

## Linette A. Gibs

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**Subject:** FW: Parlementsfragen Augustus 12 WvSv - Boek 2 Bp en WvSR  
**Attachments:** Annex 1\_Overview Members Committee Penal Procedures Code.pdf; Annex 2a\_Overview FATF Recommendations and Penal Code.docx; Annex 2c\_Overview FATF Recommendations and Civil Code Book 2.docx; Annex 2b\_Overview FATF Recommendations and Penal Procedure Code.docx; Final-Parliament questions August 12.docx

STATEN VAN SINT MAARTEN			
Ingek. 11 SEP 2019			
Volgnr. 151006/19-20			
Par.	J	is	ney

**From:** Nancy R. Guishard-Joubert  
**Sent:** Wednesday, September 11, 2019 12:37 PM

From: "Ursula, Russell" <[Russell.Ursula@sintmaartengov.org](mailto:Russell.Ursula@sintmaartengov.org)>  
Date: 9/11/19 12:36 PM (GMT-04:00)  
To: "Nancy R. Guishard-Joubert" <[nancy.joubert@sxmparliament.org](mailto:nancy.joubert@sxmparliament.org)>  
Cc: "de Weever, Cornelius" <[Cornelius.deWeever@sintmaartengov.org](mailto:Cornelius.deWeever@sintmaartengov.org)>, "Martina, Eunicio" <[Eunicio.Martina@sintmaartengov.org](mailto:Eunicio.Martina@sintmaartengov.org)>, Julien Ulant Vrutaal-Panneflekk <[julienvrutaal@gmail.com](mailto:julienvrutaal@gmail.com)>, Vidjai Jusia <[vidjai.jusia@justice.gov.sx](mailto:vidjai.jusia@justice.gov.sx)>, Ligia Stella <[Director.fiu@fiu.gov.sx](mailto:Director.fiu@fiu.gov.sx)>, "Stella, Ligia" <[Ligia.Stella@sintmaartengov.org](mailto:Ligia.Stella@sintmaartengov.org)>  
Subject: Parlementsfragen Augustus 12 WvSv - Boek 2 Bp en WvSR

Dear Mrs. Joubert,

Please find attached answers to the questions posed by the Parliament on August 12, 2019 while discussing the legislations as indicated in the subject line.

Please note that free form translation in the English language of the draft legislations will follow in my next e-mail.

Regards,  
Russell Ursula.

**From:** Vidjai Jusia [<mailto:vidjai.jusia@justice.gov.sx>]  
**Sent:** Monday, September 2, 2019 5:14 PM  
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**Cc:** Ligia Stella <[director.fiu@fiu.gov.sx](mailto:director.fiu@fiu.gov.sx)>; Stella, Ligia <[Ligia.Stella@sintmaartengov.org](mailto:Ligia.Stella@sintmaartengov.org)>; Martina, Eunicio <[Eunicio.Martina@sintmaartengov.org](mailto:Eunicio.Martina@sintmaartengov.org)>; de Weever, Cornelius <[Cornelius.deWeever@sintmaartengov.org](mailto:Cornelius.deWeever@sintmaartengov.org)>  
**Subject:** Re: Parlementsfragen Augustus 12 WvSv - Boek 2 Bp en WvSR

Beste Russell,

Bijgaand mijn input voor de antwoorden op de Statenvragen.

Vriendelijke groet / Kind Regards  
Vidjai Jusia



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## ANSWERS TO PARLIAMENT QUESTIONS POSED ON AUGUST 12 - Ontwerp Lv WsR – WvSv - BW 2

### AGENDA ITEM 1 (SR)

#### MP Brison:

- **Who are the “legal professionals”? Most legal offices are not involved (different firms were questioned). Criminal professionals are saying they were not involved. They are asking what is involved.**

A: The draft of the new Penal Process Code was prepared by a joint Committee on the Revision of the Penal Process Code, led by prof. Hans De Doelder (professor of criminal law EU Rotterdam) and his team. For St. Maarten the following were represented in the committee: the Ministry of Justice, the judiciary, the public prosecutor service, the police and the legal profession. Each country had representatives of the stakeholders involved, also from their Bar Associations, who had to give input and feedback from their peers. (See Annex 1). The names of the Sint Maarten representatives are included in the annex, and has been (will be) forwarded to the Honorable Chairlady of the Parliament.

- **Wants for each law the FATF recommendation that deals with it. This to avoid all kind of other issues being regulated.**

A: See Annex 2a, 2b and 2c. It should be pointed out that the FATF recommendations are set up in general terms and should be read in conjunction with their respective Interpretive Notes. Also, recommendations are implemented spread over more than one provision, due to the system of the specific legislation.

- **Action plan of Minister to Trinidad: was there a change in the action plan for Sint Maarten: please provide this to parliament.**

The Action Plan was provided to the Secretariat of the Parliament through e-mail on August 12 (please see attached). The progress made is included with bold letters in the last column from page 22 to page 74. The translation of the three (3) laws adopted by Parliament earlier this year (has been forwarded to the CFATF Secretariat on Friday August 30<sup>th</sup> (Wijzigingslv van de Landsverordening melding Grensoverschrijdende Geldtransporten; Landsverordening Meldpunt Ongebruikelijke Transakties; and the Landsverordening Bestrijding Witwassen en Terrorisme Financiëring), and it is expected that this will be included in the Action Plan in preparations of the November 2019 CFATF Plenary. The English translated versions are also included as annexes with these answers. Please note that this is a free form translation, and that the Dutch version remains the legal technical correct version which should be used for decisive legal interpretations.

#### MP Emmanuel:

- **How many unusual transactions is being prosecuted by the prosecutor’s office right now?**  
Information on potentially ongoing investigations based on unusual transaction reports cannot be provided based on the responsibilities of the MOT and the Prosecutors office.

#### MP Williams:

- **Was there a project group in the Netherlands to deal with the changes in the Penal Code?**

A: See Annex 1, representatives from the BES. And of course there was Prof. De Doelder c.s. of the Erasmus University of Rotterdam.

**MP Richardson:**

- **Have CURACAO and Aruba past theirs already?**

A: No, not as yet. It is my understanding that they will begin debating the laws in the near future. However, St. Maarten is not in the same position as Aruba or Curacao since we are one of the most non-compliant in the region and the “last in the class.”

**AGENDA ITEM 2 (SV)**

**MP Emmanuel:**

- **Question: is this giving payment to crown witness for their testimony?**

A: No direct payment is given by the Prosecutor’s Office (OM). But financial deals could be made pertaining to the seized/frozen assets or when a person is ordered to pay a sum of money to the Country in order to deprive him of unlawfully obtained gains (ontnemingsvordering/verplichting tot betaling van een geldbedrag aan de staat ter ontneming van wederrechtelijk verkregen voordeel).

- **Can the minister confirm or indicate show of transactions that stems from TF transactions or grown roots?**

A: unusual transaction reports have been submitted to the MOT that are related to terrorism financing and originated in Sint Maarten.

- **What is meant by: there was a suspicion of terrorism financing.**

A: a suspicion of terrorism financing means that after analysis of the unusual transaction(s) the MOT got an indication that the transaction from one subject to the next subject could be linked to terrorism financing.

