BRIEFING PAPER – DEFENCE OF DEMOCRACY PACKAGE

April 2024

Directive of the European Parliament and of the Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries (COM (2023) 637 12/12/2023)

This document has been prepared by the informal coalition on the Defence of democracy Package coordinated by Civil Society Europe with the contribution of ALDA, Civil Liberties Union for Europe, European Center for Nonprofit Law, European Civic Forum, European Partnership for Democracy, European Youth Forum, ILGA Europe, Philea, The Good Lobby, Transparency International EU.

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1. Introduction

On 12 December 2023, as part of the Defence of Democracy package, the European Commission (the "**Commission**") published a proposal for a directive on the transparency of interest representation on behalf of third countries (the "**Directive**"). The proposal was delayed, in part in response to significant concerns raised by civil society and others earlier in 2023.

Considering the forthcoming European Parliament elections, the Directive will primarily be negotiated and adopted in the next legislature. It is our understanding that the Belgian Presidency aims to agree on the Council's General Approach by the end of June and that preliminary discussions will take place in the European Parliament over the coming months.

We outline below our primary concerns as the undersigned civil society organisations ("**CSOs**") and why we believe the proposal fails to address the fundamental rights issues raised during the consultation process. We welcome the need for transparency and the Commission's underlying concern about the increasing attempts to undermine democracy across Europe. However, we believe the Directive is not the correct instrument to pursue this goal and that it does not address the underlying issues (**Section 3**). Instead, the Directive imposes burdensome obligations on CSOs (**Section 4**), who are among the most active actors in ensuring transparency and protecting civic space and who play a key role in ensuring that democracy is protected from threats, whether they come from internal or external sources. Thus, placing additional restrictions on civil society will undermine the crucial role that CSOs play without effectively tackling undue interference in democratic processes (**Section 3**).

2. Executive summary

- The Directive does not comply with EU law in two major ways (**Section 5**):
    - First, although the Directive's legal basis is Article 114 TFEU, the Directive does not pursue a genuine objective of improving the functioning of the internal market. Instead, the Directive creates more obstacles and discriminatory measures across interest representation providers, based on the origin of their funding and on their size and administrative capabilities.
    - Second, the Directive imposes unjustified and disproportionate restrictions on the fundamental rights to privacy, to the protection of personal data, and freedom of association. The Directive fails to take into account the stigmatising impact of the transparency obligations and the deterrent effect of this law, which by its very nature will effectively impede CSOs' freedom of association.
- The Directive requires significant amendments to comply with fundamental rights and avoid any unjustified restrictions on CSOs (**Section 6**):
    - The proposed definitions are too broad to ensure clarity and legal certainty. In particular, the Directive should clarify (i) the definitions used throughout the Directive, in particular those of economic activities of interest representation, representation on

behalf of third countries, services and remuneration and exclude project-related funding that is not linked to a specific interest representation activity; (ii) the scope of ancillary activities; and (iii) the scope of the circumvention clause.

- Duplication of registry efforts covering the same territory should be avoided to limit the administrative burden of CSOs and all other legal entities.

- No liability for legal representatives of non-EU entities should be established, as it would be disproportionate and effectively prevent entities from taking part in civil society actions in the EU, as CSOs would be unable to find any EU representative willing to take on such risk on their behalf.

3. Premise

The Directive is premised on the basis that interest representation services and comparable activities carried out on behalf of third countries should be transparent and recorded. Circumvention of the obligations or the provision of incorrect information will be fined. Nevertheless, while the Directive mandates the registration of transparent entities, it does not specifically address the challenge of detecting and managing covert operations. As a result, despite the registration of numerous transparent entities, the difficulty in identifying and mitigating covert influences will persist as bad actors will continue to find ways to operate without any clear and demonstrable link to third-country interest representation. The risk of the Directive is to put the focus on legitimate organisations while distracting from, and even encouraging, serious attempts of foreign interference by other means. As demonstrated by the cases of Qatargate and Voice of Europe, work to expose these actions requires a more targeted approach by the judiciary and intelligence services.

The explanatory note and text of the Directive go to considerable length to emphasise that foreign funding should not be stigmatised. The Directive requires Member States to set up and maintain national registers in such a way as to ensure a neutral, factual and objective presentation of the information contained therein. However, the implementation of a separate register for third-country funding creates a real risk of stigmatisation, especially when combined with actions that fall outside the scope of the Directive, and by non-state actors such as smear campaigns and media articles. These risks are all the more significant as the Directive requires Member States to make the transparency registers public. Thus, a variety of actors can use the information and, far from maintaining the neutral presentation desired, twist it to suit certain objectives.

