

## **DAFNE/EFC PHILANTHROPY ADVOCACY JOINT CONTRIBUTION TO EC RULE OF LAW ANNUAL REPORT CONSULTATION:**

**4 MAY 2020**

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

### **NEED TO LINK CIVIC SPACE WITH RULE OF LAW**

We as DAFNE and EFC jointly work on the enabling Framework for philanthropy in a context of wider civil society space. Since a few years we observe a worrying trend of restrictive measures in a number of Member States which is negatively affecting rules of law, democracy and civic space and the ability of philanthropic organisations and wider civil society actors to carry out their work.

Limitations to the rule of law appear to often go hand in hand with restrictions on civil society space, other fundamental rights and/or democracy. For this reason we welcome the inclusion of an enabling framework for civil society as part of the 4 pillar on checks and balances supporting democratic systems based on the rule of law. A shrinking and threatened civic space with legal or practical restrictions to the freedom of assembly, association and expression and the right to participation is an important indicator of a weak rule of law environment.

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. They have crucial expertise dealing with vulnerable groups.

### **PHILANTHROPY AND WIDER CIVIC SPACE TRENDS**

In our contribution we would like to highlight some trends concerning particularly civic freedoms and the right to participation which we identified across the EU since the beginning of 2019 as well as recent developments linked to the Covid-19 crisis that are impacting civic space and that will have a longer term impact after the publication of the report. The information provided has been gathered through our regular cooperation with member and partner organizations at EU and national level. We remain available to provide further information on specific issues identified in relation to particular countries upon request.

#### [An overall trend of challenged civil society and philanthropy space](#)

According to the CIVICUS Monitor, rating civil liberties globally from open to closed, of the 27 EU Member States, only fourteen have an open **civic space**, twelve narrow and one obstructed. Several of other tools and reports have shown how pressures are emerging all across the EU to different extents: the platform [Civic Space Watch](#), published in December 2019 a report that highlights restrictions to civic freedoms in various EU countries and publishes frequent alerts also for States with an open civic space showing that challenges exist in all countries.

We have over the past years also seen **restrictions introduced on the philanthropy sector** such as the introduction of so-called foreign funding/foreign agent restrictions which seriously impact on cross-border philanthropy. Also some of the money laundering or terrorism financing policy was limiting the operating space for philanthropy and wider civil society 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 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.

Recognition of foreign based public benefit organizations and their donors remains very complex and some governments still discriminate foreign based organisations. This slows down some of the philanthropic cross-border work to overcome the COVID-19 crisis. <https://www.efc.be/uploads/2019/03/Enlarging-the-Space-for-European-Philanthropy.pdf>

Recent reports also highlight the impact of emergency measures to fight the spread of the Covid-19 pandemic on civic space.

### Freedom of Association

Associations in the context of the freedom of association include a wide range of civil society organisations, such as associations, foundations, co-operatives and even on-line associations.

Everyone can freely establish, join and participate in a CSO and procedures to create CSOs should be clear and simple. CSOs should be free to access and use resources also in cross-border contexts.

However, rules on registration continue to be interpreted in some countries in a way which discriminates NGOs based on their activities. In Bulgaria for example several cases of arbitrary refusal to register associations working for minority rights continue to be reported despite rulings by the European Court of Human Right condemning these practices.

Legislation or regulation aimed at imposing bureaucratic burdens consuming NGOs’ resources or limiting their access to (foreign) funding, and to tax deductions have been adopted or drafted in Hungary, Romania but also in Italy and Latvia. In 2019 we have also seen the removal of the public benefit status of Attac Germany and Kampakt by the German tax authorities confirmed by a Court judgment.

In some countries legislation purportedly aimed at transposing EU directives on anti-money laundering and countering financing of terrorism were used to introduce disproportionate reporting requirements severely affecting civil society organisations (see for instance Romania and Spain). Bank de-risking practices are also affecting the financial access for civil society organisations to open bank accounts or arbitrary closure, receive/transfer cash

The Covid-19 crisis has also brought increased financial uncertainties for NGOs across Europe because of the inability to carry out programmes and lack of funding opportunities.

