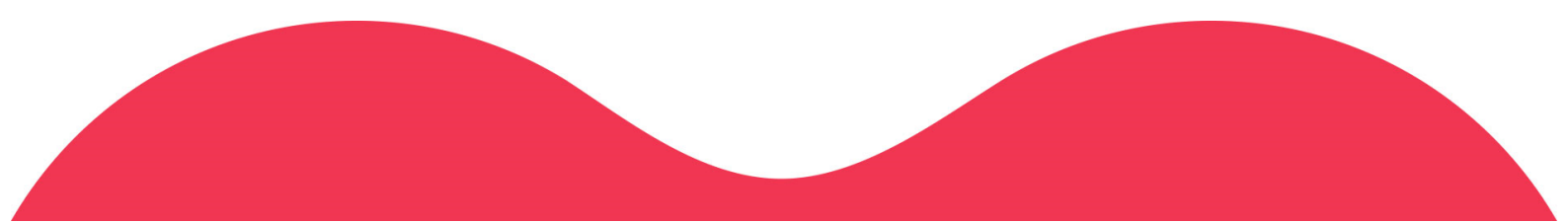


13/04/2023

Philea comments on EU Defence of Democracy package



Philea submission to consultation on defence of democracy, 13 April 2023

I. Introduction

The Philea Legal Affairs Committee (LAC) is pleased to contribute to the European Commission Defence of Democracy consultation.

As Philea we are also engaging with the wider civil society on the matter and have contributed to a submission submitted by Civil Society Europe (CSE). This paper will focus on the specific philanthropy perspective, while also supporting a separate contribution from CSE.

II. General Comments

We welcome the proposal for a Defence of Democracy Package as a potential important contribution to enhancing democratic participation, protection, resilience and recognition of civil society, including philanthropy organisations, though we would like to stress that the information in the call for evidence does not go into much detail.

We consider that threats to democracy also encompass much broader issues and areas, including the functioning of checks and balances of policymakers, corruption issues, etc. which currently do not seem to be covered by the initiative, and we recommend looking into this.

Separate pillar on civil society, including philanthropy space & civic space

We welcome, as documented by the call for evidence, that the proposal aims to protect and strengthen EU democracies and that it will include measures to foster an enabling civic space and promote inclusive and effective engagement by public authorities with civil society and citizens in order to bolster resilience from within. We also acknowledge the recognition that “*a strong and enabling civic space is critical for the resilience of our democracies and of the role of civil society organisations in acting as watchdogs, holding governments to account, protect and promote fundamental rights, and combating disinformation*”. Finally, we also place



high expectations on the recognition that *“active and engaged public participation is essential to the quality of democratic life”*.

We also take note of the intention for the proposal drafters to be fully consistent with the European Commission annual rule of law report and fully compliant with the Charter of Fundamental Rights.

We believe that the package should complement the current European Democracy Action Plan by supporting a coherent and strategic approach to civil society which should be recognised as the cornerstone of democracy. Furthermore, the package would benefit from a **separate pillar** on civil society space next to election integrity, media pluralism and the fight against disinformation. We would like to highlight in this context the conclusions of the Conference of the Future of Europe that called for a Civil Society Strategy in the framework of the European Democracy Action Plan Revision.

Need for an impact assessment

Given the sensitivity of the measures to defend democracy and to address covert foreign interference in EU democracies, we strongly recommend that the package should undergo a proper impact assessment, including a fundamental rights impact assessment given the concerns around the civic freedoms of expression, association and assembly.

There is a strong risk of creating a dichotomy between addressing challenges to civic space and the rule of law and the development of measures trying to address undue foreign interference that could have an undue impact on the freedom of expression, association and assembly, and as a result on the ability of civil society actors to counter foreign interference. A proper impact assessment should hence address compatibility with EU treaties and legislation in force.

