

# **Improving the tax- deductibility of philanthropic cross- border donations for nature conservation in the EU**



**ENPLC**

European Networks for  
Private Land Conservation





Scan me



# Improving the tax-deductibility of philanthropic cross-border donations for nature conservation in the EU

Report



**European Networks for  
Private Land Conservation**

**Final version:** 02.10.2023

**Authors:** Anne-Sophie Mulier, ELO; Carolina Halevy, Eurosite; Dr. Tilmann Disselhoff - NABU

**Support by:** LIFE ENPLC Conservation Finance Working Group

The ENPLC project has received funding from the European Union's LIFE programme under grant agreement LIFE19 PRE/NL/000003

[www.enplc.eu](http://www.enplc.eu)

Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or CINEA. Neither the European Union nor the granting authority can be held responsible for them.

## Introduction – philanthropic nature conservation in the EU, a legal patchwork

Since its inception, the European Union has had the objective to create a single market for goods, capital, services, and people. European institutions and member states have had mixed success in reaching this goal. While this year we celebrate the 30th anniversary of the Single European Act, which established a single market for trade and investments in the EU, we are still far away from a level playing field for civil society organisations. Although the Treaty on the Functioning of the European Union (TFEU) prohibits discrimination on grounds of nationality, the reality is that depending on their place of residence, philanthropic organisations, their supporters, and their beneficiaries are treated very differently across the EU. This can be traced back to different traditions regarding the relationship of the state and civil society, different approaches towards private action for the public good, and as a result, different legal traditions regarding philanthropy in the various EU member states. To this date, even after decades of European integration, the heterogeneity of charity law in the EU has not been resolved. There is not even a common legal definition of the term “philanthropic organisation” in the EU.

The absence of a common legal framework for the philanthropic sector in the EU is felt sorely when it comes to biodiversity policy. For decades, international and national public authorities have consistently underperformed in the implementation of nature conservation legislation and policy. Public funding and capacity have always fallen short of the levels necessary to reach stated objectives. In the field of nature conservation, voluntary action by civil society organisations and private citizens has traditionally helped to close this capacity gap. This has been recognised by EU member states, most of which have added nature conservation to the list of charitable causes, thereby giving preferential tax treatment to philanthropic nature conservation organisation and citizens and corporations that donate to them. But national tax legislation regarding charities has not yet been harmonised on the EU level.

The result is schizophrenic. EU citizens, their economic activities, professional networks, and personal relationships, their land ownership, and their connection to nature have steadily become more mobile and international, while their ability to support nature conservation (or other philanthropic causes) across borders has hardly improved. For example, a Belgian businesswoman living in Antwerp may ride her bike to a nature reserve in the Netherlands after work, spend the weekend at her holiday home in a Natural Park in the French Ardennes and visit a bird sanctuary in Spain during her winter holidays. But from a practical point of view, she has no financial incentive to support a nature conservation organisation outside Flanders that protects and manages the natural places she cares about.

This is unfortunate, as a transboundary perspective is vital for achieving EU biodiversity policy goals. It's a truism that nature knows no borders. Land uses in one place have impacts elsewhere. Species migrate, habitats shift their distribution patterns. Accordingly, nature conservation organisations tackle issues that do not stop at administrative boundaries. What's the use of conserving the breeding habitat of an endangered bird population if its

wintering grounds are destroyed? A transboundary perspective is an essential prerequisite for answering most current conservation problems.

But such a perspective is not only advantageous for most conservation issues. It is also beneficial for nature conservation NGOs themselves – especially for those operating in European countries with a less developed philanthropic sector (which happen to also be the countries that host much of the EU's biodiversity). If a conservation NGO can frame its activities as relevant in a larger context, it will be better equipped to solicit donations from foreigners and thereby broaden its support base. EU member states thus have multiple reasons to help domestic nature conservation NGOs strengthen their European perspective.

Luckily, they do not have to start from scratch. Despite the legal patchwork ruling philanthropy in the EU, member states share a couple of common denominators. Most importantly, almost all consider nature conservation to be of public benefit and provide tax incentives for charitable donations to nature conservation NGOs. This is a good starting point. According to the logic of the single market, such tax incentives should be applicable for donations to all eligible philanthropic organisations, regardless of whether they are registered in the same country as the donor or in another EU member state. This non-discrimination principle has been affirmed in a series of rulings by the European Court of Justice. But unfortunately, reality still looks very different. Many EU member states have been slow to reform their charity law to align it with the non-discrimination principle, and those member states who do no longer discriminate against foreign charities and their donors continue to pose administrative barriers and legal uncertainty on them. The fragmentation of charity tax law and its implementation across national (and sometimes regional) administrative boundaries in the EU thus continue to be a disincentivising environment for donors who want to support nature conservation organisations outside their own jurisdiction.

