

Response to the European Commission Annual Rule of Law Report Stakeholders consultation

Brussels, 4 May 2020

1. Introduction

This contribution has been prepared by the working group on Civic Space of Civil Society Europe which is composed of CSE members, the European Foundation Centre as a partner organisation and several organisations working in the area of civic freedoms. We would like to thank in particular the following organisations for their contribution: Civil Liberties Union, the European Center for non Profit Law, the European Civic Forum, the European Foundation Centre and Dafne, Greenpeace European Unit, the Lifelong Learning Platform, Solidar, and Transparency International EU.

As Civil Society Europe works primarily on the enabling Framework for civil society, our contribution will focus on this aspect. For a few years we assist to a worrying trend of restrictive measures in a number of Member States which is negatively affecting civic space and the ability of civil society actors to carry out their legitimate tasks. Civil society represents constituencies from a wide range of sectors; its organisations contribute to enhancing and promoting the effective access to civic, political, economic, social, cultural and environmental rights for many as well as mobilise through campaigning, advocacy and judicial proceedings when these are not respected.

In times of crisis, civil society organisations and activists are often among the first to inform public opinion, advocate and take action for the respect of the rule of law in national and international fora, and therefore are themselves often one of the first targets of those who aim to undermine the rule of law. Civil society actors also play an essential role in improving and protecting a free and pluralist media environment through education, training and watchdog functions. CSOs have crucial expertise dealing with vulnerable groups, thus are key actors in promoting fair laws.

According to the CIVICUS Monitor, which is rating civil liberties globally from open to closed, of the 27 EU Member States, only fourteen have an open civic space, twelve narrow and one obstructed¹. Although the European Union (EU) remains the region of the world with the largest number of countries with open civic space, conditions for civil society continue to deteriorate². A number of other tools and reports have shown how pressures are emerging all across the EU to different

¹ <https://monitor.civicus.org/>

² <https://civicus.contentfiles.net/media/assets/file/GlobalReport2019.pdf>

extents: the platform [Civic Space Watch](#), to which we contribute, published in December 2019 a report³ that highlights restrictions to civic freedoms in various EU countries and publishes frequent alerts also for States with an open civic space showing that challenges exist in all countries. Friends of the Earth Europe published also at the end of 2019 the report of a survey⁴ conducted among its members showing shrinking civil society space in 16 countries. Recent reports also highlight the impact of emergency measures to fight the spread of the Covid-19 pandemic on civic space⁵.

For these reasons we welcome the inclusion of an enabling framework for civil society as part of the 4th pillar on checks and balances supporting democratic systems based on the rule of law. A shrinking and threatened civic space with legal or practical restrictions to the freedom of assembly, association and expression and the right to participation is an important indicator of a weak rule of law environment.

2. Trends affecting civic freedoms in 2019-2020

In our contribution we would like to highlight some trends concerning particularly civic freedoms and the right to participation which we identified across the EU since the beginning of 2019 as well as recent developments linked to the Covid-19 crisis that are impacting adversely civic space and that will have a longer term impact after the publication of the report. The information provided has been gathered through our regular cooperation with member and partner organizations at EU and national level. We remain available to provide further information on specific issues identified in relation to particular countries upon request.

2.1 Freedom of expression

Civil society organisations doing advocacy work either as main activity or at the result of providing services are increasingly labelled as being “political” and seen as interfering with the authorities in charge of decisions, instead of being considered as important contributors to the promotion of public interest. There are examples of smear campaigns against civil society working on issues deemed sensible by authorities based on those grounds in a growing number of countries such as in the Czech Republic, Slovakia, Poland, Hungary, Germany. On these grounds, authorities have also targeted funding to certain organisations or areas of work⁶. Conditionality of funding clauses in public grants have also appeared in several countries, limiting the possibility for organisations to exercise their watchdog role in a context of increasing scarcity of public and private resources for civil society. Laws or regulation on transparency or elections include ambiguous clauses on political activities and restrictions for third party donations on campaigning which have a chilling

