

# The role of foundations in international anti-money laundering

Wouter H. Muller\*

## Abstract

Money laundering is a serious crime that destabilizes society. The author focuses on the measures undertaken by the international community to combat money laundering and analyses a possible abuse of foundations in such illegal schemes.

## Introduction

Money laundering is a serious crime that destabilizes our society, both economically and socially.

Criminals, who can continuously and successfully launder their criminal proceeds, use their financial power to undermine the integrity of our financial systems, of government structures and, in general, of our economic system. With bribery they have means to manipulate legal structures and bend rules to serve their interests.

Weaker political and economical societies are more often prone to these manipulations than stronger ones and the danger in this system is that organized crime can eventually take over the rule in those societies that are lead by corrupt governments.

In the 'Tampere Declaration' following the European Council of October 1999, a special section was dedicated to specific actions to be taken against money laundering. In paragraph 51 the Presidency stated that:

*Money laundering is at the very heart of organised crime. It should be rooted out wherever it occurs. The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime.<sup>1</sup>*

Already in the early eighties had the international community slowly started to develop measures to combat money laundering.

Recognizing the immense threat of money laundering the G7 at its summit of 1987 decided that integrated

\* Wouter H. Muller Henley & partners AG.

<sup>1</sup> Conseil européen de Tampere (15 et 16 octobre 1999) Conclusions de la présidence: X. Action spécifique de lutte contre le blanchiment d'argent. 51. Le blanchiment d'argent est au coeur même de la criminalité organisée. Il faut l'éradiquer partout où il existe. Le Conseil européen est déterminé à veiller à ce que soient adoptées des mesures concrètes pour dépister, geler, saisir et confisquer les produits du crime. ([www.ena.lu/mce.cfm](http://www.ena.lu/mce.cfm))

international action was needed to combat the increasing misuse of the worldwide financial system by organizations and individuals laundering criminal money.

It was at that time that it was decided to establish an intergovernmental body to set world wide standards to fight money laundering, the 'Financial Action Task Force (FATF)'.

The FATF was quick in setting global AML-Standards by issuing its Forty Recommendations in 1990.

After the tragic events of 11 September 2001 it was evident that a new phenomenon, namely terrorism, although it had already existed for a long time<sup>2</sup>, had become the new focus.

The FATF was very fast in responding to the events of 9/11 and already in October 2001 its mandate was extended to deal with all issues related to terrorist financing.

In the very same month the FATF adopted eight Special Recommendations on Terrorist Financing, complementary to the already existing Forty Recommendations and a ninth Special Recommendation was added in October 2004.

In the meantime, as a result of changed and more sophisticated money laundering techniques, the Forty Recommendations were amended twice, in 1996 and 2003, to become more effective by reflecting those changes.

## Transparency of legal persons and arrangements

In the first version of its Forty Recommendations, the FATF recognized and addressed the unlawful use of legal persons by money launderers when it refers to transparency of legal persons and arrangements. Recommendation 33 specifically addresses this issue as follows:

### Recommendation 33

*Countries should take measures to prevent the unlawful use of legal persons by money launderers. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries*

<sup>2</sup> For example, the RAF in Germany in the late 60s and 70s, the IRA in Northern Ireland and England and the ETA in Spanish Basque Territory.

## The role of foundations in international anti-money laundering

*that have legal persons that are able to issue bearer shares should take appropriate measures to ensure that they are not misused for money laundering and be able to demonstrate the adequacy of those measures. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.*

Although Recommendation 34 more specifically refers to Trusts, the analogy to Foundations is obvious and should be recognized.

### **Recommendation 34**

*Countries should take measures to prevent the unlawful use of legal arrangements by money launderers. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries that can be obtained or accessed in a timely fashion by competent authorities. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.*

In the Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations, updated as of June 2006, the criterion for Recommendation 34 is described as follows:

*Countries should take measures to prevent the unlawful use of legal arrangements in relation to money laundering and terrorist financing by ensuring that its commercial, trust and other laws require adequate transparency concerning the beneficial ownership and control of **trusts and other legal arrangements**.*<sup>3</sup>

In the examples of mechanisms that countries could use in seeking to ensure that there is adequate transparency, the FATF is even more specific when it states ‘... **trusts or other similar legal arrangements**’.<sup>4</sup>

Although not stated *expressis verbis*, the link with Foundations is clearly made here.