Avoid unintended consequences on civil society, including philanthropy

Although the information in the call for evidence is scarce and not very visible, we understand that a draft legislative proposal (directive) would require NGOs and other actors to disclose foreign funding if they engage in “interest representation”. Such an approach is of deep concern to us since it risks running counter the core European values, freedoms and rights.

Furthermore, it potentially restricts access to finance for NGOs and has the potential to stigmatise and put under suspicion NGOs receiving foreign funding (and those outside EU philanthropic organisations that give grants

and support to EU-based organisations). It would also erect barriers to cross-border philanthropy and the freedom of association and free flow of capital rights. Furthermore, it would have a detrimental impact on all civil society organisations' activities both in the European Union and in third countries.

Separate pillar for accessible and inclusive elections

Prioritising equality in all aspects and enhancing access to democratic participation are also crucial to defending democracy. In this sense, the package should supplement the European Democracy Action Plan and align with the European Pillar of Social Rights by introducing a pillar dedicated to promoting and defending accessible, inclusive elections to ensure active citizenship, equal democratic participation, as well as gender balance and inclusivity in politics and decision-making.

III. Comments on a legal instrument on covert foreign interference

The call for evidence indicates that a legal instrument (directive) would introduce common transparency and accountability standards for interest representation services directed or paid for from outside the EU, to contribute to the proper functioning of the internal market, and to protect the EU democratic sphere from covert outside interference. Doing this would support awareness in the context of the provision of these services. A recommendation on covert interference from non-EU countries would complement the directive establishing harmonised transparency requirements for the provision of services from outside the EU. Specifically, it would provide for additional non-binding measures to tackle the issue, including awareness-raising, and promoting best practices.

We understand that the proposal would include the harmonisation of rules for transparency registers across Member States, but also policy to prevent covert foreign interference.

On national and EU transparency registers

We support transparency registers. We are nonetheless concerned about the latest evolution of the EU Transparency Register which does not address equally all registered entities. NGOs must disclose all sources of funding contrary to all interest groups that have only to declare with no control an

estimation of their lobbying expenses. It gives a false impression to the public that NGOs are the main vector of interest representation, while they are the least represented entities on the Transparency Register, after corporate representatives and consultancies. It also devalues our work as contributing to the public interest and as partners to public actors in addressing societal issues.

We are also concerned that NGOs/civil society organisations are more and more confined into an interest representation role, which removes the attention from their core role as contributing to solving societal issues, often in complementary ways and in many cases also in collaboration with government initiatives.

On potential EU measures to “prevent covert foreign interference”

We would like to state the following concerns around the idea of a directive on “transparency measures to prevent covert foreign interference”:

- Defending democracy, rule of law and fundamental rights is very important and must be done through measures that take these very same EU principles into account. The EU should lead by example to ensure that its **envisaged policy to prevent “covert foreign interference” is risk-based, proportionate and fit for purpose, and that it takes into account fundamental rights** and does not unduly restrict legitimate cross-border funding to civil society organisations that engage in interest representation.
- The consultation document does not **define the term “interest representation services directed or paid for from outside the EU” and it does not explain which entities will be targeted nor how**. Would the directive target both for-profit and non-profit organisations, a category which includes foundations, associations, consultancies, academic institutions? We are deeply concerned about the vagueness of the interest representation concept and how it may be applied to non-profit organisations, given that they are not and should not be considered to represent the interest of funders but of the general public. If the legislative initiative goes beyond public foreign government funding/interference to also include private philanthropy foreign funding, it would have a chilling impact on cross-border philanthropy, and potential conflicts with the free flow of capital and freedom of association must be carefully assessed. Such

an initiative would likely lead to fewer resources for civil society organisations and would affect funding from EU allies.

