

THE DEFENCE OF DEMOCRACY NEEDS FREE NGOS

Civil Liberties Union for Europe

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About this paper

The European Commission refers to efforts to nurture, protect and strengthen democracy as one of its core priorities. Following the [European Democracy Action Plan](#) presented in 2020, which outlined ongoing actions to safeguard the integrity of elections, strengthen media freedom and pluralism, and fight against disinformation, the Commission's President von der Leyen, in her [2022 State of the Union address](#), announced a new initiative which she referred to as "Defence of Democracy package".

The Commission has sought consultation with stakeholders, including civil society, to inform the preparation of this package. Building on its [tireless research, advocacy and capacity building work](#) to help the EU and its Member States better protect and promote human rights, democracy and the rule of law for all, this policy paper represents Liberties' response to such consultation, and complements a [joint civil society submission](#) Liberties contributed to.

The Defence of Democracy package: what is the EU up to?

While the ambitious name points to a potentially very wide array of measures, the "Defence of Democracy package", which the Commission is set to unveil before the summer of this year, has in practice, as its main goal, that of "defending democracy from covert foreign influence". The initiative is said to be pursued

in a political context which has witnessed a marked increase in cases of covert interference in our democratic sphere by countries outside the EU, with the risks further accentuated by the Russian war of aggression against Ukraine. According to the Commission, a strengthened resilience of our democracies is dependent upon a strong response against foreign interference – be it pursued from outside, or using organisations established in the EU which act as proxies for foreign entities.

Accordingly, the main initiative part of this package will be a legal instrument (a directive) which would introduce "common transparency and accountability standards for interest representation services directed or paid for from outside the EU". In a nutshell, the directive will likely subject to a number of transparency - registering and reporting - requirements any entity, including civil society and non-governmental organisations (NGOs), which pursue lobbying activities and are recipients of a certain amount of funding from third countries - be it a government of a country outside the EU and the European Economic Area or an entity with structural links to such a government.

Such legislation would be accompanied by a recommendation providing for additional non-binding measures to tackle the issue of covert interference from non-EU countries in relation to the provision of services from outside the EU, including awareness raising, and promoting best practices.

Further recommendations on secure and resilient electoral processes and the upcoming elections to the European Parliament and on the

promotion of civic engagement in the Member States would complete the package, aiming at encouraging measures “to bolster democratic resilience from within”.

Free NGOs are a vital component of our democracies

Civic space is the “space” that allows people to say what’s on their mind and converse with others, to protest against things that are not in their best interest, to join together in citizens’ groups and other organisations - and so exercise their fundamental freedoms of expression, association, and assembly - without obstruction from the government. Civic space is necessary in any democracy insofar as these freedoms are instrumental to citizens to communicate their asks and concerns to their elected representatives and their governments.

Civil society organizations are especially important in civic space. They give people a channel to communicate with their representatives. They keep people informed about how politicians are using the resources and powers given to them. And they make sure governments don’t overstep the law - including EU law - and encroach on people’s rights and freedoms. The more a government is accountable to the people, and the more involved people are in government, the more likely it is that politicians will act not in their own best interest but in the people’s. That is what makes civil society organisations essential pillars of democracy.

NGOs working on the promotion and protection of human rights are particularly precious to our democracies. There are many concrete examples which show how the work of these organisations contributes to promoting accountability, transparency and civic engagement, offering a vital contribution to the EU’s efforts to protect and strengthen democracy, the rule of law and fundamental rights. This includes NGOs’ efforts to promote and defend the right to access public interest information, engage in fact-checking, promote media freedom and counter disinformation; their engagement to fight against impunity and corruption and promote accountability, including by supporting and protecting whistleblowers and other critical voices; their initiatives to help counter divisive narratives and hate speech in the public sphere; and their work to promote citizens’ engagement and democratic participation at EU, national and local level, including by mobilising citizens’ turnout in elections and organising citizens’ panels.

Any initiative aimed at protecting and promoting democracy needs therefore to value and favour an open civic space and seek to strengthen an enabling environment for civil society organisations to carry out their crucial work.

Why the proposed measures risks weakening rather than strengthening our democracies

The European Commission's narrative around the announced "Defence of Democracy package" reaffirms the importance of a strong and enabling civic space as critical for the resilience of our democracies. It recognises, in particular, the role of civil society organisations in holding governments to account, protecting and promoting fundamental rights, as well as protecting societies from undue influence by combating disinformation and fostering active and engaged public participation.