A key issue is the “comparability test”. EU member states that have reformed their tax laws now offer tax incentives for donations to foreign-based charities, but only if proof is provided that the foreign organisation receiving the donation is comparable to an eligible resident charity. However, most members states do not provide formal or legal guidance on how this comparability test should be applied. Tax authorities must decide case by case whether a donation to a foreign NGO is eligible for a tax deduction. The burden of proof lies with the donor who must provide all relevant documents of the recipient charity (statutes, annual reports) and sometimes needs to translate them into a language the tax authority can read. This cumbersome and risky process means that donors shy away from working with foreign-based charities because of the resulting administrative burden.



## Towards a European single market for charitable giving

The aim of LIFE ENPLC was to develop policy recommendations for EU member states on how to foster the transboundary dimension of philanthropic activities in the nature conservation sector by improving incentives for cross-boundary donations. As a first step, it planned to compile a comparative overview of how national tax laws in the EU incentivise charitable donations to nature conservation NGOs, both for domestic and in other EU member states. Secondly, LIFE ENPLC intended to identify the main obstacles for cross-border charitable donations and options for overcoming them.

Since the design of the project in 2019, however, important steps have been taken by other initiatives and organisations in the same direction. In 2020, the OECD issued its report “Taxation and Philanthropy” providing a detailed review of the tax treatment of philanthropic entities and charitable giving in 40 OECD member and participating countries, in both a domestic and cross-border context. In 2021, Philea, the Philanthropy Europe Association published an up-to-date comparative overview of the legal and fiscal environments for foundations across 40 European countries. Its report “Comparative Highlights of Foundation Laws: The Operating Environment for Foundations in Europe 2021” outlines what forms of tax incentives exist to encourage philanthropic organisations and charitable giving and how this differs across the continent for both domestic and cross-border cases. These publications had the same scope as what LIFE ENPLC planned to do in the context of comparative studies.

Secondly, the European Parliament started a legislative initiative in 2020 titled “A statute for European cross-border associations and non-profit organisation”. As part of this initiative, the European Parliament commissioned two studies, which investigated the consequences of introducing a legal basis for non-profit organisations on EU level regarding the tax treatment of cross-border donations. The first study by Fici (2021) “A statute for European cross-border associations and non-profit organizations – Potential benefits in the current situation” concluded that the benefit of such a statute would be enormous, as organisations holding the status/label would be recognised by all member states, regardless of the country of their incorporation. Any member state would be required to grant foreign organisations holding the status the same benefits, rights and obligations as national organisations holding the status; this would also apply to the tax treatment of donations. The second study by Müller and Fernandes (2021) reiterated that the current practice of leaving the “comparability test” to the individual tax authorities results in a “prolonged and costly process that is often difficult for smaller organisations to handle. [NGOs thus] face significant administrative costs and barriers.” The authors recommend policy action on EU level but concede that any harmonisation of the legal landscape for charities in the EU remains a challenge, as Article 114 of the TFEU, which provides the legal basis for harmonisation measures regarding the internal market, does not apply to fiscal provisions.

Despite the cautious tone of the latter study, the European Parliament, in its resolution of 17 February 2022, requested the European Commission to submit proposals for a regulation

establishing a statute for a European Association and for a Directive on common minimum standards for non-profit organisations in the European Union.

In reaction to the European Parliament resolution, the European Commission held a public consultation on cross-border activities of associations in the single market, which ended in November 2022. The responses to this consultation confirmed the need of policy action at EU level to improve operation of charities across different member states in the EU harmonising tax treatment for cross-border donation. Tax-related restrictions were considered the most dissuasive current aspect of engaging in activities across borders, with 47% of the respondents stating that they face difficulties in obtaining recognition of tax benefits by competent authorities of other member states. Several causes were mentioned as potential challenges:

- lack of recognition by member states of a foreign association's status,
- lack of knowledge/understanding of foreign legislation,
- lack of administrative procedures for philanthropic cross-border activities,
- incompatible legislation between member states.

Most respondents concluded that minimum standards for the treatment of cross-border philanthropic operations in the EU are urgently needed. The European Commission is now preparing a legislative proposal and related impact assessment in reply to the European Parliament's request. The publication of both documents was originally planned for the second quarter of 2023.

In this context of renewed public and political interest on EU level regarding the harmonisation of charity law and the tax treatment of cross-border charitable donations, the project LIFE ENPLC organised a webinar in early 2023, which had 102 online participants from 29 countries. The webinar covered three aspects:

- a) Meenakshi Fernandes of the EP Directorate-General for Parliamentary Research Services summarised the political state of play regarding the tax-deductibility of philanthropic cross-border donations for nature conservation in the EU.
- b) Anne-Laure Paquot of Transnational Giving Europe discussed options for conservation NGOs and their donors to improve their transboundary activities under current conditions, using available workarounds and support services by international philanthropic networks.
- c) Phil Tabas of The Nature Conservancy and Nat Page of Fundatia ADEPT took detailed looks at cross-border land conservation activities in two case studies from the US and Romania.