In Recommendation 33, it is mentioned ‘*In particular, countries that have legal persons that are able to issue bearer shares should take appropriate measures to ensure that they are not misused for money laundering ...*’.

An often-used scheme to hide the ownership of a company-structure has always been a structure where the ultimate shareholder was a company with bearer

shares, held by a trust or a foundation, thus providing complete anonymity.

In my view, it is clear that the combination of both Recommendations 33 and 34 seek to discourage the set-up of such scheme that easily accommodates the needs of money launderers.

## Foundations

The term ‘Foundation’ (Fondation, Fundación, Stiftung or Stichting) finds its origin in civil law jurisdictions. It is believed to originate in medieval times when someone endowed a monastery, a church or other religious institution in perpetuity.

Nowadays it is still generally put in connection with a philanthropic or charitable goal. Looking for a definition of a foundation in eg the ‘Encyclopaedia Britannica’, one is directly referred from foundation to ‘philanthropic foundation’. Therefore, a foundation can be generally described as ‘*A legal entity, set up by individuals or institutions, with the purpose to support charitable institutions in line with its goals for which it is funded by endowments or grants.*’

Although a foundation is a civil law entity, it is also found in common law jurisdictions. In the US, eg, a foundation is a type of philanthropic organization set up by individuals or institutions as a legal entity (a corporation or trust) with the purpose of distributing grants to support causes in line with the goals of the foundation or as a charitable entity that receives grants in order to support a specific activity or activities of charitable purpose. The fact that it can be set up as a corporation or trust is in contradiction with the civil law definition where a foundation is a legal entity *per se*.

In the US, also the word ‘foundation’ does not have the same legal meaning as eg ‘Inc.’, ‘Corp.’ or ‘Ltd.’. Therefore, the name of a US-foundation often does not include the word ‘foundation’. Whether in the end a foundation is considered a charitable organization is determined by the IRS, based on its interpretation of the Federal Tax Laws.

In the UK, one can also find the word foundation in the name of charitable foundations, eg The Gatsby Charitable Foundation. However, under UK-law the term foundation has not been defined and has no precise meaning as in civil law jurisdictions.

In recent years, some common law jurisdictions have enacted foundation legislation, eg the Bahamas and St Kitts, and Jersey is expected to introduce its new law on foundations in early 2007.

<sup>3</sup> Bold print by the author.

<sup>4</sup> Bold print by the author.

## Family or private foundations

In the US ‘The Council on Foundations’ defines a family foundation as ‘one whose funds are derived from members of a single family. At least one family member must continue to serve as an officer or board member of the foundation, and as the donor. The family member plays a significant role in governing and/or managing the foundation throughout its life. Most family foundations are run by family members who serve as trustees or directors on a voluntary basis—receiving no compensation’.

‘The Rockefeller Foundation’, the ‘Ford Foundation’ and recently ‘The Bill and Melinda Gates Foundation’ are well-known examples of a family foundation.

In civil law jurisdictions a family foundation is less common than eg in the US where ‘The Foundation Center’ has identified more than 33,100 family foundations with at least USD 1 million in assets or making grants of USD 100,000 or more in 2003–2004.<sup>5</sup>

In Liechtenstein, legislation with regard to Family Foundations—or Foundations in general—goes back as far as 1926 when the applicable sections were introduced in the Law on Persons and Companies. Although based on Swiss Civil Law provisions the Law was—and still is—more flexible. Whereas in most civil law jurisdictions legislation on Private Foundations is very strict and inflexible, Liechtenstein passed its Law with the purpose to allow maximum flexibility in order to meet the circumstances and requirements of the time.