However, the concrete measures envisaged to be part of the "Defence of Democracy package" intended to help counter covert foreign interference - a directive on "common transparency and accountability standards for interest representation services directed or paid for from outside the EU", and a complementary recommendation - are at odds with the goals of the package, because they risk having a serious negative impact on civil society organisations and on civic space.

Indeed, the reporting and disclosure obligations such instruments may impose would impact on NGOs' fundraising activities, which is an integral component of their right to freedom of association, as illustrated by, among others, the Council of Europe's Venice Commission and the OSCE Office for Democratic

Institutions and Human Rights (ODIHR) in their [Joint Guidelines on Freedom of Association](#). The Guidelines make clear that freedom of association would be deprived of its meaning if individuals wanting to associate did not have the ability to access resources of different types, including financial, in-kind, material and human resources, and from different sources, including public or private, domestic, foreign or international. Therefore, the ability to seek, secure and use resources, including resources from outside EU member states, is essential to the existence and operation of any association and an inherent part of the right to freedom of association.

While it is true that foreign interference in democratic processes can pose challenges that need to be addressed in terms of the potential manipulation of information and of public opinion and the threats to the security, integrity and fairness of elections, the proposed instruments rest on flawed assumptions and rely on measures which fall short of achieving the desired objectives, thus risking amounting to unnecessary and disproportionate restrictions to the right to freedom of association.

An unsupported assumption

First of all, it is very far-reaching to maintain that all entities, including NGOs, which pursue lobbying activities and are recipients of a certain amount of funding from third countries potentially are tools for foreign authoritarian governments to pursue covert foreign interference aimed at damaging the EU's and national democratic processes and institutions. The

mere fact that an NGO benefits from funding from a foreign government is not sufficient to cast doubts over the legitimate nature of its activities. As human rights bodies including the Venice Commission and ODIHR have stressed in their guidelines and opinions, enhanced transparency and reporting obligations may not be justified on the basis of abstract “public concern” or mere “suspicions” about the honesty of financing of NGOs and they should be based on a concrete risk analysis concerning the involvement of associations in the commission of offences and/or in pursuing activities which amount to a real and imminent threat to the process of formation of political institutions, the institutional order or the political decision-making process. In particular, in its recent report on funding of associations, the Venice Commission clarified that such obligations can be considered as pursuing legitimate purposes “only if they aim to avert a real, and not only hypothetical danger” and rest “on a prior risk assessment indicating ‘plausible evidence’ of a sufficiently imminent threat to the State or to a democratic society” (see report mentioned above, paragraph 146). In addition, reporting and disclosure obligations that focus on foreign funding might be problematic with regard to prohibition of discrimination.

Vague wording

Secondly, the concept of “lobbying activities” seems to be intended by the European Commission in this context in an overly vague and broad manner. Based on the background information shared so far by the Commission, the concept of “lobbying activities” would refer

to “activities with the objective of directly or indirectly influencing the formulation or implementation of policy or legislation or the public decision-making processes”. This includes, for example, organisation or participation in meetings, conferences or events. In the above-mentioned report, the Venice Commission considered the aim of “preventing NGOs from being misused for political goals”, and emphasized in this respect that no legal regulation should, in any form or manner whatsoever, infringe upon the democratic rights of individuals to express their opinions, conduct advocacy activities and campaign for political change. It made very clear that, thus, restrictions on association activities for merely advancing “political goals” are illegitimate. The Venice Commission considers that only a narrow category of formal lobbying activities, defined as “promoting specific interests by communication with a public official as part of a structured and organised action aimed at influencing public decision-making”, may justify “the imposition of transparency requirements concerning the funding of associations to the extent that they engage in formal lobbying activities because the public may have a clear interest in knowing the lobbying actors who have access to government decision-making processes for the purpose of influence, including their financial sources” (see report mentioned above, paragraph 144).

The risk of going too far

Imposing transparency obligations on the basis of flawed assumptions and vaguely worded concepts risks amounting to a burden for civil

society actors and NGOs which is disproportionate with respect to the activities they carry out. This risk is made clear if one looks at the concrete application of the US Foreign Agents Registration Act, which has seen, among others, the obligation for the following organisations to register: a U.S. environmental non-profit, because it received a grant from the Norwegian government to work on deforestation in Brazil and other countries with tropical forests; a consultant of a foreign non-governmental foundation for helping the foundation educate members of the U.S. public about development, democracy, and good governance issues abroad; a U.S. religious organization for helping prepare banners for foreign attendees of a rally because in printing banners for a foreigner it acted as a “publicity agent” under the Act. Further, such an approach may create problems for enforcement, leading administrations to become overwhelmed with superfluous registrations.