- **Which countries are referred to as high risk country?**

A: high risk countries are North Korea and Iran. There are also other monitored countries that are currently grey listed on the FATF website as having deficient AML/ATF infrastructures (<http://www.fatf-gafi.org/countries/#high-risk>).

- **On which grounds were the Cubans incarcerated: answer: where are the Cubans today awaiting deportation? Are you aware they received a letter from the UNCHR?**

The Cubans were first detained on the basis of illegally staying in Sint Maarten. One has also been detained on suspicious of human trafficking. They are not able to submit a request for asylum in Sint Maarten. As they were having complaints on their detention the KPSM made contact with UNHCR. The UNHCR is in the process of providing these detained Cubans a refugee status and will indicate to them to which country they may go to receive asylum. This despite the court indicating that Sint Maarten was allowed to deport these Cuban nationals. On this

moment they are residing on Sint Maarten and have obligations to check in weekly with KPSM (meldplicht).

**MP Brison:**

- **Privacy Committee: not there yet, we are contravening our own laws because the privacy committee has not been established as yet. Will we follow our own law first or the CFATF standards?**

A: Sint Maarten has committed itself to live up to the international anti-money laundering and counter terrorism financing standards. Furthermore, the MOT is obligated to take privacy stipulations into account for it to be able to work with its counterparts. A concrete advice on the Privacy Committee will be reviewed and discussed within the CoM in the coming weeks. It is expected that the Privacy Committee will be established soon.

- **Aruba and Curacao approved this law has there been a position of these parliaments? Isn't Aruba and Curacao compliant with the FATF?**

Each country of the Kingdom of the Netherlands have their own different risk profiles. Paint a picture of an island with many casinos in hotels, stand-alone casinos, lotteries and number booths all around without a gaming control board and you will understand the risk associated to St. Maarten. Also the examiners team working on a country's mutual evaluation report are different persons. The time elapse in which countries have been submitted to an evaluation also sometimes provide for different focus by the evaluating teams. Sint Maarten was the last country evaluated in the CFATF third round of mutual evaluations whereby interpretations and expectations on the implementation of FATF recommendations has been shifting.

- **Mullet Bay: was the 100 million transaction reported to the MOT?**  
MOT does not give information on individual reports.

**MP Leonard:**

- **When a case is going on for 6 or 8 years, what is in place to protect people on this (verjaring)?**

A: The Penal Code regulates when the right of the Prosecutor to institute criminal proceedings will be precluded upon lapse of the statute of limitation. An act of prosecution (daad van vervolging) halts the statute of limitation. According to the jurisprudence of the Supreme Court (Hoge Raad) the violation of the reasonable time limit pursuant to Article 6, par. 1, of the ECHR can lead to a reduction in punishment. (Vide: [ECLI:NL:HR:2000:AA7309](#), [ECLI:NL:HR:2001:AA9372](#) and [ECLI:NL:HR:2015:2465](#))

- **What is the punishment for a prosecutor when he holds a cse file, even though the lawyer has requested this several times?**

A: There is no punishment when a prosecutor refuses to give the defense council the files. But the defense council may address the Examining Magistrate in order to set a term in which the files have to be presented. The Magistrate has the final say in the judicial system of Sint Maarten. If its instructions are not followed, the case may be thrown out of court and the

prosecutor will not be able to continue presenting the case. This can also not be initiated again because of the “non bis in idem” principle. This principle translates literally from Latin as: not twice for the same; that is, a man shall not be tried twice for the same crime.

- **Crown witness: addressed: is it already being implemented? Is it already happening now and needs to become a law?**

A: The crown witness was never regulated in the Caribbean Kingdom countries. From a rule of law point of view this is less than ideal. Regulation is necessary in order to make the use of a crown witness more transparent, controllable and testable by the courts and the defence counsels. The use of crown witnesses is not a new phenomenon that is introduced by the new Penal Procedure Code. It already existed in practice under the Netherlands Antilles and was also allowed by the Dutch Supreme Court (Hoge Raad), which is also the highest Court for the Caribbean Kingdom Countries. The first time in St. Maarten in 1994, This case made it to the Supreme Court (HR 15 februari 1994, NJ 1994, 322) and even to the European Commission on Human Rights. In 2003 a crown witness case in Curacao was also handled by the Supreme Court. It follows from the jurisprudence of the Supreme Court and of the European Court of Human Rights that the use of crown witnesses is allowed in certain criminal cases and under certain conditions to effectively combat crime.

- **What does the CFATF has to do with this whole witness program?**

FATF Recommendation Nr. 30 advises countries to take measures, including legislative ones, at the national level, to allow their competent authorities investigating money laundering and terrorist financing cases to postpone or waive the arrest of suspected persons and/or the seizure of the money, for the purpose of identifying persons involved in such activities or for evidence gathering. The Crown Witness program, which has been applied already in Sint Maarten based on jurisprudence, is now proposed to be legislated.

- **What protection is there for a suspect who has a crown witness against him or her?**

A: The examining magistrate shall hear the witness on the intended agreement and shall review the lawfulness of the agreement. The public prosecutor shall provide the examining magistrate with the information he requires for his review. The review of the deal (between the Prosecutor and the Crown Witness) by the Examining Magistrate is a safeguard for the person who is incriminated by the statement of a Crown Witness. A related example was provided last week in a money laundering case in Zwolle, Netherlands, and involving Curacao suspects. In the case, also known as “Cymbal”, the magistrate did not honor a deal that was agreed by the prosecution office with the suspects, and handed out full sentences instead of a reduced deal because of cooperation with the prosecutor’s office.

- **Can a witness be considered a witness and a suspect?**

A: In the case of a crown witness: yes.

#### **MP James:**

- **Are changes proposed by OM, or ministry of justice based on needs seen?**
- **Why did we need to broaden the seizure possibilities?**

A: In the new Penal Procedure Code all objects that may serve to reveal the truth or demonstrate unlawfully obtained gains shall be liable to seizure. Also, all objects whose confiscation or withdrawal from circulation may be ordered shall be liable to seizure (Article 119). Furthermore, objects intended to preserve the right of redress to pay the unlawfully obtained benefit or the purpose of preserving the right of recovery for payment of a fine or of a victim-measure can be seized (Article 119a).

- **Workgroup: who were the members of the workgroup?**

A: See Annex 1

### **AGENDA ITEM 3 (BW-2)**

#### **MP Brison:**

- **Reiterate: who were the legal representative at the presentation?**

A: See Annex 1

- **Can you say that the chamber of commerce can de-register just because entity has received unusual transaction against it?**

A: Government will amend Article 25 of the Civil Code Book 2 to reflect that the Chamber can only deregister after an irrevocable court verdict.

- **Is this in compliance with the ordinance of data protection and privacy.**

A: Yes, this serves the enforcement of the law.

- **Law is stating “foundations” and does not provide for further exceptions? Where are the limitations on foundations included in this legislation?**

A: article 59 paragraph 9 of Book 2 of the Civil Code states that the foundations that have the balance and the total of the income or expenses are less than NAf 100.000 are exempted from the obligation.

- **NPO can be targeted when just a board member commits a crime. How does this reflect on the entire foundation?**

A: Criminal Code article 2: 301: An embezzlement carried out by him who has been detained out of necessity, or by guardians, trustees, administrators, executors of an estate, court-appointed liquidators of an estate or community or liquidators of a company or managers of institutions of goodwill or foundations, in relation to any good that they possess as such, are punishable by imprisonment of a maximum of five years or a fine of the fourth category.