Some years ago Austria also introduced flexible legislation with regard to private foundations and shortly afterwards Panama and the Netherlands Antilles followed.

## Identification of the beneficial owner

Both the FATF and the European Commission have recognized that their recommendations and directives needed to be adapted to the more sophisticated money laundering techniques. As stated before the Forty Recommendations of the FATF were amended in 1996 and 2003 to become more effective and Nine Special Recommendations were issued recognizing the vital importance of taking action to combat the financing of terrorism.

The European Commission answered to these developments with the adoption in May 2005 of the Council of Europe Convention no. 198 on Laundering, Search,

Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism<sup>6</sup> and the publication on 25 November 2005 of the Third Money Laundering Directive.<sup>7</sup>

The close cooperation between FATF and the European Commission in the fight against money laundering and terrorist financing is best expressed in the 5th Consideration to the directive, stating:

*The Community action should continue to take particular account of the Recommendations of the Financial Action Task Force (hereinafter referred to as the FATF), which constitutes the foremost international body active in the fight against money laundering and terrorist financing. Since the FATF Recommendations were substantially revised and expanded in 2003, this Directive should be in line with that new international standard.*

In this Third Directive the European Commission made it clear that, in order to prevent the misuse of legal entities and other legal arrangements, it is of pre-eminent importance to identify the ultimate beneficial owner of such entity or arrangement. In Considerations numbers 9 and 10 it is described as follows:

*(9) In view of the crucial importance of this aspect of the prevention of money laundering and terrorist financing, it is appropriate, in accordance with the new international standards, to introduce more specific and detailed provisions relating to the identification of the customer and of any beneficial owner and the verification of their identity. To that end a precise definition of ‘beneficial owner’ is essential.<sup>8</sup>*

*Where the individual beneficiaries of a legal entity or arrangement such as a foundation or trust are yet to be determined, and it is therefore impossible to identify an individual as the beneficial owner, it would suffice to identify the class of persons intended to be the beneficiaries of the foundation or trust. This requirement should not include the identification of the individuals within that class of persons.*

*(10) The institutions and persons covered by this Directive should, in conformity with this Directive, identify and verify the identity of the beneficial owner. To fulfil this requirement, it should be left to those institutions and persons whether they make use of public records of beneficial owners, ask their clients for relevant data or obtain the information otherwise, taking into account the fact that the extent of such customer due diligence measures relates to the risk of money laundering and*

<sup>6</sup> Available at [www.coe.int](http://www.coe.int)

<sup>7</sup> Official Journal of the European Union L309/15 of 25 November 2006 ([www.statewatch.org/news/2006/nov/eu-financial-transaction-dir.pdf](http://www.statewatch.org/news/2006/nov/eu-financial-transaction-dir.pdf)).

<sup>8</sup> Bold print by the author.

<sup>5</sup> The Foundation Center: Key Facts on Family Foundations, January 2006 ([www.foundationcenter.org](http://www.foundationcenter.org)).

## The role of foundations in international anti-money laundering

*terrorist financing, which depends on the type of customer, business relationship, product or transaction.*

In Article 4, paragraph 6 of the Directive a 'Beneficial Owner' is defined as follows:

*(6) 'Beneficial owner' means the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted.*

*The beneficial owner shall at least include:*

*(a) in the case of corporate entities: etc.<sup>9</sup> in the case of **legal entities, such as foundations**<sup>10</sup>, and legal arrangements, such as trusts, which administer and distribute funds:*

- (i) where the future beneficiaries have already been determined, the natural person(s) who is the beneficiary of 25% or more of the property of a legal arrangement or entity;*
- (ii) where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates;*
- (iii) the natural person(s) who exercises control over 25% or more of the property of a legal arrangement or entity.*

Switzerland, to cite an example, among others has underlined the necessity of identifying the beneficial owner of legal entities or arrangements by implementing anti-money laundering rules, in particular with regard to establishing the identity of the beneficial owner of domiciliary companies (companies, institutes, establishments, foundations, trusts/fiduciary companies, etc., which have neither trading nor manufacturing operations or any other commercial activities in the country of domicile, eg foundations, common law trusts, Panama, BVI and other offshore companies). Swiss banks have now implemented as a general rule that such offshore structures cannot open bank accounts or safekeeping accounts if not provided with reliable information about the identity of the beneficial owner

<sup>9</sup> As the focus of this article is on Foundations only, the part on corporate entities is left out intentionally.

