

Financial Transparency Laws in Brazil:

How They Impact Civil Society and Non-Profit Organizations

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Executive Summary

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

Brazil last participated in an FATF evaluation in 2010 after which the country was found to have inadequate laws addressing money laundering and terrorism financing. Brazil's government responded by approving Law 13,260, which regulates collaboration between non-profit groups and the government. That law was redrafted after vigorous criticism from civil society groups, the United Nations, and other stakeholders. However, CSOs still feel that they are operating in an environment of "criminalization" as the government imposes more requirements and "proof of good conduct." Law 13,260 includes descriptions of illegal terrorist acts, which many in the non-profit sector find ambiguous and broad, potentially subjecting individuals liable for common crimes associated with social protest to long prison sentences. Brazil still does not have laws addressing money laundering and terrorism financing in the non-profit sector.

Additionally, Brazil has not publicly identified a subset of CSOs that are vulnerable to terrorist financing abuses and has not implemented effective and proportional oversight measures based on a risk assessment. Though the government has expressed a commitment to a Strategic National Risk Assessment Committee, public statements do not specify that the assessment will identify at-risk CSOs or include participation from the civil society sector.

ICNL concluded that CSOs could be adversely affected if the government of Brazil implements new controls that are not based on a risk assessment, but the country does have examples of past government-civil society collaboration that could be used to develop, implement, and evaluate new oversight measures affecting CSOs.

A. Introduction

Since Brazil's last mutual evaluation in 2010,¹ FATF has highlighted the country's serious deficiencies in AML/CFT.² On 16 March 2016, Brazil approved Law 13,260³ on terrorism and terrorist financing. The legislation was redrafted after the civil sector and United Nations Special Rapporteurs on human rights,⁴ among others, vigorously criticized it, warning that its ambiguous provisions could criminalize civil society protest as terrorism.⁵ FATF recognized the redrafted legislation as a positive step forward but insisted that the country take further action to address the identified deficiencies.⁶

Brazil lacks a special legal framework to regulate NPOs with regard to AML/CFT. In 2016, Law 13,019, the Regulatory Framework for Civil Society Organizations (MROSC Law),⁷ was adopted. This law regulates collaboration between NPOs and the State, and, in particular, the funding of NPOs by State agencies. The Law does not regulate NPO funding from domestic or foreign private sources. The next joint FATF-GAFILAT evaluation of Brazil is scheduled for 2021.

B. An Analysis of AML/CTF Legislation from the Point of View of Freedom of Association

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

¹ See <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Brazil%20full.pdf>.

² See *Plenário do FATF – Brasil continua deficiente na Prevenção ao Financiamento do Terrorismo [FATF Plenary – Brazil Continues to Have Deficiencies in the Prevention of Terrorist Financing]* <http://conformita.com.br/plenario-do-fatf-brasil-continua-deficiente-na-prevencao-ao-financiamento-do-terrorismo/>.

³ Available at: <http://www2.camara.leg.br/legin/fed/lei/2016/lei-13260-16-marco-2016-782561-norma-pl.html>.

⁴ See <http://www.conectas.org/pt/acoes/justica/noticia/40407-onu-critica-pl-antiterrorista>.

⁵ See <https://es.globalvoices.org/2016/04/27/brasil-sanciona-su-primera-ley-antiterrorista/>.

⁶ See <https://www.delitosfinancieros.org/brasil-necesita-progresar-en-materia-de-financiacion-del-terrorismo-segun-gafi/>.

⁷ Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l13019.htm.

⁸ Similarly, Article 16 of the American Convention on Human Rights (“the American Convention”) protects the right of association. The only acceptable restrictions to freedom of association are substantially identical to those provided for in the ICCPR. Brazil ratified the ICCPR and the American Convention in 1992.

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

¹⁰ *Ibid.*, ¶ 163.

