**Philanthropy Advocacy (Dafne/EFC) comments on the draft Dutch act on transparency of civil society organisations of the Netherlands *(Wet Transparantie Maatschappelijke Organisaties)***

29 June 2021

To whom it may concern,

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* ***/Wet Transparantie Maatschappelijke Organisaties*** by June 29th 2021:

Since the draft 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.

We consider that past discussions and consultations (we also submitted a response to the previous consultation on the original draft law in 2019) were used to improve the first draft of the law as it was initially presented in 2019. Some very worrying elements were taken out such as the publication requirements for certain donations and donor information and the focus on outside EU donations.

We also wish to stress again that we recognise the need to regulate non-government organisations and philanthropic organisations and the flow of philanthropic funding with risk-based and proportionate measures and legislation. However, such legislation should follow agreed principles, rights and guarantees in a European Union context and should not put unnecessary burdens on the sector.

Following an initial assessment and after consulting with legal experts and the sector, we are concerned that the draft law would:

- Have negative consequences on funders and public-benefit organisations in the Netherlands and in wider Europe, and hence limit their roles and contributions to society.
- Put at risk the status of the Netherlands as a philanthropy-friendly environment and as a strong defender for safeguarding civic space in Europe.
- Not be in line with the overall existing enabling environment for philanthropy in Europe and approaches with regard to transparency and accountability.
- Conflict with EU Treaty freedoms, the Charter of the Fundamental Rights of the EU, the European Convention of Human Rights EU law, and rule of law principles.

## I. General comments

Institutional philanthropy in Europe includes more than 147,000 donors and foundations with an accumulated annual expenditure 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. 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. This must be cherished, stimulated and rewarded persistently. Recognition by politicians and by 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, freedom, democracy, equality, the rule of law and human rights, including the rights of persons belonging to minorities.

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** and a **defender of the rule of law and safeguarding civic space in a European context.** We are concerned that the proposed draft law would have negative consequences for funders and public-benefit organisations in the Netherlands and in wider 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 that generally respects the freedoms and privacy rights of donors. The EFC has in 2015 published a comparative overview of the diverse legal and fiscal environments of foundations in 40 countries across wider Europe:

A new joint Dafne and EFC edition of this comparative analysis work is in the pipeline and will be published this year. From this comparative mapping it follows 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). The EFC and DAFNE analysis 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.

While our analysis suggests that overall, European countries provide a good environment for philanthropy and civil society, there is growing evidence indicating that in several of them, **regulation as well as the wider political climate are increasingly challenging these actors' activity** – whether deliberately or unintentionally. Regulatory constraints on civil society, including philanthropy, can stem from the legitimate desire to prevent the sector from terrorism financing or other criminal behaviour. We also see that governments struggle with finding an appropriate and proportionate approach to transparency and accountability regulation in line with international and European security policy.

Clearly, national laws as well as EU-level policy should facilitate cross-border philanthropy in line with EU fundamental rights and values, and 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[1]. When Hungary for the first time introduced foreign funding restrictions, the European Court of Justice condemned it for unlawfully restricting the foreign financing of civil organisations[2].

**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, also for foreign donors and actors with appropriate checks and balances but no heavy red tape. Donors and foundations inside and outside the Netherlands take note that the new law would shrink the space for philanthropy in the Netherlands and beyond and create some legal uncertainty.

## II. Specific comments on the draft law articles

We have worked with legal experts (in particular the European Center for Not-for Profit Law (ECNL) to analyse the draft **Dutch law** and we explicitly refer to the separate analysis available here and to our joint ECNL/EFC/Dafne guidebook on EU law and civil society space

We would like to highlight some concerns around the draft law below:

**National regulation and the Dutch new transparency law should be in line with EU law (including European core values such as democracy, rule of law and fundamental rights/Treaty Freedoms and Charter of the Fundamental Rights of the EU) and the European Convention of Human Rights, and should respect European core values.** Our

[1] 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)

[2]

initial analysis suggests that specific attention should be given to ensure that the Dutch draft law is in line with the:

- **European core values in Article 2 of the TEU such as** equality, the rule of law and human rights, including the rights of persons belonging to minorities.