- **A thorough impact assessment** should be undertaken. A careful assessment of potential conflicts of such a legislative initiative with fundamental rights such as the freedom of association/freedom of expression must be carried out. The freedom of association includes the right for civil society organisations (be they associations or foundations) to access resources from different sources (public as well as private/philanthropic). It also includes the right to use resources and to act/give grants across borders. Access to finance for civil society organisations across borders must not be unduly restricted: Civil society organisations receiving foreign funding, as well as those non-EU philanthropic organisations that give grants and support to EU-based organisations, must not be stigmatised or put under suspicion. In the context of clear statements coming from the EU level to condemn recent attempts to introduce foreign funding restrictions at the national level in Georgia and Hungary (where these restrictions were suggested via a law to introduce more transparency on foreign funding), caution needs to be taken when the EU now considers adding more transparency into foreign funding flows.
- Questions arise as to whether it would even be effective and fit for purpose in protecting the democratic sphere, and whether in fact it would divert attention and energy from true malicious interference.
- Such an initiative could even contribute to the restriction of civic space and democratic participation. It could potentially lead to a snowball effect in other parts of the world.
- Furthermore, since a directive requires transposition in Member States, some EU countries could also use it to close down civil society space and to stigmatise civil society organisations in their countries.
- We question whether such an approach would be fit for purpose and address effectively the problems at stake as regards foreign covert interference. The call for evidence does not give sufficient elements to understand this, as it will always be possible for external private entities whatever their legal form to operate outside such registers. In the absence of an impact assessment, we do not observe any substantial and recurrent evidence of use of interest representation services, and in particular of civil society organisations, for undue foreign interference.



- Moreover, the call for evidence does not refer to an analysis of existing tools at national and EU level to address risk of abuses, such as finance and tax obligations, company and association registers, anti-money laundering provisions, and mechanisms for controls. In addition, the package does not include measures to address vulnerabilities within national and EU institutions to corruption and influence from foreign governments, including developing a culture of accountability, and this despite repeated calls by the European Ombudsman.

Policy should be in line with EU and international law:

- The European Court of Justice ruled against the Hungarian LexNGO in June 2020 (C-78/18) In this landmark judgement, the court set out a substantive element of freedom of association—the right to access funding (including foreign funding). Also the Council in its conclusions on civic space *“...acknowledges that civil society actors at all levels need appropriate and sufficient human, material and financial resources to carry out their missions effectively and that the freedom to seek, receive and use such resources is an integral part of the rights to freedom of association”* .
- Such principles are also enshrined in international law. The [OSCE/Venice Commission Guidelines on Freedom of Association](#), principle 7, paragraph 221 states: *“The right to freedom of association would be deprived of meaning if groups wanting to associate did not have the ability to access resources of different types, including financial, in-kind, material and human resources, and from different sources, including public or private, domestic, foreign or international.”*
- The EU has condemned the proposal by the Georgian government to introduce a similar provision: *“The proposed draft law on ‘transparency of foreign influence’ raises serious concerns. Creating and maintaining an enabling environment for civil society organisations and ensuring media freedom is at the core of democracy. It is also key to the EU accession process and part of the 12 priorities, notably priority 7 on media freedom and priority 10 on the involvement of civil society. The European Union is supporting Georgia in its reform efforts, responding to the country’s own aspirations for continued development and EU membership, as enshrined*



in Georgia's Constitution. The draft law's adoption would be inconsistent with these aspirations and with EU norms and values."

- The US FARA, dating back to the 1930s, has been contested by civil society in the US because it includes vague definitions of what constitutes a foreign agent in political and other activities, and even in the collection of funds, meaning that the legislation would basically encompass all CSOs' activities. It also creates a negative labelling of CSOs funded through foreign funding, and it creates obstacles to philanthropy. Finally, the law includes sanctions and penalties including imprisonment.

IV. Comments on a communication on civic engagement and civil society, including philanthropy space

This proposal "starts from the premise that civic participation, understood as engagement of civil society actors and citizens on matters of public interest, is only effective in an enabling, safe and supportive environment. The recommendation is aimed at helping Member States to frame the promotion of civic engagement in connection with the protection of democracies and respect for fundamental rights. It would therefore reflect the need to ensure a common level of protection and engagement with these actors in our democracies across the Union (and beyond), as the existing challenges cannot be addressed solely at Member States level. This Recommendation will also draw on the experience of the Conference on the Future of Europe."