*international cooperation.*¹¹ Similarly, penalties should be strictly proportionate to the legitimate aim pursued. Forced dissolution procedures should only be undertaken when there is a clear and imminent danger resulting in a flagrant violation of national law and used only when lesser measures would be insufficient.¹²

1. As explained in the introduction, Brazil does not have a special law regulating the NPO sector with regard to AML/CFT. The registration and oversight of NPOs in Brazil is currently regulated by two laws: the Civil Code, and the Public Registries Law. The legal status of NPOs is automatically recognized upon registry of their articles of association with a notary.¹³ This legal framework for establishing NPOs is not considered problematic under international standards regarding the right to freedom of association, as it does not entail delays, significant costs, or interference in organizations' articles of association.¹⁴ The MROSC Law regulates government funding of NPOs, thus contributing to the transparency of those contracts and preventing corruption. The MROSC Law does not aim to oversee funding of NPOs by non-governmental actors who may be involved in money laundering or terrorist financing.

Nevertheless, NPOs sense they are operating in an environment of “criminalization”:

“...a context of mistrust on the part of the State, which increasingly imposes more controls on civil society organizations. Legislative developments convey this perception, inasmuch as all recent laws—including the [MROSC] Law on access to public funds—have created more obligations and demanded further ‘proof of [good] conduct,’ such as certificates attesting to technical capacity and the absence of tax liabilities, as well as evidence of operational capacity.”¹⁵

Law 13,260 on terrorism and terrorist financing is part of this environment of criminalization, since, according to NPOs, it is imposing controls that are perceived as burdensome for the exercise of the right to freedom of association.¹⁶

2. Law 13,260, adopted in 2016 to fulfill FATF requirements, is applicable both within and outside the NPO sector. The law’s definition of “acts of terrorism”¹⁷ includes, in part, using violence to sabotage the operations or take control, even temporarily, of the media, means of transportation, or public facilities or sites where essential public services are carried out; endangering a person’s life or physical safety, and more (Article 2 §1). Terrorist financing, which carries a

¹¹ Ibid, ¶ 179.

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

¹³ See Szazi and Storto, *Investigación sobre el marco legal de las organizaciones de la sociedad civil en Latinoamérica: Informe del equipo de Brasil* [Research on the Legal Framework of Latin American Civil Society Organizations: Report of the Brazil Team], p. 2, available at: <http://www.icnl.org/programs/lac/PDF/BRAZIL/INFORME%20FINAL%20BRASIL.pdf>.

¹⁴ Ibid.; Also see Report of the Special Rapporteur of May 2012, ¶ 75.

¹⁵ See *Investigación sobre el marco legal de las organizaciones de la sociedad civil en Latinoamérica: Informe del equipo de Brasil* [Research on the Legal Framework of Latin American Civil Society Organizations: Report of the Brazil Team], p. 6.

¹⁶ Ibid.; Also see *Second Report*, ¶ 163.

¹⁷ Article 2 of Law 13,260 stipulates that terrorism consists of one or more individuals carrying out acts provided for hereunder for reasons of xenophobia, discrimination or prejudice based on race, color, ethnicity, or religion, when committed for purposes of causing social or widespread terror, [and] endangering people, property, public peace and/or security.

prison term of 15-30 years, is defined in part as receiving, providing, offering, obtaining, safeguarding, maintaining in deposit, requesting, or investing in any manner, whether directly or indirectly, resources, assets, property, fees, articles of value, money, or services of any kind to plan, prepare, or execute the criminal acts described (Article 6). Furthermore, any individual or entity that offers, receives, obtains, safeguards, invests, or in any other manner contributes to the procurement of resources to finance an individual, group of persons, association, or other entity whose main or secondary activity, no matter how infrequent, is subject to the same penalty (Article 6).

The desk review found that Brazilian NPOs were critical in their assessments of Law 13,260, mainly because the acts defined as terrorism have already been provided for under other criminal laws and the descriptions of the outlawed terrorist acts are ambiguous and broad, potentially subjecting individuals liable for common crimes associated with social protest to long prison sentences.¹⁸ The NPOs did not mention the provisions on terrorist financing in their extensive critiques, and the desk review has found no evidence that the practical impact of Law 13,260's implementation has restricted NPOs' access to means of financing.¹⁹

C. Analysis of AML/CTF Laws from the Point of View of FATF Standards

FATF is an inter-governmental body whose objectives are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing, and other threats related to the integrity of the international financial system.²⁰ To this end, FATF has developed 40 Recommendations for States committed to combatting these crimes. GAFILAT is a regional group²¹ that belongs to FATF's network. FATF's recommendations have undergone important revisions since 2014.²² In 2016, FATF revised Recommendation 8²³ and its IN regarding NPOs, eliminating the statement that NPOs "are particularly vulnerable" to terrorist abuse and inserting new language urging States to apply a risk-based approach²⁴ and to respect their obligations under international human rights law.²⁵ According to the reformulated IN, countries must use the risk assessment process to identify a subset of NPOs at risk and then take actions or measures

¹⁸ Nota técnica: Razões para o veto do PL 2016/2015 [Technical Note: Reasons to veto bill 2016/2015], available at: http://www.conectas.org/arquivos/editor/files/16_03_09%20Nota%20T%C3%A9cnica_Vetos%20%281%29.pdf.