The Directive also fails to recognise that actions to undermine democracy can come from all directions including from within the EU: for instance, the press has uncovered a network of think tanks and media outlets directly or indirectly supported by the Hungarian government to promote the government's position in Brussels' circles and anti-minority (e.g., LGBTQI+) stances.[1]

[1] *"Viktor Orbán brings culture war to Brussels"*, Politico Europe. 15 November 2023. Available at: https://www.politico.eu/article/viktor-orban-hungary-culture-war-woke-brussels/

4. Key provisions

The Directive focuses on ***interest representation services and comparable activities*** that aim to influence the development, formulation, or implementation of policy or legislation, or public decision-making processes, within the EU and that are carried out on behalf of third countries (***Article 3)***. Only certain services are explicitly carved out from the scope of the Directive, such as activities carried out directly by a third country in connection with the exercise of public authority and certain legal services.

It requires entities carrying out interest representation services and comparable activities to ***keep records*** of relevant contracts, activities, and key exchanges with the third-country entity and provide an annual summary (***Article 7***). Records are to be kept for four years after the interest representation service ceases.

An entity carrying out interest representation services and comparable activities that is not based in the EU is required to ***designate a legal representative*** who is responsible for ensuring compliance with the Directive (***Article 8***).

Each Member State may set up one or more ***national registers*** to comply with the Directive. Information in the registers should be presented in a neutral, factual, and objective manner (***Article 9***). Entities carrying out interest representation services and comparable activities (or their legal representatives) are required to ***submit information to the register*** in the Member State of their main establishment within a reasonable period (***Article 10***). Registered entities are assigned a unique European Interest Representation Number ("***EIRN***") (***Article 11***), which they must provide when in direct contact with public officials (***Article 14***).

Member States are required to designate a ***supervisory authority*** responsible for ensuring information in the register does not contain manifest errors (***Articles 2(10), 11, and 16***).

Registers shall make the core information ***publicly available*** in an official EU language. Entities may apply for a derogation (***Article 12***).

Member States shall make ***aggregated information*** from the registers public and transmit it to the Commission on an annual basis (***Article 13***). ***Access to information requests*** can only be made regarding entries / aggregated entries over certain thresholds (***Article 16***).

Supervisory authorities can impose **administrative fines** up to a maximum of 1% of worldwide turnover or the annual budget of the organisation or 1,000 euros for individuals (***Article 22***).

5. Overarching concerns

5.1 Legal basis and challenges to fundamental rights

For any proposed measure to comply with EU law, it must:

(a) show that it is designed to harmonise currently fragmented national rules; and

(b) comply with the principle of proportionality and not interfere with fundamental rights.

We will address these two points in turn below.

5.1(a) Legal basis and harmonisation

The Directive argues that Article 114 TFEU is the relevant legal basis as it provides for the adoption of measures to ensure the establishment and functioning of the internal market. While Article 114 TFEU is widely used as a basis for EU legislation, the Court of Justice of the EU ("***CJEU***") has clearly ruled that it does not confer a general power to regulate the internal market.[2]

The CJEU has considered that the recourse to Article 114 TFEU is not justified where the measure has only the incidental effect of harmonising market conditions within the EU.[3] The CJEU has further held that, to rely on the harmonisation of laws as a legal basis, the measures must be intended to improve the conditions for the establishment of the internal market.[4] The Directive does not fulfil either of these conditions.

First, EU legislation relying on ***Article 114 TFEU*** must have a genuine objective of improving the conditions for the establishment and functioning of the internal market. As stated by the CJEU, this means that "*a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom*" is insufficient in that regard.[5]

The Commission argues that current rules on interest representation services in the Member States are fragmented as they differ in the elements of transparency they require, and the scope of the activities covered. It also argues that pursuant to Articles 1, 2, and 10(3) TEU, the initiative aims to enhance the integrity of, and public trust in the EU. In line with the Defence of Democracy package, the primary objective of the Directive according to Recital 11 is the "*need to ensure transparency of interest representation activities carried out on behalf of third countries is a legitimate public goal, in the light of the principles of openness and transparency which must guide the democratic life of the Union in accordance with the second paragraph of Article 1 and Article 10(3) of the Treaty on the European Union ('TEU'), in conformity with the values shared by the Union and its Member States pursuant to Article 2 TEU, also supporting the exercise of citizenship rights*".

Furthermore, the CJEU has indicated that measures must aim to improve the functioning of the internal market. Indeed, a measure should aim to eliminate an "appreciable" distortion of competition within the internal market, rather than a mere small distortion.[6] The Directive merely seeks to address

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[2] See *e.g.*, Judgment of 5 October 2000, *Germany v Parliament and Council (Tobacco I)*, C-376/98, EU:C:2000:544; and Judgment of 10 December 2002, *British American Tobacco and Imperial Tobacco*, C-491/01, EU:C:2002:741.

[3] Judgment of 18 November 1999, Commission v Council, C-209/97, EU:C:1999:559, paras. 33-36.

[4] Judgment of 5 October 2000, *Germany v Parliament and Council (Tobacco I)*, C-376/98, EU:C:2000:544, para. 83.

[5] Judgment of 5 October 2000, *Germany v Parliament and Council (Tobacco I)*, C-376/98, EU:C:2000:544, para. 84.