The legitimacy and proportionality of the transparency requirements which the proposed instruments will provide for may also be questioned on the basis of the nature itself of the concrete obligations imposed on associations. As the Venice Commission explains (see report mentioned above, paragraph 140), in this context, “reporting obligations” should be distinguished from “public disclosure obligations” imposed on associations concerning their financial sources. While a “reporting obligation” consists of reporting to the relevant authorities the amount and the origin of the funding, a “public disclosure obligation” consists in making public, for instance on the website of the association concerned or in the

press or the official journal, the source of funding (either domestic or foreign) and potentially, the identity of donors. Such “public disclosure obligations”, which aim at informing the public about the origin and the amount of the financing, may be seen as pursuing the aim of ensuring transparency of the political influence exerted by lobbying groups only insofar as lobbying is precisely and narrowly defined.

Bad implementation, gold-plating and the chilling effect

In light of the weaknesses illustrated above, the margin of appreciation which EU governments will have in transposing and implementing the directive which the Commission envisages to introduce harmonised transparency requirements to counter covert foreign interference would open up the door to measures which - unintended or deliberately - may end up damaging NGOs and other civil society actors. Indeed, against the background of an unfavourable domestic funding landscape - one of the key findings of FRA’s research on civic space in the EU - many NGOs, especially in the field of human rights, rely on funding by foreign foundations and entities to carry out their advocacy and campaigning work. They therefore risk being hit by the envisaged provisions just for carrying out their legitimate activities.

Governments with authoritarian tendencies may even build on the EU’s directive provisions to introduce and justify more restrictive, burdensome and stigmatising requirements and obligations to hit and tarnish human rights

groups and other critical actors - something Hungary already attempted to do with its 2017 anti-NGO law, later struck down by the EU Court of Justice, and which other countries, such as Poland and Romania, attempted to replicate.

As a result, the directive risks having a serious chilling effect, on the one hand dissuading foreign donors from supporting NGOs and civil society organisations in the EU, and thus further increasing the challenges these actors face in seeking and accessing funding; and on the other hand discouraging beneficial and legitimate advocacy and campaigning activities, with a serious adverse effect on public participation and democracy as a whole.

Fuelling smear campaigns against civil society

In addition, while the fear of undue foreign interference putting in danger democratic processes and institutions can be appreciated, as also noted by the Venice Commission and ODIHR, over-regulation in this sphere, in particular targeting entities, including NGOs, that receive foreign funding involved in public affairs, risks feeding anti-democratic, divisive and illiberal political narratives used to restrict the work of and destroy public trust in civil society through smear campaigns. This risk of ‘politicization’ is visible if one looks at the application of similar laws in other countries: to take the case of the US Foreign Agents Registration Act, already mentioned above, examples already exist of the Act’s vague and ill-defined terms being used to accuse and

harass civil society actors carrying out legitimate advocacy and campaign activities, such as the 2018 investigations targeting four prominent U.S. environmental non-profits.

As regards the EU’s “Defence of Democracy package”, this risk is even more acute considering the negative political and regulatory context in which NGOs operate in a number of EU countries, featuring among others virulent smear campaigns against NGOs as well as limited and politically-biased funding and public benefit laws and policies, as research, including Liberties’ recently released 2023 Rule of Law Report, shows. This political context clearly points to the risk that, in certain countries, the purported measures are likely to be weaponized and abused by governments with authoritarian tendencies to further fuel attacks on civil society, silence critical voices and support a clamp down on NGOs carrying out legitimate advocacy and campaigning activities.

A threat to the EU’s credibility

The reputational risk for the EU, and the possible damage to its credibility as a democratic and transparent structure, should equally not be underestimated. On the one hand, the measures envisaged resonate with the Hungarian 2017 anti-NGO law, which the EU Court of Justice ruled as incompatible with EU law and the Charter of Fundamental Rights in 2020 upon infringement proceedings brought by the Commission itself. On the other hand, they appear at odds with the EU’s efforts, in the context of its own external relations, to

curb third countries' attempts to stigmatise NGOs receiving foreign, including EU, funding. Indeed, just a few weeks ago, the EU foreign policy chief Josep Borrell criticised Georgia's so called "foreign influence law" as going against EU values, warning that the adoption of the bill may have serious repercussions on Georgia's relations with the EU and its aim of joining the bloc.

A rights-based approach to countering foreign interference and threats to our democracies

The considerations illustrated above call for a further reflection on possible alternative solutions to cater for the legitimate concern the EU and its Member States may have as regards covert foreign interference while avoiding any undue restriction on civic space and free NGOs, which are one vital tool to actually protect and promote democracy from any - internal or external - threat.