¹⁹ See *Second Report*, ¶ 179.

²⁰ FATF, *Who we are*, available at <http://www.fatf-gafi.org/about/whoweare/>.

²¹ GAFILAT, *La función* (our role), available at <http://www.gafilat.org/content/quienes/> (In Spanish).

²² See FATF, *Best Practices: Combatting the Abuse of Non-Profit Organizations* (Recommendation 8) [2015]. Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf> (English).

²³ Recommendation 8 requires that countries "review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse". Recommendation 8 and its IN can be found at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf.

²⁴ European Center for Not-for-Profit Law (ECNL). *A String of Successes in Changing Global Counter-Terrorism Policies that Impact Civic Space*. Available at: <http://www.icnl.org/research/resources/counterterrorism/ECNL-Briefer-Change-of-the-Global-CT-Policies-that-Impact-Civic-Space-July-2016.pdf>.

²⁵ See *IN*, ¶ 2.

that are effective, appropriate, and proportionate to the risk.²⁶ Finally, the IN establishes that measures taken must not interrupt or discourage the legitimate charitable activities of NPOs.²⁷

1. The State has not publicly identified a subset of NPOs as vulnerable to terrorist financing abuse. The government agency with primary responsibility for overseeing compliance with AML/CFT regulations in Brazil is the Ministry of Finance's Council for Financial Activities Control (COAF). COAF's powers include:
 - Intaking and reviewing reports of suspicious activity, and identifying occurrences of such activity;
 - Taking disciplinary measures and enforcing administrative penalties; and
 - Communicating with the competent authorities to initiate legal proceedings in cases where there is reasonable evidence of money laundering.²⁸

Neither COAF nor any other government agency has identified a subset of NPOs vulnerable to terrorist financing abuse as the IN to Recommendation 8 requires.²⁹

2. The State has not implemented AML/CFT measures based on a risk assessment with effective and proportional oversight measures. The Central Bank of Brazil is one of the entities charged with promoting enforcement of AML/CFT rules, including the requirement to keep records with customers' data, internal controls on activities of the domestic financial system's users, communications on suspicious transactions, and trainings.³⁰ This desk review did not find any policies or procedures specifically applicable to NPOs that could be implemented in a manner that is effective and proportionate to the risk,³¹ in keeping with Recommendation 8 and its IN.³²

D. Analysis of FATF Evaluation and Follow-Up Processes and NPO Engagement

Recommendation 8 requires that countries "review the adequacy of laws and regulations that relate to non-profit organizations which the country has identified as being vulnerable to terrorist financing abuse."³³ This evaluation of the NPO sector to identify the NPO subset vulnerable to terrorist financing abuse must be, in turn, covered in the country's Mutual Evaluation performed by FATF/GAFILAT evaluators.³⁴ The IN for Recommendation 8 establishes that "developing cooperative relationships among the public and private sectors and with NPOs is critical to understanding NPOs' risks and risk mitigation strategies, raising awareness, increasing effectiveness and fostering capabilities to combat

²⁶ Ibid., ¶ 5.

²⁷ Ibid., ¶ 4.

²⁸ See <https://enfin.com.br/termo/coaf-conselho-de-controle-de-atividades-financeiras-sfakadla>.

²⁹ See IN, ¶ 5.

³⁰ See <http://www.bcb.gov.br/fis/supervisao/acaoestado.asp>.

³¹ See <http://www.bcb.gov.br/fis/supervisao/lavdinreg.asp>.

³² See IN, ¶ 5.

³³ See *The FATF Recommendations*. Recommendation 8. Pag. 11, available at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf.