³ <https://civic-forum.eu/publication/view/activizenship-4>

⁴ http://www.foeeurope.org/sites/default/files/democratic_europe/2019/thriving-civic-space-strong-democracy.pdf

⁵ <https://www.icnl.org/covid19tracker/>

⁶ <http://civic-forum.eu/publication/view/activizenship-4>, pp. 13-15, 29.

effect on civil society such as in Ireland. In Germany tax authorities are withdrawing the charitable status of campaigning organizations on the grounds that their activities would be political and not charitable, preventing them from benefiting from tax deductions on their donations and therefore endangering their funding.⁷

We have noted an increasing interference of economic and trade considerations over human rights concerns. Environmental organisations are increasingly being portrayed as an obstacle to economic development and, in some cases (for example in Austria, Germany and Slovenia) these arguments have been used to question or limit NGOs' involvement in environmental assessments and other mechanisms of democratic accountability. Many EU countries foresee criminal sanctions for defamation that have been applied to associations, activists, journalists or even regular citizens keeping accountable the state or corporations. For instance, In France, private companies associated with the Bolloré Group opened SLAPPs against NGOs Sherpa and ReAct, as well as several newspapers, to stop them reporting human rights abuses in Cameroon.

The State of artistic freedoms has also deteriorated in different countries. For example, in Spain an abusive use of criminal law on the glorification of terrorism led to a significant amount of artists being jailed or self-exiling to avoid prison sentences⁸.

Another area of concern is the disproportionate impact on freedom of expression of criminal legislation supposedly aimed at countering disinformation or defamation. For instance, a legislation adopted in April in Hungary as part of emergency measures supposedly to fight the COVID-19 pandemic punishes "fake news" and "fear mongering" on Corona with up to five years in prison⁹

Proposed amendments to defamation laws aiming at countering the threat of foreign propaganda and fake news sparked debate in Lithuania for their impact on freedom of expression ahead of the 2019 elections.¹⁰

In other countries, attacks on freedom of expression are also reported to derive from the abuse of laws on hate speech, such as in Croatia. The tendency to devolve responsibility for censoring content on the internet to private service providers with the aim of countering hate speech or prevent the spread of disinformation is also worrying. In France a draft law, called the Avia bill, has been highly contested as it would centralise the control of internet under a government body with

⁷ <https://www.liberties.eu/en/news/germany-outdated-law-risks-strangling-civic-activism/18284>

⁸

<https://freemuse.org/wp-content/uploads/2018/05/Freemuse-The-state-of-artistic-freedom-2018-online-version.pdf>

⁹

https://civitates-eu.org/the-covid-19-crisis-shows-the-need-for-civil-society-to-be-stronger-than-ever-not-only-in-hungary/?hq_e=el&hq_m=6120919&hq_l=19&hq_v=ebb719494c

¹⁰ <https://www.liberties.eu/en/news/civicus-monitor-lithuania-update-march-2019/17655>

high sanction powers and be a threat against free access to culture, and civic participation as provided freely through internet¹¹.

In many countries we have also seen criminalisation of solidarity with migrants targeting either organisations or individual citizens. Certain countries such as Hungary and Italy have either enacted legislation that prevents citizens and civil society organisations to give humanitarian assistance (shelter, food, free legal assistance or advice whether in their own homes or in structures or rescue at sea) to asylum seekers or migrants or in many other countries people and civil society organisations were put under pressure through police harassment, legal cases or even arrest¹². In Croatia, this results in serious interference with the work of organizations working on the promotion and protection of migrants' and refugees' rights. Smear campaigns of organisations and activists through official statements and social media have contributed to creating distrust towards NGOs particularly in countries who face the greatest arrival of refugees.

There is also a tendency to dismiss civil society organisations as intermediary bodies between individuals and the State. A populist discourse emphasizes the need to communicate directly and exclusively with citizens and tends to dismiss real dialogue and participation including with citizens themselves.

