



Defence of Democracy package

An analysis of the foreign funding directive

Introduction

As part of the Defence of Democracy package adopted on 12 December 2023, the European Commission proposed a directive which aims to “introduce common transparency and accountability standards in the internal market for interest representation activities carried out on behalf of third countries”.

In its justification for the directive, the Commission claims that interest representation activities are increasingly used by third-country governments to promote their policy objectives. It states that since there is currently a fragmented approach in terms of how these activities are captured and regulated amongst Member States, this creates room for third-country actors to “evade transparency requirements and covertly influence decision-making and democratic processes”.

As a result, it proposed a directive which creates a register of entities funded by foreign countries who carry out interest representation services or activities on behalf of third countries to influence the “development, formulation or implementation of policy or legislation or public decision-making in the internal market”. As a result, it is de facto a foreign funding register.

Several civil society organisations, including ECF, have repeatedly raised our widespread concerns with the European Commission in consultations, meetings and letters. While we recognise the legitimacy of the Commission’s concerns about any malign interference and disinformation, this foreign funding directive will fail in its stated intention of exposing covert foreign interference in policymaking. Instead, it will likely lead to stigmatisation and harassment of civil society and other legitimate actors that are funded by sources outside the EU and EEA. This in turn will weaken the key role civic actors should play in vibrant and healthy democracies and in upholding the rule of law and defending fundamental rights, *including* from malign interference. This will not only be deeply harmful to democracy inside the EU, but it will dramatically weaken Europe’s role in protecting civil society and democracy around the world. In particular, it will damage its legitimacy and credibility when criticising similar tools used by authoritarian regimes.

Below is a summary of our main concerns with the directive.

What's in the directive?

The directive proposed by the Commission creates a register of entities that carry out interest representation services or activities on behalf of third countries to influence the **“development, formulation or implementation** of policy or legislation or public decision-making in the internal market.”

Examples of entities required to register include: lobbying and public relations companies, think tanks, civil society organisations, private research institutes, public research institutes offering research services, individual researchers and consultants. The directive defines ‘interest representation activities’ as “organising or participating in meetings, conferences or events; contributing to or participating in consultations, parliamentary hearings or other similar initiatives; organising communication or advertising campaigns including through media, platforms, use of influencers in social media, networks and grassroots initiatives; preparing policy and position papers, legislative amendments, opinion polls and surveys, open letters and other communication or information material”.

Entities that provide interest representation services or activities on behalf of third countries are required to register in a public national register and will receive a unique **European Interest Representation Number (EIRN)**. Registered entities and their subcontractors will need to provide the EIRN when they come into contact with public officials.

The directive does include some exemptions. For example, it does not apply to services or activities provided on behalf of European Economic Area (EEA) countries (this would exempt those receiving EEA/Norway grants). Contributions to the core funding of an organisation or similar financial support are exempt if the entity would receive such funding regardless of whether or not it carries out specific interest representation activities for the country providing such funding. However, the wording of the exemptions remains unclear.

Information about the entities registered will be public with limited exceptions. In some cases, an entity's public information may not be published if it can demonstrate that there are grounds for legitimate interest, including a serious risk that the publication would expose an individual to a violation of their fundamental rights.

At the member state level, the register will be overseen by both an administrative authority (for data collection) and a supervisory authority (for compliance and enforcement). The supervisory authority may impose administrative sanctions for non-compliance after issuing prior warnings and its decisions are subject to judicial review. Administrative penalties for non-compliance are one percent of the annual worldwide turnover for entities doing categorised as interest representation services, while for other legal entities it is one percent of their annual budget and for natural persons, €1000.

At the EU level, oversight will be carried out by an advisory group made up of a representative from the supervisory authorities of each member state.



Why is civil society concerned?

1. The scope and extent of the problem is unclear

To date, the scale of the problem the directive is trying to address, “covert foreign interference”, and the main actors involved in it, remain unknown. As such, it is not possible to assess the necessity and the proportionality of the measures.

In its impact assessment, the basis upon which the Regulatory Scrutiny Board gave the directive the green light, the Commission states that “the scale of interest representation activities carried out on behalf of third countries in the member states is largely unknown.” However, it adds that “reports of such activities exist.” As a result, the definition of the problem and its scope within the directive is broad and unclear. It is also clear that the directive does not stem from an evidence-based approach.