[6] Judgment of 5 October 2000, *Germany v Parliament and Council (Tobacco I)*, C-376/98, EU:C:2000:544, paras. 106-107.

some existing disparities in the existing national transparency registers of 15 Member States and address the lack of such register in the other 12 Member States.[7]

Second, in seeking to address some disparities in the existence and functioning of national transparency registers, the ***Directive creates additional distortions to the internal market***. Contrary to removing potential obstacles to the functioning of the internal market, the Directive *introduces* additional obstacles by discriminating against certain interest representation service providers based on the origin of their funding. Creating differences in treatment goes against the legal basis in Article 114 TFEU and limits the ability of organisations to seek and receive funds, as further explained below.

Service providers receiving foreign funding and operating across several Member States will face an additional administrative burden. This will be particularly onerous for small non-profit and volunteer organisations that do not have full-fledged administrative teams and significant resources. The requirements may also place organisations receiving foreign funding at a competitive disadvantage. For example, a legal entity that receives funds from a third country and that is registered appropriately in the transparency register, is looking to hire a consultant – or an 'interest representation service provider' – for advocacy services. That consultant might turn down the work because it would also have to register thus entailing an additional administrative burden and potential stigmatisation.

Finally, the Directive also has implications in relation to the ***Windsor Framework and the maintenance of Irish North-South cooperation*** under its Article 11. Irish organisations receiving UK funding would be affected in a particular manner which is against the spirit of the Windsor Framework.

North South cooperation was a key commitment of the Good Friday/Belfast Agreement and civil society work on both sides of the border plays a crucial role in this. This was reflected in the NI Protocol/Windsor Framework which includes an explicit commitment to maintaining the necessary conditions for North-South cooperation as a central part of the Good Friday/Belfast Agreement. This directive risks undermining that commitment due to the impact on Northern Irish civil society groups who receive funding from UK authorities and carry out work North and South of the border. Examples of the work that could be impacted include human rights organisations supporting families bereaved by the conflict, others working on promoting the Irish language North and South of the border or on the rights of migrants also North and South of the Border. These organisations receive funding from the UK Government or from both the Irish and UK Governments, they carry out activities in both countries and usually also have staff in the Republic of Ireland. The Directive could have a chilling effect on these activities and de facto on the North-South Cooperation which is an essential part of the Windsor Framework commitment.

5.1(b) Proportionality and fundamental rights

As set out in Article 5(4) TEU, EU institutions must take measures that are suitable and necessary to achieve a desired end, as well as refrain from imposing a burden on individuals that is excessive in relation to the objective pursued. The CJEU has considered that while fundamental rights may be restricted to pursue a given measure, EU institutions must ensure that "*those restrictions in fact*

[7] Annex 6 of the Commission's Impact Assessment (SWD(2023) 663 final).

correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed".[8]

As set out in the Commission's Operational Guidance on Fundamental Rights in Impact Assessments, the Commission aims to ensure that "*the EU's approach to legislation is exemplary*" regarding fundamental rights.[9] Member States are obliged to respect the rights, observe the principles, and promote the application of the Charter of Fundamental Rights of the EU (the "***Charter***"). Only after intense scrutiny of the initial plans to put forward a legislative proposal on interest representation services did the Commission undertake an impact assessment. As explained further below, the Directive does not fulfil these conditions as it imposes disproportionate restrictions on the rights to privacy, to the protection of personal data, and freedom of association protected by Articles 7, 8, and 12(1) of the Charter.

First, the ***right to seek financial and material resources is*** recognised as ***an inherent part of the right to freedom of association***.[10] In *Commission v. Hungary*, the CJEU considered that general transparency obligations applicable to CSOs constituted a restriction of their freedom of association as they render more difficult their action or operation and limit their capacity to receive financial resources.[11]

Such a restriction can be legitimate but only under three cumulative conditions, *i.e.*, that i) the restriction shall be prescribed by law, ii) shall pursue at least one legitimate aim, and iii) the restriction shall be necessary in a democratic society to achieve that legitimate aim (Article 52 of the Charter).

Second, the CJEU has considered that ***transparency restrictions on foreign funding must not have a deterrent effect on CSOs*** and that foreign funding should not be seen as intrinsically suspect.[12]

While the Commission's explanatory note to the Directive provides an analysis of the fundamental rights implications of the proposal, it primarily focuses on the benefits of increased transparency and concludes that the Directive does not affect the essence of the right to freedom of association. In doing so, the Commission attempts to differentiate the Directive from the case in *Commission v. Hungary*,[13] noting that the Directive does not ban foreign funding, negatively label the activities of CSOs, or create a system of licensing or pre-authorisation. However, the CJEU clearly articulated that foreign funding should not be seen as intrinsically suspect. By creating a separate register for foreign-funded

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[8] Judgment of 5 October 1994, *Germany v Council*, C-280/93, EU:C:1994:367, para. 78. See also Judgment of 9 September 2020, Slovenia v Commission, T-626/17, EU:T:2020:402, para. 170; and Judgment of 20 September 2016, Ledra Advertising v Commission and ECB, C-8/15 P to C-10/15 P, EU:C:2016:701, para. 70.

