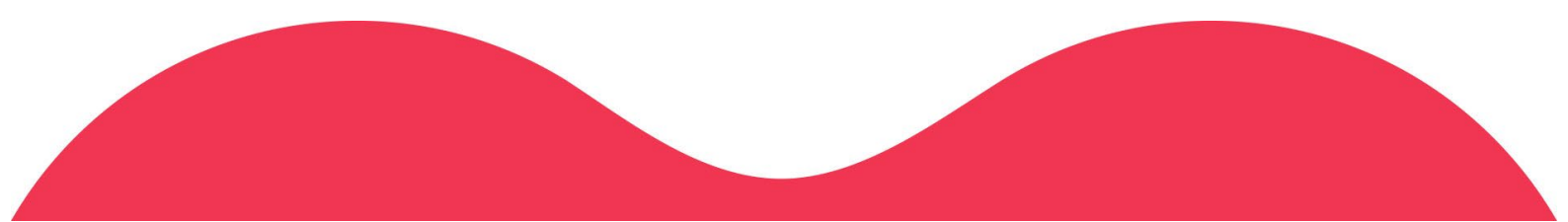


24/01/2022

Philea (Dafne and EFC convergence) Legal Affairs Committee Contribution to the EU Rule of Law Annual Report Consultation



We welcome the opportunity to provide input from philanthropy infrastructure to the European Commission's annual rule of law consultation.

We as Philea, a Dafne (Donors and Foundations Networks in Europe) and EFC (European Foundation Centre) convergence, work on the enabling framework for philanthropy in the context of wider European civil society space. For several years now, we have observed a worrying trend of restrictive measures in several Member States which is negatively affecting the rule of law, democracy and civic space as well as the ability of philanthropic organisations and wider civil society actors to carry out their work. Our members and partner organisations have also reported on general rule of law concerns in several Member States.

1. Rule of law concerns observed

Threats to the rule of law in the narrower sense have been observed by the philanthropy infrastructure and by our members and partners in several EU Member States where governments have enacted new laws that threaten independent media, or that directly undermine access to justice and judicial independence.

Threatening independent media

The Covid-19 crisis has hit the media sector in several countries at a time when it plays a crucial role in providing accurate information and countering disinformation about the pandemic.

Some countries have tried to introduce a "media tax" imposed on publishers, broadcasters, cinema owners and companies providing advertising services, in order to raise funding for the healthcare and culture sectors.

Economic pressure on media can put media pluralism and media freedom at risk. This is particularly alarming in countries where the editorial independence of private as well as public service media is already considered fragile, and the concentration of media ownership in the hands of a few large entities, coupled with the resulting decrease in media pluralism, was already a cause for serious concern. Larger media conglomerates are in better shape to withstand the financial shock, with smaller, local and regional outlets under greater threat and already closing down or reducing their operations.

Undermining access to justice and judicial independence

Access to justice as one of the core elements of the rule of law implicates the presence of an independent and impartial judiciary and the right to have a fair trial. Access to justice, including sufficient constitutional and legal



guarantees of judicial independence, is also an important part of the Rule of Law Checklist adopted in 2016 by the Council of Europe's Venice Commission to monitor whether rule of law is implemented in the Member States in an objective, thorough, transparent and equal manner. However, there is concern that the independence of the judiciary is at risk in some EU Member States, including Poland. An independent judiciary is of the utmost importance for democracy and civil society because it is a shield protecting citizens from possible abuse.

2. Need to link civic shape with rule of law

The rule of law is however in danger not only when a government directly undermines judicial independence, or when corruption directly impacts decision-making, but also when it makes it impossible for civil society to scrutinise a government's actions. Limitations to the rule of law appear to often go hand in hand with restrictions on civic space, erosion of fundamental rights and democratic backsliding.

In addition, philanthropic and other civil society organisations are often among the first to inform public opinion, advocate and take action for the respect of the rule of law in national and international fora, and therefore are themselves often one of the first targets of those who aim to undermine the rule of law. They also play an essential role in improving and protecting a free and pluralist media environment through education, training and watchdog functions. Crucially, civil society organisations also have deep expertise in dealing with vulnerable groups.

A shrinking and threatened civic space with legal or practical restrictions on freedom of assembly, association and expression and the right to participation is an important indicator of a weak rule of law environment. Therefore, we welcomed the inclusion, in the first year of rule of law report consultations, of an enabling framework for civil society as part of the 4th pillar on checks and balances supporting democratic systems based on the rule of law. However, given the important role of civil society, we suggest that the methodology of the questionnaire is reconsidered and that questions around civil society are given a more prominent place in the questionnaire with a separate thematic focus section.

