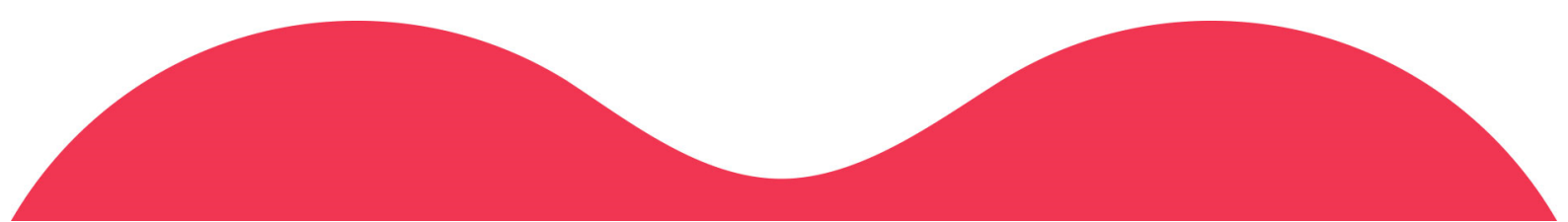


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# **Philea contribution to European Commission Consultation on European Association Statute**

Legal Affairs Committee



## Introduction

The philanthropy and foundation sector is pleased to contribute to this important European Commission consultation and would like to stress our **key asks to work towards a European Single Market for Public Good that covers foundations as well as associations with the current policy approach.**

We have also provided input into the September 2022 European Commission consultation on a proposed Council recommendation to develop social economy framework conditions by 2023, by adapting legal frameworks to the needs of social economy entities. The social economy family includes different types of legal entities such as associations, mutual societies, and cooperatives as well as foundations and philanthropic organisations, which is the sector represented by Philea. Philanthropic organisations are social economy actors in their own right and also act as funders and supporters of other social economy and civil society actors.

As Philea, we are also actively engaging as a board member of Social Economy Europe (SEE) around the wider social economy agenda and also with the wider civil society community on issues of common concern. We are a member of the European Expert Group on Social Economy (GECES) and have also been contributing to the social economy agenda from the perspective of philanthropy in this context. This paper will focus on the specific philanthropy perspective, while we are also supporting and co-signing separate contributions from SEE and Civil Society Europe.

### **The important role of philanthropy and wider civil society**

The foundation/philanthropy sector plays a critical role in the implementation of the SDGs and in supporting Europe's social and economic resilience. Moreover, we do crucial work alongside other civil society actors to make sure that across Europe the Rule of Law and the protection of Fundamental Rights are respected by Member States. European philanthropy is a key contributor to a more equitable and sustainable world, and now has a critical role to play in fostering greater resilience and well-being and promoting diversity and inclusion.

### **More need and desire to operate across borders**

The Climate crisis, the Covid pandemic and the war in Ukraine as well as other societal challenges require cross-border actions and solidarity across borders. Also the day-to-day life of citizens has become more European and international and also corporations operate across borders. Hence individual and corporate donors as well as philanthropic



organisations need a level playing field to express their philanthropic vision and solidarity across borders. Philanthropic endowments also need a level playing field and non-discrimination with regard to their cross-border asset allocation. Good asset allocation policy recommends diversification of the portfolio.

## A Single Market for Public Good

Despite societal challenges going beyond borders, philanthropic organisations and other members of the social economy and civil society family are still not benefiting from the Single Market when it comes to their cross-border activities. Hence, we are calling for a Single Market for Public Good in our [Manifesto](#) and our [contribution to the Social Economy Action Plan](#). Better recognition of and dialogue with the foundation sector; facilitation of cross-border action; enabling and protecting the space; and co-granting and co-investing for the public good in Europe are our 4 key recommendations.

Cross-border activities of public-benefit organisations, including philanthropic actors, remain complex also inside the Single Market. The current legal, administrative and fiscal treatment of cross-border activities results in high transaction costs and prevents the sector from benefiting from the freedom of association and treaty freedoms such as free flow of capital and freedom of expression. Despite numerous calls and attempts, an appropriate European policy framework for public-benefit organisations, such as foundations and associations similar to that of their for-profit counterparts, is still lacking.