A crime committed by a person working for a company or who occupies an executive position in that company, is dealt with in criminal court.

- **Holland and Europe have the right of bank account etc. Please include this in the current laws as well as a compromise?**

The right to a bank account is a very laudable and positive initiative and no reasonable person can be against this as long as the person to open the bank account can positively be identified. Not only in Europe, but also in Canada where some of our most important banks are headquartered, you have the right to open a bank account. However, this initiative should be included or dealt with in another more proper finance based legislation or regulations such as The Government Ordinance Regulating the Supervision of Banking Institutions.

**MP Emmanuel:**

- **Please provide information from the Central Bank of Curacao and SXM: where is it regulated that they can request for customers to provide the source of wealth?**

A: National Ordinance combating money laundering and terrorism financing (AB 2019 no. 25) chapter II Customer Due Diligence (CDD), specifically article 8 paragraph 2.

**MP James**

- **NPO: approach seems to be draconian: please provide the NPOs that fall in the FATF definition.**

A: the NPOs that have a balance and total of the income or expenses above the amount of NAf 100.000.

**MP Williams:**

- **Aansprakelijkheid of the chamber of commerce is not included when removing a foundation.**

A: The removing of a foundation from the register will not be a discretionary/facultative power of the Chamber but will be compulsory by law. Therefore, the Chamber can't be held responsible for doing so.

## Bijlage 1

### Leden van de gezamenlijke commissie herziening Wetboek van Strafvordering

#### Afdeling Aruba

Mr. E. Baars	Openbaar Ministerie Aruba	Advocaat-generaal
Mr. L. Emerencia	Bureau Ministerie van Justitie en Onderwijs Aruba	Juriste
Mr. M.E.F.H. van Erve	Openbaar Ministerie Aruba	Wvd.-Procureur-Generaal
Mr. C.J. Hart	Monica Kock & Partners Law Offices	Advocaat
Mr. L. Pieters	David Kock Wix Lawyers	Advocaat
E.L. Soemers	Korps Politie Aruba	Hoofdinspecteur
Mr. L. Tromp	Directie Wetgeving en Juridische Zaken	Juriste
Mr. W.C.E. Winfield	Gemeenschappelijk Hof van Justitie	Rechter
Mr. E.M. Witjens	Universiteit van Aruba	Wetenschappelijk hoofdmedewerker straf- en strafprocesrecht

#### Afdeling Curacao



Mr. F.B.P. Girigorie	Korps Politie Curaçao	Hoofd Politie Dienst wnd.
Mr. H. de Jong	Openbaar Ministerie Curaçao	Hoofdofficier van Justitie
Mr. Mirto F. Murray	SMS Attorneys at Law	Advocaat
Mr. D.A. Piar	Openbaar Ministerie	Procureur-Generaal
Mr. L. Hoefdraad	Gemeenschappelijk Hof van Justitie	Voormalig president
Mr. J.J.T. Silié	Beleidsorganisatie Ministerie van Justitie	Teamleider afdeling Juridische Zaken & Wetgeving van de Beleidsorganisatie, senior beleidsadviseur, senior wetgevingsjurist
Mr. H.A.C. Smid	Gemeenschappelijk Hof van Justitie	Rechter-plaatsvervanger
Mr. E.F. Sulvaran	Advocatenkantoor Sulvaran en Peterson	Advocaat
Mr. L. de Vries	Wetgeving en Juridische Zaken	Hoofd Wetgeving B
Mr. E.B. Wilsoe	Pieter & Wilsoe Advocaten	Advocaat

**Afdeling Sint Maarten**

Mr. Drs. V.K. Jusia	Ministerie van Justitie	Afdelingshoofd Justitiële Zaken
Mr. I.R. Chitaroe	Ministerie van Justitie, stafbureau SG	Senior juridisch adviseur
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Mr. R.F. Gibson jr	Law Offices Gibson & Associates	Advocaat
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Mr. W.E. Manning		Gepensioneerd Rechter- commissaris
Mr. H. Mos	Openbaar Ministerie Sint Maarten	Voormalig Hoofdofficier van justitie
Mr. T.H.W. Stein	Parket Procureur Generaal Curaçao, Sint Maarten en Bonaire, Sint Eustatius en Saba	Advocaat-generaal
LL.M. H.K.F. van Straten	Korps Politie Sint Maarten	Strategisch Adviseur

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Mr. J.H. Bults	Openbaar Ministerie BES	Senior beleidsmedewerker
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Mr. D.C.I. Van Delft	Openbaar Ministerie BES	Hoofdofficier van justitie
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Prof.mr. H. de Doelder	Erasmus Universiteit Rotterdam	Hoogleraar straf(proces)recht
Mr. B.A. Salverda	Erasmus Universiteit Rotterdam	Wetenschappelijk onderzoeker
Mr. J.H.J. Verbaan	Erasmus Universiteit Rotterdam	Wetenschappelijk onderzoeker
Mr. R.J. Verbeek	Erasmus Universiteit Rotterdam	Wetenschappelijk onderzoeker

## ANNEX 2a

### The FATF Recommendations (Related to the amendments to the Penal Code)

Nr	FATF Recommendation <sup>1</sup>	SXM Legislation
	<b>B – MONEY LAUNDERING AND CONFISCATION</b>	
3	Money laundering offence	Draft Ordinance to amend the Penal Code: Sections O and P
	<b>C. TERRORIST FINANCING AND FINANCING OF PROLIFERATION</b>	
5	Terrorist financing offence	Draft Ordinance to amend the Penal Code: Sections A, B, C, D, E, F, G, H, I, J, K, L, N, Q.

#### **Ad Recommendation 3:**

Money laundering is punishable under the Penal Code, which Code entered into force on June 1, 2015. Vide articles 2:404 - 2:406.

#### **Article 2:404**

1. *Guilty of laundering and liable to a term of imprisonment not exceeding six years or a fine of the fifth category shall be any person who:*
  - a. *hides or conceals the real nature, the source, the location, the transfer or the moving of an object, or hides or conceals the identity of the person entitled to an object or has it in his possession, while he knows that the object derives - directly or indirectly - from any serious offence;*
  - b. *obtains an object, has an object in his possession, transfers or converts an object or makes use of an object, while he knows that the object derives - directly or indirectly - from a serious offence.*
2. *Objects shall mean all property of any description, whether corporeal or incorporeal.*

#### **Article 405**

*Any person who engages in habitual laundering shall be liable to a term of imprisonment not exceeding nine years or a fine of the fifth category.*

#### **Article 406**

1. *Guilty of negligent laundering and liable to a term of imprisonment not exceeding four years or a fine of the fourth category shall be any person who:*
  - a. *hides or conceals the real nature, the source, the location, the transfer or the moving of an object, or hides or conceals the identity of the person entitled to an object or has it in his possession, while he has reasonable cause to suspect that the object derives - directly or indirectly - from any serious offence;*
  - b. *obtains an object, has an object in his possession, transfers or converts an object or makes use of an object while he has reasonable cause to suspect that the object derives - directly or indirectly - from any serious offence;*
2. *Objects shall mean all property of any description, whether corporeal or incorporeal.*

The term "from any serious offence" ('afkomstig uit enig misdrijf') includes all serious offences (*misdrijven*). In this context, one should think of the so-called "underlying crimes". The underlying crimes are not only punishable in

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<sup>1</sup> The full text of the FATF-recommendation and the interpretive note to the recommendation is added to this document.