### The process for preparing and enacting laws - right to participate in public affairs

The space for civil society to participate meaningfully in the process for preparing and enacting

legislation and public debates around those has been shrinking in the past years. Indeed, the European Court of Human Rights stated that allowing participation in public life and policy is one of the principal features of democracy—that is, to create the possibility for members of a society to resolve social and political problems through dialogue. Besides lack of regular and effective consultation of civil society stakeholders in the process of enacting law, which affects many countries across the EU. In 2019, this also manifested through the allegations of CSOs being “political” or engaging in “political activity” all across Europe in the attempt to delegitimise the sector and justify measures to hinder its actions. In addition, vagueness of rules concerning political or lobby activities that (potentially) apply to civil society organizations has stifled their voices in crucial public debates about specific legislation (Ireland, Germany).

During the COVID-19 crisis, the public participation and possibilities to debate have been almost extinct in 2020, due to the nature of emergency measures adopted mainly by the executive branch, with no or little parliamentary or public oversight. In addition, some countries attempted to adopt or adopted legislation not related directly to the pandemic, but with no consultation with the affected groups or the broader public. This has detrimental effects for public trust, democratic process and the oversight of legislative activities.

The Covid-19 crisis has posed many challenges also to public administrations leading also to temporary unemployment measures for staff, suspension of meetings or reorganisation online of national parliaments. Nonetheless we are concerned that this has had a negative impact on civil dialogue practices such as public consultations and access to information that allows public scrutiny..

Generally, civil society needs to be more systematically involved in decision making processes. While we welcome the involvement of CSOs experts in advisory committees in certain countries, a wider and sustained public debate is necessary to ensure that a longer term perspective is taken on issues with interlinkages on the current crisis and its roll out: environmental and climate issues, investments in public health and social inclusion, protection of most vulnerable in our societies, over dependence of the economy from third countries outside Europe, use of technology in monitoring the spread of the pandemic and fundamental rights. Also participation in those decisions contributes to trust building and also participation in enforcement.

We are also concerned about the development of tracing apps for the prevention of the spread of the Covid-19 because of the impact they will have on the data privacy, freedom of expression and the risk of stigmatisation of individuals or communities derived from the use of such app that overweigh its possible benefits.

### Freedom of expression

Freedom of expression applies to civil society organisations, as part of the umbrella rights that fall under the scope of freedom of association. CSOs, including philanthropic organisations, have the right to conduct their activities based on many causes and purposes, without any interference from states regarding their opinion, ideas or beliefs.

Civil society organisations doing advocacy work either as main activity or at the result of providing services are increasingly labelled as being “political” and seen as interfering with the authorities in charge of decisions, instead of being considered as important contributors to the promotion of public interest. There are examples of smear campaigns against civil society working on issues deemed sensible by authorities based on those grounds in a growing number of countries such as in the Czech Republic, Slovakia, Poland, Hungary, Germany. On

these grounds, authorities have also targeted funding to certain organisations or areas of work. Conditionality of funding clauses in public grants have also appeared in several countries, limiting the possibility for organisations to exercise their watchdog role in a context of increasing scarcity of public and private resources for civil society. Laws or regulation on transparency or elections include ambiguous clauses on political activities and restrictions for third party donations on campaigning which have a chilling effect on civil society such as in Ireland. In Germany tax authorities are withdrawing the charitable status of campaigning organizations on the grounds that their activities would be political and not charitable, preventing them from benefiting from tax deductions on their donations and therefore endangering their funding.

In some countries we have also seen criminalisation of solidarity with migrants targeting either organisations or individual citizens. Certain countries such as Hungary and Italy have either enacted legislation that prevents citizens and civil society organisations to give humanitarian assistance (shelter, food, free legal assistance or advice whether in their own homes or in structures or rescue at sea) to asylum seekers or migrants or in many other countries people and civil society organisations were put under pressure through police harassment, legal cases or even arrest. Smear campaigns of organisations and activists through official statements and social media have contributed to creating distrust towards NGOs particularly in countries who face the greatest arrival of refugees.