[9] Commission Staff Working Paper, Operational Guidance on taking into account Fundamental Rights in Commission Impact Assessment, 6 May 2011, p. 3.

[10] Report to the Human Rights Council A/HRC/23/39 on access to financial resources. http://freeassembly.net/wp-content/uploads/2013/09/A.HRC_.23.39_EN-annual-report-April-2013.pdf

[11] Judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paras. 114-115.

[12] Judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, para. 118.

[13] Judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476.

organisations, even if positioned in a neutral way, the Directive creates a separation that intrinsically conveys suspicions regarding foreign funding.

The CJEU considered: i) the **stigmatising impact** of requiring "*organisations in receipt of support from abroad*" to declare themselves and present themselves to the public as such; and ii) the **deterrent effect of the law** "*on the participation of donors resident in other Member States or in third countries in the financing of civil society organisations falling within the scope of the Transparency Law and thus to hinder the activities of those organisations and the achievement of the aims which they pursue*".[14]

It is irrelevant that the Directive stipulates the need for neutral language. As indicated by the CJEU, it is the very nature of the measure that will "*create a generalised climate of mistrust vis-à-vis the associations and foundations at issue, in Hungary, and to stigmatise them*".[15] Indeed, the stigmatising effect will rather come from communications and media based on the register, which will be facilitated by the fact that the reported information is made public. As such, the stigmatising and thus deterrent effects of the Directive will be inevitable as they derive from the very nature of the measures.

Third, ***any transparency obligation imposed on organisations should remain limited*** to certain entities to avoid a disproportionate infringement of freedom of association.

The Directive creates great potential for mistrust and stigmatisation that will, at minimum, force organisations to consider the implications of receiving funding from outside the EEA. This will lead to a possible distortion of the market, limit CSOs in their essential role as key pillars of a plural democratic society, and thus largely undermine the right to freedom of association.

The Commission's explanatory note also refers to the 2019 Venice Commission Report on the funding of associations, which notes that:

> "*such a drastic measure, as "public disclosure obligation" (i.e. making public the source of funding and the identity of the donors) may only be justified in cases of political parties and entities formally engaging in remunerated lobbying activities*"; and
>
> "*lobbying as a professional remunerated activity should be clearly defined in the legislation and be clearly distinguished from ordinary advocacy activities of civil society organisations, which should be carried out unhindered*".[16] (emphasis added)

The Directive fails to provide a clear definition and a clear delineation between remunerated lobbying activities and ordinary advocacy activities of civil society (see **Section 6.1(a)** below).

Fourth, such ***restriction of fundamental rights imposed on CSOs is thus not justified as it does not pursue a legitimate aim and is not proportionate.*** Even if the restrictions to fundamental freedoms

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[14] Judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paras. 58 and 118.

[15] Judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, para. 118.

[16] Council of Europe, Report on funding of associations adopted by the Venice Commission, March 2019, pp. 32 and 44, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)002-e.

were legitimate (*quod non*), the Directive goes well beyond the principle of proportionality, enshrined in Article 5(4) TEU.

In *Commission v. Hungary*, the CJEU ruled that:

> *"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."*[17] (emphasis added)

The European Court of Human Rights ("**ECHR**") has reiterated this principle in *Ecodefence v Russia*, which clearly concluded that restrictions on seeking funding from foreign sources interfere with freedom of association. In particular, the ECHR noted the burdensome nature of the transparency obligations, the lack of clarity in the definitions, and the chilling effect that the very nature of these obligations could have on CSOs.[18]

The following provisions in the Directive clearly constitute unjustified and disproportionate restrictions on the rights to freedom of association, and freedom of expression:

- The obligation to provide subcontractors and public officials with the EIRN for any interest representation service, even in cases when the policy affected might be only distantly linked to the third-country funder (or not linked at all), is likely to create a chilling effect in the possibility of engagement of such organisations.

- The proposed provisions on national registers, despite the harmonisation clause of Article 4, can be problematic. Indeed, national registers would be managed directly by national supervisory authorities defined in the text as independent but without any guarantee for independent review. The Directive does not provide for any safeguard of the independence of these national authorities – which raises fundamental rights concerns. The administrative fee of 1% of the revenue, although already used in other EU legislation, is hardly to be considered a limited amount in the case of CSOs that mostly do not have funds that can be freely spent. For instance, an organisation that receives almost all its funding from operating grants or project funding would not have the possibility to use that money to pay the fine. In this case, the total revenue criterion would be misleading, could lead to serious financial problems for the organisation, and therefore contribute to undue hardship. This is also worsened by the fact that fines can be issued without prior warning when breaching the provision of circumvention.

- In the Advisory Group set up by Article 19, there is no representation neither of the registered entities nor of EU institutions working on the protection of fundamental rights (such as the EU

[17] Judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, para. 86.

[18] ECHR, Judgment of 14 June 2022, *Ecodefence and Others v Russia*.