The Treaties and EU institutions acknowledge that a free civil society is essential for making the values enshrined in Article 2 TEU, including democracy, human rights and the rule of law, a reality, and for raising public awareness about their significance and existing challenges. This has been

reaffirmed in the Commission Communication on Further strengthening the Rule of Law within the Union (COM(2019) 163), as well as the European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886(RSP)). EU institutions should act accordingly and envisage a concrete role for civil society actors as both contributors and beneficiaries of EU initiatives aimed at monitoring and strengthening the rule of law. This is all the more urgent against the background of a worrying trend of restrictive measures in Member States negatively affecting civic space and the ability of civil society actors to carry out their legitimate tasks.

The existence of old and new barriers to philanthropy and wider civic space got confirmed by our recent legal analysis across 40 countries in Europe: "[Comparative Highlights of Foundation Laws](#)", published on 1 October 2021. More information on the "Single Market for Philanthropy", which is strongly supported by the sector, can be accessed in our [European Philanthropy Manifesto](#) as well as our [contribution to the Social Economy Action Plan](#).

Despite the fact that the cross-border engagement of foundations and funders of the wider NPO sector is growing, the legal, fiscal and administrative environment for cross-border philanthropy even within the European Union, is still far from satisfactory. While the European Court of Justice (ECJ) has recognised the application of the free movement of capital to philanthropic funds along with ensuring that the principle of non-discrimination applies to donors and foundations in the EU, this does not yet work in practice, and we call on EU and national policymakers to improve the situation. **Philanthropic organisations and donors are challenged by various legal, administrative and fiscal barriers which have been estimated in the EFC's "Feasibility Study on the European Foundation Statute", published some 10 years ago, to amount to €90,000,000 to €101,700,000 per year.**

3. Philanthropy and wider civic space trends

In this paper, we wish to highlight some trends concerning philanthropy and civic space and the right to participation which we identified across the EU in 2020, particularly linked to the Covid-19 crisis, that are impacting civic space and that will have a longer-term impact after the publication of the Rule of Law report.

The information provided has been gathered through our regular cooperation with member and partner organisations at the EU and national

levels. We remain available to provide further information on specific issues identified concerning particular countries.

1. An overall trend of challenged civil society and philanthropy space

In recent years, we have seen restrictions imposed on the operating environment for the philanthropy sector, such as the introduction of so-called foreign funding/foreign agent restrictions which severely restrict cross-border philanthropy. Moreover, certain aspects of money laundering and terrorism financing policy were limiting both the operating space for philanthropy and wider civic space. Even though not required by the relevant EU directive, a few countries are considering associations and/or foundations as “(quasi) obliged entities” and hence put them under more strenuous reporting requirements, despite the absence of clearly identified risks. While the security agenda is of great importance, policy measures must be risk-based and proportionate, and caution is needed to avoid unintended consequences for the philanthropy sector.

Recognition of foreign-based public-benefit organisations and their donors remains very complex, and some EU governments still discriminate against foreign-based organisations. This slows down some of the philanthropic cross-border initiatives that play an important role in overcoming the Covid-19 crisis. More information can be accessed in this 2018 Dafne-EFC study: [“Enlarging the Space for European Philanthropy”](#).

2. Covid-19 shakes the socio-economic, political and cultural landscape

The question of how to guarantee the preservation of democratic life in a situation of emergency such as the Covid-19 pandemic has been a challenging one. To take swift decisions, a general tendency to concentrate powers at the government level while limiting the role of institutions in charge of checks and balances has been reported across Europe. In countries where the functioning of democracy and the rule of law were already constrained, authorities have taken advantage of the situation to further concentrate their powers and to pass controversial legislation unrelated to the Covid-19 emergency. As we move towards a normalisation of the virus in our lives, in the long term, the danger is that the emergency and coercive practices that have emerged during the pandemic will not disappear but become normalised.

3. Challenges to civic freedoms

Some of the trends that emerged in previous years in parts of Europe concerning the exercise of civic freedoms were amplified in 2021 by the Covid-19 pandemic.

3.1. Restricting freedom of association and philanthropy flows

In June 2021 the Hungarian Parliament finally retracted the 2017 Act on the Transparency of Organisations Supported from Abroad, which was found by the Court of Justice of the EU a year earlier to breach EU law on several counts. However, it was replaced with similarly worrying new clauses (Act XLIX. of 2021) that affect organisations “capable of influencing public life,” i.e. those with an annual budget above 20 million HUF (~€60,000), making them subject to inspection by the State Audit Body. As this law will apply first to the 2021 financial year, its practical consequences are yet to be seen, but at a minimum, new administrative burdens and inspections are expected.