There is also a tendency to dismiss civil society organisations as intermediary bodies between individuals and the State. A populist discourse emphasizes the need to communicate directly and exclusively with citizens and tends to dismiss real dialogue and participation including with citizens themselves.

### Right to privacy

CSO, including philanthropic organisations and their funders, have privacy rights, which protects them from non-grounded interference from states. Disproportionate limitations and those lacking a legal basis would imply breaches of the philanthropic sector's rights to private life.

Some countries have or are considering to introduce reporting requirements on donors and beneficiaries also in the context of money laundering and terrorism financing policy, which appear to be in conflict with privacy rights. Public listing of donors or beneficiaries would seriously affect the willingness of individuals to develop their activities freely and would increasingly add costs to the CSOs' daily functioning. This freedom should be recognised for philanthropic organisations and donors as going against it would implement excessive costs to their activities, and could affect their willingness to donate, as revealing their identity and information about their affiliation, political opinion and belief, could be deducted from where they are donating to. Extra obligations would have a chilling effect on donors and they could result in a serious drop in the final amount of donations.

Additionally, we are concerned about the development of tracing apps for the prevention of the spread of the Covid-19 because of the impact they will have on the data privacy, freedom of expression and the risk of stigmatisation of individuals or communities derived from the use of such app that overweigh its possible benefits.

## Freedom of Assembly

With more and more people protesting on the streets of Europe and movements rising, authorities are progressively and relentlessly chipping away people's rights to, among others, peacefully protest, freedom of expression and privacy rights. A number of states have introduced new legislation to restrict the right to peaceful assembly, for example by preventing assemblies in certain time and places such as in Poland (revision of the Law on Assemblies to ban certain peaceful demonstrations in the vicinity of "cyclical" pro-government rallies) or in Spain (Organic Law 4/2015 on the Protection of Citizen Security). In some countries, existing legislation has been misused to hamper lawful protests with no effective remedy, such as in Romania.

Use of excessive and indiscriminate use of force has emerged in several countries (France, Hungary, Romania, Spain...). Also the criminalisation of demonstrators through mass arrests, preventive collection of ID, administrative sanctions and excessive criminal charges are factors restricting the right to assembly and the right to protest, especially those related to climate crisis (Austria, Belgium) or migrants crisis (Greece).

In several countries security considerations linked to anti-terrorism measures become prevalent over the freedom of assembly (see for instance Security Law in France). In many countries local authorities give authorisation for demonstrations while they should only require notifications or they ban areas close to Institutions.

Emergency measures linked to the Covid-19 crisis have imposed temporary restrictions on assemblies and demonstrations. However, some of these bans have been considered disproportionate (see court case in Germany) or problematic when the governments have taken advantage of the situation to propose legislation such as in Poland on the restriction of abortion rights, which should undergo a wide public debate.

## **RULE OF LAW IN THE EU**

The European Union is built on the rule of law. The rule of law is one of the common values upon which the European Union is founded and common to all Member States. It is enshrined as such in Article 2 of the Treaty of the European Union. The European Commission, together with other Union institutions and the Member States, is responsible under the Treaties for guaranteeing the rule of law as a fundamental value of our Union and making sure that EU law, values and principles are respected. Access to justice being 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 important part of the [Rule of Law Checklist](#) adopted in 2016 by the Council of Europe's Venice Commission in order to monitor whether rule of law is implemented in Member States in an objective, thorough, transparent and equal manner. However there is concern that the rule of law is at risk in some EU Member States including Poland:

## Judiciary in Poland

In Poland the governing party with the majority in the Parliament, the conservative Law and Justice (PiS) party, have pushed through several radical, and highly controversial, legal changes over the past few years. One of the crucial field that has been changed is judiciary. We believe that the independent judiciary is of utmost importance for democracy and civil society, because it a shield protecting citizens from the possible abuse.

