting or distributing activity. By taking any money collecting or distributing activity as relevant starting point, new rules for NPOs generally and for associations specifically could tackle the potential risk of domestic terrorism and further address the issue of the misuse of funds intended for charitable purposes.

Rather than solely obliging associations to register in the commercial register, all NPOs (irrespective of their legal form) carrying out money collecting or distributing activities could be, *e.g.*, obliged to nominate a designated person responsible for these collecting or distribution activities. Comparable to a data security officer or a compliance officer, such person could have the responsibility to keep records of collecting activities and notify responsible authorities of any suspicious activity. Such mandate as *NPO Risk Officer* either could be given to a specific member of the association or an association’s board member (or in case of other legal forms any person acting on behalf of the NPO, such as *e.g.*, a member of a foundation board).

It could be envisaged to provide the Money Laundering Report Office Switzerland (MROS) with the competence to examine and hear cases of suspicion for TF brought forward by NPOs. In order to obtain a better overview of the sector, it could also be considered to organize reviews by such an authority (without, however, resulting in a regular supervisory authority). Tax-exempt NPOs could further be obliged to hand over data to tax authorities concerning their collecting activities and the involved persons. Thus, Switzerland could provide the relevant data, whose lack the FATF had criticized in its last mutual evaluation.\(^{61}\) Since not every money collecting activity includes a risk of TF (*e.g.*, occasional collecting activities in churches or distribution in areas of the world with a firm compliance regime),

\(^{60}\) Cf. *infra* IV.4.a.

\(^{61}\) Cf. *supra* IV.1.
qualitative criteria or quantitative de minimis limits (or a combination of the two)\textsuperscript{62} could be set, e.g., by providing rules which are aligned with AML criteria.

These measures would not only broaden the scope of application but would also provide a more suitable, yet less incisive regulation, in line with both the risk-based approach as well as the Swiss principles of proportionality. If an NPO Risk Officer could be the responsible point of contact with authorities when suspicious money-collecting activities occur, it must be analyzed which information they need to collect in order to fulfil the mandate, thus providing for more transparency. In obtaining this relevant information, lists of those persons who are able to access financial funds can play a crucial role, as laid out in the following section.

4. A Member Register for Associations?

a) Analysis

The Swiss draft proposal also entails the introduction of an obligation for registered associations to keep a member register (Mitgliederverzeichnis), in which the members have to be entered with their full credentials (art. 61a para. 1 draft CC). The register has to be kept in a way that allows for a permanent access to it from within Switzerland (art. 61a para. 2 draft CC). Finally, the relevant information as well as any supporting documents has to be kept for five\textsuperscript{63} years after the member has been removed from the register (art. 61a para. 3 draft CC), viz. they have left the association.

With its draft proposal, the Swiss legislator aims at reaching the same amount of transparency with regard to the controlling persons over associations as it is attained in joint-stock corporations\textsuperscript{64} and cooperatives\textsuperscript{65}.\textsuperscript{66} The proposed requirement to grant a permanent access to it from within Switzerland corresponds to the rules enacted per 1 July 2015 for joint-stock corporations and cooperatives. Therefore, one can examine the interpretation of these norms provide by legal scholarship in order to elucidate the rules of the member register for associations. Art. 686 para. 1 sentence 2 of the Swiss Code of Obligations requires joint-stock corporations to keep its share register (Aktienbuch) in such a manner that it can be accessed at any time in Switzerland. This accessibility, however, is not for the public, but limited

\textsuperscript{62} The relatively low costs for the organization of a terrorist attack (see Footnote 55 above) suggest that quantitative thresholds would have to be rather low in order to be effective. Thus, in our view, additional material criteria should be defined in order to cover NPOs that are actually at risk and exclude those that are not.

\textsuperscript{63} In the original proposal by the Swiss Government, the draft included a duty to keep the relevant information for ten years. This duration has been reduced to five years in the parliamentary deliberations.

\textsuperscript{64} Cf. art. 686 of the Swiss Code of Obligations, SR 220.

\textsuperscript{65} Cf. art. 837 of the Swiss Code of Obligations.