Agency for Fundamental Rights), therefore lacking the crucial oversight to limit the adverse effects on fundamental rights of the Directive.

- The lack of a financial threshold for the applicability of the Directive also means that organisations that receive very minor amounts of funding from third countries would need to comply with the Directive. This requires disclosing the information of being third-country funded in all relations with policy makers, whatever the topic of discussion, *i.e.*, including topics for which no funding was received, considering how broad the notion of 'interest representation service' is, which therefore argues for the need of a stricter definition of 'interest representation service'.

5.2 The EU as a global actor

The EU is one of the largest donors to rights and democracy groups around the world. It ***has spoken out against 'transparency laws' in other regions, which are a disguised way to limit civic space and silence dissenting voices***, including the recent examples of responses to the Georgian Transparency Law,[19] the foreign agent law in Kyrgyzstan,[20] and the foreign agent law in Bosnia and Herzegovina.[21] The EU's own funding often seeks to influence laws and policies – for example, calls for proposals on torture prevention seek, in part, to improve domestic and regional frameworks for the eradication of torture and the EU actively supports advocacy work on the abolition of the death penalty or the ratification of the Rome Statute of the International Criminal Court.

In some instances, the EU's support is also relatively covert. For example, to protect the security of individual human rights defenders, individual funding is not always advertised and, in response to closing civic space across the globe, the EU has increasingly relied on organisations such as the European Endowment for Democracy ("**EED**"), which is formally independent of the EU, and with less rigid funding rules allows more flexible operation in politically difficult environments.[22]

A law that appears to be a similarly blunt instrument in tackling unwanted influence will do immeasurable damage to the EU's global role and reputation as a protector of rights. Since the Commission published the Directive, several countries have made reference to it in their own communications. For example, speakers in the Parliament in Georgia have referred to the Directive as a strict regulation of third-country funding, similar to the draft "agents' law" initiated by the People's Power movement[23] and the ruling party in the country has re-proposed the law partially mirroring

[19] EEAS, Georgia: Statement by the High Representative on the adoption of the "foreign influence" law, 7 March 2023, available at: https://www.europarl.europa.eu/doceo/document/B-9-2023-0353_EN.html.

[20] European Parliament, Motion for a Resolution on crackdown on the media and freedom of expression in Kyrgyzstan, 11 July 2023, available at: https://www.europarl.europa.eu/doceo/document/B-9-2023-0353_EN.html.

[21] Commission Staff Working Document, Bosnia and Herzegovina 2023 Report, 8 November 2023, p. 4, available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/e3045ec9-f2fc-45c8-a97f-58a2d9b9945a_en?filename=SWD_2023_691%20Bosnia%20and%20Herzegovina%20report.pdf.

[22] European Parliament, Shrinking space for civil society: the EU response, 12 April 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578039/EXPO_STU(2017)578039_EN.pdf.

[23] *Sozar Subari - The "democracy protection package" presented by the European Commission includes the law on transparency of agents and the aim is to protect democracy, exactly what we said* (English translation of the Georgian title). 1tv.ge, 12 December 2023. Available at:

some of the language of the directive[24] The EU, which has already expressed concern on the reproposal of the Georgian foreign agents' law[25] will lack any credibility in the future to criticise foreign funding laws elsewhere, and third countries will likely question the EU's own funding when aimed at influencing laws and policies.

6. The Directive

6.1 Scope (Article 3)

The scope of the Directive is very wide and lacks specificity. ***It remains unclear which activities and services would fall into the scope***. The impact assessment didn't fully analyse the ***number of organisations likely to fall within the scope of the Directive***,[26] based on the proposed definitions and considering that the number of interactions with officials from any level of government (down to the municipal level) are included.

The Directive applies to entities, irrespective of their place of establishment, carrying out (i) an interest representation service provided to a third-country entity or (ii) an interest representation activity carried out by a third country a public or private entity whose actions can be attributed to an entity referred to the central government and public authorities at all other levels of a third country, with the exception of members of the EEA, taking into account all relevant circumstances, that is linked to or substitutes activities of an economic nature and is thus comparable to an interest representation service.

6.1(a) Interest representation activity

The definition of an 'interest representation activity' is very broad covering an activity conducted with the "*objective of influencing the development, formulation or implementation of policy or legislation, or public decision-making process*". This includes most activities that CSOs engage in as part of their regular advocacy or participation in civil dialogue. The Directive states that a "*clear and substantial link should exist between the activity and the likelihood that it would influence the development, formulation or implementation of policy or legislation, or public decision-making processes, in the Union*" (Recital 17). This leaves room for wide interpretation and includes activities whose main objective is not interest representation but have a likelihood for influence. It should be clarified, which activities should be exempt from the scope of the Directive, such as activities conducted in the context of a structured civil society dialogue, and those conducted by small entities with limited funds.

https://1tv.ge/news/sozar-subari-evrokomisiis-mier-wardgenil-demokratiis-dacvis-paketshi-shedis-agentebis-gamchvirvalobis-kanoni-da-mizani-aris-demokratiis-dacva-zustad-is-rasac-chven-vambobdit

[24] *Georgian Government to bring back aborted foreign agent law.* OC media, 3 April 2024. Available at: https://oc-media.org/georgian-government-to-bring-back-aborted-foreign-agents-law/

[25] *EU warns candidate country Georgia over disputed 'foreign agent' law".* Politico Europe, 4 April 2024. Available at: https://www.politico.eu/article/eu-criticizes-georgia-ruling-party-controversial-foreign-agent-law/

[26] The impact assessment includes an estimation of the organisations concerned but doesn't take into consideration the number of legal entities in the EU and the different national contexts.

