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Philea submission to UN Special Rapporteur Clément N. Voule on the freedom of peaceful assembly and of association

Philea, the newly created Philanthropy Europe Association emanating from a convergence of the European Foundation Centre (EFC) and the Donors and Foundations Networks in Europe (Dafne), welcomes this opportunity to contribute to the consultation of the UN Special Rapporteur on the rights to freedom of peaceful assembly and association on trends, developments, and challenges regarding the ability of civil society organisations (including philanthropy) to access resources, including foreign funding. We thank the Special Rapporteur for preparing this important report to present key findings at the 50th session of the Human Rights Council.

We as Philea see the enabling framework for philanthropy in a context of wider European civil society space. For several years now, we have observed a worrying trend of restrictive measures in several European countries which is negatively affecting civic space and the ability of philanthropic organisations and wider civil society actors to carry out their work. As members of WINGS we are contributing to their work on the enabling environment for philanthropy and civil society. Alongside this, we closely collaborate with ECNL (and ICNL) as well as other experts and networks in the field.

From a European perspective we would first like to share the following reflections on restrictions to cross-border philanthropy in a context of wider civil society space:

There is a clear global trend (see recent CIVICUS monitor) that has demonstrated continuing trends of civic space restrictions weakening civil society through vilification, withdrawal, defunding and undermining from within (Civicus, 2020. "State of Civil Society Report 2020". June 2020). Various analyses have been done to identify the drivers of this trend (see for example: Hayes, Ben and Joshi, Poonam, 2020. "Rethinking Civic Space in an Age of Intersectional Crises: A briefing for funders", Funders Initiative for Civil Society, May 2020).

In this submission, we wish to highlight some trends concerning philanthropy space in Europe, which we identified across Europe in 2020/2021. The information provided has been gathered through our regular cooperation with our member organisations, national experts and partner organisations at the EU and national levels. We remain available to provide further information on specific issues identified concerning particular countries.

While compared to other parts of the world, the philanthropy sector seems to have a relatively stable environment in Europe. However, in recent years, we have seen restrictions imposed on the operating environment for the philanthropy sector including old and new barriers, which were confirmed by the recent Philea legal analysis across 40 countries in Europe "Comparative Highlights of Foundation Laws" based on 2020 research done in collaboration with national level experts, resulting in in-depth profiles of the operating environment for philanthropy in 40 EU and non-EU countries.

The European Union Agency for Fundamental Rights confirmed these trends and is also looking at the financing of CSOs specifically, "Challenges facing civil society organisations working on human rights in the EU" 2017.

1. Foreign funding restrictions (foreign agent laws) in European Union countries

The International Centre for Not-for-Profit Law (ICNL) identified in 2015 that one-third of all civil society restrictions are restrictions on international funding of CSOs, including cross-border philanthropy (Doug Rutzen ICNL "Aid Barriers and the Rise of Philanthropic Protectionism", International Journal of Not-for-Profit Law, March 2015).

We have seen such restrictions also being introduced in the middle of Europe, for example in Hungary. In June 2021 the Hungarian Parliament finally retracted the Act on the Transparency of Organisations Supported from Abroad of 2017, 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 other 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.

2. Cross-border restrictions for public-benefit foundations in the EU despite a Single Market

Barriers remain for cross-border action of philanthropic organisations. While it is easy for goods and services to move freely across the European Union (Internal Market), it remains a challenge for philanthropic organisations to move their seat and merge across borders, and sometimes even to be recognised as a legal entity.

Recognition of Foreign Foundations

European philanthropic organisations sometimes need to register or create a branch before they are able to operate in another country in Europe. Their 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.

3. An overall trend of tighter reporting and transparency rules

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 donor and philanthropic actors and beneficiaries' privacy rights; 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 European court of Justice actions. In November 2021, the European Court of Justice 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.

4. Over-implementation of money laundering and terrorism financing policy

Some of the tighter reporting and transparency rules that have come into force in Europe were introduced in the name of the security agenda. 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" (e.g. Spain) and hence have put them under more strenuous reporting requirements, despite the absence of clearly identified risks. In addition, banks are hesitating to provide services to the NPO and philanthropy sector (so-called bank de-risking). 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, see more below.