<sup>10</sup> Bold print by the author.

<sup>11</sup> In the US the Permanent Subcommittee on Investigations, chaired by Senator Coleman and Senator Levin, has requested the US Government Accountability Office (GAO) to review the legal requirements in 50 US states to set up non-publicly traded companies. The GOA reported that 'Most states do not require ownership information at the time a company is formed, and while most states require corporations and limited liability companies (LLC) to file annual or biennial reports, few states require ownership information on these reports.' GAO-06-376, 7 April 2006 ([www.gao.gov/new.items/d06376.pdf](http://www.gao.gov/new.items/d06376.pdf)).

of the assets to be deposited. A domiciliary company therefore cannot itself be accepted as a beneficial owner.

In other financial markets, such as the US<sup>11</sup> and the UK, the identity of the beneficial owner is requested in the case of a 'client', obviously acting as a nominee, but not for domiciliary companies.

This being said, it is clear that identification of the beneficial owners and beneficiaries of legal entities and legal arrangements is an absolute must. To establish the identity of a client is one thing, to know your client, KYC, or customer due diligence, CDD, is something completely different. In its Forty Recommendations the FATF has dedicated 9 Recommendations (4–12) to CDD and record keeping. However, the implementation of these 9 Recommendations varies from one jurisdiction to another.

The 'Basel Institute on Governance' has published an interesting comparative study on 'The impact of changes in AML on the major cross-border banking centres'<sup>12</sup> in which, amongst other things, a comparison is made with regard to CDD in Switzerland, the UK, the US and Singapore.

In his foreword to the study, the words of Dr Alfredo Gysi, President SFS Stiftung Finanzplatz Schweiz, do not need any further comments:

*Two different concepts of anti-money laundering regulations seem to exist: one based on 'retail banking' and the other based on 'private banking'. The first one prevails in the UK and the US and stresses data gathering and reporting requirements. 'Know-your customer' requirements play a minor role. The standard joke that 'KYC' actually stands for 'Kill-Your-Career' is symptomatic of the low priority given to customer due diligence and client identification under this concept, at least until very recently. The alternative concept applied in Switzerland and (in principle) in Singapore focuses on strict know-your-customer and due diligence duties. The term 'banking secrecy' is a clear misnomer: there is nothing secret between banks and their clients.*

### The use of charities and money laundering

Recognizing the vital importance of taking action to combat the financing of terrorism, the FATF has, as stated before, agreed on Nine Special Recommendations, which, when combined with the Forty Recommendations on Money Laundering, set out

<sup>12</sup> Mark Pieth and Gemma Aiolfi: *Anti-Money Laundering: Leveling the Playing Field*, chapter IV. Especially the Appendix 'Customer Due Diligence-Overview' by Mathias Pini is very informative.

## The role of foundations in international anti-money laundering

the basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts.

In these Recommendations special attention is given to channels used by terrorist for moving funds. One of the effects of international action against terrorist financiers has been to push supporters of terrorism out of the formal financial system and into riskier, more expensive, and more cumbersome methods of raising and moving money, such as charities.