Similarly, in 2021 more countries proposed or introduced tighter legislation that raises concerns from a freedom of association perspective and that negatively impacts on cross-border funding and philanthropic flows. These laws (for example in PL, BG, EL, NL) are officially aimed at improving transparency, but there are concerns that they discriminate against, overburden and stigmatise considerable parts of the sector.

Transparency legislation that restricts the freedom of association is a trend that has already emerged in previous years. While these pieces of legislation are all different, they raise similar concerns and potential threats to the civic sector including philanthropic action such as: increased and sometimes double reporting requirements that drain CSO resources; concerns around the privacy rights of donors, philanthropic actors and beneficiaries; disproportionate sanctions in case of non-compliance with reporting requirements; discrimination of CSOs vis-a-vis other entities (like private companies) that are not subject to the same requirements; and vilification of the sector in the eyes of the public. For example, in September 2020, Tempus Public Foundation, the national agency managing the EU’s Erasmus+ programme in Hungary, started requesting that its CSO applicants and selected grantees submit declarations stating that they conform to the provisions of the “foreign-funded” legislation as a compulsory precondition of contracting. Several affected organisations publicly protested this measure, also bringing the matter to the attention of the European Commission. Likewise, the 2018 legal package dubbed “Stop Soros” remains in effect,



despite ECJ actions. In November 2021, the CJEU made another ruling with significant impact on CSOs working to support refugees and asylum seekers by declaring the so-called “Stop Soros” law package potentially criminalising such activities to be contrary to EU law.

3.2. Restricting the freedom of assembly, expression and association

As the Covid-19 virus spread across Europe, national authorities started to restrict and limit the possibility for gatherings of people. During the first wave of the pandemic, in most EU countries the freedom of assembly was restricted as a by-product of restrictions on movement and gatherings, without specifically mentioning the right to peaceful assembly, and leaving ambiguity as to which activities were permitted and which were restricted due to the broad and vague wording. Often, the vagueness in addressing the right to peaceful assembly resulted in discretion left to competent authorities to decide whether to allow assemblies.

As a general tendency across Europe, the requirement to notify authorities of planned assemblies has started to function de jure or de facto as an authorisation system, even in cases of small gatherings of a handful of participants.

The Covid-19 pandemic has been framed as a matter of public security. In some cases (e.g. instances documented in HU, PL, SI, FR), concerns were flagged that the Covid-19 rules were applied against people exercising their right to peaceful assembly. A number of arbitrary and sometimes violent arrests of peaceful protesters not linked with the Covid-19 restrictions, was also reported (i.e. in FR, BG, PL, ES), including during the Black Lives Matter demonstrations (i.e. in FR, BE, DE, EL).

Since the outbreak of the global pandemic, across Europe several governments have restricted access to information, locked out the media and displayed a general intolerance to criticism. Smear campaigns against civil society were also reported in some countries (i.e. CZ, EL, PL, SI, HU). For instance in Poland, the public media was used for political campaigns, including a campaign against LGBT* communities.

3.3. Data gathering and surveillance

Concerns about the expansion of surveillance technologies and the right to privacy have been voiced by civil society and human rights bodies across Europe. These warnings have become especially pressing with moves to provide, or attempting to provide, law enforcement agencies with additional

powers to collect and use private data, including on mobile phones, tracing apps and other technologies (i.e. in BL, PL, SI, HR).

4. The dialogue between civic organisations and governing bodies is challenged during the crisis

Civic society and philanthropic organisations can be important allies for public authorities that want to address societal vulnerabilities and environmental concerns. However, the exceptional circumstances brought about by the Covid-19 health emergency created huge obstacles for the proper functioning of civil dialogue. Institutions needed to act quickly and effectively to slow the spread of the virus and reduce the heavy impact that the restrictions have had on the economy and the population. The increased workload, coupled with social distancing and teleworking, greatly affected the capacity of institutions to respond to the increased number of requests for dialogue and consultation.