## ANNEX 2a

the Penal Code, but also in some specific national ordinances. These are successively (with the addition of the relevant article in the Penal Code):

- Participating in a criminal organization (2:57, 2:80, 2:127 and 2:252);
- extortion (2:294 – 2:297);
- terrorism, including financing of terrorism (2:54 and 2:55, juncto 1:202, 1:203 and 1:204);
- Human trafficking and smuggling of human beings (2:154 and 2:239);
- sexual exploitation, i.a. sexual exploitation of children (2:239);
- Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1:118, onder d, juncto Article 3 of the [Opiumlandsverordening](#));
- illegal arms trade (1:118, onder e juncto Article 6 of the [Vuurwapenverordening](#) and Article 1 of the [Wapenverordening](#));
- intentional handling of stolen property (2:397 and 2:399);
- corruption and bribery (2:314, 2:350, 2:351 and 2:352);
- fraud (2:305);
- counterfeiting money (*valsmunterij*) (2:169 tot 2:172);
- piracy and counterfeiting of products (2:307);
- environmental crime (artikel 52 of the [Landsverordening afvalwater](#), Article 33 of the [Landsverordening grondslagen natuurbeheer and –bescherming](#), Article 38 of the [Landsverordening voorkoming van verontreiniging door schepen](#) and Article 81 of the [Landsverordening maritiem beheer](#));
- murder and grievous bodily harm (2:259, 2:262, 2:273 t/m 2:276);
- abduction, unlawful deprivation of liberty and hostage-taking (2:245, 2:246, 2:249 and 2:250);
- robbery and theft (2:288 tot and met 2:291);
- tax offenses (including with regard to customs and excise duties and tax) (Article 49, par. 2, of the [Algemene landsverordening landsbelastingen](#), and Articles 233, 233A, 233B and 235, par. 2, of the [Landsverordening I. U. and D.](#));
- piracy (2:365 and 2:366); and,
- insider trading and market manipulation (2:311 and 2:321, and Articles 8 and 9, juncto Article 15 of the [Landsverordening toezicht effectenbeurzen](#)).

In Article 1:127 it is stipulated that not only natural persons but also legal persons can commit crimes.

### **Article 1:127**

1. *Criminal offences can be committed by natural persons and legal persons.*
2. *If a criminal offence is committed by a legal person, criminal proceedings may be instituted and such punishments and measures as prescribed by law, where applicable, may be imposed:*
  - a. *on the legal person; or*
  - b. *on those persons who have ordered the commission of the criminal offence, and on those persons who actually directed the unlawful acts; or*
  - c. *on the persons referred to in a and b jointly.*
3. *In the application of paragraphs 1 and 2 the following shall be considered as equivalent to the legal person: the unincorporated company, the partnership, the shipping company and the special purpose fund.*

To exclude that parallel criminal, civil or administrative proceedings may exclude liability of (legal) persons, groups of (legal) persons, and organizations, the draft ordinance (amending the Penal Code) includes a new and generally

## ANNEX 2a

applicable fourth paragraph in Article 1: 143 of the Penal Code. That new fourth paragraph contains a nuance on the "principle of ne bis in idem" (prohibition of double jeopardy)<sup>2</sup>.

The additional criminal offences are criminalized in Article 1:123:

### **Article 47**

1. *The following persons shall be criminally liable as offenders of a criminal offence:*
  - 1°. *any persons who commit the offence, either personally or jointly;*
  - 2°. *any persons who, by means of gifts, promises, abuse of authority, use of force, threat or deception or by providing opportunity, means or information, intentionally solicit the commission of the offence.*
2. *With regard to the last category, only those acts they intentionally solicited, and their consequences, shall be taken into account.*

### **Ad Recommendation 5:**

Terrorist financing is punishable under the Penal Code. Vide articles 2:54 and 2:55.

### **Article 2:54**

*He who intentionally provides himself or another with the opportunity, means or information to commit a terrorist offence or an offence in preparation or facilitation of a terrorist offence, or intentionally acquires knowledge or skills for that purpose or teaches another, shall be punishable by a term of imprisonment not exceeding eight years or a fine of the fifth category.*

### **Article 2:55**

1. *Guilty of financing of terrorism and liable to a term of imprisonment not exceeding eight years or a fine of the fifth category shall be any person who intentionally:*
  - a. *collect funds for himself or for another indirectly or immediately for committing a terrorist offence or for supporting persons or organizations that*
  - b. *commit or intend to commit terrorist offences, or commit an offence in preparation or facilitation of a terrorist offence;*
  - c. *collects funds for themselves or for another indirect or immediate, knowing that these funds will be used in whole or in part for committing a terrorist offence, or for supporting persons or organizations who commit or intend to commit terrorist offences, or for committing an offence in preparation or facilitating a terrorist offence;*
  - d. *provides or makes funds available to another directly or indirectly for committing a terrorist offence or for supporting persons or organizations who commit or intend to commit terrorist offences, or for committing a offence in preparation or facilitation of a terrorist offence;*
  - e. *provides or makes funds available to another indirectly or indirectly in the knowledge that these funds will be used in whole or in part for committing a terrorist offence or for supporting persons or organizations who commit or intend to commit terrorist offences, or for committing an offence in preparation or facilitating a terrorist offence.*
2. *For the purposes of the first paragraph, a person is understood to be natural persons, legal persons, groups of natural or legal persons, and organizations; funds means money, as well as all goods and all property rights, obtained in any way, and the documents and data carriers, in whatever form or capacity, which show ownership or entitlement to the money, property or property rights, with including, but not limited to, bank credits, travelers' checks, bank checks, money orders, shares, securities, bonds, bills and letters of credit.*

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<sup>2</sup> According to this principle a (legal)person may not be prosecuted or punished twice for the same offense.

## ANNEX 2a

The explanation of this recommendation speaks several times explicitly about "money" and "cash". This is unambiguously determined in Article 2:55, par. 2. But in Article 2:54 such a provision is missing. To take away any doubt, the draft national ordinance (amending the Penal Code) adds a new paragraph 2 to article 2:54, which makes it clear that "funds" *shall mean all property of any description, whether corporeal or incorporeal, including money*. The same is included in Articles 2:404 and 2:406, as well as in the new Article 2:408, par. 2, which regulates the more serious criminalization of terrorist financing.

The new article 2:408 regulates the financing of terrorism in accordance with the International Convention on the financing of terrorism. Crimes against internationally protected persons and acts involving nuclear material and weapons of mass destruction have been stipulated more in detail, as well as the financing of travel for the purpose of committing a terrorist crime.

The criminalization does not indicate that funds are intended, regardless of whether they have a legal or illegal origin. In order to give this a place in the Penal Code, the draft national ordinance amending the Penal Code inserts in the new article 2:408, par. 1, sub a, b and c, after the phrase "immediately or indirectly":, obtained lawfully or unlawfully.

Following the update of the text of the FATF recommendations (October 2015), a new section B3 concerning the financing of travel for the purpose of committing a terrorist crime was added. In order to give this clarifying addition also its place in the Penal Code, the draft ordinance includes a new paragraph in the new article 2:408, which expressly makes this punishable.