FATF Special Recommendation VIII is dedicated to the use of charities or non-profit organizations—NPOs, by stating:

*Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:*

- (i) *by terrorist organisations posing as legitimate entities;*
- (ii) *to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and*
- (iii) *to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.<sup>13</sup>*

In its Interpretative Note to Special Recommendation VIII the FATF describes its objective for SR VIII as follows:

*The objective of Special Recommendation VIII (SR VIII) 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.<sup>14</sup>*

For the purposes of SR VIII, the Interpretative Note to SR VIII, the Methodology for Addressing Compliance with the FATF 40+9 Recommendations<sup>15</sup> and the Typologies of Terrorist Misuse of NPOs<sup>16</sup> a non-profit organization is defined as ‘a legal entity or organization

*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”’.*

It is evident that strict adherence to KYC and CDD rules are even more important with the use of NPOs than with other legal entities.

For NPOs there is an extra dimension to these rules. Not only the identity of the ‘client’ must be established, but also special attention should be given to:

- the purpose clause of the NPO
- the origin of each endowment made to the NPO
- the identity of each person, group or entity who or which made an endowment to the NPO
- the destiny of the grants made by the NPO, ie the identity of the person, group or entity to whom or to which the grant is made and the purpose of the eventual use of the grant made by the NPO
- the background and professionalism of the board, directors and staff of the NPO.

Strict supervision and clear rules are adamant here. However, without international cooperation, it is almost impossible for supervisory institutions and officials of NPOs to assure that these organizations are not misused for illegal purposes.

One of the hurdles in this respect is the legality of the purpose of the NPO. What may be acceptable in one part of the world, or one section of a community, may not be acceptable in another. This is more likely to occur where foundations operate across frontiers. For example, the purpose clause stated to be for the promotion of a particular religious, political, social, economic, environmental, politically correct cause may be acceptable in the jurisdiction where the foundation exists but would not be acceptable elsewhere. General unacceptability may be unfortunate but not necessarily fatal. Where the unacceptable element becomes unacceptable because of illegality, then problems occur. A purpose clause must be acceptable in the jurisdiction in which the foundation is set up, otherwise it would not be a legally set up foundation. It is the legality in another jurisdiction where it may operate which is important; if a legally constituted foundation intends to execute a purpose which is illegal in another country, then there is little justification for that activity. Therefore there must be mutuality in legality of purpose. Adding the phrase ‘by all possible means’ to the purpose clause does not affect

<sup>13</sup> [www.fatf-gafi.org/document/9/0,2340,en\\_32250379\\_32236920\\_34032073\\_1\\_1\\_1\\_00.html#VIIIINonprofit](http://www.fatf-gafi.org/document/9/0,2340,en_32250379_32236920_34032073_1_1_1_00.html#VIIIINonprofit)

<sup>14</sup> [www.fatf-gafi.org/dataoecd/16/6/36174688.pdf](http://www.fatf-gafi.org/dataoecd/16/6/36174688.pdf)

<sup>15</sup> [www.fatf-gafi.org/dataoecd/45/15/34864111.pdf](http://www.fatf-gafi.org/dataoecd/45/15/34864111.pdf)

<sup>16</sup> [www.fatf-gafi.org/dataoecd/39/19/34033761.pdf](http://www.fatf-gafi.org/dataoecd/39/19/34033761.pdf)

## The role of foundations in international anti-money laundering

this and to interpret this to mean ‘all possible legally acceptable means’ also adds nothing. Although the panacea is said to be international cooperation, it is inevitable that awareness of what is acceptable or legal in other countries will restrict the politicians happy concept of a global village.

The FATF has addressed this problem by dedicating in the Methodology for SR VIII one special section to ‘International Cooperation with Regard to Effective Information Gathering and Investigation’ and another to the question of ‘Responding to International Requests for Information about an NPO of Concern’.

The US government is also aware of the fact that charities can be used as a front for illegal purposes and that only by way of international cooperation this issue can be solved.

