



Response to the European Commission Consultation on the Defence of Democracy package

Brussels, 25 September 2023

About European Civic Forum

European Civic Forum (ECF) is a pan-European network of nearly 100 associations and NGOs across 29 European countries: big federations of associations, national platforms uniting hundreds of thousands of NGOs, and smaller groups working at community level or engaging with the public on local issues. We work to build a democratic and civic Europe that delivers on people's needs.

Introduction

The European Commission is currently engaging in a consultation on the Defence of Democracy (DoD) package which aims to bring together legislative and non-legislative measures, to “strengthen resilience to covert foreign interference and encourage civic engagement in our democracies”.

As part of the consultation, the European Commission sent out a questionnaire to targeted stakeholders in preparation of an impact assessment to support the package. The Commission proposes questions along three possible policy options to capture “transparency of interest representation activities carried out on behalf of third countries and impacting the formulation or implementation of policy or legislation or decision-making processes in the EU.”

We welcome the Commission's decision to postpone the package in order to conduct an impact assessment following a letter to President Von der Leyen, sent by 230 civil society organisations,

expressing concerns over the package and the legislative process¹. We also welcome the Commission's willingness to listen to and engage in a dialogue with civil society on the legislative proposal and safeguards for civil society. We remain committed to engaging with the Commission on this policy file to ensure that there will be no negative impacts on civic actors, and that the adopted measures are conducive to strengthening European democracy.

However, we remain concerned that the legislative proposals to regulate "transparency of interest representation activities carried out on behalf of third countries" are not fit for the purpose of defending democracy or for tackling foreign interference². On the contrary, they will have negative consequences on democracy, including on freedom of association, expression, participation, media freedom and academic freedom, outweighing the potential benefits by increasing the risk of weakening democratic resilience.

In identifying and linking covert foreign interference with foreign funding ('high amounts of money from a third country'), the proposed measures are conducive to creating a negative presumption and stigmatising CSOs who receive foreign funding. The negative impacts of foreign funding legislation on civil society have been well-documented³, including in countries like the US, and the UK, and Hungary in the EU. On the contrary, there is little evidence of the potential effectiveness of the tool for the intended aim of increasing transparency of malign foreign influence (it is obvious that those with negative intentions will find other tools to get the support they need as soon as a mechanism of registration will come into effect).

This is why we continue to call on the Commission to refrain from introducing any new policy or legal measure which seeks to target foreign funding for not-for profit entities who act in the interest of public/common good.

While we welcome the opportunities for consultation with the Commission on the legislative process thus far, we believe that the process could be further strengthened. As per the Commissions' own better regulation guidelines, it is important that an impact assessment be conducted for a "comprehensive understanding of the policy problem at hand." To date, we have had no access to data and information which was gathered by the Commission on the scale and scope of the problem of "covert foreign interference", on the main actors involved, and clarifying if CSOs should even fall in this category in addition to other entities. It is crucial that the Commission identify and analyse the issue that needs addressing thoroughly as a basis for any policy response being put forward.

Moreover, there has been no comprehensive assessment to determine whether a legislative tool is the best instrument to address the problem. Despite this lack of evidence, the Commission has proposed three policy options: a recommendation, directive, or regulation. We are concerned that these policy tools are not fit for purpose. The questionnaire informing the impact assessment is also formulated in a way which legitimises without evidence the approach pre-identified by the European Commission.

Recommendation: The European Commission should engage in a structured dialogue with stakeholders on the drivers and characteristics of the risks and how to address them jointly in order to defend democracy in the EU.