³⁴ See *Procedures for the FATF Fourth Round of AML/CTF Mutual Evaluations*, ¶ 4, available at <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf>.

terrorist financing abuse within NPOs.”³⁵ In addition to outreach and educational programs,³⁶ 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.”³⁷ Dialogue between the government and NPOs can be encouraged: during the NPO sector risk assessment; while developing and implementing measures to mitigate risk and related guidelines; during a FATF country mutual evaluation; and whenever related issues arise.³⁸

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

As was mentioned previously, this desk review did not find evidence that the State has identified a subset of NPOs vulnerable to terrorist financing abuse or conducted a review of laws and regulations related to this subset. Additionally, there was no indication that the NPO sector participated in this process.³⁹

2. Is there a dialogue between NPOs and State agencies to develop and refine best practices aimed at addressing the risks and vulnerabilities of terrorist financing and protecting NPOs from them?

Since 2003, the National Strategy to Combat Corruption and Money Laundering (ENCCLA) has guided the development of a coordinated government strategy on these issues. ENCCLA has focused on training programs, as well as the creation of databases and efficiency indicators for AML/CFT controls.⁴⁰ The action agenda coordinated by ENCCLA included Action 12: *Support for implementation of the MROSC Law and its impact on the misuse of public funds.* Under the leadership of the Ministry of Government, and with broad engagement by the civil sector, including the most influential Brazilian NPO networks, along with COAF, the Central Bank, and other national and state public agencies, a collective analysis was conducted of the MROSC Law.⁴¹ The explicit objective of the analysis was to comply with Recommendation 8 by identifying the many kinds of irregularities and misuse of funds that occur in contracts entered into between the State and NPOs, as a contribution to the risk assessment of persons who misuse the legal structure of NPOs to commit illicit acts.⁴² The desk review did not find any similar collective analysis of NPOs’ receipt of non-government funds.

On 24 November 2017, while preparing its 2018 action agenda, ENCCLA expressed its “firm determination to establish a Strategic National Risk Assessment Committee with a view to strengthening national instruments to prevent and combat money laundering and terrorist financing, as well as to make the joint work conducted by competent public bodies more effective.”⁴³ The statement does not indicate whether this Strategic Committee will include in

³⁵ See *IN*, ¶ 4 (f).

³⁶ *Ibid.*, ¶ 6 (a) (ii).

³⁷ *Ibid.*, ¶ 6 (a) (iii).

³⁸ See FATF, *Best Practices: Combatting the Abuse of Non-Profit Organizations* (Recommendation 8), ¶ 27.

³⁹ See *IN*, ¶ 6 (a) (iii).

⁴⁰ See <http://www.bcb.gov.br/fis/supervisao/acaoestado.asp>.

⁴¹ See <http://www.participa.br/articles/public/0055/0335/E16A12 - SG-PR - Produto final - Tipologias e boas praticas MROSC.pdf>.

⁴² *Ibid.*, p. 4.

⁴³ *Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro – ENCCLA Statements 2018*. <http://enccla.camara.leg.br/acoefs/acoefs-de-2018>.

its mission an evaluation of the NPO sector to identify the subset of organizations at risk, or whether the NPOs will be represented on the Committee—both of which measures would be consistent with the Recommendation and its IN.⁴⁴

3. Has the State facilitated the NPO sector’s participation in the FATF/GAFILAT mutual evaluation?

FATF’s last mutual evaluation of Brazil took place in 2010, and therefore would not reflect the State’s current practices in AML/CFT matters. The next mutual evaluation, which is scheduled for 2021, is still several years away.

E. Conclusions

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

- In repeated statements, FATF has pointed to Brazil’s failure to comply with its Recommendations, including Recommendation 8, and has urged the State to adopt new AML/CFT measures;
- The current legal framework regulating NPOs’ registration has been evaluated as favorable for the exercise of the right to freedom of association;
- The NPO sector may be adversely affected if, under pressure to comply with FATF standards, the State implemented new disproportionate controls on NPOs that are not based on a risk assessment; and
- Under ENCCLA’s coordination, there has been collaboration between the State and the NPO sector in evaluations related to AML/CFT, which could be used as models to develop, implement, and evaluate new oversight measures affecting NPOs.

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

⁴⁴ See Recommendation 8; See *Best Practices: Combatting the Abuse of Non-Profit Organizations (Recommendation 8)*, ¶ 27.