  *Art.2*

  *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".* The core principles underlying democracy, the rule of law and pluralism within the meaning of Article 2 TEU include enhancing participation and enabling civic space. The rule of law is not only in danger when a government directly undermines judicial independence, or when corruption directly impacts decision-making, but in some European countries also when it makes it impossible for civil society to scrutinise its actions. Limitations to the rule of law often appear to go hand in hand with restrictions on civic space and erosion of fundamental rights. A shrinking civic space with legal or practical restrictions on freedom of assembly, association and expression and the right to participation is an important indicator of a weakening rule of law environment. The Treaties and EU institutions acknowledge that a free civil society is essential for making the values enshrined in Article 2 TEU, including democracy, human rights and the rule of law, a reality, and for raising public awareness about their significance and existing challenges. This has been reaffirmed in the Commission Communication on Further Strengthening the Rule of Law within the Union (COM(2019) 163), as well as the European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886(RSP)). This is all the more urgent against the background of a worrying trend of restrictive measures in some Member States negatively affecting civic space and the ability of civil society actors to carry out their legitimate tasks.

- **Right to property** – restrictions of the right to property such as the right to transfer property must comply with Article 1 first protocol to the European Convention of Human Rights (ECHR) – There is concern that the transfer of property acquired wrongfully, as suggested in Article 4a of the law, could be in conflict with the right to property in particular since the law in place that limits the right to property does not include well-defined criteria and is too vague (the concept of "undermining the democratic order" is not clear cut and it is not clear if the measure is proportionate; no lighter means are there to achieve the desired effect; and proper checks & balances must be put in place).

- **Freedom of religion or belief** (Article 9 ECHR)/**Freedom of expression** (Article 10 ECHR) The law will also need to be carefully checked with regard to the freedom of religion or belief and freedom of expression. Those freedoms can be limited obviously if they are "undermining the democratic order", but that must be very well defined, given the fact that freedom of religion and expression are very important rights and values.

- **Right to Private Life / Privacy** (Article 8 ECHR and Article 17 ICCPR and Article 7 CFR) CSOs, including philanthropic organisations and their funders, have privacy rights, which

protect 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 introduced, or are considering to do so, 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. This freedom should be recognised for philanthropic organisations and donors as going against it would bring 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.

- **Protection of personal data** (Article 8 CFR and General data Protection Regulation (GDPR) 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 of restrictions to the free movement of capital within the EU.

- **Free Movement of Capital** in the Treaty of the Functioning of the EU - free movement of capital (Articles 63-66, TFEU). Restrictions to foreign philanthropic flows are protected by the free movement of capital.

- **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))

  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[3]. We consider that requirements to report on 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 selection appears too vague on that point. While the draft law is 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 any additional measures must be necessary and proportionate to achieve the stated aims. Restrictions are generally 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. In addition, there should always be consideration of less intrusive rules.

[3] 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

**With regard to the Freedom of Association** the European Court for Human Rights puts tight requirements for justifying restrictions to the freedom of association and the following, which have to be carefully assessed here:

> *58. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively (see Gorzelik and Others, cited above, § 92).*
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> *59. Given that the implementation of the principle of pluralism is impossible without an association being able to express freely its ideas and opinions, the Court has also recognised that the protection of opinions and the freedom of expression within the meaning of Article 10 of the Convention is one of the objectives of the freedom of association (see Gorzelik and Others, cited above, § 91). Such a link is particularly relevant where – as here – the authorities' intervention against an association was, at least in part, in reaction to its views and statements (see Stankov and the United Macedonian Organisation Ilinden, cited above, § 85 in fine).*
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> *60. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (ibid., § 86; and Ceylan v. Turkey [GC], no. 23556/94, § 32, ECHR 1999-IV, with further references).*
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> *61. Consequently, the exceptions set out in Article 11 are to be construed strictly; **only convincing and compelling reasons can justify restrictions on freedom of association.** In determining whether a necessity within the meaning of Article 11 § 2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts (see Sidiropoulos and Others, cited above, ibid.)[4]"*