The Defence of Democracy package also included a Recommendation on promoting the engagement and effective participation of citizens and CSOs in public policy processes.[27] This is a welcome development and echoes longstanding advocacy calls from civil society. The Recommendation promotes the engagement of civil society throughout the policy-making process and highlights the importance of public watchdogs in the proper functioning of a democratic society. The activities included in the Recommendation in many ways mirror those listed as 'interest representation activities' in the Directive. Thus, while the Commission is encouraging civil society engagement in policy-making, if the same organisations receive funding from abroad, they will fall within the scope of the Directive.

For example, if a CSO receives project grants from multiple donors, including from outside the EEA for advocacy work on civic space in Europe, and engages in formal EU consultation processes alongside other advocacy activities, would they need to register as an interest representation service provider and comply with all the requirements provided in the Directive?

6.1(b) Interest representation service

An 'interest representation service' is defined as an activity normally provided for remuneration as referred to in Article 57 TFEU. The term is e***xtremely broad and would likely also include advocacy activities,*** which would normally not be considered a "service" in the way a consulting firm or law firm might be engaged, and paid a fee, to carry out a specific service. Given that the pursuit of a social objective does not prevent qualification as a service,[28] the use of this term is not appropriate in the definition. It is too broad and fails to limit the restrictions to what is strictly necessary to achieve the Directive's objectives.

For instance, a membership-based CSO receives funds from a third-country donor to conduct research, provide policy inputs and gather members' inputs to a policy proposal. It is unclear whether this would be considered as conducting an 'interest representation service' on behalf of a third country.

The term 'remuneration' comprises any consideration for the services provided.[29] According to Recital 27, *"contributions to the core funding of an organisation or similar financial support, for example provided under a third country donor grant scheme, 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*." This definition fails to provide sufficient detail, it is unclear what "similar financial support" would entail and core funding itself remains undefined. It is also based on an unprovable counterfactual, making it difficult to assess whether core funding would be excluded or not and includes a subjective factor related to the third country's intention to fund, regardless of the interest representation.

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[27] Commission Recommendation on promoting the engagement and effective participation of citizens and civil society organisations in public policy-making processes (the "**Recommendation**"), 12 December 2023, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PI_COM%3AC%282023%298627.

[28] Judgment of 14 July 2022, *Asociación Estatal de Entidades de Servicios de Atención a Domicilio*, C-436/20, EU:C:2022:559, para 65.

[29] Judgment of 27 September 1988, *Belgian State v Humbel*, C-263/86, EU:C:1988:451, para. 17.

The ***exclusion of core funding*** seems to imply a recognition on the part of the legislator that the flexibility and autonomy inherent in core funding, means it should not be considered remuneration for an interest representation service. However, the Directive does not fully articulate this and does not clarify the boundaries to identify when activities are carried out 'on behalf of a third country'. In what circumstances is an organisation considered to be acting independently? When an organisation receives funding that is not core funding, does it automatically imply remuneration for an interest representation service? Or if an organisation receives project funding that is relatively flexible and covers both core operations and advocacy could that be considered as falling within the exclusion for core funding?

It is also important to note that despite long-term advocacy in favour of core funding, it is still rare for CSOs to receive significant core funding, especially from government donors. The EU itself, for example, gives mostly project funding. Thus, the exclusion would benefit a relatively small number of organisations.

There is also ***no minimum threshold or exemption for very small amounts of funding or small organisations***. If for example, an organisation receives 300 euros from a third country to cover lunch at an event to launch a policy paper, would this be considered remuneration for an interest representation service? Or if a CSO contributes 1000 euros to a joint civil society project, and the 1,000 euros comes from a larger advocacy grant from a third country, would this again be considered remuneration for an interest representation service? And would the lead organisation in the joint project need to check the source of the funding received from each organisation?

The Directive could also make a clear ***distinction between lobbying activities, defined as professional remunerated activity, and CSO advocacy***, which constitutes an expression of representative democracy. As provided in the 2019 Venice Commission Report on the funding of associations, "*lobbying as a professional remunerated activity should be clearly defined in the legislation and be clearly distinguished from ordinary advocacy activities of civil society organisations*".[30]

6.1(c)Exemption of ancillary activity

The Directive does not apply to (i) the exercise of official authority directly by a third-country entity, (ii) certain legal and other professional advice, and (iii) ancillary activities.