The traditional channels of CSO advocacy – both formal (such as consultative bodies and processes) and informal (petitions and signature collections) – continued to be hampered throughout 2020. While legislation provides for public participation, decisions are often made behind closed doors, without any involvement by the affected stakeholders. In Hungary for instance, public officials ignore CSOs' requests for dialogue and often circumvent existing consultation mechanisms, e.g. through submitting significant bills by individual governing party MPs, abolishing or not convening earlier existing consultative bodies and committees. In some Member States, government officials continue to make vilifying or denigrating statements concerning leading CSOs in public. The Hungarian Parliament introduced in June 2021 anti-paedophilia legislation which, through last-minute amendments, was hijacked to ban "homosexual propaganda to minors". One of the key messages sent by the Hungarian government is that they don't want to "leave the sexual education of children to LGBT* activists", which means an elimination of sensitisation and citizen education programmes carried out by CSOs as schools, afraid to cooperate with them, exercise self-censorship.

In some countries, civil society organisations reported that the time available for consultation on some adopted legislation was shortened (i.e. BG, EE, LV, PO) or suspended/generally absent (i.e. RO, HU) in disregard of institutional frameworks of civil dialogue. The lack of meaningful dialogue with the sector is deemed to be an important factor for the lack of reactivity of the government to many societal emergencies (i.e. DE, EL). Additionally, as a general trend, civil dialogue is particularly rare on European matters; this

remains true during the pandemic. The European Recovery package has been an opportunity to foster participation of civil society organisations in the development of strategic reforms, notably in the context of recovery and resilience after the pandemic. Research however shows that most CSOs who participated in consultations found them to be mostly a tick-the-box exercise with little material supplied prior to meetings and with limited time available.

5. Economic difficulties of the sector soar during the crisis

The Covid-19 crisis had a huge economic and financial impact on many parts of the civic sector, against the background of an already challenging funding landscape.

Public support for the sector during the pandemic often arrived quite late, with many governments prioritising funding for businesses first. Only a minority of the European countries created specific funding for the sector fit for its specificities (i.e. AT, IE, IT, LT). Many other countries included NGOs in some of the measures supporting employers and businesses (i.e. BE, BG, FR, DE, EE, RO, SI, ES). However, in most cases, only a small proportion of CSOs was eligible for this support, and this funding was unfit for the specific needs of the sector.

Also, while CSOs were at the forefront of providing support to social groups most affected by the coronavirus pandemic (by providing food aid, supporting digital education, disseminating information and legal aid, among other actions), the government opened no additional funding sources to civil society. In fact, in some countries some existing sources of funding were cut back and, despite promising government statements, CSOs were even left out of the furlough (“Kurzarbeit”) schemes designed to help maintain employees through the lockdown.

Some Member States have however introduced new incentives for philanthropic action, which may have had a positive impact on private giving, see <https://philea.eu/european-governments-covid-19-and-eu-covid-19-recovery-schemes-policy/> and the Charities Aid Foundation (CAF) report on national policy responses for philanthropy support across the world in the context of Covid-19: <https://www.cafonline.org/docs/default-source/about-us-global-alliance/charities-aid-foundation-covid-19-global-policy-paper.pdf>. However, these incentives were not always renewed in 2021. Also, only a few countries used national recovery plans to develop activities benefiting the civil society sectors or including them in the implementation.

Many foundations and philanthropic organisations have also adapted their way of working by being more flexible about beneficiaries' use of funding, extension of reporting deadlines, providing more core support and collaborating with new partners including public actors. However, barriers to cross-border activity continue to exist, such as foreign funding restrictions or the lack of implementation of the non-discrimination principle. Civic space under the lockdown has been narrowed, but, even under detrimental conditions, the philanthropic sector has shown a high level of dynamism.

IV. Recommendations for EU rule of law approach

Together with our wider civil society partners, we call on the European Commission to propose and adopt the following measures for a participatory and broader rule of law approach:

- Add **civic space as a separate pillar of the rule of law reports**, with an additional chapter systematically analysing the state of civic space in EU Member States and its connections to the rule of law context, or strengthen civic space within the chapter on checks and balances.
- Plan in advance a systematic and regular **involvement of civil society actors** as part of the rule of law review cycle both at EU and national level at different stages of the process, including by involving them in the design of rule of law reporting structures, exchange on country-specific recommendations, reporting consultations, country visits and by requesting civil society feedback on the information received from Member States and on the outcomes and findings of the report.
- Give **an account of the role of civil society**, as well as a free and safe civic space, as integral parts of the system of checks and balances supporting democratic systems based on the rule of law, and as instrumental in promoting and safeguarding the rule of law at European, national, and local levels.
- **Establish a clear link** between the respect of the rule of law and the existence of enabling civic space in Member States.
- Include systematically within the annual rule of law review a **comprehensive assessment of civic space**, including European philanthropy, in each Member State. This assessment should be based on a uniform structure, using internationally accepted standards and a checklist of the information that needs to be collected/presented in the civil society chapter of the report.