[4] See The United Macedonian Organisation Ilinden and others v. Bulgaria (Application no. 59491/00)

The following specific elements of the draft law give rise to concerns as follows:

- The draft law entails different threat scenarios: on the one hand threats to the **"public order"** , see Article 3 or threats to the **"democratic state under rule of law"**, see Article 4a. Hence questions come up whether these concepts are sufficiently defined and clear cut (hence **in line with the rule of law principles**). According to Article 3, the Mayors can act on grounds of **maintaining public order** in their municipalities. We are not sure how the public order concept ties with the concept of a democratic state under rule of law. What is the exact difference between these two concepts?
- According to Article 3.1., the Mayor is given powers for demanding information on the **geographical origin, purpose and extent** for one or more donations with the aim to maintain public order. The Mayor can in case of "substantial" donations also **request personal data** if needed for the maintenance of public order. It is not clear when a donation is substantial in this context. From the perspective of a breach of **privacy rights of CSOs and donors,** such wide **discretionary power may not be proportionate.** There is also concern as to whether the draft Act is in line with **the rule of law principle**. The Mayor is given powers with a large margin of interpretation and this **creates legal uncertainty** due to lack of clear criteria on what may constitute an indication of risk or disruption. [Notably because there are around 300 municipalities in the NL, each have their own mayor] **There is also room for potential discriminatory application** as it will be left to the Mayor to apply the act based on each individual situation and own judgment; In this context also **checks and balances** must be provided. CSOs need to have a **remedy to challenge the decision of a mayor** via an independent court who would review the decision.
- **A wide group of CSOs will be potentially affected**. The draft Act aims to narrow the target group to only those organisations that are potentially a threat to public order. However, the decision on which are those CSOs is left to the Mayor, the public prosecutor and other authorities. Moreover, the draft Act does not provide for clear criteria that will guide the authorities to decide.
- Article 3.2 also enables the Mayor to process personal data which may show **religious or philosophical believes** and there is concern that this conflicts with the **freedom of religion and beliefs and freedom of expression** and is not sufficiently explained why such data should be collected to address what type of risk etc. Furthermore, it can disproportionately affect certain religious (minority) groups and, hence, could be **discriminatory.**
- In this context it is also relevant that Mayors can bolster their requests under **threat of a penalty.** Pursuant to the explanatory memorandum, the General administrative law (Algemene wet bestuursrecht or Awb) is not applicable to the request for information, consequently the **protection provided by that law, including challenging it in an administrative court of law, would not apply**. How could a CSO challenge such an information request in a court, prior to being "served" a

penalty or another measure? The requirement of adequate **protection against *abus de pouvoir*** is an issue to raise in this context.

- **According to Article 4** of the draft law, the public prosecutor is granted rights to request information in case of **"serious doubts",** a concept which is not further specified and hence creates potential room for arbitrary and unclear application.
- **Article 4a introduces the court to order at the request for the public prosecutor the following measures:**

  a. an order to periodically **report all or specified categories of donations** to the public prosecutor's office for a period of up to three years to be determined by the court;
  b. the **freezing** of one or more goods for a maximum period of one year, which shall lapse by operation of law after the expiry of this period, unless a request for renewal has previously been granted;
  c. a **ban of up to two years from receiving certain donations** or certain specified categories of donations; or
  d. the **return of donations**, the deposit in a third-party money account designated by the court or the forfeiture to the state of certain donations or goods of the social organisation.

  **The criteria for such measures to be put in place are however not very clear cut:** *"(…) if it is plausible that a social organisation receives donations and carries out **activities** aimed at undermining or clearly threatening to undermine the **Dutch democratic rule of law** and these measures are **necessary to avert** this undermining to a sufficient extent."* Article 4a (1).

