

## DAFNE and EFC joint contribution to consultation

21<sup>st</sup> February 2019, Brussels

### DAFNE/EFC comments on draft Dutch act on transparency of civil society organisations of the Netherlands

On behalf of Philanthropy Advocacy, a joint initiative of the Donors and Foundations Networks in Europe Aisbl (DAFNE) and the European Foundation Centre Aisbl (EFC), we are responding to your open invitation to submit comments on the draft Dutch act on *transparency of civil society organisations of the Netherlands* by February 22<sup>nd</sup> 2019.

We understand that the law proposal suggests the obligation for Civil Society Organisations (CSO's) to report on their website all donations of at least 15,000 EUR including the name and residence of the donors. Since such a law would affect the work of some of our members in and outside the Netherlands and would have a wider impact on European philanthropy and civil society, we appreciate the opportunity to provide some initial comments on the above mentioned draft law.

Institutional philanthropy in Europe includes more than 147,000 donors and foundations with an accumulated annual giving of nearly 60 billion euros. Institutional philanthropy alongside the wider civil society, plays a key role in defending and promoting the values enshrined in Article 2 of the European Union (EU) Treaty, which include respect for human dignity, human rights and the rule of law. 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.

We clearly recognise the need to regulate non-government organisations and philanthropic organisations and the flow of philanthropic funding. Countries across the globe are engaged in this activity; however, the new legislation that is being proposed should follow agreed principles, rights and guarantees. In a European Union context those would be:

- **Freedom of Association** (covered in Article 11 European Convention of Human Rights (ECHR) and Article 22 International Convention on Civil and Political Rights (ICCPR) and also Article 12 of the Charter of the Fundamental Rights of the EU (CFR))
- **Right to Private Life / Privacy** (Article 8 ECHR and Article 17 ICCPR and Article 7 CFR) and **Protection of Personal Data** (Article 7/8/12 CFR and **General Data Protection Regulation (GDPR)**)
- **Free Movement of Capital** in the Treaty of the Functioning of the EU

## 1. Potential conflicts with human/fundamental rights and EU law

We have worked with legal experts (in particular the European Center for Not-for Profit Law (ECNL)) to analyse the **Dutch law and its potential conflicts with human/fundamental rights and EU law** and we explicitly refer to and endorse the separate more in-depth legal ECNL analysis available here: [http://ecnl.org/wp-content/uploads/2019/02/ECNL-Submission-on-the-Dutch-Draft-Act-on-Transparency-of-CSOs-Feb-2019\\_final.pdf](http://ecnl.org/wp-content/uploads/2019/02/ECNL-Submission-on-the-Dutch-Draft-Act-on-Transparency-of-CSOs-Feb-2019_final.pdf). We have concerns that the draft Act would conflict with the Freedom of Association as well as privacy rights of the donors whose names and residence would be published.

The **right to freedom of association** covers a wide range of civil society organisations including foundations and it includes the right to access and to distribute resources<sup>1</sup>. We conclude on the basis of the above mentioned ECNL analysis that the tighter reporting requirements and requirement to publish donors' data is a restriction to the Freedom of Association. First of all, any restriction to the Freedom of Association must be prescribed by law but the criteria for exempting certain types of organisations appears too vague on that point. While the draft law may be based on the legitimate aims to help combat criminal behaviour such as money laundering and terrorism financing, we argue in the analysis that the fight against "undesirable behaviour and undesirable influences" is not a legitimate aim in this human/fundamental rights context. Furthermore, we are also of the opinion that additional reporting and publishing of donor information as suggested in the draft act is neither necessary nor proportionate to achieve the stated aims. Restrictions are only permissible if they refer to a concrete risk/threat and this does not appear to be the case in the draft law in question. Another question is whether tighter reporting rules and disclosure of donor information are even appropriate to achieve the stated purpose. Secondly, blanket bans or requirements are usually not in line with the principle of proportionality. In addition, there should in any case be consideration of less intrusive rules. The analysis also suggests that the sanctions for breaches with the draft act seem disproportionate.