It is repeated here: to exclude that parallel criminal, civil or administrative proceedings may exclude liability of (legal) persons, groups of (legal) persons, and organizations, the draft ordinance includes a new and generally applicable paragraph 4 in Article 1: 143 of the Penal Code. That new fourth paragraph contains a nuance on the "principle of ne bis in idem" (prohibition of double jeopardy

## ANNEX 2a

### The FATF Recommendations

#### B. MONEY LAUNDERING AND CONFISCATION

##### 3. Money laundering offence

Countries should criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.

##### INTERPRETIVE NOTE TO RECOMMENDATION 3 (MONEY LAUNDERING OFFENCE)

1. Countries should criminalise money laundering on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) and the United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention).
2. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences; or to a threshold linked either to a category of serious offences; or to the penalty of imprisonment applicable to the predicate offence (threshold approach); or to a list of predicate offences; or a combination of these approaches.
3. Where countries apply a threshold approach, predicate offences should, at a minimum, comprise all offences that fall within the category of serious offences under their national law, or should include offences that are punishable by a maximum penalty of more than one year's imprisonment, or, for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences that are punished by a minimum penalty of more than six months imprisonment.
4. Whichever approach is adopted, each country should, at a minimum, include a range of offences within each of the designated categories of offences. The offence of money laundering should extend to any type of property, regardless of its value, that directly or indirectly represents the proceeds of crime. When proving that property is the proceeds of crime, it should not be necessary that a person be convicted of a predicate offence.
5. Predicate offences for money laundering should extend to conduct that occurred in another country, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence, had it occurred domestically.
6. Countries may provide that the offence of money laundering does not apply to persons who committed the predicate offence, where this is required by fundamental principles of their domestic law.
7. Countries should ensure that:
  - (a) The intent and knowledge required to prove the offence of money laundering may be inferred from objective factual circumstances.
  - (b) Effective, proportionate and dissuasive criminal sanctions should apply to natural persons convicted of money laundering.
  - (c) Criminal liability and sanctions, and, where that is not possible (due to fundamental principles of domestic law), civil or administrative liability and sanctions, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which more than one form of liability is available. Such measures should be without prejudice to the criminal liability of natural persons. All sanctions should be effective, proportionate and dissuasive.
  - (d) There should be appropriate ancillary offences to the offence of money laundering, including participation in, association with or conspiracy to commit, attempt, aiding and abetting, facilitating, and counselling the commission, unless this is not permitted by fundamental principles of domestic law.

#### C. TERRORIST FINANCING AND FINANCING OF PROLIFERATION

##### 5. Terrorist financing offence \*

Countries should criminalise terrorist financing on the basis of the Terrorist Financing Convention, and should criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts. Countries should ensure that such offences are designated as money laundering predicate offences.



## ANNEX 2a

### INTERPRETIVE NOTE TO RECOMMENDATION 5 (TERRORIST FINANCING OFFENCE)

#### A. Objectives

1. Recommendation 5 was developed with the objective of ensuring that countries have the legal capacity to prosecute and apply criminal sanctions to persons that finance terrorism. Given the close connection between international terrorism and, *inter alia*, money laundering, another objective of Recommendation 5 is to emphasise this link by obligating countries to include terrorist financing offences as predicate offences for money laundering.

#### B. Characteristics of the terrorist financing offence

2. Terrorist financing offences should extend to any person who wilfully provides or collects funds or other assets by any means, directly or indirectly, with the unlawful intention that they should be used, or in the knowledge that they are to be used, in full or in part: (a) to carry out a terrorist act(s); (b) by a terrorist organisation; or (c) by an individual terrorist.

3. Terrorist financing includes financing the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.

4. Criminalising terrorist financing solely on the basis of aiding and abetting, attempt, or conspiracy is not sufficient to comply with this Recommendation.

5. Terrorist financing offences should extend to any funds or other assets, whether from a legitimate or illegitimate source.

6. Terrorist financing offences should not require that the funds or other assets: (a) were actually used to carry out or attempt a terrorist act(s); or (b) be linked to a specific terrorist act(s).

7. Countries should ensure that the intent and knowledge required to prove the offence of terrorist financing may be inferred from objective factual circumstances.

8. Effective, proportionate and dissuasive criminal sanctions should apply to natural persons convicted of terrorist financing.

9. Criminal liability and sanctions, and, where that is not possible (due to fundamental principles of domestic law), civil or administrative liability and sanctions, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which more than one form of liability is available. Such measures should be without prejudice to the criminal liability of natural persons. All sanctions should be effective, proportionate and dissuasive.

10. It should also be an offence to attempt to commit the offence of terrorist financing.

11. It should also be an offence to engage in any of the following types of conduct:

(a) Participating as an accomplice in an offence, as set forth in paragraphs 2 or 9 of this Interpretive Note;

(b) Organising or directing others to commit an offence, as set forth in paragraphs 2 or 9 of this Interpretive Note;

(c) Contributing to the commission of one or more offence(s), as set forth in paragraphs 2 or 9 of this Interpretive Note, by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a terrorist financing offence; or (ii) be made in the knowledge of the intention of the group to commit a terrorist financing offence.

12. Terrorist financing offences should apply, regardless of whether the person alleged to have committed the offence(s) is in the same country or a different country from the one in which the terrorist(s)/terrorist organisation(s) is located or the terrorist act(s) occurred/will occur.

## ANNEX 2b

### The FATF Recommendations (Related to Penal Procedure Code)<sup>1</sup>

Nr	FATF Recommendation <sup>2</sup>	SXM Legislation
	<b>B – MONEY LAUNDERING AND CONFISCATION</b>	
4	Confiscation and provisional measures (see also recommendation 38)	<p>Penal Procedure Code, Book Three, Titel IX Seizure (Articles 119 - 154a);</p> <p><i>But in order to seize and confiscate goods or digital (financial) data, the investigative authorities need to have entrance to and search a home, /other (specific) places or computer systems and also need to investigate en do research. So, also relevant are the provisions stipulated in</i></p> <p><u>Book Three - Several Special Coercive Measures:</u> -  <i>Titel X Entering of dwellings (Articles 155 - 163);</i>  <i>- Titel XI Entering of special places (Article 164);</i>  <i>- Titel XII Maintaining Order during the - performance of Official Acts (Article 165);</i>  <i>- Titel XIII Measures during an Inspection or a Search (Article 166);</i>  <i>- Titel XIV Search for the purpose of recording data and research in computerized devices or systems and examination of objects which contains data (Articles 167 – 174); and</i></p> <p><u>Book Four – Criminal investigation, investigation by the Examining Magistrate and subsequent decisions:</u></p>
	<b>F – POWERS AND RESPONSIBILITIES OF COMPETENT AUTHORITIES AND OTHER INSTITUTIONAL MEASURES</b> <i>Operational and Law Enforcement</i> Responsibilities of law enforcement and investigative authorities	
30	Responsibilities of law enforcement and investigative authorities	See under Recommendation 4. Also see Penal Procedure Code, Book Three: Title XVI Criminal financial investigation Title XVII Special Investigative Powers Title XVIII Special Powers
31	Powers of law enforcement and investigative authorities	See under recommendations 4 and 30
	<b>G – INTERNATIONAL COOPERATION</b>	

<sup>1</sup> It must be noted that the present Penal Procedure Code contains provisions which partly comply with the recommendations. Government had agreed (with the other Kingdom countries) to develop a new Penal Procedure Code. With the new Penal Procedure Code the changes and updates to i.a. the FATF recommendations should than be fully implemented.