As recognized by the SEAP, social economy including philanthropy is one of the main facilitators towards the creation of an inclusive and non-discriminatory Europe, given its strong focus on addressing social challenges such as helping disfavoured groups integrating the labour market or providing care and support for certain groups in risk of social exclusion, such as the elderly or people with disabilities. Unfortunately, this role still remains under-explored in the Single Market.

## Calling for an ambitious proposal

### Proposal should cover public-benefit foundations as well as associations

The legislative proposal should cover public-benefit foundations as well as associations with a view to creating a Single Market for public-benefit action. This level playing field is needed to enable public-benefit organisations to address today's societal challenges,

also across borders. The sector as well as the European Parliament have been calling for a legislative action for the non-profit/public-benefit sector.

[Philea](#), alongside the wider civil society and social economy, welcomed the February 2022 [European Parliament policy proposal](#). [Philea's initial position paper](#) stressed the important contribution for strengthening the recognition and operating space for non-profit organisations (NPOs) including philanthropy. We were pleased to see that the EU Commission responded to the European Parliament report in May 2022 stating **that it will present a legislative act on dealing with civil society organisations**. Then in August 2022, the European Commission started a consultation running until October 28<sup>th</sup> on a **Proposal for a legislative initiative on cross-border activities of associations**, which could give the impression that it was focusing on associations only.

Hence, we urgently ask the European Commission that **the legislative EU initiative should cover public-benefit foundations and associations** as was recommended by the JURI report and has been stressed by both the foundation and association sector. While associations and foundations are often distinct legal forms, it must be noted that in several countries the distinction is not that clear-cut, and in common law countries it is even lacking. In addition, both types of organisation work towards the public good and face similar barriers when operating across borders (barriers around the recognition of the legal personality, moving the seat across border, merging across border etc). Recent trends around shrinking civil society space have also been focusing on the civil society sector as a whole and not referring to distinct legal forms at the national level. There should hence be the ambition to protect and recognise the public-benefit sector and to overcome barriers to cross-border public-benefit work.

## **The proposal should address identified barriers for public-benefit foundations' and associations' work**

We understand that the European Commission has issued studies to analyse existing barriers of associations when acting across borders, and Philea together with national and key European academics have analysed the operating space for foundations when operating across borders. The analysis across 40 countries in Europe initiated by Philea in 2020/2021, "[Comparative Highlights of Foundation Laws](#)", confirms that barriers to philanthropy and foundations' cross-border work remain an issue (see more details in a separate Annex attached to this paper). Even if the [freedom of movement and establishment and capital is embedded in EU Treaties](#), the fundamental right of association is still not fully supported and promoted in several Member States.

The following barriers continue to exist:



## **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.

## **Restrictions on foreign funding and overly tight AML/CFT rules**

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. Receiving funding from abroad remains difficult for Hungarian organisations, and foreign funders are hesitating to fund Hungarian NGOs.

Moreover, certain aspects of money laundering and terrorism financing policy are limiting both the operating space for philanthropy and the 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, without 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.

In addition, many banks apply de-risking practices to civil society organisations including philanthropy. We have heard of several instances of bank accounts being blocked or banking services to public-benefit organisations being denied or delayed. Transferring philanthropic grants across borders by bank transfer has also become more difficult.

## **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 comparable foreign EU-based public-benefit organisations and their donors from local ones. There are still rules in place

which provide that non-resident public-benefit organisations (and their donors) are denied all or some tax benefits which domestic legislators have granted to resident foundations (and their donors). Even when discrimination is formally removed, rules and processes are often so complex, costly and lengthy that significant barriers to cross-border philanthropic action remain.

We have also been alerted of the application of VAT rules, leading to uncertainty or double taxation in cross-border contexts.

### **Complex impact investing and asset administration rules (not always in a 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 overly risky investments). Additionally, some national laws do not permit equity investments and/or the giving of loans and/or donations by public-benefit organisations or any other programme activity that generates income on the programme side.