The key driver of the global counterterrorism and money laundering policy is the Financial Action Task Force (FATF). The 40 FATF Recommendations include Recommendation 8 requiring governments to take a risk-based approach to protect the non-profit sector from becoming abused or misused for the financing of terrorism. Some governments have used the FATF policy for restricting civil society space and flow of philanthropic funds and donations. We as Philea and WINGs are engaged in the Global NPO Coalition on FATF (Global NPO Coalition on FATF). There is clear concern around over-regulation and inappropriate restrictions imposed on civil society including philanthropy, by governments that justify their actions by pointing to FATF rules. FATF has recently created an "unintended consequences" workstream to assess the matter and review how to avoid unintended consequences of its policy on civil society space. FATF has also issued strong statements about government misuse of anti-money laundering and terrorism financing policy, for example in the context of Serbia. Please see also some recent developments in Turkey.

5. Non-implementation of the free flow of capital and non-discrimination principle

While most European governments have introduced tax incentives to stimulate philanthropic activity, this is still not always the case in cross-border contexts. Tax-effective cross-border philanthropy does not yet work. Despite ground-breaking decisions of the European Court of Justice, which have introduced the non-discrimination principle, laws remain complex, and, in some cases, even discriminatory (Spain is just now amending its tax laws in this regard).

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. 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 from local ones. 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.

In the EU the free flow of capital and the non-discrimination principle has been confirmed by several ECJ rulings over the past 15 years, prompting a wave of national tax law revisions. It is unacceptable that barriers continue to exist. The 2014 joint EFC-TGE (Transnational Giving Europe) study, "Taxation of cross-border philanthropy in Europe after Persche and Stauffer – From landlock to free movement?"; the 2017 EFC/TGE study; and our 2020 in-depth profiles of the operating environment for philanthropy in 40 EU and non-EU countries outline how several EU Member States have not yet removed this discrimination – and even where they have, practical or legal problems persist.

6. Covid-19 shakes the socio-economic, political and cultural landscape as well as the philanthropic sector

The Covid-19 pandemic has been challenging the socio-economic, political and cultural landscape, including the operating space for philanthropy and civil society organisations. 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. The Covid-19 crisis had a huge economic and financial impact on many parts of civil society, 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 Philea's paper on Covid-19 related policies of European governments and the EU, and the Charities Aid Foundation (CAF) report on national policy responses for philanthropy support across the world in the context of Covid-19). However, not all of these incentives were 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. A recent analysis also demonstrated the lack of involvement of the civil society sector in the consultation, implementation and monitoring processes of the national recovery plans.

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.

The effect of Covid-19 has also shut off everyday opportunities to give. Sponsored events, income that charities are able to raise, and the need to shield vulnerable elderly populations who make up significant numbers of volunteers all added up to a funding crisis that continues to haunt charities and their beneficiaries around the world (see ”CAF World Giving Index 2021: A global pandemic special report”, June 2021).

1. On donor responses to restrictions to cross-border philanthropy in a context of wider civil society space:

Already in 2014/2015, Ariadne, EFC (now Philea) and other partners worked on guidance for funders to respond to challenges to the Closing Space for Civil Society as a practical starting point for funders.

Many funders are clearly concerned about the closing space of civil society and civic space (mainly because it concerns their beneficiaries' space but also because it concerns their own space) and many have engaged in collaborative initiatives to push back. Funders acknowledge that it is not a simple, straightforward or static picture, and different actors are needed to counter this trend. Two such initiatives are mentioned below:

A pooled fund called Civitates was created in 2017 at the EFC conference in Warsaw, “Courage to re-embrace solidarity in Europe”, out of concern for the state of democracy in Europe. The fund, which is hosted by the Network of European Foundations and housed in Philanthropy House in Brussels, became operational in 2018 thanks to the support of 16 diverse foundations, which provided a starting budget of €4.1 million (for 2018-2020). In addition to providing funding, Civitates has a Funding Plus component, through which the fund provides capacity development and networking opportunities to its grantees. Civitates, which has an annual budget of approximately €3 million, is supported by a large group of diverse foundations, of different shapes and sizes, which bring in a wealth of expertise and different perspectives. The initiative builds on lessons learned from other pooled funds.

The Funders' Initiative for Civil Society (FICS) was established in 2016 by a group of funders, including some Philea members, to develop a strategic funders' response to the systemic challenge of closing civic space. In 2019, FICS interviewed 150 funders and civil society representatives to understand the opportunities and threats that will shape civic space in the next ten years (see the report: "Rethinking Civic Space in an Age of Intersectional Crises: A briefing for funders", Funders Initiative for Civil Society", May 2020).