<sup>2</sup> The full text of the FATF-recommendation and the interpretive note to the recommendation is added to this document.

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37	Mutual legal assistance	<u>Penal Procedure Code, Book Seven, Titel VIII International Mutual Legal Assistance (Articles 555 - 567);</u>
38	Mutual legal assistance: freezing and confiscation	<u>Penal Procedure Code, Book Seven, Titel IX Transfer of Enforcement of Criminal Judgments, Section Two B - Seizure (Articles 579a – 579f)</u>
39	Extradition	<u>Penal Procedure Code: Articles 96, 604p, 612, 652,</u>
40	Other forms of international cooperation	<u>Penal Procedure Code, Book Seven, Titel VIII International Mutual Legal Assistance, Section Four- International Joint Investigation Teams (Articles 565a – 565e)</u>

## ANNEX 2b

### The FATF Recommendations

#### 4. Confiscation and provisional measures

Countries should adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and the Terrorist Financing Convention, including legislative measures, to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of *bona fide* third parties: (a) property laundered, (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences, (c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or (d) property of corresponding value.

Such measures should include the authority to: (a) identify, trace and evaluate property that is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation; and (d) take any appropriate investigative measures.

Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

#### **INTERPRETIVE NOTE TO RECOMMENDATIONS 4 AND 38 (CONFISCATION AND PROVISIONAL MEASURES)**

Countries should establish mechanisms that will enable their competent authorities to effectively manage and, when necessary, dispose of, property that is frozen or seized, or has been confiscated. These mechanisms should be applicable both in the context of domestic proceedings, and pursuant to requests by foreign countries.

## ANNEX 2b

### 30. Responsibilities of law enforcement and investigative authorities

Countries should ensure that designated law enforcement authorities have responsibility for money laundering and terrorist financing investigations within the framework of national AML/CFT policies. At least in all cases related to major proceeds-generating offences, these designated law enforcement authorities should develop a pro-active parallel financial investigation when pursuing money laundering, associated predicate offences and terrorist financing. This should include cases where the associated predicate offence occurs outside their jurisdictions. Countries should ensure that competent authorities have responsibility for expeditiously identifying, tracing and initiating actions to freeze and seize property that is, or may become, subject to confiscation, or is suspected of being proceeds of crime. Countries should also make use, when necessary, of permanent or temporary multi-disciplinary groups specialised in financial or asset investigations. Countries should ensure that, when necessary, cooperative investigations with appropriate competent authorities in other countries take place.

#### INTERPRETIVE NOTE TO RECOMMENDATION 30 (RESPONSIBILITIES OF LAW ENFORCEMENT AND INVESTIGATIVE AUTHORITIES)

1. There should be designated law enforcement authorities that have responsibility for ensuring that money laundering, predicate offences and terrorist financing are properly investigated through the conduct of a financial investigation. Countries should also designate one or more competent authorities to identify, trace, and initiate freezing and seizing of property that is, or may become, subject to confiscation.
2. A 'financial investigation' means an enquiry into the financial affairs related to a criminal activity, with a view to:
  - identifying the extent of criminal networks and/or the scale of criminality;
  - identifying and tracing the proceeds of crime, terrorist funds or any other assets that are, or may become, subject to confiscation; and
  - developing evidence which can be used in criminal proceedings.
3. A 'parallel financial investigation' refers to conducting a financial investigation alongside, or in the context of, a (traditional) criminal investigation into money laundering, terrorist financing and/or predicate offence(s). Law enforcement investigators of predicate offences should either be authorised to pursue the investigation of any related money laundering and terrorist financing offences during a parallel investigation, or be able to refer the case to another agency to follow up with such investigations.
4. Countries should consider taking measures, including legislative ones, at the national level, to allow their competent authorities investigating money laundering and terrorist financing cases to postpone or waive the arrest of suspected persons and/or the seizure of the money, for the purpose of identifying persons involved in such activities or for evidence gathering. Without such measures the use of procedures such as controlled deliveries and undercover operations are precluded.
5. Recommendation 30 also applies to those competent authorities, which are not law enforcement authorities, *per se*, but which have the responsibility for pursuing financial investigations of predicate offences, to the extent that these competent authorities are exercising functions covered under Recommendation 30.
6. Anti-corruption enforcement authorities with enforcement powers may be designated to investigate money laundering and terrorist financing offences arising from, or related to, corruption offences under Recommendation 30, and these authorities should also have sufficient powers to identify, trace, and initiate freezing and seizing of assets.
7. The range of law enforcement agencies and other competent authorities mentioned above should be taken into account when countries make use of multi-disciplinary groups in financial investigations.
8. Law enforcement authorities and prosecutorial authorities should have adequate financial, human and technical resources. Countries should have in place processes to ensure that the staff of these authorities maintain high professional standards, including standards concerning confidentiality, and should be of high integrity and be appropriately skilled.

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### **31. Powers of law enforcement and investigative authorities**

When conducting investigations of money laundering, associated predicate offences and terrorist financing, competent authorities should be able to obtain access to all necessary documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions, DNFBPs and other natural or legal persons, for the search of persons and premises, for taking witness statements, and for the seizure and obtaining of evidence. Countries should ensure that competent authorities conducting investigations are able to use a wide range of investigative techniques suitable for the investigation of money laundering, associated predicate offences and terrorist financing. These investigative techniques include: undercover operations, intercepting communications, accessing computer systems and controlled delivery. In addition, countries should have effective mechanisms in place to identify, in a timely manner, whether natural or legal persons hold or control accounts. They should also have mechanisms to ensure that competent authorities have a process to identify assets without prior notification to the owner. When conducting investigations of money laundering, associated predicate offences and terrorist financing, competent authorities should be able to ask for all relevant information held by the FIU.

## **ANNEX 2b**

### **37. Mutual legal assistance**

Countries should rapidly, constructively and effectively provide the widest possible range of mutual legal assistance in relation to money laundering, associated predicate offences and terrorist financing investigations, prosecutions, and related proceedings. Countries should have an adequate legal basis for providing assistance and, where appropriate, should have in place treaties, arrangements or other mechanisms to enhance cooperation. In particular, countries should:

- (a) Not prohibit, or place unreasonable or unduly restrictive conditions on, the provision of mutual legal assistance.
- (b) Ensure that they have clear and efficient processes for the timely prioritisation and execution of mutual legal assistance requests. Countries should use a central authority, or another established official mechanism, for effective transmission and execution of requests. To monitor progress on requests, a case management system should be maintained.
- (c) Not refuse to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.
- (d) Not refuse to execute a request for mutual legal assistance on the grounds that laws require financial institutions or DNFBPs to maintain secrecy or confidentiality (except where the relevant information that is sought is held in circumstances where legal professional privilege or legal professional secrecy applies).
- (e) Maintain the confidentiality of mutual legal assistance requests they receive and the information contained in them, subject to fundamental principles of domestic law, in order to protect the integrity of the investigation or inquiry. If the requested country cannot comply with the requirement of confidentiality, it should promptly inform the requesting country.