There is also clear concern that publication of information and details about the name and residence of donors are impacting the **right to private life and is in conflict with the EU General Data Protection Directive**. Generally, when regulating reporting of civil society organisations, governments should respect privacy rights of donors, beneficiaries and staff as well as the right to protect legitimate business confidentiality. In the context of developments in Hungary, the Venice Commission has, in 2017, considered the public disclosure of the identity of donors to be excessive and unnecessary in particular with regard to the requirements of the right to privacy (opinion 20 June 2017 pa 53). Data collection and processing also have to follow EU standards such as the General Data Protection Regulation (GDPR). The analysis also raises potential restrictions to the **free movement of capital** within the EU.

## 2. Regulation in line with transparency and accountability regulation in Europe.

Our own **comparative analysis work around philanthropy and foundations** suggests that in a European context governments appear to provide for an enabling environment for philanthropy space, generally respecting freedoms and privacy rights of donors. Countries have generally not included public reporting/disclosure on donors' private data in their

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<sup>1</sup> Van Veen, Civil Society in Europe and the European Convention on Human Rights in *Civil Society in Europe* editors: van der Ploeg, van Veen, Versteegh (2017) Cambridge University Press, P. 25 f with further references

schemes, though reporting on donations as such to public authorities (be they tax or supervisory authorities) is done in some countries. Recent mappings done by national experts have confirmed this analysis.

The European Foundation Centre (EFC) has, in 2015, published a comparative overview of the diverse legal and fiscal environments of foundations in 40 countries across wider Europe. In 2018/2019, the EFC joined forces with the Donors and Foundations Networks in Europe (DAFNE) to map more recent developments with regard to transparency and accountability regulation around institutional philanthropy (<http://efc.issuelab.org/resource/comparative-highlights-of-foundation-laws-the-operating-environment-for-foundations-in-europe-2015.html>). This comparative mapping shows that foundations are generally subject to reporting requirements and supervision, which are covered by a mix of foundation law (or charity law)/tax law and other laws (e.g. money laundering laws other laws) – however in most cases taking into account privacy rights and data protection. In 2011, the EFC and DAFNE also engaged in an analysis that concluded that existing public regulation and self-regulatory frameworks provide for appropriate and sufficient checks and balances to ensure that the sector is transparent and held accountable. <http://efc.issuelab.org/resource/exploring-transparency-and-accountability-regulation-of-public-benefit-foundations-in-europe.html>

**From a comparative perspective across Europe, the Netherlands** have always been considered to provide for a liberal, flexible and attractive environment for philanthropy and civil society, both for local organisations and also for foreign donors and actors. This of course comes with appropriate checks and balances but no heavy red tape and generally taking into account human/fundamental rights, including privacy rights and data protection. Donors and foundations inside and outside the Netherlands take note that the proposed changes would shrink the space for philanthropy in the Netherlands and beyond, and hence have a detrimental effect on its ability to do public good.

While our analysis suggests that overall European countries provide for a good environment for philanthropy and civil society, there is growing evidence indicating that **regulation as well as the wider political climate are increasingly challenging civil society and philanthropic actors' activity** – whether deliberately or unintentionally in several European countries. Regulatory constraints on civil society, including philanthropy, can stem from the desire to protect national sovereignty (e.g. requiring recipients of foreign funding to be labelled as foreign agents), security and terrorism or financial crime prevention. But there are also differing views on the legitimacy and role of civil society and philanthropy and an increasing hostile climate in some countries, in particular when it comes to engaging in political activities and cross-border activities generally. We have recently seen foreign funding restrictions being introduced for the first time with the European Union - in Hungary, which runs counter to European values and principles. Then we also see that governments struggle with finding an appropriate and proportionate approach to international and European security policy. Clearly, national laws as well as EU level policy must be in line with fundamental rights and values, and EU Treaty Freedoms. National and EU level rules on tax evasion, money laundering and counter-terrorism financing rules must be proportionate to the risks they seek to address and must not unduly restrict legitimate charitable activities (see also the January 2018 joint