In his testimony before the Senate Committee on Banking, Housing and Urban Affairs of 13 July 2005, Stuart Levey, Under Secretary Office of Terrorism and Financial Intelligence US Department of the Treasury, stated, amongst other things, the following:

*The U.S. Government has confronted this problem head on in a coordinated manner. We have thus far designated more than 40 charities worldwide as supporters of terrorism. Two notable examples are our actions against the U.S. branches of the Al Haramain Islamic Foundation and the Islamic African Relief Agency (IARA), both al Qaida-linked charities that were operating in the United States. In both cases, law enforcement agents executed search warrants while Treasury’s OFAC simultaneously blocked the organizations’ assets, stopping the flow of money through these groups. Thanks to the work of the State Department, we have persuaded other nations to join us in bringing these and other charities to the United Nations Security Council for designation, and to shutter these dangerous organizations in their respective countries.*

### Case law and international action

On 13 October 2006 the FATF has published a Report ‘The Misuse of Corporate Vehicles, including Trusts and Company Service Providers’ on the ways in which Corporate Vehicles (legal entities, including corporations, trusts, foundations and partnerships with limited liability) can be misused for money laundering or terrorist financing purposes.<sup>17</sup> The Report gives an overview of 35 cases with regard to the exploitation of corporate vehicles for money laundering/terrorist

financing. The Report concludes that this misuse could be significantly reduced if governments have access to information about the beneficial owner, the source of assets and the business objective of the company or trust.

Although none of the 35 cases directly relate to the misuse of foundations or NPOs, the typology is clear: the use of trusts and/or companies to divert payments or the money flow and the use of trusts and/or companies to conceal the identity of clients. A study of these cases can only lead to the conclusion that, in stead of trusts or companies, foundations could have been used to that end with the same result.

As mentioned before, Under Secretary of Finance, Mr Stuart Levey, stated in his deposition that worldwide more than 40 charities have been designated as supporters of terrorism. Two such ‘charity’ cases have attracted worldwide attention: The Holy Land Foundation for Relief and Development and Interpal.

### The Holy Land Foundation

The Holy Land Foundation (HLF) is a non-profit charitable organization in the US established in 1987. Calling itself America’s largest Islamic charity, HLF purported to be a source of help for needy Palestinian muslims in Israel, Jordan, Lebanon and the Palestinian Authority. The organizations website stated: ‘Our mission is to find and implement practical solutions for human suffering through humanitarian programs that impact the lives of the disadvantaged, disinherited, and displaced peoples suffering from man-made and natural disasters.’ In reality, however, the Foundation was a major financier of the terrorist organization Hamas.

On 4 December 2001 US President Bush in an Executive Order designated HLF as a terrorist organization and it was put on the List of Specially Designated Nationals & Blocked Persons (the SDN List) of the Treasury’s Office of Foreign Assets Control (OFAC).<sup>18</sup> On that same day HLF’s headquarters in Richardson (Texas) and all its other offices in the US were closed and searched by the FBI and the US Treasury Department and its assets were frozen. Treasury officials concealed however that, although the vast majority

<sup>18</sup> OFFICE OF FOREIGN ASSETS CONTROL—Specially Designated Nationals and Blocked Persons, 9 January 2007, p. 116. OFAC regulations prohibit transactions with certain persons and organizations listed on the OFAC website as ‘Terrorists’ and ‘Specially Designated Nationals and Blocked Persons’, as well as listed embargoed countries and regions.

## The role of foundations in international anti-money laundering

of its funds was reserved for terrorists or terrorist activities, a substantial amount of the money raised goes to charities.

On 17 June 2002 the European Council also included HLF in an updated list of persons, groups and entities to which its Regulation on Specific Restrictive Measures with Regard to Combating Terrorism is directed.<sup>19</sup>

HLF has repeatedly, without success, appealed to the courts with the goal to have the freeze lifted. Eventually, on 27 July 2004, the US Justice Department handed down a 42-count indictment against HLF and seven of its top leaders, including conspiracy, providing material support to Hamas, a foreign terrorist organization, and the families of suicide terrorists, tax evasion and money laundering. The indictment charged that HLF provided more than \$12.4 million to individuals and organizations linked to Hamas between 1995 and 2001. The group had raised a total of nearly US\$ 60 million since 1989 but only reported \$ 36.2 million to the IRS, according to the indictment. Five leaders were arrested and two managed to escape. On 11 December 2006, lawyers for HLF have filed a suit to dismiss the charges in Federal District Court in Dallas.