- Develop **guidelines and indicators at EU level** as part of the rule of law process as a reference tool for national monitoring and the development and strengthening of an enabling civic space framework at national/local level.
- **Cover the following elements:** enabling legal environment, not just changes in legislation but also implementation; framework for civil society organisations' financial viability and sustainability; access to participation in decision-making, including the right to access information; safe space including the state duty to protect from verbal and physical attacks, smear campaigns, judicial harassment and criminalisation of human rights and watchdog activities; contribution to the functioning and protection of the rule of law framework; make connections between civic space restrictions and rule of law deficiencies in other areas such as judicial, media, and corruption areas.
- Establish an **alert mechanism** to allow civil society actors to promptly signal to the European Commission serious issues and/or threats regarding restrictions to civic freedoms. Such an alert mechanism should lead to a rapid (re)assessment of the situation allowing for timely and concrete reaction at EU level.
- Make sure that when severe deficiencies on civil society freedoms and civic space are identified, they are **addressed through EU tools** such as the rule of law framework, infringement proceedings and Article 7 TEU.
- Develop a **specific checklist** to assess the impact of EU legislation on civil society freedoms and civic space, to be integrated as part of existing impact assessment tools on fundamental rights, on socio-economic and on environmental impacts.
- Systematically **include the impact on civil society freedoms and civic space within the monitoring** of the transposition and implementation of EU legislation by Member States such as in the case of the anti-money laundering directives, with a view to a strategic approach to infringement proceedings.
- Set an example by the development of an enabling civic space framework at EU level: proposing an **interinstitutional agreement on civil dialogue** and access to information based on Article 11 TEU.
- Promote more effectively the **right to participation**, by reviewing and improving mechanisms for participation of civil society in all processes resulting from EU funding such as the monitoring of the EU Recovery



Package as well as structural funds, and capacity building, so as to support CSOs' watchdog role and hence their contribution to upholding the rule of law.

- An enabling framework cannot work without providing **funding support** to civil society. The European Commission should work with other EU institutions to ensure that adequate support to civil society within the different funding instruments is included both in the MFF and in the recovery mechanisms linked to the exit from the pandemic crisis.
- **Philanthropy must be enabled**, and cross-border philanthropy must not be discriminated against and should flow freely. Foreign funding restrictions are not in line with the Free Flow of Capital. CSOs and philanthropic actors must enjoy a favourable tax environment also in cross-border contexts.

The above-mentioned recommendations would also need to consider the remaining barriers to cross-border activity of public-benefit foundations/philanthropy as revealed by our 2021 mapping and analysis, provided in Philea's detailed [profiles of the operating environment for philanthropy in 40 EU and non-EU countries](#) and the comprehensive analysis, "[Comparative Highlights of Foundation Laws](#)", published in 2021.

Recognition of Foreign Foundations

Philanthropic organisations sometimes need to register or create a branch before they are able to operate in another country in Europe. The legal personality is not always recognised abroad. Some Member States require a special registration process or even creation of a branch in order for the foreign foundation to be able to operate in their territory.

Cross-Border Merger of Foundations

Philanthropic entities cannot merge across borders as companies can.

Cross-Border Transfer of the Seat

There is no legal provision in most countries for shifting a philanthropic organisation's headquarters across borders, so this process entails a high degree of legal uncertainty.



Complex Impact Investing and Asset Administration rules (not always cross-border context)

Some national laws require a preservation of the value of the endowment, and mission-related investment or investment in social enterprises do not always generate the required returns (or are considered as investments that are too risky). Additionally, some national laws do not permit the giving of loans by public-benefit organisations or any other programme activity that generates income on the programme side.

Restrictions on Foreign Funding

Whereas philanthropic funding should flow freely according to the EU principle of free movement of capital within the internal market, there is a new worrying phenomenon of so-called foreign funding/foreign agent restrictions.

Discrimination of cross-border philanthropy and complex procedures

Some governments have not yet introduced the non-discrimination principle and the free flow of capital but continue to discriminate against comparable foreign EU-based public-benefit organisations and their donors. There are still rules in place which provide that non-resident foundations (and their donors) are denied all or some tax benefits which domestic legislators have granted to resident foundations (and their donors). If discrimination is formally removed, rules and processes are often so complex, costly and lengthy that significant barriers to cross-border philanthropic action remain.

Philea – Who we are

Philea nurtures a diverse and inclusive ecosystem of foundations, philanthropic organisations and networks working for the common good. We help our members to get inspired, act together and achieve greater impact by sharing data and knowledge, exchanging best practices, connecting around common themes, engaging in policy work, and more.

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