  In terms of measures suggested, the prohibition of receiving certain donations and return of donations are more intrusive than others and should only be considered if less drastic measures have not had the desired effect.

  Furthermore, the draft Act does **not provide for clear legal remedies** that are available for CSOs in case an organisation is considered to be a threat to public order or democratic rule of law. Such lack of control mechanisms and clear criteria leads to the regulatory situation contrary to the rule of law principles and enhances potential for arbitrary implementation.

  We acknowledge that if the case is being brought to Court by the public prosecutor, the CSO will automatically have a remedy which includes contesting that they are a threat (since the judge would need to assess this aspect before deciding on whether or not to order measures). However, this is not the case at an earlier stage, which is when authorities require a CSO to disclose information on donations and donors. In order to prevent unnecessary restrictions/burdens on CSOs, a clear remedy should be made possible regarding the decision of the authorities (mayor, pp, etc.) so they can contest the assumption of the authorities that this CSO is a threat.

- **According to Article 5 of the draft Act, intermediaries are obliged to provide name, place of residence/registered office, country of their clients.** The draft Act potentially **violates the right to privacy** as it requests all intermediaries to obtain private information in advance about the donors of CSOs (name, private residency/seat, country) regardless of whether there is justified reason for further scrutiny by the Mayor and other authorities. This puts a burden on such organisation to obtain and verify information. At the same time this may deter individual donors from providing funding because they may not be willing to provide information on their private address without clarity on how it will be used. It will potentially **create reluctance and discourage support to CSOs** among funders from abroad or intermediary organisations based in the Netherlands.

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

- Have negative consequences for funders and public-benefit organisations in the Netherlands and in wider Europe and hence limit their role and contribution to society.
- Put at risk the status of the Netherlands as a philanthropy friendly environment and as a strong defender for safeguarding civic space in Europe.
- Not be in line with the overall existing enabling environment for philanthropy in Europe and approaches with regard to transparency and accountability.
- Conflict with EU Treaty Freedoms and the Charter of the Fundamental Rights of the EU and the European Convention of Human Rights EU law and rule of law principles.

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 when finalising the law.

Yours sincerely,

Dafne Executive Director
Co-lead Philanthropy Advocacy
www.dafne-online.eu

EFC Enabling Environment Manager
Co-lead Philanthropy Advocacy
www.efc.be

**Philanthropy Advocacy**
The Dafne and EFC joint advocacy project "Philanthropy Advocacy" acts as a monitoring, legal analysis and policy engagement hub for European philanthropy. Its main objective is to shape the national, European and international legislative environment by implementing the European advocacy roadmap for a Single Market for Public Good, to unleash private resources for European solidarity.
Please find more information on

**Donors and Foundations Networks in Europe (Dafne)**
Dafne brings together 30 national associations across Europe, representing over 10.000 public-benefit foundations, big and small, who want to make a difference to society. We lead, strengthen and build the field for the common good in Europe. We believe that an independent and courageous philanthropic sector can be a catalyst for a just and equitable society, where all can participate and prosper and have a voice, from the most marginalised to the most privileged. Philanthropy is vital for a resilient, inclusive and sustainable Europe.

Dafne is involved in four key areas: advocacy, peer exchange, communications and research that are needs-based and future-oriented. Our story began 15 years ago – out of the desire to connect and facilitate exchange in the growing field of European philanthropy. We developed from an informal peer exchange organisation to a leading voice of European philanthropy.

Dafne and the EFC jointly lead the Philanthropy Advocacy project. Please find more information on www.dafne-online.eu
**European Transparency Register:** 075961340619-25

**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. Working closely with our members, a dynamic network of strategically-minded philanthropic organisations from more than 30 countries, we:

- Foster peer-learning by surfacing the expertise and experience within the sector
- Enhance collaboration by connecting people for exchange 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

The EFC and Dafne jointly lead the Philanthropy Advocacy project. Please find more information on www.efc.be
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