In this context, we consider that the European Commission must take immediate and effective steps to defend universal fundamental values enshrined in the Art. 2 of the Treaty on the European Union, particularly the European Commission must continue to use the Court of Justice of the European Union to challenge the Polish Government's attempts to undermine the independent judiciary in Poland. In addition, EU should include the rule of law conditionality in the management of EU funds.

## Elections in Poland in the Covid-19 situation

Concerns have also been raised over Poland's decision to carry out presidential elections in May by postal ballot to avoid the spread of COVID-19, which critics say may be illegal or unconstitutional. Despite mounting concerns about public safety, Poland's elections scheduled for May 10 are set to go ahead. The government has adopted the changes to the electoral code on April 6, allowing postal voting for all eligible citizens and to introduce other changes to the election code in a process that provided limited possibility for a meaningful debate on changes. The Organisation for Security and Co-operation in Europe's Office for Human Rights and Democratisation, (OSCE ODIHR) raised its concerns about the upcoming presidential elections in Poland "*genuine elections require an authentic campaign in which voters can hear the programmes and opinions of all candidates in order to make a well-informed choice...the current limitations on public gatherings due to the pandemic make campaigning close to impossible. I am concerned that if the presidential election goes ahead under the current circumstances, it may fall short of a number of international standards.*" According to the OSCE commitments, legislation regulating elections should be adopted "at the end of a public procedure" and be "formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives." The Code of Good Practice in Electoral Matters of the Council of Europe's Venice Commission provides that "the fundamental elements of electoral law ... should not be open to amendment less than one year before an election." Also more than 600 Polish judges turned to the Organization for Security and Co-operation in Europe with a letter claiming that "*We're concerned by the threat to basic norms, such as the rule of universal and secret suffrage.*" Given that Poland has no prior experience with such a postal vote and thus no prior preparations in place, the judges argue it will be impossible to ensure that all ballots reach eligible voters and therefore doubt that Polish citizens will have "*a real possibility to cast their vote.*" In an April 27 opinion, [ODIHR called on Poland to introduce changes only to the electoral framework well in advance](#) of elections in order to preserve legal certainty and allow sufficient time for preparations and voter education. On April 8, the co-rapporteurs on the situation in Poland for the Parliamentary Assembly of the Council of Europe recommended [postponing the elections to the second half of this year](#).

Several Polish and international judiciary associations have asked Brussels to take action. “We are writing to you in respect of the worsening breakdown of the rule of law in Poland, as well as specifically in regard to actions that must be taken ahead of the upcoming presidential election,” [the letter](#), addressed to Commissioners Věra Jourová and Didier Reynders, says. “An unfair and not free presidential election is due to take place at the peak of the COVID19 pandemic.”

## Recommendations

**We suggest the European Commission to cover the following issues in the report with a view to the identification of relevant recommendations and follow-up measures:**

1. **Give 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 to promote and, when needed, safeguard the rule of law at European, national and local levels.
2. **Provide a comprehensive and detailed overview on civic space deficiencies in EU Member States**
3. **Include a section on the impact of the covid-19 emergency measures** on the rule of law and on fundamental rights, including **on an enabling civic space**

We believe that this first annual review report should be the start of a long term process and **we call on the European Commission to propose and adopt the following measures as a follow up:**

1. **Include systematically within the annual rule of law review a comprehensive assessment of the civic space in each Member State** within its diverse and interrelated components and its impact on the political system and the rule of law. Such framework should include, at least, a review of the legislative and policy framework and its implementation, including the use of digital technologies, relating to the exercise of civic space fundamental freedoms.
2. **Plan in advance a systematic and regular involvement of civil society actors** as part of the review cycle at the different stages of the process, including by involving them in the design of rule of law reporting structures, reporting consultations, country visits and by requesting civil society feedback on the information received from Member States to make sure the input is complete or merits a request from the Commission for further clarification from national authorities;
3. Allow for a **dialogue with civil society on the outcomes and findings** of the rule of law review cycle, including assessment of this first year exercise and the preparation of the next reporting
4. **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 framework at national/local level.
5. **Establish an alert mechanism** to allow civil society actors to promptly signal to the European Commission serious issues and/or threats regarding civic freedoms. Such alert mechanism should lead to a rapid (re)assessment of the situation allowing for timely and concrete reaction at EU level
6. **Make sure that** when severe **deficiencies on civil society freedoms and civic space** are **identified**, they **are addressed** through existing preventative and

sanctioning tools, including the rule of law framework, infringement proceedings and Article 7 TEU;