Countries should render mutual legal assistance, notwithstanding the absence of dual criminality, if the assistance does not involve coercive actions. Countries should consider adopting such measures as may be necessary to enable them to provide a wide scope of assistance in the absence of dual criminality.

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### **38. Mutual legal assistance: freezing and confiscation \***

Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money laundering, predicate offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value. This authority should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law. Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value, and arrangements for coordinating seizure and confiscation proceedings, which should include the sharing of confiscated assets.

#### **INTERPRETIVE NOTE TO RECOMMENDATION 38 (MUTUAL LEGAL ASSISTANCE: FREEZING AND CONFISCATION)**

1. Countries should consider establishing an asset forfeiture fund into which all, or a portion of, confiscated property will be deposited for law enforcement, health, education, or other appropriate purposes. Countries should take such measures as may be necessary to enable them to share among or between other countries confiscated property, in particular, when confiscation is directly or indirectly a result of coordinated law enforcement actions.
2. With regard to requests for cooperation made on the basis of non-conviction based confiscation proceedings, countries need not have the authority to act on the basis of all such requests, but should be able to do so, at a minimum in circumstances when a perpetrator is unavailable by reason of death, flight, absence, or the perpetrator is unknown.



## The FATF Recommendations

*(Related to the revision of the Civil Code)*

Nr	FATF Recommendation	SXM Legislation
	<b>C. TERRORIST FINANCING AND FINANCING OF PROLIFERATION</b>	
<b>8</b>	Non-profit organisations	Revision National Ordinance Book 2 of the Civil Code: 1, 4, 5, 15, 24, 25, 55, 57a, 107, 109, 272

The Revision National Ordinance aims to re-establish Book 2 of the Civil Code and to cancel bearer shares. The different types, forms and basic characteristics of legal persons in Sint Maarten are recorded and described in Book 2 of the Civil Code. The processes for establishing these legal entities are also laid down and described in Book 2. The processes for obtaining and registering the basic data are laid down and described in the Trade Register Regulation (Handelsregisterverordening) and the Trade Register Decree (Handelsregisterbesluit).

The Organization for Economic Cooperation and Development (OECD) calls for the abolition of bearer shares and traceability. Tax and related considerations play a role in this. If this call is to be ignored, it will have an adverse effect on Sint Maarten's name as a reliable country in the international fight against tax abuse and money laundering practices.

At this moment a company may have bearer shares. Sint Maarten has decided to delete this possibility in order to comply with this recommendation and with OECD recommendations on transparency and exchange of information for tax purposes. To this end, the Revised National Ordinance Book 2 of the Civil Code has been brought into proceedings; the number of changes is so extensive that it has been decided to re-adopt Book 2 in its entirety.

Book 2 of the Civil Code of Sint Maarten contains a number of provisions that are relevant against the background of FATF Recommendation 8.

### The FATF Recommendations

#### 8. Non-profit organisations

Countries should 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. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse, including:

- (a) by terrorist organisations posing as legitimate entities;
- (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and
- (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

## **ANNEX 2c**

### **INTERPRETIVE NOTE TO RECOMMENDATION 8 (NON-PROFIT ORGANISATIONS)**

#### **A. INTRODUCTION**

1. Given the variety of legal forms that non-profit organisations (NPOs) can have, depending on the country, the FATF has adopted a functional definition of NPO. This definition is based on those activities and characteristics of an organisation which put it at risk of terrorist financing abuse, rather than on the simple fact that it is operating on a non-profit basis. For the purposes of this Recommendation, NPO refers to a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of “good works”. Without prejudice to Recommendation 1, this Recommendation only applies to those NPOs which fall within the FATF definition of an NPO. It does not apply to the entire universe of NPOs.

2. NPOs play a vital role in the world economy and in many national economies and social systems. Their efforts complement the activity of the governmental and business sectors in providing essential services, comfort and hope to those in need around the world. The FATF recognises the vital importance of NPOs in providing these important charitable services, as well as the difficulty of providing assistance to those in need, often in high risk areas and conflict zones, and applauds the efforts of NPOs to meet such needs. The FATF also recognises the intent and efforts to date of NPOs to promote transparency within their operations and to prevent terrorist financing abuse, including through the development of programmes aimed at discouraging radicalisation and violent extremism. The ongoing international campaign against terrorist financing has identified cases in which terrorists and terrorist organisations exploit some NPOs in the sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organisations and operations. As well, there have been cases where terrorists create sham charities or engage in fraudulent fundraising for these purposes. This misuse not only facilitates terrorist activity, but also undermines donor confidence and jeopardises the very integrity of NPOs. Therefore, protecting NPOs from terrorist financing abuse is both a critical component of the global fight against terrorism and a necessary step to preserve the integrity of NPOs and the donor community. Measures to protect NPOs from potential terrorist financing abuse should be targeted and in line with the risk-based approach. It is also important for such measures to be implemented in a manner which respects countries’ obligations under the Charter of the United Nations and international human rights law.

3. Some NPOs may be vulnerable to terrorist financing abuse by terrorists for a variety of reasons. NPOs enjoy the public trust, have access to considerable sources of funds, and are often cash-intensive. Furthermore, some NPOs have a global presence that provides a framework for national and international operations and financial transactions, often within or near those areas that are most exposed to terrorist activity. In some cases, terrorist organisations have taken advantage of these and other characteristics to infiltrate some NPOs and misuse funds and operations to cover for, or support, terrorist activity.

#### **B. OBJECTIVES AND GENERAL PRINCIPLES**

4. The objective of Recommendation 8 is to ensure that NPOs are not misused by terrorist organisations: (i) to pose as legitimate entities; (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; or (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes, but diverted for terrorist purposes. In this Interpretive Note, the approach taken to achieve this objective is based on the following general principles:

(a) A risk-based approach applying focused measures in dealing with identified threats of terrorist financing abuse to NPOs is essential given the diversity within individual national sectors, the differing degrees to which parts of each sector may be vulnerable to terrorist financing abuse, the need to ensure

## **ANNEX 2c**

that legitimate charitable activity continues to flourish, and the limited resources and authorities available to combat terrorist financing in each country.

(b) Flexibility in developing a national response to terrorist financing abuse of NPOs is essential, in order to allow it to evolve over time as it faces the changing nature of the terrorist financing threat.

(c) Past and ongoing terrorist financing abuse of NPOs requires countries to adopt effective and proportionate measures, which should be commensurate to the risks identified through a risk-based approach.

(d) Focused measures adopted by countries to protect NPOs from terrorist financing abuse should not disrupt or discourage legitimate charitable activities. Rather, such measures should promote accountability and engender greater confidence among NPOs, across the donor community and with the general public, that charitable funds and services reach intended legitimate beneficiaries. Systems that promote achieving a high degree of accountability, integrity and public confidence in the management and functioning of NPOs are integral to ensuring they cannot be abused for terrorist financing.

(e) Countries are required to identify and take effective and proportionate action against NPOs that either are exploited by, or knowingly supporting, terrorists or terrorist organisations taking into account the specifics of the case. Countries should aim to prevent and prosecute, as appropriate, terrorist financing and other forms of terrorist support. Where NPOs suspected of, or implicated in, terrorist financing or other forms of terrorist support are identified, the first priority of countries must be to investigate and halt such terrorist financing or support. Actions taken for this purpose should, to the extent reasonably possible, minimise negative impact on innocent and legitimate beneficiaries of charitable activity. However, this interest cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing or other forms of terrorist support provided by NPOs.