The recording of the webinar and the slides of all presentations can be found on the project's website (<https://enplc.eu/cross-boundary-donations/>).



## Conclusion

The LIFE ENPLC webinar showed that despite the lack of a single market for charitable cross-border transactions in the EU, European cross-border philanthropy, particularly for environmental causes, are increasing. This trend is facilitated by intermediaries such as Transnational Giving Europe, the Charities Aid Foundation, Global Giving, and the King Baudouin Foundation, who transfer donations across borders while giving donors access to domestic tax deductions. Such intermediaries typically charge a fee for their service. For example, Transnational Giving Europe asks for a fee of 5% of the donation up to EUR 100,000 and 1% above this sum, capped at a maximum fee of EUR 15,000.

Another “work-around” to today’s administrative challenges of cross-border giving is the establishment of subsidiaries or franchises in several countries by the charitable recipient of donations. This model has been developed particularly for nature conservation purposes in North America, where organisations such as the American Friends of Canadian Conservation are registered as domestic “501 (c) (3) non-profit organisation” under US law and as “prescribed donee” under Canadian law, enabling them to hold title to land in Canada or to transfer land to a registered charity in Canada for conservation purposes. In Europe, some conservation foundations such as Fundatia ADEPT are registered in several countries (in this case the UK and Romania), which allows them to operate across borders more freely.

As we need more philanthropic money to resolve the climate and biodiversity crises, we welcome legal reform facilitating a transparent and equitable treatment of donations across borders. Simplifying and harmonising national NGO and tax law in the EU and removing bureaucratic red tape would allow many European conservation organisations to dramatically improve their operations. However, we acknowledge that efforts on EU level are hampered by the fact that in most member states, charity law is largely part of the tax legislation, for which the EU has very limited legislative authority. While company law in the EU is regulated by EU Directives and Regulations that national legislation must comply with, there is no such unifying legal basis for charities. The lack of a legal statute for philanthropic organisations at Union level thus continue to prevent non-commercial interests to be on equal footing with commercial undertakings and economic interest groups. Nevertheless, we support the European Parliament’s legal initiative to create a statute for European non-profit organisations.

An area that has received hardly any attention in Europe yet is the tax treatment of cross-border in-kind donations, particularly donations of properties or land use rights. The US and Canada have developed an elaborate system of federal and state tax incentives for donating permanent land use restrictions to eligible recipients in the form of “conservation easements”. While the use of conservation easements is gaining momentum in the Europe (see <https://enplc.eu/conservation-easement/>), there have been no known cases to date in Europe of treating conservation easements as in-kind donations, let alone cases of across country borders. We consider this an important area of future research and policy development. There is a growing constituency of conservation-minded second-home landowners owning property outside their country of residence who may be inclined to dedicate their property or parts of it to nature by permanently restricting land its use to activities compatible with conservation objectives. Being able to codify such restrictions in

the form of a conservation easement donated to a local charity and claiming a tax-deduction for such a donation could dramatically increase the pace and scale of private land conservation in Europe.

## Literature

European Commission. (n.d.). *Single market – Proposal for a legislative initiative on cross-border activities of associations*. Retrieved February 2023, from European Commission: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13538-Single-market-Proposal-for-a-legislative-initiative-on-cross-border-activities-of-associations/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13538-Single-market-Proposal-for-a-legislative-initiative-on-cross-border-activities-of-associations/public-consultation_en)

European Commission. (n.d.). *Single market – Proposal for a legislative initiative on cross-border activities of associations*. Retrieved February 2023, from European Commission: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13538-Single-market-Proposal-for-a-legislative-initiative-on-cross-border-activities-of-associations\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13538-Single-market-Proposal-for-a-legislative-initiative-on-cross-border-activities-of-associations_en)

European Parliament. (n.d.). *MEPs push for game-changer rules for pan-European civil society*. Retrieved February 2023, from European Parliament: <https://www.europarl.europa.eu/news/en/press-room/20220210IPR23023/meps-push-for-game-changer-rules-for-pan-european-civil-society>

Philea. (n.d.). *Philea*. Retrieved February 2023, from Comparative Highlights of Foundation Laws: The Operating Environment for Foundations in Europe 2021: <https://philea.issuelab.org/resource/comparative-highlights-of-foundation-laws-the-operating-environment-for-foundations-in-europe-2021.html>