Instead, it is based on the assumption that foreign funding transparency is a good approach for tackling covert foreign interference. However, there is no evidence that similar transparency measures have been effective in holding foreign actors to account for their activities and protecting democratic integrity. In fact, research into similar foreign influence legislation in several countries has shown that such measures can actually have negative impacts on democracy, as it can be weaponised against civic actors defending the common good.

Additionally, it is unclear why the Commission has focused exclusively on “foreign interference”, given that covert interference may come from diverse sources, both within and outside the EU.

2. Broad, unclear language leaves room for abuse and misinterpretation

The broad and unclear language used throughout the directive may result in it being interpreted in a variety of ways, or misinterpreted and potentially misused to restrict civil society, including their capacity to criticise and influence policymaking.

For example, the directive fails to clearly define what it means to “**influence**” the development, formulation or implementation of policy, legislation, or public decision-making processes. The criteria it outlines for determining when there is a “**clear and substantial link**” between an activity and such “influence” is also broad and could be interpreted to widely capture all activities, even those that go beyond this directive.

The directive also does not define what it means to act “**on behalf of**” a third country or to be “**attributed to a third country entity**”. By linking *receiving funding* from foreign countries with *acting on their behalf*, it makes a dangerous and false implication: that civil society organisations represent the interests of their donors instead of their constituencies and communities. While many CSOs are funded by diverse donors, this does not mean that their donors determine their activities or the topics that they cover.

Furthermore, the directive includes a long list of legitimate, everyday activities that civil society engages in that it describes as ‘interest representation activities’ (Article 2) but is not clear enough



in outlining the criteria that will be used to determine whether such activities are being carried out on behalf of a third-country interest that is harmful to the democracy of the EU.

When it comes to record-keeping (Article 7), the directive states that to ensure proportionality, when personal data is made publicly available, it should be “limited to what is strictly necessary for the purpose of informing citizens, their representatives and other interested parties about interest representation activities carried out on behalf of third countries”. However, it does not indicate what information might be considered as “strictly necessary” and what would not, which leaves this open to interpretation and risks violating necessity and proportionality standards. Similarly, it is concerning that entities may be required to share “**key exchanges**” needed to understand the “nature and purpose” of the interest representation activity, without specifying the types of exchanges. With this broad wording, authorities could be at liberty to request, for example, emails, records or minutes of meetings with foreign funders, and more. Not only could this result in violating privacy, but it may lead to the sharing of sensitive information placing civic actors and defenders at risk which could be weaponised by authorities.

The broad scope and lack of clarity will lead to confusion about which entities need to register and which do not, making its enforcement difficult, if not impossible. This will open opportunities for abuse and arbitrary application of the law by authorities wishing to unduly restrict civic space.

3. Impact on civic space, fundamental rights & breach of EU law

We are concerned that the directive may breach EU primary law, affecting both fundamental rights such as association, expression and participation; and economic freedoms like capital and establishment.

On Freedom of association and expression

Article 12 of the EU Charter of Fundamental Rights and Article 22 of the International Covenant on Civil and Political Rights (ICCPR) protects the freedom of association. Accordingly, any restrictions placed on this right must be “prescribed by law” and “necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”.

Furthermore, the right of civil society to seek and secure funding and resources from domestic, foreign, and international entities is recognised. The Venice Commission's opinion on the funding of associations reiterates this, stating that “in particular, states shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source, nor stigmatise those who receive such resources.” It also argues that ‘public disclosure obligations’, which refers to publicising the source of funding and the identity of the donors, may be justified only in cases of political parties and entities formally engaged in paid lobbying activities. However, in the case of associations, it states that “the imposition of a blanket ‘disclosure obligation’ concerning the financial sources and the identity of the donors cannot be justified with the broadly defined political nature of the activities conducted by the association.”



However, the directive's focus on foreign funding is likely to contradict these standards and lead to unintended consequences on the right to association, such as creating a disproportionate administrative burden, stigmatisation and harassment. By singling out foreign funding, the directive creates the unfair impression that those who are funded from outside the EU can be reasonably suspected of malign "activities carried out on behalf of third countries".

Research evaluating foreign influence legislation has shown that there are many negative impacts that such legislation can have on those fighting for democracy. In addition, the high number of anonymous responses from Central Europe to the initial public consultation on the package, attacking foreign-funded CSOs as foreign enemies, is just one example of stigmatisation and comes in the context of increasingly regressive narratives about actors that fight for open and vibrant democracies. There are also several documented examples of governments using the pretext of transparency and the need to tackle "foreign influence" to stifle civil society and diaspora groups that are defending access to rights for all.