The **foundation/philanthropy sector does 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 it plays a critical role in fostering greater resilience and well-being and promoting diversity and inclusion.

Despite societal challenges going beyond borders, philanthropic organisations are still not benefiting from the European single market when it comes to their cross-border activities, and we have seen **old and new barriers for our sector**. Hence, we are calling for a Single Market for Philanthropy in our [Manifesto](#) and in 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.

In the context of the Defence of Democracy package, we consider that the EU should develop a fourth pillar on civil society including philanthropy space with enabling policy to:

- **Better recognise and engage** with civil society organisations including foundations – the EU and Member States should engage in more structured dialogue with philanthropy and foundations (e.g. around the NRRF and beyond – going beyond consultation towards participation and co-designing) and better recognition of the important role the sector plays in creating an inclusive and equitable labour market for disfavoured groups, including people with disabilities.
- **Develop a more enabling cross-border environment for foundations and philanthropy:** There is a need to develop policy at EU level on the recognition of legal personality when acting abroad, move of seat across borders, merger across borders, and removal of foreign funding restrictions etc. The EU should support the creation of supranational legal forms for associations and foundations and/or minimum standards. It should also work on overcoming tax barriers to cross-border philanthropy, i.e., better implementation of the non-discrimination principle with regard to cross-border philanthropy taxation (for donors when donating across borders to public-benefit organisations and foundations when they have asset allocations across borders).
- **Work on an enabling legal and tax treatment for public-benefit foundations and philanthropy:** The EU should call on member states to develop easy processes to create foundations/associations; corporate tax exemption; and exemption from gift and inheritance tax as well as for public-benefit organisations more generally. It should ensure that national money-laundering and terrorism-financing policy is risk-based, proportionate and does not unduly restrict legitimate philanthropic transactions (we have seen cases of over-regulation with unintended consequences in several Member States) and ensure that public-benefit organisations have access to banking services, which has become an issue due to extensive compliance regulations that banks have to maintain.
- **Facilitate impact investment for philanthropic actors and co-investment opportunities with public actors:** The EU and member states should consider enlarging the toolbox of philanthropy by also enabling new forms of impact investing and mission-related investments/sustainable investments. The EU should collaborate with foundations/philanthropy and wider social economy/civil society in the design, implementation, and follow-

up to NRRF and MFF as well as CERV and other EU financial support schemes. And it should simplify financial rules.

As Philea, we map and analyse the operating space for philanthropy and observe that old and new barriers prevent the sector from unleashing its full potential across borders, see our 2021 analysis, "[Comparative Highlights of Foundation Laws](#)".

Philanthropy also works with the wider civil society and social economy around promoting enabling frameworks for our sector. Philea is supporting the Civil Society Europe call for a Civil Society Strategy.

Building resilience and empowering civil society including philanthropy should hence be **the fourth pillar of the European Democracy Action Plan** next to promoting free and fair elections, strengthening media freedom, and countering disinformation, which should take into account the following five principles and measures around wider civil society space:

1. A conducive institutional, political and socio-economic landscape
2. A supportive legal and regulatory framework for civic freedoms, in particular freedoms of association, peaceful assembly and expression, and its effective implementation to ensure the protection of civil society space.
3. Safe space and duty to protect: Public authorities have a duty to protect civil society actors and human rights defenders.
4. Improved dialogue between civil society and policymakers: Governments and EU policymakers must pursue policies and narratives that empower citizens and organised civil society to be meaningfully engaged in the public debate and policymaking.
5. A supportive framework for CSOs' financial viability and sustainability including supportive legislation on core funding: Foreign and international funding, and availability of sufficient and predictable resources are crucial to civil society's capacities, independence and long-term strategic planning. The free flow of philanthropic and humanitarian support is also a crucial part of this.