An 'ancillary activity' means an activity that supports the provision of an interest representation activity but has no direct influence on its content. According to Recital 20, ancillary activities include catering, the provision of a venue, the printing of brochures or policy papers, or the provision of online intermediary services, such as online platform services. This leaves significant room for interpretation regarding the limit of ancillary activities.

For instance, if the Canadian Embassy in Berlin would host an evening talk and reception as part of a CSO's advocacy work to bolster civic space in Europe, without providing any input into the content of the event, would that count as an ancillary activity?

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[30] Council of Europe, Report on funding of associations adopted by the Venice Commission, March 2019, pp. 32 and 44, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)002-e.

While it is important to exclude ancillary activities, the definition of such should be clarified to avoid organisations refraining from potential ancillary activities due to the uncertainty as to whether they would be considered a representation service provider.

6.1(d) Circumvention

While a circumvention clause is included under Article 20 to avoid abuses, for example by setting up a legal entity to avoid links to government funds, it is unclear how effective this will be or how supervisory authorities will have the power or means to check the origin of funds in third countries. Although the Directive provides for the creation of an 'Advisory Group' to advise, *i.a.*, on activities whose object or effect is to circumvent obligations in this Directive, it remains uncertain, how effective measures can be taken (Recital 55). Furthermore, the Directive seems to excessively rely solely on whistleblowers (Recitals 43, 52, 56). The Directive would not cover situations in which support for third-country influence is funded by entities not directly associated with third countries. Such a situation will be assessed on a case-by-case basis (Recital 23), leaving room for uncertainty and circumvention.

Furthermore, the proposal of sanctioning circumvention activities seems problematic. While it is stated that the sanctioning regime would ensure "*that CSOs and other non-profit associations would not be exposed to the threat of criminal penalties or dissolution*" and sanctions would only be imposed following a prior early warning, such mechanism is not provided in the case where an infringement amounts to a violation of the prohibition of circumvention. This is particularly problematic because (suspected or even assumed) cases of circumvention can be punished directly and unintentional errors cannot be corrected by affected entities. Organisations sanctioned accordingly would then only have the option of taking legal action.

6.2 Administration and liability provisions

6.2(a) The overlap of existing regimes and national authorities' independence

The Directive entails significant administrative burdens both for Member States and designated supervisory authorities, and ultimately for organisations required to register.

The Directive stipulates that Member States are free to provide one or multiple registers so long as the scope of each register is clearly defined. This is likely to cause confusion and additional work, as ***multiple registers may require different information and reporting deadlines***. Where existing national registers (as part of general transparency laws) exist, challenges have already been documented in relation to the intersection between foreign influence laws and existing lobbying laws [31] In addition, transparency registers in many Member States are limited to engagement with parliamentarians and do not include, as envisioned under the Directive, engagement with all civil servants at the national and municipal level, therefore it would add an additional layer of complexity in the disparity of treatment among organisations and in the adaptation of current registers to the new Directive.

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[31] The Good Lobby, Study on Foreign Interference Legislations, 2023 page 27 https://www.thegoodlobby.eu/wp-content/uploads/2023/11/TGL-Study-How-to-Evaluate-a-Foreign-Influence-Legislation-A-Comparative-Analysis.pdf

For Member States and particularly for supervisory authorities, it will be ***administratively heavy to manage multiple registers with different information regarding the scope of the registers***. In addition, ***the Directive is silent on the independence of national authorities***, which can be highly problematic as the transparency register could be used as a tool against civil society, according to evolving political influences. Therefore, the Directive must provide for clear safeguards to avoid national authorities from being subject to political pressure or external influence.

Furthermore, the vagueness of the definitions, combined with the wide scope of the Directive, will likely lead to unintended administrative red tape, overregulation and restrictions of fundamental rights due to the arbitrariness of the application of the Directive by executive authorities. Due to that, it is very likely that CSOs will self-limit themselves in their contacts with foreign donors, which will risk shrinking civic space.

6.2(b) Liability for legal representatives of non-EU entities

A similar burden is placed on persons or organisations nominated as the legal representatives of organisations outside the EEA (Article 8(3) of the Directive). *The obligation to designate a legal representative for non-EU-based entities* that fall within the scope of the Directive a***nd the liability of that representative*** when the registered entity does not comply ***raises several issues.***

First, the legal representative is required to take on a significant reporting responsibility, likely without access to the requisite information to make an accurate determination as to whether an organisation falls within the scope of the Directive. If entities find a suitable representative willing to assume the associated risks, it can be assumed that potential legal representatives will ask for adequate remuneration as well as for some protection from potential liability from the entities they represent. This will make the appointment of a representative financially burdensome and disproportionate. Therefore, this particular provision is problematic and unfair. Entities that cannot afford legal representation would suffer a disadvantage compared to entities that can.