7. **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.
8. 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
9. **Set the 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
10. An enabling framework cannot work without 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 next MFF and in the recovery mechanisms linked to the exit from the pandemic crisis**.
11. 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 must enjoy a favourable tax environment also in cross-border contexts.
12. **Audit** areas of EU competence where EU legislation could be proposed to address identified deficiencies related to civic space and promote civil society organizations' rights and freedoms. **These should include** for example **legally binding measures to fight Strategic Lawsuits Against Public Participation (SLAPP) to protect activists and civil society organisations**, alongside journalists, media organisations, academics, trade unions and citizens speaking out in the public interest.

On that basis, we call on the European Commission to **include specific recommendations to member States as to address civic space deficiencies identified with concrete timelines**, including on the urgency to:

1. Ensure a **meaningful involvement of civil society in the discussion and review of the Commission report** with a view to the adoption of follow up measures to address findings and recommendations. This should include holding a public presentation and discussion before national and when relevant regional parliaments.
2. **Promote an institutional culture recognizing the important role played by civil society organisations as watchdogs and representatives of rights holders**, including by setting in place tools and practices to ensure a meaningful participation of civil society representatives when designing and enacting laws and policies. With particular reference to the challenges posed by measures adopted to face the COVID-19 pandemic, this should imply at least:
  - Developing together with civil society and relevant stakeholders/experts a **systematic review of the emergency measures linked to the covid-19 pandemic crisis** and their impact on civic freedoms and fundamental rights, including the use of digital tracking.
  - **ensuring a meaningful consultation and participation of civil society in the development and assessment of exit strategies from the pandemic crisis**

3. **Refrain from adopting regulatory measures impacting on civil society organizations freedoms and civil space;**
4. **Ensure that adequate public support and funding is granted to civil society and rights groups.** Crisis support to the civil society sector should **also be part of recovery measures in the aftermath of the COVID-19 pandemic**, including in critical sectors such as social and health services to persons who are most vulnerable and discriminated, culture, civic participation and the protection of the environment.

## Philanthropy Advocacy – who we are

Philanthropy Advocacy (PA) is a joint project of Donors and Foundations Networks in Europe (DAFNE) and European Foundation Centre (EFC) acting as a monitoring, legal analysis and policy engagement hub for European philanthropy. Institutional philanthropy in Europe includes more than 147,000 philanthropic organisations with an accumulated annual giving of nearly 60 billion euros. Besides funding and investments, these organisations combine an outstanding set of expertise, deep knowledge and excellent stakeholder networks in the areas of their activities that can be leveraged significantly with the appropriate framework conditions.

The main objective of the Philanthropy Advocacy is to promote an enabling environment by implementing the European Philanthropy Manifesto. The Manifesto recommendations include: a better recognition of philanthropy in EU legislation as well as at national level; supports cross-border philanthropy across the EU; and decreases today's barriers for philanthropy in order to leverage the impact of donors' and foundations' spending of private resources for public good.

For further information, do not hesitate to contact:

Max von Abendroth  
Executive Director  
DAFNE - Donors and Foundations Networks in Europe  
Email: [max.abendroth@dafne-online.eu](mailto:max.abendroth@dafne-online.eu)  
[www.dafne-online.eu](http://www.dafne-online.eu)

Hanna Surmatz  
Enabling Environment Manager  
EFC European Foundation Centre  
Email: [hsurmatz@efc.be](mailto:hsurmatz@efc.be)  
[www.efc.be](http://www.efc.be)