More details on potential measures around participation and civil dialogue:

- o Beyond public consultations, recognise civil dialogue on equal footing with social dialogue. The recommendations need to have clear wording on civil dialogue and how to implement it both on domestic



and EU level frameworks and legislation. Additionally, it should provide a framework for EU civil dialogue

- o Develop a Commission staff working document on the functioning and potential of European civil dialogue as per Art. 11 TEU, to bring coherence in the engagement practices and standards across all DGs;
- o Give content to the Vice President in charge of relations with civil society. Basic coordination structures (focal points) for civil dialogue should be developed within each DG and Executive Agency of the European Commission, formalising and structuring the involvement of CSOs on sectoral policy issues beyond online consultation along all phases of policy making, including its implementation and evaluation phase.
- o Develop further the role of the European Commission representations in the different countries on dialogue and engagement with civil society, and of the European Parliament Liaison Offices, for example by providing access and support to contribute to a national perspective on the development of EU policies and legislation.
- o Promote civic education at all levels and in all spheres of learning (formal, non-formal and informal learning). The European Commission should issue guidelines for Member States on the minimum standards and best practices of citizen education on the national level based e.g. on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education. Ensure access to independent and nonpartisan Education for Democratic Citizenship and Human Rights (EDC/HRE).
- o Reinforce access to (government) information at EU and national level, including transparency of EU decision making.
- o Develop an inter-institutional (Commission-Council-Parliament) coordination on the matter, as well as regular high-level meetings between representatives of the institutions and civil society.

More considerations on funding (of concern more for smaller foundations and CSOs)

- Review relevant EU grants in dialogue with civil society, in order to further improve their positive support to civil society and its work,



especially ensuring that it provides long-term core support to ensure sustainability of civil society organisations.

- Establish a structured dialogue mechanism between representative civil society platforms and relevant DGs/Executive Agencies on the implementation of EU programmes as a whole, and related grants and funding streams in particular.
- Supporting the capacities of civil society organisations to monitor the use of EU funds from abuse should be done by reserving a part of the technical support instrument for NGOs. The European Commission should also monitor actual participation of civil society both during programming and use of EU funds, and step up in case of deficiencies, or where consultation was just a “tick-box exercise”.
- Involve CSOs in the early stages of the review of the Multiannual Financial Framework and Financial regulations.
- Remove regulatory and fiscal obstacles to access to funding and donations, including across borders. National and EU policies should facilitate cross-border philanthropy. There should be no foreign funding restrictions, and access to formal banking channels need to be enabled.
- Ensure that EU funds provided through shared management are accessible to civil society organisations and that open procedures are in place.
- We would as Philea be pleased to offer the know-how and expertise of philanthropy organisations to make EU-funding processes and conditions more user-friendly by, for example, entering into a consultation with relevant agencies to review funding rules.

V. A separate pillar for accessible and inclusive elections

Prioritising equality in all aspects and enhancing access to democratic participation are also crucial to defending democracy. In this sense, the package should supplement the European Democracy Action Plan and align with the European Pillar of Social Rights by introducing a pillar dedicated to promoting and defending accessible, inclusive elections to ensure active citizenship, equal democratic participation, as well as gender balance and inclusivity in politics and decision-making.



About Philea – Philanthropy Europe Association

Our vision is for philanthropy to use its full potential to co-shape and support a pluralistic, just and resilient society that centres people and planet. To achieve this, our mission is to enable, encourage and empower the philanthropic community to build a better today and tomorrow.

We nurture a diverse and inclusive ecosystem of foundations, philanthropic organisations and networks in over 30 countries that work for the common good. With individual and national-level infrastructure organisations as members, we unite over 10,000 public-benefit foundations that seek to improve life for people and communities in Europe and around the world.

We galvanise collective action and amplify the voice of European philanthropy. Together we:

- **Co-create knowledge and learn** from effective practices
- **Collaborate** around current and emerging issues
- **Promote enabling environments** for doing good

In all we do, we are committed to enhancing trust, collaboration, transparency, innovation, inclusion and diversity.

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