2.2 Freedom of Assembly

With more and more people protesting on the streets of Europe and movements rising, authorities are progressively and relentlessly chipping away people's rights to, among others, peacefully protest, freedom of expression and privacy rights. A number of states have introduced new legislation to restrict the right to peaceful assembly, for example by preventing assemblies in certain time and places such as in Poland (revision of the Law on Assemblies to ban certain peaceful demonstrations in the vicinity of "cyclical" pro-government rallies) or in Spain (Organic Law 4/2015 on the Protection of Citizen Security). In some countries, existing legislation has been misused to hamper lawful protests with no effective remedy, such as in Romania¹³.

Use of excessive and indiscriminate use of force has emerged in several countries (France, Hungary, Romania, Spain...). Also the criminalisation of demonstrators through mass arrests, preventive collection of ID, administrative sanctions and excessive criminal charges are factors restricting the right to assembly and the right to protest, especially those related to climate crisis (Austria, Belgium) or migrants crisis (Greece).

In several countries security considerations linked to anti-terrorism measures become prevalent over the freedom of assembly (see for instance Security Law in France). In many countries local

¹¹ <https://www.laquadrature.net/en/2019/07/11/the-hate-speech-law-will-turn-the-internet-into-television/>

¹² https://www.tni.org/files/publication-downloads/web_theshrinkingspace.pdf

¹³ <https://www.liberties.eu/en/news/civicus-monitor-romania-update-february-2020/18881>

authorities give authorisation for demonstrations while they should only require notifications or they ban areas close to Institutions.

Emergency measures linked to the Covid-19 crisis have imposed temporary restrictions on assemblies and demonstrations. However, some of these bans have been considered disproportionate (see court case in Germany¹⁴) or problematic when the governments have taken advantage of the situation to propose legislation such as in Poland on the restriction of abortion rights, which should undergo a wide public debate.

2.3 Freedom of Association

Associations in the context of the freedom of association include a wide range of civil society organisations, such as associations, foundations, co-operatives and even on-line associations. Everyone can freely establish, join and participate in a CSO and procedures to create CSOs should be clear and simple. CSOs should be free to access and use resources also in cross-border contexts.

However, rules on registration continue to be interpreted in some countries in a way which discriminates NGOs based on their activities. In Bulgaria for example several cases of arbitrary refusal to register associations working for minority rights continue to be reported despite rulings by the European Court of Human Right condemning these practices.

Legislation or regulation aimed at imposing bureaucratic burdens consuming NGOs' resources or limiting their access to (foreign) funding, and to tax deductions have been adopted or drafted in Hungary, Romania and Poland, but also in Italy and Latvia. In 2019 we have also seen the removal of the Association status of Attac Germany and Kampakt by the German tax authorities confirmed by a Court judgment. This is despite the fact that access to resources represents an integral part of the right to freedom of association.

In some countries legislation purportedly aimed at transposing EU directives on anti-money laundering and countering financing of terrorism were used to introduce disproportionate reporting requirements severely affecting civil society organisations (see for instance Romania and Spain). Bank de-risking practices are also affecting the financial access for civil society organisations to open bank accounts or arbitrary closure, receive/transfer cash¹⁵

In last two years, many civil society organisations are struggling to make ends meet as a consequence of austerity measures as well as by shifting priorities in government budget which have considered areas such as social services, health services and culture or even fight against corruption, just to give some examples in which civil society organisations are active and providing

¹⁴

<https://www.dw.com/en/top-german-court-coronavirus-restrictions-not-grounds-to-ban-all-protests/a-53153858>

¹⁵

http://ecnl.org/wp-content/uploads/2018/05/Understanding-the-Drivers-of-De-Risking-and-the-Impact-on-Civil-Society-Organizations_1.pdf

essential services or playing an essential advocacy or watchdog role, as non-priority areas (such as in Czech Republic, Poland, Austria, Belgium, Croatia).

The Covid-19 crisis has also brought increased financial uncertainties for NGOs across Europe because of the inability to carry out programmes and lack of funding opportunities. Also many associations are laying down staff. Many organisations that survive through donations, fundraising events or economic activities as well as those where governments redirected funding to other sectors are at risk of closing down or seen their capacities heavily reduced. The risk is to lose the important expertise civic organisations have in supporting vulnerable groups and safeguarding the rule of law at a time when these will be most needed. It is critical that recovery measures at national and EU level also address this negative trend.