DAFNE-EFC study on enlarging the space for philanthropy<sup>2</sup>). Also taking into account a slightly changed climate for philanthropy space in Europe, this year we felt the need to launch a joint DAFNE-EFC **Philanthropy Advocacy Initiative which aims to ensure an enabling environment for institutional philanthropy.**

Philanthropy and philanthropic organisations are a **critical part of our democratic and pluralistic societies.** Many individuals and philanthropic organisations support endeavours from which we all benefit, such as education, health, science, international development, environment, culture and fighting poverty. Philanthropy's contribution to society is therefore unique and this must be cherished, stimulated and acknowledged. Recognition by politicians and governments is crucial, especially now, when citizenship, participation and caring for each other are more important than ever in light of the serious challenges to these democratic ideals in some parts of Europe. Philanthropy, alongside the wider civil society, plays a key role in defending and promoting the values enshrined in Article 2 of the EU Treaty, which include respect for human dignity, human rights and the rule of law.

Philanthropy needs a policy and regulatory environment that allows it to unleash its full potential and we hope that the Netherlands can continue to be the benchmark for an enabling philanthropy space in a European context.

### **3. Negative effects on philanthropy and wider civil society:**

We are concerned that the proposed draft law, in particular the suggested public reporting of donors/donations, would send the wrong signals and would have devastating consequences for funders and CSOs in the Netherlands and wider Europe. The obligation to publish the names and addresses of donors is likely to have a **chilling effect on donors** and could lead to a severe drop in donations for many CSOs. Donors often donate to causes linked to their passion or concern and may not always wish the public to know that they are associating themselves with a particular issue. Or they may not wish the public to know how much resources they have to donate. **Some donors may face a higher risk** of harassment and attacks on their reputation or even their physical well-being as a result of the forced disclosure of information on their donations.

To summarise the above, we are concerned that the draft law:

- conflicts with human/fundamental rights and EU law
- is not in line with the overall environment for philanthropy in Europe
- puts at risk the status of the Netherlands as a philanthropy-friendly environment country
- will have a significant chilling effect on donors and philanthropy in Europe.

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<sup>2</sup> Breen, Oonagh B., "Enlarging the Space for European Philanthropy", published by the EFC and DAFNE, 2018. (<http://efc.issuelab.org/resource/enlarging-the-space-for-european-philanthropy.html>)

Thank you again for giving us an opportunity to participate in the consultation process and we hope that you will take our concerns into account.

Yours sincerely,



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Chief Executive  
EFC



Max von Abendroth  
Chief Executive  
DAFNE

### About Donors and Foundations Networks in Europe (DAFNE)



DAFNE is Europe's largest network of donors and foundations associations. With 26 member associations with a collective membership of more than 10,000 foundations and grant-makers, DAFNE is a leading voice of European foundations. It underpins individual activities of its members by encouraging dialogue and collaboration between the national associations. DAFNE is currently chaired by Felix Oldenburg, General Secretary of the Association of German Foundations.

EU Transparency Register ID: 060243428664-85 [www.dafne-online.eu](http://www.dafne-online.eu)

### About the European Foundation Centre (EFC)



As a leading platform for philanthropy in Europe, the EFC works to strengthen the sector and make the case for institutional philanthropy as a formidable means of effecting change. We believe institutional philanthropy has a unique, crucial and timely role to play in meeting the critical challenges societies face. More people and causes benefit from institutional philanthropy than ever before, from eradicating deadly diseases and making the world's populations healthier to combating climate change and fighting for global human rights and equality. Working in close collaboration with our members, a dynamic network of strategically-minded philanthropic organisations from nearly 40 countries, we:

- **Foster peer-learning** by surfacing the expertise and experience embedded in the sector
- **Enhance collaboration** by connecting people for inspiration and joint action
- **Advocate** for favourable policy and regulatory environments for philanthropy
- **Build a solid evidence base** through knowledge and intelligence
- **Raise the visibility** of philanthropy's value and impact

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