¹ <https://civilsocietyeurope.eu/wp-content/uploads/2023/07/Cssr-Reynders-reply-to-Civil-Society.pdf>

² <https://civic-forum.eu/wp-content/uploads/2023/04/ECF-Response-to-European-Commission-Consultation-on-the-Defence-of-Democracy-Package.pdf>

³ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/337/82/PDF/G2233782.pdf?OpenElement>



The policy proposals are neither fit for defending democracy nor for tackling covert foreign interference

Democratic backsliding, disinformation and foreign interference thrive on popular dissatisfaction towards public policies. Therefore, in order to defend democracy, including tackling covert foreign interference, EU institutions should focus on broadly addressing the growing public mistrust towards institutions which constitutes a major threat to democracy. To improve institutional actions, it should also take appropriate measures that contribute to building democratic resilience, in particular by delivering inclusive and coherent policies that leave no one behind and creating an enabling environment for civil society actors. Such an approach can be limited by the Commission's legal basis, which is grounded in the "proper functioning of the internal market". This is why an articulated approach is needed between the EU and at the Member State level to address the issue jointly in its complexity.

It is crucial to reiterate that democracy can only be strengthened with a rights-based approach. Thus, any policy options should incorporate measures that are grounded in fundamental rights. Any policy which clashes with rights such as freedom of association, peaceful assembly, expression and participation or which does not tackle adverse economic, social, environmental or human rights consequences, cannot support the strengthening of democracy.

With regards to the aim of shining a light to malign foreign interference, the Commission's proposal assumes that foreign funding transparency is a good proxy to capture covert foreign interference. However, there is no evidence of the effectiveness of similar transparency measures adopted in third countries to uphold democratic integrity.

Research evaluating foreign influence legislation in several countries that implemented such tools demonstrates the negative impacts that such legislation can have on democracy. In several cases, such legislation has been weaponized and has led to negative consequences, for instance for diaspora groups and civil society. Additionally, there are concerns about the overall effectiveness and credibility of this legislation in achieving its intended purpose as it has resulted in uneven enforcement practices and gaps in holding foreign actors accountable for their activities⁴.

For these reasons, the Commission should consider alternative approaches to tackle covert foreign interference by drawing on good practices, which engage both civil society and independent media. For example, in the Czech Republic, a multi stakeholder approach is being used, where five non-governmental organisations have launched a joint initiative in response to the events in Ukraine to *actively promote executive and legislative measures* aimed at strengthening the resilience against the influence of undemocratic regimes. In Lithuania, CSOs have worked closely with authorities in identifying proxy entities created by Russia.

Additionally, the primary role of the judiciary in investigating matters brought to the courts, input by whistle-blowers and independent investigative journalists in exposing and capturing corruption, disinformation and covert foreign interference are well documented. For example, civil society and

⁴ Forthcoming research by The Good Lobby (to be published).

investigative journalists were able to uncover the widespread surveillance taking place in the EU as a result of Pegasus spyware⁵.

Recommendation: The European Commission's impact assessment should use a fundamental rights approach as a starting point and look into good practices both by public institutions - including the judiciary - and private institutions, civil society and independent media who have worked on tackling malign foreign influence.

An assessment of the proposed policy options shows negative consequences for civil society

While the European Commission holds that the proposed legislative measure is not intended to hurt democratic civil society, our internal risk assessment, based on the aim, scope and policy options of the proposal, shows that it would lead to negative repercussions on civil society and democracy at large.

The aim

By singling out foreign funding, the current approach creates the impression that such funding serves as a proxy for attacks against democracy as those who are funded from outside the EU can be suspected of doing “activities carried out on behalf of third countries”. The stigma associated with receiving foreign funding is exemplified by the concerted anonymous responses from Central Europe to the public consultation on the package who attacked foreign funded CSOs as foreign enemies.

Thus it is likely that singling out foreign funding will instead first and foremost stigmatise CSOs, and additionally be detrimental to the capacity of organisations by creating a bureaucratic burden. CSOs are already engaged in fulfilling important transparency measures and conduct extensive reporting at the national and EU level.

It is important to highlight that many CSOs are funded by diverse donors, but this does not mean that their donors determine the work that they do or interests that they cover. The right to seek and secure funding and resources from domestic, foreign, and international entities is protected under UN and COE guidelines on association⁶.