## **Policy options to consider**

Below we would like to share some initial reflections on policy options to consider to overcome barriers and protect the operating space for public-benefit organisations:

### **Create supranational legal forms for associations and foundations**

We call for creating European supranational legal forms for the public-benefit sector (foundations and associations), which would enable the setting up of truly European public-benefit organisations mainly governed by EU law and immediately recognised in all Member States, which would help overcome existing barriers and stimulate more truly European public-benefit initiatives.

The idea of developing supranational legal forms should be further analysed including reviewing other legal bases than the catch all article, which requires unanimous approval of all Member States and the procedure of enhanced collaboration. The Commission refers to barriers in the single market to take this forward, through a wide definition of economic activity, which could include service providers and other NPOs and foundations. As a single market legal basis, Articles 50 and 114 – perhaps 53, or a combination of these could potentially work.



With the Association statute, individuals, legal entities (associations and foundations and philanthropic organisations) will be able to create a European Association. With a European Foundation Statute, truly European foundations as purpose- and asset-driven independent public-benefit organisations could be created (noting that the 2012 European Foundation Statute proposal was withdrawn in 2015 since Member States could not agree unanimously on it).

Overall, we note that new **European legal forms should be attractive and accessible instruments** that will be picked up by the sector and citizens to operate more easily across borders. Unnecessary red tape and disproportionate reporting and supervision should be avoided.

## **Create new (national) legal public-benefit forms via EU law and other efforts for mutual recognition**

We support the proposal to create new national public-benefit legal forms via EU law, based on common public-benefit criteria, that would enable these new national entities to be recognised in other Member States' jurisdictions by mutual recognition.

The approach resembles the approach taken with single-member private limited liability companies. The path of a directive was chosen requiring all Member States to have single member LLCs in their national law (Directive 2009/102/EC). We welcome the approach to create a new type of national public-benefit organisation (association/foundation) at national level following agreed core public-benefit criteria that could be recognised across the EU more easily.

Such a proposal would allow these non-profit entities to have their legal personality fully recognised in the different EU countries, for instance to be able to move their seat or merge with another association or foundation. We would like to draw the attention to the fact though that the creation of such a new national legal form at the national level would not help the millions of other existing public benefit associations/foundations at national level. It may not be helpful if existing associations/foundations would need to establish a new organisation from scratch in order to receive mutual European recognition.

Ideally the EU policy proposal could hence contain mutual recognition of certain types of legal entities fulfilling criteria of public-benefit organisations. Ideally a common concept of such public benefit/public interest could be defined at the European level. Another option to consider could be the creation of a European public-benefit label for existing national legal forms, which would grant mutual recognition across the EU.

If the proposal were to include public-benefit foundations as well as associations, it could potentially also further clarify the application of other laws (e.g. state aid/competition law).

## Harmonise common minimum standards for cross-border operations in the EU

While we are aware of the rich and diverse cultures and traditions at the national level, we would be in favour of the establishment of minimum standards enshrined in fundamental rights on which national frameworks would be based for both foundations and associations.

We see this not as an alternative to supranational legal forms or the creation of national legal forms, but rather as a complementary measure to the first two options.

Since the space for public-benefit and civil society action has been shrinking also inside the EU, we call on strong protection mechanisms to be put in place. We would welcome the creation of common framing of minimum standards to ensure that national laws are in line with the freedom of association and freedom of expression, which are both applicable to foundations and associations (see Council of Europe work on freedom of association) – in particular also with regard to moving the seat/engaging in political activities/access to funding etc.

We would hence welcome minimum standards that guide Member States to ensure **an enabling environment for associations and foundations by correct application of the freedom of association, the freedom of expression and the free flow of capital**. We have seen that Member States have issued national laws regulating public-benefit organisations that are in clear conflict with EU law, including ECHR, and minimum standards could ensure that certain standards and fundamental rights are kept.

We note that within Member States public-benefit and civil society organisations can take different organisational forms such as for example associations as membership-based organisations and foundations as purpose- and capital/assets-driven organisations. Minimum standards – in particular with regard to establishment, governance, reporting and involvement of external authorities – must take this variety into account and **offer sufficient flexibility and provide for enabling conditions in line with the freedom of association**. The involvement of supervisory authorities/power of surveillance and administrative/reporting requirements must be EU law and ECHR compliant.