Recently, "foreign agent" laws have been proposed by governments in EU candidate countries such as Georgia, Bosnia and Herzegovina, as well as in other countries like Kyrgyzstan and Kazakhstan. Just last month, the Hungarian government adopted the "Sovereignty Defence Act" which could be used to arbitrarily target any organisation or person it suspects of serving foreign interests and allegedly jeopardising Hungary's sovereignty. The government is already using the Commission's proposed directive as a reference to justify this law by stating that EU policymaking is also tackling foreign interference.

While limitations on the right to association are permissible in specific circumstances, international standards clearly state that such limitations must be necessary, proportionate and based on a prior risk assessment indicating "plausible evidence" of a sufficiently imminent threat to the state or a democratic society. The Venice Commission affirms that such restrictions on the freedom of association must "aim to avert a real, and not only hypothetical danger". It also warns that "public concern" and "suspicions" regarding how the NGO sector is being funded or financed cannot be used to justify limitations on the right of associations to funding, especially if there is no "substantiated concrete risk analysis concerning any specific involvement of the NGO sector in the commission of crimes."

However, the Commission has repeatedly stated that there is insufficient information about interest representation services or activities carried out on behalf of third countries in the internal market.

On civil participation

Civil participation, which refers to the "engagement of individuals, NGOs and civil society at large in decision-making processes by public authorities", is a crucial component of participatory democracy, as enshrined in Article 11 of the Treaty of the European Union (TEU). Despite the fact that this was recently recognised in one of the non-legislative components of the Defence of Democracy package - the recommendation on citizen participation and civic engagement - the directive actually limits civil participation as it fails to affirm that public debate and evidence-based policy is a crucial component of democracy.

Examples of civil participation can include consultations, public hearings, and dialogue with government representatives. The Council of Europe guidelines for civil participation in political



decision-making clearly state that the authorities should seek to facilitate participation and therefore avoid unduly burdening individuals, CSOs and civil society at large in the course of civil participation. However, many of these important civil participation activities would fall into the directive's definition of interest representation activities and would be subject to new generalised administrative processes imposing new requirements for registration and record keeping. This could result in further stigmatisation and make access to the policy-making process burdensome and less accessible. For example, it proposes that entities may be asked to present their **EIRN** when entering into contact with public authorities.

Such a requirement does not take into consideration the risk that policymakers might limit their interactions with civil society organisations that are registered and contribute to a stigmatisation of CSOs as "foreign agents". Additionally, this requirement does not take into account the nature and frequency of such contact. For example, the directive fails to distinguish between contact as part of an established and structured civil dialogue process, a one-off meeting, or a consultation initiated by a public official. In particular, CSOs working for excluded groups, individuals and grassroots movements are likely to see their already limited access to public officials significantly impacted.

Civil society's contribution to the common good is unaccounted for in the directive as it places CSOs on the same footing as entities acting for commercial, financial and private interests. In doing so, it fails to distinguish interest representation activities like lobbying from civil dialogue and civil participation.

As a consequence, this places additional administrative and reporting responsibilities on CSOs, even in cases when they may receive an invitation to participate in such activities (for example, responding to an open consultation during a legislative process or an invitation to a parliamentary hearing). This would be harmful for developing a vibrant and extended dialogue between civic actors and institutions in a period of growing public mistrust in institutions. It may also result in over-registration (where due to uncertainty and fear of breaking the rules CSOs feel obliged to register) or a chilling effect on those carrying out advocacy and other related activities which fall under interest representation activities.

On economic freedoms

The directive does not respect the EU Court of Justice judgement in *Commission vs Hungary* (transparency of associations). The Court found reporting duties for foreign funding to be discriminatory and unjustifiable restrictions to the free movement of capital, as set out in Article 63 of the Treaty on the Functioning of the European Union:

"In particular, those provisions single them out as 'organisations in receipt of support from abroad', requiring them to declare themselves, to register and systematically to present themselves to the public as such, subject to penalties which may extend to their dissolution. In thus stigmatising those associations and foundations, those provisions are such as to create a climate of distrust with regard to them, apt to deter natural or legal persons from other Member States or third countries from providing them with financial support."



"The objective of increasing the transparency of the financing of associations, although legitimate, cannot justify legislation of a Member State which is based on a presumption made on principle and applied indiscriminately that any financial support paid by a natural or legal person established in another Member State or in a third country and any civil society organisation receiving such financial support are intrinsically liable to jeopardise the political and economic interests of the former Member State and the ability of its institutions to operate free from interference."