Furthermore, as per principles of democracy and right to participation, CSOs have a legitimate role to influence the “formulation or implementation of policy or legislation or decision-making processes in the EU.” Given that we live in a globalised world, broadly distinguishing when “activities carried out on behalf of third countries” is not as clear cut. Coincidentally, interests may interlink without regarding borders. Additionally, foreign interests that happen to meet local interests are more than often not malign. Additionally, CSOs often advocate both for common good within the EU and cover issues and concerns present in foreign countries. Therefore, we need a thorough analysis of the interactions between foreign funding, foreign interests, local civil actors to inform the Commissions’ approach.

⁵ <https://citizenlab.ca/category/research/tools-resources/>

⁶ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e)



Scope

In its questionnaire, the Commission states that the scope of its proposals aims to cover “interest representation services.” It is important to reiterate that civil society organisations do not provide paid interest representation services (as recognised by specific exceptions in the services directive). CSOs represent the self-organisation of people, which is distinct from the government and market actors, and they advocate for the common good and access to fundamental rights for all in line with the European Treaty provisions and the EU Charter for Fundamental Rights. It is therefore important to clearly distinguish between those doing interest representation services on behalf of commercial interest versus non-commercial interests for common good.

Additionally, the present scope covers a broad range of activities including “organising or participating in meetings, conferences or events, contributing to or participating in consultations or parliamentary hearings, organising communication or advertising campaigns, organising networks and grassroots initiatives, preparing of policy and position papers, legislative amendments, opinion polls, surveys or open letters, or activities in the context of research and education”. This wide scope risks capturing majority of activities carried out by civil society.

The policy options

The Commission has proposed three policy options: a recommendation, directive, and regulation. However, the tools developed do not substantively deal with the root causes of democratic backsliding in Europe or tackle covert foreign interference nor do they provide appropriate support for democratic resilience or dissuasive sanctions.

The proposal for a directive introduces “common proportionate registration” together with “record-keeping obligations” and the “requirement for mandatory disclosure of registration numbers when entering in contact with public officials”.

We are concerned that if CSOs fall under the scope of such a directive, there would be negative consequences for civil society as the directive leaves room to be misused by Member States who decide on how it is transposed into national law.

There are well documented examples of how Member States have misused directives to adversely affect civil society. For example, in the case of EU Anti Money Laundering Directive application in Romania, the government’s proposal placed civil society in the same category of financial risk as providers of gambling services and banking institutions. With no legitimate cause and no risk assessment, Romanian lawmakers expanded the EU directive and created requirements for CSOs to report on the recipients of their services and assistance by including them, beyond the scope of the directive, in the sphere of beneficial owners⁷. In case of non-compliance, it introduced sanctions of dissolution of the organisation. In the case of Cyprus, the Central Bank continues to consider all non-profit entities as high risk for anti-money laundering, despite the fact that the EU Anti-Money Laundering Directive requires measures to be proportionate to the nature and size of entities⁸.

In addition, the requirement for record keeping obligations and mandatory registration risks being overly burdensome and could result in the policy-making process becoming less accessible and

⁷ <https://civicspacewatch.eu/wp-content/uploads/2021/06/activizanship-4.pdf>

⁸ <https://civic-forum.eu/wp-content/uploads/2023/03/Civic-Space-Report-2023-European-Civic-Forum.pdf>



participatory, with particularly negative impacts on civil society working for excluded groups, individuals and grassroots movements.

The proposal for a regulation, which introduces a “mechanism for prior authorisation/licencing to conduct interest representation activities on behalf of a third country and impacting the formulation or implementation of policy or legislation or decision-making processes in the EU”, poses significant risks for civil society actors and conflicts with international standards on the right to freedom of association⁹ and participation. The Council of Europe Guidelines on civil participation in political decision making clearly state that authorities should “seek to avoid unduly burdening individuals, NGOs and civil society at large in the course of civil participation” and should ensure that this is carried out “without undue administrative obstacles” (for more see UN and COE guidelines)¹⁰.

Therefore, a requirement for prior licensing could lead to limiting participation for smaller grassroots organisations and movements who wish to engage in the decision-making process but have insufficient capacities to engage in a prior registration process. It may also be abused if discretion is left to authorities to decide on whether an organisation (for example working on monitoring human rights in a foreign country or working on certain subject issues such as migrant rights or LGBTIQ+ rights) can influence policymaking.