Carrying out a proper fundamental rights impact assessment

In announcing the "Defence of Democracy package", the European Commission indicated that "no impact assessment is planned". The package will instead "build on the results of a call for evidence, a public consultation, targeted consultation events and Eurobarometer survey results" and be backed by in-house desk research.

This approach clearly contradicts the Commission's own commitment and guidelines on better incorporating fundamental rights into the EU's legislative and policy processes. Considering the initiative's clear impact on fundamental rights, and in particular the right to freedom of association, as illustrated above, but also other rights such as the freedom to conduct a business, a fully-fledged impact assessment is essential with a view to properly evaluate the different policy options in light of their impact on these rights.

A serious fundamental rights impact assessment, ideally to be carried out in consultation with expert bodies such as the FRA, the Venice Commission and ODIHR, as well as civil society itself, may well lead to the conclusion that the Commission's planned approach simply carries too high of a risk of unduly restricting the right to freedom of association, and is actually not fit for purpose. Or, it may prompt the Commission to ensure that the application of the envisaged measures only targets agents of foreign governments or political parties or those acting on their behalf, and covers direct principal-agent relationships. At the very least, it would likely point to the necessity of ensuring that the concept of 'foreign interference' is defined very narrowly and carefully to exclusively refer to entities acting predominantly for a foreign interest under the direction or control of a foreign government, that the assessment is based on the existence of a concrete and real risk for democratic institutions and processes, and that transparency obligations are not disproportionate.

While public consultations and surveys may help the European Commission gather insights into the risks and gaps of the proposed measures, they do not in any way replace a fundamental rights impact assessment, which should imply a thorough evaluation of existing rules, gaps, and possible policy options. In addition, only an impact assessment can ensure the necessary transparency and publicity over the specific policy evaluations and criteria guiding the Commission's action, in line with the right to good administration.

Considering more targeted measures and a different framing

The measures envisaged in the “Defence of Democracy package” to address covert foreign interference resemble existing acts which have been widely criticised for their negative impact on civic space and the work of NGOs and their inadequacy to achieve the desired objectives (see, for example, the critical analysis of the US Foreign Agents Registration Act by the International Center for Not-for-profit Law and by the American Bar Association). These critiques clearly point to the flaws of such an approach.

A range of tools already exist which could address the issue of covert foreign interference in the EU. For example, the EU's transparency register could be strengthened by enhanced monitoring and reporting obligations. More efforts could also be made to better enforce existing rules on ethics of officials and MEPs.

Furthermore, the proposal on a set of standards for non-profit entities across the Member States, which the Commission is working towards following a resolution of the European Parliament, could also represent an opportunity to consider possible measures, while framing the issue differently. Indeed, the proposal's main aim is to introduce harmonised rules on non-profit entities throughout the EU to facilitate their establishment and operations across borders, and prevent them from being subject to undue restrictions and obstacles. In this context, harmonised rules on the transparency of interest representation could be considered, in order to preserve NGOs' legitimate efforts to contribute to decision-making processes, while countering any possible abuse including in connection with attempts at interference by foreign governments.

Investing in positive measures

As extensively illustrated in the joint civil society submission to which Liberties contributed, the EU should privilege positive measures aimed at strengthening the EU's resilience to covert foreign interference over restrictive measures which carry a serious risk of negative impact on the democratic space as a whole. These should include:

- a comprehensive EU strategy on civil society, as Liberties has already called for;
- innovative measures to counter disinformation and manipulated information, in full respect of freedom of expression and information;

- a strong regulatory and supporting framework to promote media freedom, as proposed by Liberties in its recent [policy brief on the EU Media Freedom Act](#);
- fair and effective rules on the transparency and targeting of political advertising, as [advocated](#) by Liberties;
- a strengthened legal and policy framework on cybersecurity, including in the context of elections.

cover to autocrats within and outside the EU to crack down on dissent.

Pursuing a clear and coherent democratic agenda without overlooking the EU's own backyard

The EU should be clear on the internal and external factors undermining democratic processes in the EU and lead by example by pursuing a coherent democratic agenda in its external relations as well as in EU internal action, in order to be able to effectively curb and dissuade foreign interference. The approach should rest on a system of comprehensive monitoring of and rapid response to existing threats, and should integrate objectives to be pursued through a conditionality approach guiding the EU's funding and support policy. The strategy should focus not only on foreign authoritarian states, but also on their proxies within the EU. This approach would allow the EU to address foreign influence in a timely and targeted manner, instead of embracing a repressive and stigmatising approach, which risks damaging the EU's own democratic structure and providing

The Civil Liberties Union for Europe (Liberties) is a non-governmental organization promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organizations.

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