It is interesting to note here that at the time of writing this article to the best of my knowledge no charity charged of terrorism, nor any of its accused leaders, has been convicted in the US and it seems that some charities, whose assets are frozen, still wait to be charged.

### Interpal

The Palestinian Relief and Development Fund, the official name of Interpal, is a non-political, non-profit making British charity, set up in 1994, that focuses solely on the provision of relief and development aid to the poor and needy of Palestine the world over, primarily in Palestine and the refugee camps in Jordan and Lebanon.

Time and again allegations are made that Interpal is engaged in illegal activities.

On 26 May 1996 the Sunday Telegraph published an article in which it was suggested that Interpal was run by Hamas activists who encouraged and supported terrorist activities in Israel. It also stated that claims were investigated by the Charity Commission. On 29 November 1997 the Sunday Telegraph issued an

apology and retraction stating that the Trustees of Interpal are not Hamas activists and that the Charities Commission's investigations '*found there to be no evidence of any pro-terrorist bias in the charity or of any channelling of its funds toward the training of suicide bombers*'.

On 22 August 2003 the US Treasury put Interpal, who it said aided the Hamas, on the earlier mentioned SDN List of the OFAC.<sup>20</sup> Consequently on 26 August 2003 the assets of Interpal were frozen and the activities of Interpal were investigated by the Charity Commission for England and Wales. The Charity Commission, after an investigation that lasted five weeks, cleared Interpal of any illegal activity also because the US failed to provide any evidence for its allegations.

However, the Board of Deputies of British Jews continued to publish the allegation on its website in September 2003. Interpal sued the Board and concluded an out-of-court settlement on 22 December 2003. It was agreed that the Board would issue a statement on its website over the course of 28 days in which it declared that it should not have described Interpal as a terrorist organization such as Hamas and expressed its regret at the upset and distress this item caused.

On 6 January 2006 the Wall Street Journal reported that a suit was filed against the National Westminster Bank, part of the Royal Bank of Scotland, for providing bank services to Interpal, claiming that the group had been identified as linked to terrorism. The Jerusalem Post, in an article of 9 January 2006, reported the story as 'UK Bank sued in US for serving Hamas'. On 2 July 2006 the Jerusalem Post issued an apology to Interpal and Nat West for any discomfort which may have been caused by the publication of the article.

In spite of these allegations Interpal repeatedly denies its 'links behind the cover of charity' with Hamas and stresses the fact that it has twice been the subject of investigation by the Charity Commission and on both occasions it received a clean bill of health.

Interpal has not been included in the European Council-list of persons, groups and entities to which its Regulation on specific restrictive measures with regard to combating terrorism is directed. However, on 9 January 2007 it is still included in the OFAC SDN-List. This clearly demonstrates the difficulties in assessing the AML/CFT issues related to charity and NPOs.

<sup>19</sup> Council Decision 2002/460/EC of 17 June 2002 Implementing Art. 2(3) of Regulation (EC) No 2580/2001 on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism and Repealing Decision 2002/334/EC.

<sup>20</sup> OFAC SDN-List 9 January 2007, p. 172.

## The role of foundations in international anti-money laundering

### Case law

There is hardly any case law with regard to Foundations and AML. However, the annual reports of eg the Sepblac, the Spanish Financial Intelligence Unit, mention in various years, cases where non-profit organizations (without specifying if they have the legal form of foundations or other) have been used in the past for money laundering purposes. For example, in 2005, the report mentions the case of a representative of a non-profit organization which received important amounts from the administration as subsidies, and through a complex system of movements between bank accounts controlled by him and the non-profit organization, simulated relationships with fictitious suppliers, diverting the funds received from the administration for other purposes and using the banking system for laundering illicit funds. In addition, the 2004 report cites a case where a Spanish company carried out a significant share capital increase and started to receive wire transfers from foreign countries, where, in most cases, the sender of the wire transfer was a foreign non-profit organization. Such organization resulted to be an entity involved in numerous crimes and illicit activities, including money laundering.<sup>21</sup>

### Liability of the organs representing a legal entity

There is one item which I would still like to address here briefly: the responsibility and liability of those managing and representing foundations and NPOs. It may be clear from the foregoing that board members of a NPO—or a foundation in general—have a difficult if not impossible task in maintaining CDD (KYC) requirements. With regard to NPOs board members have to go at length in investigating the origin of grants received and the purpose for which the organization or the person or group of persons to which the NPO makes its grants, wishes to use that grant.