While the proposal for a recommendation is non-binding, it could also leave room for Member States to use it as a pretext to restrict civil society and the right to association.

Recommendation: The European Commission should abandon the policy options proposed and ensure that any future proposals are in line with international standards and guidance on the right to freedom of association and participation.

Alternatives: strengthen existing tools of transparency and democratic resilience

EU institutions already have existing tools at their disposal to monitor interest representation services and lobbying. This includes the EU Transparency Register and transparency and lobbying laws at the national level in some member states.

The Commission should evaluate the efficiency and the impact of the register for addressing the issues they intend to tackle. This exercise is likely to reveal potential loopholes and weaknesses and provide ideas for measures to counter these. It could also routinely compare the data submitted in the register to what is publicly available on a given organisations website and reports. The experience of our member organisations is that they are unevenly asked whether they are registered when engaging with representatives of the institutions.

Furthermore, strengthening transparency requires tools with a two-sided approach. Any effort to counter malign influence must also address those on the receiving end by obliging those who are “being influenced” to exercise due diligence before engaging with any outside parties, duly

⁹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/127/97/PDF/G2312797.pdf?OpenElement>

¹⁰ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807509dd



reporting suspected malign attempts, and linking appropriate sanctions to omitting these obligations.

The Commission should acknowledge that covert influence cannot be addressed by a “registration legislation”, as those doing it will by nature find ways to navigate around it (and its main effect will be to “punish” those adhering to the rules instead). Therefore, the emphasis should rather be placed on capacity building of institutions and policymakers to be sensitive to risks and by allocating appropriate resources, such as judicial capacity, to monitor, expose and deal with such attempts taking on any form or shape.

Finally, the Commission should build on the European Democracy Action Plan and dedicate more programmes and funding for strengthening democratic resilience through civic education and confidence-building in the areas of human rights democracy, EU and national competences, populism, online and offline disinformation, news, media and digital literacy, EU fundamental rights and values, and respect for marginalised groups¹¹.

Recommendation: Instead of introducing a directive or regulation, the European Commission should review and further develop existing rules to better implement the Transparency Register and allocate appropriate resources to monitor and enforce it. The Commission should also heavily invest in democratic resilience and in trust in institutions.

Looking ahead: The legislative process for the package must be strengthened

While we welcome the Commission engagement with civil society thus far during the consultation process, the legislative process going forward could be further strengthened. While the Commission placed the package on hold, it is now conducting a consultation with selected targeted stakeholders, through a questionnaire which inform its impact assessment. It is unclear as to how these stakeholders were selected to participate in the process.

We are concerned that the process thus far does not provide a “comprehensive understanding of the policy problem at hand,” as per the Commissions’ Better Regulation guidelines¹². To date it is unclear what is the extent of covert foreign interference and its impacts. There is little evidence whether the proposed policy tool would be effective to protect democracy or rather divert attention and resources away from the root causes of democratic weakening. In addition, while we understand that there was an initial draft text on a proposed directive, civil society has not yet had the opportunity to see this text to make concrete comments.

The balance of the cost-benefit of the current proposals are uncertain at best and contradicts other key principles of the policy making process guidelines, including subsidiary & proportionality, transparency. While the Better Regulation guidelines state that “evidence should inform political decisions, not the other way around”, contrary to this, the questionnaire presents three policy options without putting forward any evidence on the scale and scope of the problem. Although there are good intentions with this package, the questionnaire informing the impact assessment

¹¹ <https://civilsocietyeurope.eu/wp-content/uploads/2023/09/CSE-State-of-the-Union-DIGITAL-v3.pdf>

¹² https://commission.europa.eu/system/files/2021-11/swd2021_305_en.pdf



is also formulated in a way which legitimises the approach pre-identified by the European Commission.

Recommendation: The European Commission should conduct a comprehensive fundamental rights impact assessment before proposing any policy options.