National and European level private solutions are developed to facilitate tax-effective giving across borders. The private initiative Transnational Giving Europe network provides an efficient solution for the time being (until existing barriers are removed by legislative or other policy developments). At European level, TGE is the only practical and secure solution for tax-effective cross-border cash donations. The TGE network covers 19 countries and enables donors, both corporations and individuals, resident in one of the participating countries, to financially support non-profit organisations in other Member States, while benefiting directly from the tax advantages provided for in the legislation of their country of residence.

What are some donor strategies/approaches to engage around the trend of closing space for civil Society as discussed at recent Philea (former EFC and Dafne) events over the past years?

- This is not a simple/straightforward/static picture – multiple strategies are needed
- Do not back away – engage / find ways to continue supporting civil society; working with local partners is key
- Joint funder collaboratives may create more impact
- No one can do it alone – a multi-stakeholder approach is needed. Analysing and potentially engaging in collaboration with others and new partners is key. Partners should include local actors, governments (local and foreign), other civil society actors including other funders as well as new allies such as business.

With the aim to empower civil society actors and help develop their resilience, several funders have developed different short-term strategies including emergency assistance, litigation support but also more long-term strategies to empower civil society actors such as considering providing more core funding over longer periods.

The funders' landscape is constantly evolving as is the wider civil society. Funders are faced with a different set of actors in civil society and need to decide for example if and how they **can support informal/fluid civil society groups**.

Some funders are testing more **participatory grantmaking approaches**.

Some funders are also engaging in more **hands-on engagement with civil society organisations** beyond grantmaking, including providing training and other support for their beneficiaries such as sitting on boards (an activity that may put their independence at risk).

Funders are acting more often in collaboration with others: local actors, governments (local and foreign), other civil society actors including other funders as well as businesses.

2. From a European perspective we would like to share the following reflections on potential policy measures to help overcome barriers to cross-border philanthropy in a context of wider civil society space in Europe:

The European philanthropy infrastructure has made policy recommendations to move towards a "Single Market for Philanthropy", which can be accessed in our European Philanthropy Manifesto as well as in our contribution to last year's Social Economy Action Plan.

In the EU the free flow of capital and non-discrimination principle were confirmed by different ECJ rulings over the past 15 years, which have created a wave of national tax law revisions. It is unacceptable that barriers continue to exist. The 2014 joint EFC-TGE study, "Taxation of cross-border philanthropy in Europe after Persche and Stauffer – From landlock to free movement?"; the 2017 EFC/TGE study; as well as our 2020 in-depth profiles of the operating environment for philanthropy in 40 EU and non-EU countries outline how several EU Member States have not yet removed this discrimination – and even where they have, practical or legal problems persist.

Possible solutions to help overcome barriers to cross-border philanthropy are the following:

- Better implementation of the EU non-discrimination principle/overcoming barriers to tax effective philanthropy: It is important to ease tax-effective cross-border donations from individual and corporate donors for the public benefit and social economy actors; and to ease philanthropic foundations' tax-effective asset allocation/investment of their endowments across borders via a code of conduct.

- The creation of a European supranational legal form for foundations/philanthropic organisations.
- There also needs to be caution that EU and national policy on money laundering and terrorism financing is risk-based and proportionate and applied in a meaningful way to public-benefit foundations/organisations (in particular the policy on beneficial ownership), to avoid undue restrictions on (cross-border) public-benefit work.

Philea is hence very pleased about the launch of the December 2021 EC Social Economy Action Plan, which recognises the important role of the philanthropy sector and makes concrete proposals to help remove the legal obstacles impeding philanthropic organisations' ability to operate (also across borders) in the Single Market (see our briefing on the action plan).

Philanthropy's entry points in the action plan range from the publication of guidance to Member States on the tax treatment of cross-border public-benefit donations and exploring mutual recognition; to launching dedicated co-investment mechanisms with foundations; as well as performing dedicated studies on philanthropy, among many more opportunities. This Social Economy Action Plan also links to key proposals coming from the European Parliament, which on 16 February 2022 approved a report on a European Statute for Associations and NPOs. This report suggests a new European vision and concrete legislative proposals for associations and philanthropic organisations to create a truly level playing field for civil society organisations in Europe.

1. **For global level recommendations, we refer to the recommendations of WINGs made in its contribution to this consultation, including:**

- Foster an international Member State consensus (condemnation) for robust diplomacy when cross-border giving (access to resources) is impeded by unreasonable legal or regulatory barriers.
- Bring together networks concerned about solutions to the cross-border giving issue.

- Develop the ecosystem of local philanthropy to be a partner in development cooperation.
- Enhance cooperation and multi-stakeholder dialogues with private sector stakeholders, in particular the banking community.

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.

philea.eu

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