These benchmarks should also be applicable at EU level so as to ensure that EU legislation is also shaped and reviewed in accordance with these principles as well as to



prevent undue consequences on civic freedoms of the implementation or transposal of EU legislation into national law as for instance with the anti-money laundering or counterterrorism directive. **Rules on combating money laundering and terrorist financing must be applied in accordance with the principles of necessity and proportionality**, particularly regarding risk-assessment obligations under international and EU law.

We also suggest that EU programmes support mutual learning and training on the development and revision of national frameworks also as part of the implementation of the country-specific recommendations under the rule of law cycle.



## **Carry out an EU information campaign, with strengthened cooperation among Member States**

We believe that this approach would be insufficient in itself to tackle the obstacles that public-benefit associations and foundations face as regards internal market freedoms.

However, such an information campaign could accompany the implementation of a future legislation.

We believe that mutual learning and exchange among Member States and with civil society organisations would be very useful in this field.

We also believe that this very welcome initiative should be accompanied by other measures from the European Commission that would be part of an overall roadmap to support civil society and the promotion of civic freedoms both at national and EU level, as well as measures supporting the wider social economy.

Part of this could be a Communication on the role of public-benefit civil society organisations in our pluralistic societies and link with initiatives to recognise, empower, protect, support and engage with the sector in the form of civil dialogue and beyond (co-granting and co-investing).

## **Consider this policy in the context of the wider European strategies for civil society and social economy**

This new initiative should be one of the elements of a future civil society strategy, next to civil dialogue provisions, civic space within the rule of law, and overall protection elements as well as the existing wider European Social Economy Strategy.

## **Consider this policy in the context of cross-border philanthropy taxation**

The application of the free movement of capital to philanthropic flows, along with ensuring that the principle of non-discrimination applies to donors and public-benefit organisations in the EU, does not yet work in practice. We are of the opinion that the new policy proposal could link efforts to reach a better implementation of the non-discrimination principle with regard to tax effects of philanthropic activities by, for example, presenting guidance on how national tax law norms related to philanthropy could better implement the non-discrimination principle with regard to the tax treatment of foreign EU-based public-benefit organisations and their donors. We are pleased to see that guidance to Member States with regard to cross-border

philanthropy taxation is already in the pipeline and announced as one of the measures in the Social Economy Action Plan.

## Consider linking to non-EU contexts

We suggest that the new instrument would also open up opportunities for co-investing and co-granting with organisations seen as equivalent from non-EU countries (and would ease collaboration and facilitate cross-border giving in general).

This could potentially start with organisations from countries that already have a close affiliation with the EU, have good regulatory systems and where public-benefit organisations can be considered as broadly equivalent in the way they operate and fulfil a public benefit.

Easing access to the Single Market for Public Good by actors from non-EU countries would hopefully enable more cross-border collaborations also beyond the EU Member States.

## Conclusion

The new legislative proposal should be ambitious and create a Single Market for Public Good, which we call for in our Philea Manifesto and our contribution to the Social Economy Action Plan. Philea, alongside our civil society and social economy colleagues, consider that this proposal – also in the context of the recent EU Action Plan for Social Economy – must be a real game changer for enabling philanthropy/civil society and social economy work. While we would welcome the creation of supra-national legal forms and/or creation of new national legal forms, we consider that mutual recognition of existing public benefit organisations very important. We favour the idea of minimum common standards ensuring a uniform level of protection of all organisations acting for the public benefit/public interest. We believe that a Single Market for Public Good will help philanthropy to contribute even more and better in facing the polycrises with which societies are grappling today.

We are confident that the European Commission will develop a legislative policy proposal in close dialogue with civil society – including philanthropy – to discuss the best policy proposal in line with the freedom of association and the free flow of capital and freedom of expression.

## About Philea

Philea - Philanthropy Europe Association nurtures a diverse and inclusive ecosystem of foundations, philanthropic organisations and networks in over 30 countries that work for the common good. We unite over 10,000 public-benefit foundations that seek to improve life for people and communities in Europe and around the world.

Philea is a convergence of Dafne and EFC – Donors and Foundations Networks in Europe and the European Foundation Centre – forming a strong, united voice for European philanthropy.

European Transparency Register: 78855711571-1

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