What to do eg in case the charity to which a NPO wants to make a gift is not on the EU-List but indeed on the OFAC SDN-List. A European NPO will most probably not encounter any difficulty within the EU. However, it should not be surprised to find its name sooner or later on the SDN-List. Board members of that

NPO could then be included on the SDN-List as well and face problems when entering the US.

A number of organizations have been set up in the US to assist in addressing the question of due diligence with regard to grants. On a general level eg NASD<sup>22</sup> offers an automated method of searching the OFAC SDN-List and the Palestinian Legislative Council (PLC) list.

Another question is the liability of the entity itself when represented by a board member and the liability of the board member him- or herself. A recent ruling of the Supreme Court of Liechtenstein of 1 December 2005, gives some interesting points to consider. A lawyer, being a board member of an Establishment (which can be compared with a Foundation), acted both as board member and as attorney in the same case. The fact that he received money from one of the parties to the case on his firm's bank account in his capacity as attorney of one of the parties (and not as board member) does not relieve him from his duties under Anti-Money Laundering legislation or Due Diligence Regulations to investigate the origin of the money.<sup>23</sup> In his capacity as board member of the establishment, he knew or should have known that the money was not clean. Should he not also have been a board member he could not have known that the money was not clean. The fact that he received the money in his capacity as an attorney, the Supreme Court ruled, did not relieve him from his duties under the Anti-Money Laundering Law now that he, in his capacity of board member of the Establishment, should or could have known or suspected that the money was not clean. However, the fact that he received the money in his capacity of attorney and not as board member for and on behalf of the Establishment, meant that the Establishment itself was not liable under AML-legislation.<sup>24</sup>

### Conclusion

Foundations and AML is a difficult area with many aspects to consider, certainly when charity is concerned.

<sup>21</sup> Special thanks to Javier García Sanz and Guillermo San Pedro, Lawyers with URÍA MENÉNDEZ in Madrid (Spain) for providing this information.

<sup>22</sup> As the world's leading private-sector provider of financial regulatory services, NASD has helped to bring integrity to the markets—and confidence to investors—for more than 60 years. NASD has long served as the primary private-sector regulator of America's securities industry. NASD oversees the activities of more than 5025 brokerage firms, approximately 169,470 branch offices and more than 658,170 registered securities representatives. ([www.nasd.com/AboutNASD/index.htm](http://www.nasd.com/AboutNASD/index.htm)).

<sup>23</sup> In his dual capacity as board member as well as attorney of the Establishment the attorney remains obliged to verify the background as well as the circumstances of the money transfer and might therefore be obliged to file a report under the AML Legislation.

<sup>24</sup> Special thanks to Dr Johannes Gasser, partner with Advokaturbüro Dr Dr Batliner & Dr Gasser, Vaduz, Liechtenstein, for providing this information.



**The role of foundations in international anti-money laundering**

It is of great importance to implement rules to fight the misuse of corporate entities and legal arrangements world wide. International cooperation is therefore a precondition.

*doi:10.1093/tandt/ttm024*

**Wouter H. Muller**

Henley & Partners AG  
Kirchgasse 22  
CH-8001 Zurich  
Switzerland

Tel: + (41) 44 266 22 22

Fax: + (41) 44 266 22 23

Email: [wouter.muller@henleyglobal.com](mailto:wouter.muller@henleyglobal.com)

[www.henleyglobal.com](http://www.henleyglobal.com)