(f) 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. Countries should encourage the development of academic research on, and information-sharing in, NPOs to address terrorist financing related issues.

### **C. MEASURES**

5. Without prejudice to the requirements of Recommendation 1, since not all NPOs are inherently high risk (and some may represent little or no risk at all), countries should identify which subset of organisations fall within the FATF definition of NPO. In undertaking this exercise, countries should use all relevant sources of information in order to identify features and types of NPOs, which, by virtue of their activities or characteristics, are likely to be at risk of terrorist financing abuse.<sup>21</sup> It is also crucial to identify the nature of threats posed by terrorist entities to the NPOs which are at risk as well as how terrorist actors abuse those NPOs. Countries should review the adequacy of measures, including laws and regulations, that relate to the subset of the NPO sector that may be abused for terrorism financing support in order to be able to take proportionate and effective actions to address the risks identified. These exercises could take a variety of forms and may or may not be a written product. Countries should also periodically reassess the sector by reviewing new information on the sector's potential vulnerabilities to terrorist activities to ensure effective implementation of measures.

6. There is a diverse range of approaches in identifying, preventing and combating terrorist financing abuse of NPOs. An effective approach should involve all four of the following elements: (a) sustained outreach, (b) targeted risk-based supervision or monitoring, (c) effective investigation and information gathering and (d) effective mechanisms for international cooperation. The following measures represent examples of specific actions that countries should take with respect to each of these elements, in order to protect NPOs from potential terrorist financing abuse.

## ANNEX 2c

### (a) Sustained outreach concerning terrorist financing issues

- (i) Countries should have clear policies to promote accountability, integrity and public confidence in the administration and management of NPOs.
- (ii) Countries should encourage and undertake outreach and educational programmes to raise and deepen awareness among NPOs as well as the donor community about the potential vulnerabilities of NPOs to terrorist financing abuse and terrorist financing risks, and the measures that NPOs can take to protect themselves against such abuse.
- (iii) 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.
- (iv) Countries should encourage NPOs to conduct transactions via regulated financial channels, wherever feasible, keeping in mind the varying capacities of financial sectors in different countries and in different areas of urgent charitable and humanitarian concerns.

### (b) Targeted risk-based supervision or monitoring of NPOs

Countries should take steps to promote effective supervision or monitoring. A “one-size-fits-all” approach would be inconsistent with the proper implementation of a risk-based approach as stipulated under Recommendation 1 of the FATF Standards. In practice, countries should be able to demonstrate that risk-based measures apply to NPOs at risk of terrorist financing abuse. It is also possible that existing regulatory or other measures may already sufficiently address the current terrorist financing risk to the NPOs in a jurisdiction, although terrorist financing risks to the sector should be periodically reviewed. Appropriate authorities should monitor the compliance of NPOs with the requirements of this Recommendation, including the risk-based measures being applied to them.<sup>22</sup> Appropriate authorities should be able to apply effective, proportionate and dissuasive sanctions for violations by NPOs or persons acting on behalf of these NPOs.<sup>23</sup> The following are some examples of measures that could be applied to NPOs, in whole or in part, depending on the risks identified:

- (i) NPOs could be required to license or register. This information should be available to competent authorities and encouraged to be available to the public.<sup>24</sup>
- (ii) NPOs could be required to maintain information on: (1) the purpose and objectives of their stated activities; and (2) the identity of the person(s) who own, control or direct their activities, including senior officers, board members and trustees. This information could be publicly available either directly from the NPO or through appropriate authorities.
- (iii) NPOs could be required to issue annual financial statements that provide detailed breakdowns of incomes and expenditures.
- (iv) NPOs could be required to have appropriate controls in place to ensure that all funds are fully accounted for, and are spent in a manner that is consistent with the purpose and objectives of the NPO’s stated activities.
- (v) NPOs could be required to take reasonable measures to confirm the identity, credentials and good standing of beneficiaries<sup>25</sup> and associate NPOs and that they are not involved with and/or using the charitable funds to support terrorists or terrorist organisations<sup>26</sup>. However, NPOs should not be required to conduct customer due diligence. NPOs could be required to take reasonable measures to document the identity of their significant donors and to respect donor confidentiality. The ultimate objective of this requirement is to prevent charitable funds from being used to finance and support terrorists and terrorist organisations.
- (vi) NPOs could be required to maintain, for a period of at least five years, records of domestic and international transactions that are sufficiently detailed to verify that funds have been received and spent in a manner consistent with the purpose and objectives of the organisation, and could be required to make these available to competent authorities upon appropriate authority. This also applies to information mentioned in paragraphs (ii) and (iii) above. Where appropriate, records of charitable activities and financial operations by NPOs could also be made available to the public.

## ANNEX 2c

### (c) Effective information gathering and investigation

(i) Countries should ensure effective cooperation, coordination and information-sharing to the extent possible among all levels of appropriate authorities or organisations that hold relevant information on NPOs.

(ii) Countries should have investigative expertise and capability to examine those NPOs suspected of either being exploited by, or actively supporting, terrorist activity or terrorist organisations.

(iii) Countries should ensure that full access to information on the administration and management of a particular NPO (including financial and programmatic information) may be obtained during the course of an investigation.

(iv) Countries should establish appropriate mechanisms to ensure that, when there is suspicion or reasonable grounds to suspect that a particular NPO: (1) is involved in terrorist financing abuse and/or is a front for fundraising by a terrorist organisation; (2) is being exploited as a conduit for terrorist financing, including for the purpose of escaping asset freezing measures, or other forms of terrorist support; or (3) is concealing or obscuring the clandestine diversion of funds intended for legitimate purposes, but redirected for the benefit of terrorists or terrorist organisations, that this information is promptly shared with relevant competent authorities, in order to take preventive or investigative action.

### (d) Effective capacity to respond to international requests for information about an NPO of concern.

Consistent with Recommendations on international cooperation, countries should identify appropriate points of contact and procedures to respond to international requests for information regarding particular NPOs suspected of terrorist financing or involvement in other forms of terrorist support.

## D. RESOURCES FOR SUPERVISION, MONITORING, AND INVESTIGATION

7. Countries should provide their appropriate authorities, which are responsible for supervision, monitoring and investigation of their NPO sector, with adequate financial, human and technical resources. **Glossary of specific terms used in this Recommendation**

### **Appropriate authorities**

refers to competent authorities, including regulators, tax authorities, FIUs, law enforcement, intelligence authorities, accrediting institutions, and potentially self-regulatory organisations in some jurisdictions.

### **Associate NPOs**

includes foreign branches of international NPOs, and NPOs with which partnerships have been arranged.

### **Beneficiaries**

refers to those natural persons, or groups of natural persons who receive charitable, humanitarian or other types of assistance through the services of the NPO.

### **Non-profit organisation or NPO**

refers to a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious, cultural, educational, social or fraternal purposes, or for the carrying out of other types of "good works".

### **Terrorist financing abuse**

refers to the exploitation by terrorists and terrorist organisations of NPOs to raise or move funds, provide logistical support, encourage or facilitate terrorist recruitment, or otherwise support terrorists or terrorist organisations and operations.

## ANNEX 2c