\textsuperscript{66} Cf. Explanatory Notes to the proposed reform, BBl 2019 5493.
to the Swiss authorities.67 *Mutatis mutandis* this must apply to the member registers of associations, as many associations are dedicated to religious, political, trade union-related and gender-specific issues. Swiss federal data protection law grants special protection to this type of information (so-called “sensitive personal data”).68 Hence, there is an inherent tension between the need to combat the misuse of associations for the financing of terrorism on the one hand, and the constitutional right to freely associate and the right to privacy regarding sensitive personal data on the other hand. The enshrinement of the latter is a pillar of a free and liberal society and must not be lightly undermined. Thus, the implementation of an obligation for (some) associations to keep a record of its members must (i) have a valid justification and (ii), if the first presupposition applies, balance the different interests, without favoring either to the detriment of the other.

Even assuming that the Swiss draft proposal strikes the right balance in this sense, it remains to be assessed if the implementation of such a register for members actually is the adequate instrument to tackle the risks it sets out to address.69 The very concept of a risk-based regulation is turned upside down if a risk is correctly assessed, but the ensuing regulation fails to address it properly. FATF’s extensive case-studies on the misuse of NPOs for redirecting funds has shown that the individuals diverting the funds towards terrorist organizations are, in fact, regularly transient volunteers for the NPOs or other employees.70 Therefore, it is doubtful that the formalistic approach taken by the regulators requiring to register all the members of the association is the adequate solution. In our view, the proposed member register goes both too far and not far enough at the same time: Too far in that it equates members of an association to (beneficial) owners of a joint-stock corporation, thus assuming that they control the association. However, the degree of exercising control over an association by its members is hardly comparable to the manner in which owners of other corporations can decide over them. For example, while a controlling shareholder can appoint the board, a member of an association only bears such power if they are either a controlling group or a single individual. In the case of associations that operate internationally, this is the exception rather than the rule. By enacting a rule that simulates such an alternate reality, the legislator exceeds what is necessary. On the other hand, the proposed rule does not go far enough in that it does not consider an important risk factor, *i.e.*, the risk stemming from volunteers and employees that have access to the associations’ finances. By failing to address this risk, the utility of the proposed regulation is questionable. Rather, the legislator should re-consider the proposal and take the NPO-specific risk assessment as a starting point instead of copying existing boilerplate language for functionally

67 See, for the Swiss scholarship on the matter *du Pasquier/Wolf/Oertle* in Basler Kommentar OR II, 5th ed., art. 686 at no 2c.

68 See art. 3 let. c Federal Act on Data Protection, SR 235.1.

69 Cf. supra II.2.

70 See Footnote 18 above.
non-identical company forms. This would optimally serve the objects of the FATF, ensure the compliance of Swiss legislation with the Recommendation 8, and, most importantly, effectively tackle the threat of a potential misuse of associations by terrorist organizations and their supporters all by protecting the work of legitimate NPOs.

b) Proposals
Building on the assumption that the Swiss legislator holds on to the notion of the necessity of a register, a potentially more effective solution would be a register for those members, associates, employees, and volunteers that have actual – and objectively verifiable – access to the association’s finances and bank accounts. Further it should include persons who undertake payments or who can decide upon the distribution of funds on behalf of the NPO. Such a register would better ensure the capture of potential risks while avoiding the obligation to create and monitoring lists of individuals who are not even in a position to control the flow of funds. At the same time, the thorny question revolving around the issue of “control” over an association would be solved, as any person given access to the association’s finances must be registered. From a procedural perspective, the NPO Risk Officer described above could keep the register and be responsible for it vis-à-vis the authorities.

V. Conclusion
Against the backdrop of the risk-based approach as well as Swiss constitutional principles, the new rules for internationally active Swiss associations adopted by the Swiss Federal Council and Parliament appear too undifferentiated to effectively tackle the risks of TF through NPOs. In view of the interests at hand, a more fitted regulation could have struck a better balance between allowing NPOs to pursue their charitable goals and at the same time effectively preventing the financing of terrorism. Instead of a general obligation to be entered in the commercial register, one could have considered the introduction of an NPO Risk Officer for fundraising organizations, irrespective of their legal form, if they present a certain risk profile. Moreover, instead of a general member register, a list of those persons that have effective access to the assets would have been more obvious. In conclusion, it remains to be hoped that the Swiss Federal Council will regulate more measuredly in the implementing provisions.