2.4 The process for preparing and enacting laws - the right to participate in public affairs

The space for civil society to participate meaningfully in the process for preparing and enacting legislation and public debates around those has been shrinking in the past years. Indeed, the European Court of Human Rights stated that allowing participation in public life and policy is one of the principal features of democracy —that is, to create the possibility for members of a society to resolve social and political problems through dialogue. Lack of regular and effective consultation of civil society stakeholders in the process of enacting law as well as restrictions or even systemic obstructions to the exercise of the right to access information affect many countries across the EU including Croatia, Hungary, Italy and Spain. In 2019, this also manifested through the allegations of CSOs being “political” or engaging in “political activity” all across Europe in the attempt to delegitimise the sector and justify measures to hinder its actions. In addition, vagueness of rules concerning political or lobby activities that (potentially) apply to civil society organizations has stifled their voices in crucial public debates about specific legislation (Ireland, Germany).

During the COVID-19 crisis, the public participation and possibilities to debate have been almost extinct in 2020, due to the nature of emergency measures adopted mainly by the executive branch, with no or limited parliamentary or public oversight. In addition, some countries (Poland, Hungary) attempted to adopt or adopted legislation not related directly to the pandemic, but with no consultation with the affected groups or the broader public. This has detrimental effects for public trust, democratic process and the oversight of legislative activities.

The Covid-19 crisis has posed many challenges also to public administrations leading also to temporary unemployment measures for staff, suspension of meetings or reorganisation online of national parliaments. Nonetheless we are concerned that this has had a negative impact on civil dialogue practices such as public consultations and access to information that allows public scrutiny. A similar concern has been raised by the European Ombudsman as concerns EU

institutions¹⁶. Also on a longer term civil society has not been systematically involved in processes for exiting from the lockdown. While we welcome the involvement of CSOs experts in advisory committees in certain countries, a wider and sustained public debate is necessary to ensure that a longer term perspective is taken on issues with interlinkages on the current crisis and its roll out: environmental and climate issues, investments in public health and social inclusion, protection of most vulnerable in our societies, over dependence of the economy from third countries outside Europe, use of technology in monitoring the spread of the pandemic and fundamental rights. Also participation in those decisions contributes to trust building and also participation in enforcement.

We are also concerned about the development of tracing apps for the prevention of the spread of the Covid-19 because of the impact they will have on the data privacy, freedom of expression and the risk of stigmatisation of individuals or communities derived from the use of such apps that overweight its possible benefits.

3. Recommendations

We suggest the European Commission to cover the following issues in the report with a view to the identification of relevant recommendations and follow-up measures:

- 1) **Give account of the role of civil society as well as a free and safe civic space** as integral parts of the system of checks and balances supporting democratic systems based on the rule of law and as instrumental to promote and, when needed, safeguard the rule of law at European, national and local levels.
- 2) **Provide a comprehensive and detailed overview on civic space deficiencies in EU Member States**
- 3) **Include a section on the impact of the covid-19 emergency measures** on the rule of law and on fundamental rights, including **on an enabling civic space**

We believe that this first annual review report should be the start of a long term process and **we call on the European Commission to propose and adopt the following measures as a follow up:**

- 1) **Include systematically within the annual rule of law review a comprehensive assessment of the civic space in each Member State** within its diverse and interrelated components and its impact on the political system and the rule of law. Such a framework should include, at least, a review of the legislative and policy framework and its implementation, including the use of digital technologies, relating to the exercise of civic space fundamental freedoms.
- 2) **Plan in advance a systematic and regular involvement of civil society actors** as part of the review cycle at the different stages of the process, including by involving them in the design of rule of law reporting structures, reporting consultations, country visits and by requesting civil society feedback on the information received from Member States to make

¹⁶ <https://www.ombudsman.europa.eu/fr/news-document/en/127058>

sure the input is complete or merits a request from the Commission for further clarification from national authorities;