This can consequently steer away those entities from providing interest representation services in the EU. Particularly for small to medium CSOs, this is likely to both prevent access to EU decision-makers and thus curtain any meaningful participation of civil society from outside the EU and distort the market in relation to who can provide interest representation services. The risk and the administrative burden for EU-based civil society would be too high to take on the responsibility to act as legal representatives for multiple partner organisations from outside the EU.

Second, the Directive fails to explain the reason for the liability of these legal representatives. The 15 Member States that regulate interest representation activities have not imposed legislation that holds the legal representatives responsible for the entities they represent[32]. It is therefore unnecessary for the Directive, whose aim is supposedly to harmonise the internal market, to introduce a burdensome provision that could make it significantly complex for these entities under the Directive to participate. This provision does not contribute to the harmonisation and improvement of transparency of interest representation but instead creates an unequal level-playing field for non-EU-based entities.

Finally, the Directive provides that non-EU entities can choose a legal representative in one of the Member States in which they carry out their interest representation activities. However, considering

[32] See also EC Impact Assessment (pp. 145 et seq).

that there may be some differences across Member States after they transpose the Directive, this can lead non-EU entities to do "forum shopping" by choosing a legal representative established in Member States where the regime is most favourable to them. This seems to go against the objective of the Directive and to further fragment the internal market.

7. Conclusion

As civil society organisations working in the EU, we share concerns about threats to democracy and the rule of law across the Union but do not feel that these threats have been adequately identified and analysed. The stated aim, to address covert foreign influence through greater transparency of interest representation services, will not be achieved through the proposed Directive but will result in an increased administrative burden for CSOs and risk undermining fundamental rights.

Given the significant rights implications, the legislative process should not be rushed. It is difficult to secure an effective, rights compliant text even with several amendments. We therefore call on the co-legislators to re-assess whether the current approach of the Directive is the right course of action and consider other approaches that would be more appropriate. This could include:

- supporting a request and taking into consideration the assessment of the EU Agency for Fundamental Rights, alongside existing and future recommendations from the Venice Commission and Office for Democratic Institutions and Human Rights (ODIHR);
- should there be the will by the institutions to shift the scope of this Directive to a more general transparency approach of interest representation in the EU requesting a Substitute Impact Assessment by the European Parliament Research Service to consider different policy options and their impact on fundamental rights and civic space.

Organisations within certain spheres will be particularly impacted by the Directive. These include organisations working in cultural and educational fields who are more likely to receive small amounts of funding from embassies for events and other activities. While these should not fall within the scope of the Directive, if a play or other cultural event focused for example, on the environment and green policies, the organisers might be unsure whether they would risk non-compliance if they failed to register. Similarly human rights advocacy organisations would face a similar dilemma over any of their work supported by foreign public donors. The lack of clarity over what defines a contractual interest representation service on behalf of a third country entity risks undermining sectors that are i) historically underfunded and rely on small amounts of funding to support their work and ii) are a central element of well-functioning democracies. Furthermore, the very broad definition of interest representation activity will also encompass activities that are part of civil dialogue and civil participation mechanisms, therefore limiting civic space.

Based on the above analysis the below are key areas for review – but still do not fully address the underlying challenge that the Directive is not fit for the stated purpose and even in an improved form will create disproportionate challenges for civil society.

- Tighten the definitions to ensure legal certainty and clarity on who falls within the scope of the Directive. Central to this definition is clarity on the boundaries to identify when activities

are carried out 'on behalf of a third country' and in what circumstances an organisation is considered to be acting independently.

- Clarify the scope of the interest representation activities, and exclude from the scope of the Directive activities linked to civil dialogue mechanisms.
- Ensure that exclusions set out in the recitals are moved to the operative text, in particular the exclusion around core funding – which itself requires better definition.
- Consider a financial threshold for the duties required by the Directive. This would exclude organisations receiving small amounts of money to organise events and ensure that small, often volunteer run organisations with limited administrative capabilities do not face additional administrative burdens and ambiguity whether their activities require them to register.
- Exclude liability for legal representatives and the need for an expensive process to appoint a legal representative.

- Make provision for sanctions if public officials, or other entities, engage in stigmatisation or harassment of CSOs because they are foreign-funded. Checks and balances must be put in place for national authorities who oversee the register.

- Ensure the oversight by fundamental rights organisations as part of the EU advisory body. This should include a representative from the EU Agency for Fundamental Rights and representatives from civil society. Opportunities to feed into the annual structured dialogue should be facilitated to provide feedback on the functioning of the directive and to report on any challenges and improvements needed.

- Ensure that reporting obligations are proportionate and if reporting of contacts with public officials is required (annex I, 2 h) a shared responsibility between public officials and registered entities, is ensured or as in the EU Register the reporting is done by public officials.

Signatory organisations

alda
European Association for Local Democracy

CIVIL LIBERTIES UNION FOR EUROPE

European Center for Not-for-Profit Law

EUROPEAN CIVIC FORUM

European Partnership for Democracy

european youth forum

ILGA EUROPE

Philea
Philanthropy Europe Association

THE good LOBBY

TRANSPARENCY INTERNATIONAL EU