4. Despite so-called “safeguards”, civil society is at risk

The “safeguards” included in the directive to protect civil society will be mostly ineffective in their aim. To prevent stigmatisation of civil society organisations receiving foreign funding, the directive states that public national registers for such entities should be presented in a neutral, factual and objective manner to ensure that there are no adverse consequences (Article 9). However, it does not explain how this will be ensured or how it could work in practice.

Moreover, it does not take into account the diverse contexts in different member states, given that some are already experiencing shrinking civic space. The importance of considering a specific context when it comes to the right to funding for associations was highlighted by the Venice Commission in its opinion on the case of Hungary. In analysing the law, it accounted for the “virulent campaign by some state authorities” which portrayed the associations receiving funds from abroad as acting against the state’s interests. Thus, it concluded that any link to foreign funding would risk stigmatising those organisations and affecting their legitimate activities.

It also does not include provisions for sanctions against governments who may engage in stigmatisation and there are no checks and balances put in place for national authorities which oversee the register.

Additionally, the directive will allow member states to set up and **maintain one or several national registers** for the purpose of ensuring transparency of interest representation services/ activities. Several member states already regulate “interest representation” through laws on lobbying and political activities. Unlike other policy fields where benchmarking of good practices are put in place, the directive does not account for this. Given the current illiberal and authoritarian trends at work, even in mature democracies, the directive may lead to a conflict of laws and legal uncertainty, as well as a further administrative burden, including disproportionate, unnecessary and misguided reporting requirements for civil society. This goes against international standards which advise that record keeping should not be regulated by more than one piece of legislation, as this can create “diverging and potentially conflicting reporting requirements.”

Finally, although the directive includes several exemptions, these are broadly and vaguely-worded they are likely to be ineffective. For example, it exempts core funding: “contributions to the **core funding of an organisation** or similar financial support, should not be considered as remuneration for an interest representation service where they are **unrelated to an interest representation activity**, that is, where the entity would receive such funding regardless of whether it carries out specific interest representation activities for the third country providing such a funding”. As this wording provides no certainty of how an entity will determine whether funding is



unrelated to an interest representation activity for a third country, it leaves room for potential misuse or broad interpretation by authorities.

How can this directive be improved to defend democracy?

In order to defend democracy, it is crucial that the directive protects the right to civil participation and structured civil dialogue, as defined by Article 11 of the Treaty of the European Union (TEU). The directive should include a stand-alone chapter which outlines the importance of these rights and should ensure that there is a clear distinction between market-oriented lobbying activities and civil dialogue, aimed at ensuring the full implementation of the Treaty provisions on democracy and fundamental rights.

There should be a clear definition of what constitutes lobbying, civil dialogue and participation. This should include a clear distinction between for-profit entities and non-profit entities advocating for fundamental rights. This is outlined by the Venice Commission which emphasises that “lobbying as a professional remunerated activity should be clearly defined in the legislation and be clearly distinguished from ordinary advocacy activities of civil society.” As such, the list of interest representation activities should not cover activities related to democracy and the implementation of the Charter of Fundamental Rights and the European Convention of Human Rights, in line with international standards. However, when CSOs do engage in interest representation activities similar to lobbying for private interests, these should be covered.

In the event the scope is not further narrowed, the directive should make provision for minimum thresholds (for example 50 advocacy contacts with public officials) for entities engaged in interest representation activities, in line with good practices of legislation regulating transparency of lobbying. This will ensure that those CSOs who are engaged in these activities once off or less frequently will not face the same requirements for registration. There should also be a minimum funding threshold requirement. This will minimise the administrative burden for CSOs who receive smaller amounts of foreign funding.

The directive should also make provision for sanctions if public officials engage in stigmatisation and harassment campaigns against CSOs because they are foreign-funded. Checks and balances must be put in place for national authorities which oversee the register. At the EU level, civil society organisations should be invited as experts to the EU advisory body annually as part of a structured dialogue to provide feedback on whether the directive is working in practice and to report on any challenges and improvements needed.

Finally, strengthening transparency requires tools with a two-sided approach. Therefore, the directive should ensure that reporting obligations are a shared responsibility between policymakers and entities. 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 reporting suspected malign attempts, and linking appropriate sanctions to omitting these obligations.