- 3) Allow for a **dialogue with civil society on the outcomes and findings** of the rule of law review cycle, including assessment of this first year exercise and the preparation of the next reporting
- 4) **Develop guidelines and indicators at EU level** as part of the rule of law process as a reference tool for national monitoring and the development and strengthening of an enabling framework at national/local level.
- 5) **Establish an alert mechanism** to allow civil society actors to promptly signal to the European Commission serious issues and/or threats regarding civic freedoms. Such alert mechanism should lead to a rapid (re)assessment of the situation allowing for timely and concrete reaction at EU level
- 6) **Make sure that** when severe **deficiencies on civil society freedoms and civic space** are **identified**, they **are addressed** through existing preventative and sanctioning tools, including the rule of law framework, infringement proceedings and Article 7 TEU;
- 7) **Develop a specific checklist to assess the impact of EU legislation on civil society freedoms and civic space**, to be integrated as part of existing impact assessment tools on fundamental rights, on socio-economic and on environmental impacts.
- 8) Systematically **include the impact on civil society freedoms and civic space within the monitoring of the transposition and implementation of EU legislation** by Member States such as in the case of the anti-money laundering directives, with a view to a strategic approach to infringement proceedings
- 9) **Set the example by the development of an enabling civic space framework at EU level:** proposing an interinstitutional agreement on civil dialogue and access to information based on article 11 TEU
- 10) An enabling framework cannot work without funding support to civil society. The European Commission should work with other EU institutions to **ensure that adequate support to civil society within the different funding instruments is included both in the next MFF and in the recovery mechanisms linked to the exit from the pandemic crisis**. Targeted funding priorities for national and local organizations should also take into account the findings of the Commission's Rule of Law reports: for example, if the Commission considers that litigation, or public education measures would help to remedy issues identified by the Commission, it should then make funding available to organisations carrying out such activities in the relevant Member State. Particular attention should be paid in this context to flexibility to enable also small and grassroots civil society organizations at national and local level to access these grants such as reducing or removing co-funding requirements, the use of cascading grants and of smaller grants including also for non-registered organisations. Cross border philanthropy must not be discriminated against and should flow freely. Foreign funding restrictions are not in line with the Free flow of Capital. CSOs must enjoy a favourable tax environment also in cross-border contexts.

11) Audit areas of EU competence where EU legislation could be proposed to address identified deficiencies related to civic space and promote civil society organizations' rights and freedoms. **These should include** for example **legally binding measures to fight Strategic Lawsuits Against Public Participation (SLAPP) to protect activists and civil society organisations**, alongside journalists, media organisations, academics, trade unions and citizens speaking out in the public interest.

On that basis, we call on the European Commission to **include specific recommendations to member States as to address civic space deficiencies identified with concrete timelines**, including on the urgency to:

- 1) Ensure a **meaningful involvement of civil society in the discussion and review of the Commission report** with a view to the adoption of follow up measures to address findings and recommendations. This should include holding a public presentation and discussion before national and when relevant regional parliaments.
- 2) **Promote an institutional culture recognizing the important role played by civil society organisations as watchdogs and representatives of rights holders**, including by setting in place tools and practices to ensure a meaningful participation of civil society representatives when designing and enacting laws and policies. With particular reference to the challenges posed by measures adopted to face the COVID-19 pandemic, this should imply at least:
 - Developing together with civil society and relevant stakeholders/experts a **systematic review of the emergency measures linked to the covid-19 pandemic crisis** and their impact on civic freedoms and fundamental rights, including the use of digital tracking.
 - **ensuring a meaningful consultation and participation of civil society in the development and assessment of exit strategies from the pandemic crisis**
- 3) **Refrain from adopting regulatory measures impacting on civil society organizations freedoms and civil space without consulting the sector** and systematically seek expert advice of international bodies such as the Council of Europe Expert Council on NGO law;
- 4) **Ensure that adequate public support and funding is granted to civil society and rights groups**. Crisis support to the civil society sector should **also be part of recovery measures in the aftermath of the COVID-19 pandemic**, including in critical sectors such as social and health services to persons who are most vulnerable and discriminated against, culture, civic participation and the protection of the environment.